



## Shared Parental Leave

*Shared parental leave is an attempt to break the assumption that when a baby is born, or a child is adopted, it is for the mother to take an extensive period of leave while her partner goes quickly back to work.*

The general idea of shared parental leave (although the detail is distressingly complex) is that once the mother has taken the compulsory two weeks' leave immediately following the birth of the child, the two parents can divide the remaining leave that the mother would have between them. Statutory shared parental leave is paid – but only at the level of the lower rate of SMP.

The issue that has been hanging over this new right since the beginning is whether an employer must provide the same contractual benefits in respect of shared parental leave as for maternity leave. If for example a woman taking maternity leave would be paid in full for the first six months of her absence, should the same benefit be given to her partner? Is it discriminatory to treat someone taking shared parental leave less favourably than someone taking maternity leave?

The EAT has just ruled that drawing such a distinction is not, at least, direct discrimination. In *Capita Customer Care Ltd v Ali* the employee took two weeks' paid parental leave when his wife gave birth, but he wanted to take longer. As it happens he was particularly worried about the wellbeing of the mother who had been diagnosed with post-natal depression and advised to return to work as early as possible. The point, however, was that had he been a woman taking maternity leave he would have been contractually entitled to a further 12 weeks' fully paid leave.

Because he was seeking to take shared parental leave, however, he was told that he would only be paid at the statutory rate of approximately £140 a week. He argued that this difference amounted to direct sex discrimination.

Direct discrimination of course means comparing like with like – and one key difference between a man taking shared parental leave and a woman taking maternity leave is that the woman has actually given birth. Mr Ali's argument, however, was that the initial two weeks' leave following the birth dealt with the unique position of a woman taking maternity leave. After that, both parents were in the same position of having a baby to care for - and there was no reason why he should not be treated in the same way as a new mother would have been.

The Tribunal accepted this argument, but the EAT overturned their decision. Just because the two weeks' compulsory leave had ended, that did not mean that a man taking shared parental leave could compare himself with a woman who had given birth. Shared parental leave was introduced to allow both parents to care for a child – but maternity leave was a different thing. The purpose of maternity leave was to safeguard the health and wellbeing of the mother.

There was no basis for saying that that purpose ended after two weeks and that thereafter shared parental leave and maternity leave were comparable.

In any event, the Equality Act itself provided that it was permissible to treat women more favourably in connection with pregnancy and childbirth (s.13(6)(b)). Since the period of paid leave being argued for by Mr Ali was essentially the same as the 14 week period of leave provided for by the Pregnant Workers' Directive, it could not be argued that the treatment of women on maternity leave fell outside the scope of this exception.

This decision is clearly right. It seems absurd to say that a father who wants to care for a child for the three months following its birth is in the same position as a mother who has actually given birth. On this timescale maternity leave and shared parental leave are clearly two different things.

A more difficult issue arises when contractual benefits extend beyond three months. Does there come a point at which paid maternity leave ceases to be about the wellbeing of a mother following childbirth and simply becomes a question of time off to care for a child? Might the position of a man on shared parental leave then be comparable with the position of a woman on maternity leave? The EAT seemed open to the possibility and suggested that 26 weeks might be the appropriate cut-off point. In that case the exception in S.13 might not help. In the 2011 the EAT held in *Eversheds Legal Services v Belin* that the exception only applied if the difference in treatment was proportionate to the 'disadvantages' otherwise faced by the woman who had given birth.

On balance, though, I don't think it can be direct discrimination to have a different set of entitlements for shared parental leave and maternity leave – whatever the duration of the leave in question. The EAT in this case has put all its emphasis on the purpose of the leave, but what really matters is the reason for the less favourable treatment. It seems highly unlikely that the reason for the difference in contractual entitlement will be the sex of those involved.

It is important to remember that both men and women qualify for shared parental leave – and by no means all of the women who qualify will have given birth. Many will be the partner of the mother of the child and will not qualify for maternity leave. They will be treated in exactly the same way as a man, so it is difficult to see how direct sex discrimination could be established.

A more difficult issue is whether a policy of paying enhanced maternity pay but only statutory shared parental leave can amount to indirect discrimination. Instinctively such a claim seems feasible (men are more likely on average to qualify for shared parental leave, but not maternity leave). The key issue would be justification. There is no indirect discrimination if the employer can show that its policy is a proportionate means of achieving a legitimate aim. I would imagine an employer's argument running along the lines of 'we are keen to ensure that women's careers are not derailed by taking maternity leave and that they are able to remain in their employment and return to work. To enable this we enhance their statutory pay. We could not afford to do this for all employees who take leave, and we do not have a problem with men having to leave their jobs because of childbirth.'

Each case will turn on its facts (a standard cop-out phrase that lawyers can't stop themselves from using) but I suspect that a justification argument put in that way would gain a sympathetic hearing from the Tribunal. There is however a clear public interest in improving the extent to which men and women share childcare commitments. Government has acknowledged that fact in developing the right to shared parental leave. Perhaps employers need to acknowledge that in their own policies too.

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