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Failing to enhance pay for shared parental leave to the level of maternity pay is not sex discrimination (UK)

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Summary

In two appeal cases considered jointly, the Court of Appeal (CA) has ruled that it is not direct or indirect sex discrimination, nor a breach of equal pay rights, to provide enhanced pay for maternity leave and statutory pay only for shared parental leave (SPL).

Background

The system of SPL, introduced into UK law in 2015, allows parents to share leave between them for the purposes of caring for their new baby. This is done by the mother shortening her maternity leave.

Mothers can take up to 52 weeks of maternity leave. The first two weeks after the birth of the baby is a compulsory maternity leave period during which it is a criminal offence for the employer to allow the mother to work. Statutory maternity pay is paid at the rate of 90% of salary for the first six weeks and a flat rate for the next 33 weeks (currently GBP 148.68 per week). The remaining period is unpaid. It is relatively common for employers to pay enhanced pay to mothers on maternity leave.

Statutory pay for SPL is the same as the flat rate for statutory maternity pay (i.e. currently GBP 148.68). It is less common for employers to enhance pay for SPL than for maternity leave. As men cannot take maternity leave, this raises the possibility that it might be sex discrimination to pay different amounts for maternity leave and SPL.

Under the UK's Equality Act 2010 (EqA), direct discrimination occurs when someone is treated less favourably than another person because of sex. Indirect sex discrimination occurs when an employer has a provision, criterion, or practice (PCP) which applies to everybody, but results in one sex being put at a disadvantage. Unlike direct discrimination, it is possible for an employer to justify indirect discrimination.

The equal pay provisions of the EqA require men and women doing equal work to receive equal pay and equality in other contractual terms for doing equal work. This is done by implying a 'sex equality clause' into contracts of employment.

Two cases recently considered by the CA raised arguments as to whether it is direct sex discrimination, indirect sex discrimination or contrary to equal pay law to pay a lesser rate of pay for SPL than for maternity leave. (We reported the earlier judgments of the Employment Appeal Tribunal (EAT) in both cases in EELC 2017/28.)

Facts

The first case involved a claim for direct discrimination. Mr Ali took two weeks of paternity leave from Capita Customer Management ('Capita') immediately after the birth of his baby, and then asked to take SPL so that he could care for the baby as his wife returned to work. Capita only paid basic statutory pay for SPL. Mr Ali was aware that female employees on maternity leave from Capita were entitled to 14 weeks at full pay and asked for the same treatment, but this was refused.

The Employment Tribunal (ET) decided that this treatment of Mr Ali did amount to direct sex discrimination. The EAT disagreed and upheld Capita's appeal on two main grounds. First, the ET had used the wrong comparator for Mr Ali's claim. The correct comparator was a female employee who was taking SPL in order to care for her child – who would have been treated in exactly the same way as Mr Ali. Secondly, even if Mr Ali had been able to compare himself with a female employee on maternity leave, his claim could still not succeed because the EqA allows special treatment to be given to women in connection with pregnancy or childbirth.

The second case involved claims for both direct and indirect discrimination. Leicestershire Police paid 18 weeks of enhanced maternity pay to mothers on maternity leave, but only paid statutory pay to parents taking

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SPL. Mr Hextall took 14 weeks of SPL in the period that, if he had been a woman on maternity leave, would have entitled him to full pay.

The ET found that this was neither direct nor indirect sex discrimination. Mr Hextall appealed to the EAT on the claim for indirect discrimination, and the EAT decided that the ET had not properly considered the legal test. The PCP in this case was that Leicestershire Police only paid statutory pay to parents taking SPL. According to the EAT, there was a disadvantage because a man is proportionately less likely to be able to benefit from an equivalent rate of pay when taking leave to act as the primary carer for his child. That was because men *have* to take SPL, while women who have given birth can *choose* to take maternity leave or SPL. The EAT also rejected the argument that this was an equal pay claim.

Judgment

Both cases were appealed to the CA, which held that there had been neither sex discrimination nor a breach of equal pay rights in either case. The key points of the CA's judgment were as follows:

1. There was no direct discrimination, because the correct comparator for a man on SPL is a woman on SPL – and everyone on SPL is treated the same. A man on SPL cannot compare himself with a woman on maternity leave, the CA held, because the purposes of the leave are different. Maternity leave relates to special protection of the birth mother after pregnancy and childbirth – including recuperation and protection of the mother's biological condition, and developing the special relationship between mother and newborn child. The CA concluded that maternity leave is not just for the purpose of caring for the child, which meant that Mr Ali's claim could not succeed.
2. In Mr Hextall's case, the CA decided that this was an equal pay claim rather than a discrimination claim. All contractual terms which related to pregnancy and giving birth were not available to Mr Hextall because he is not a woman. A sex equality clause would give him a comparable term with the same rights to leave and pay to care for a new-born baby. But, crucially, the EqA says that a sex equality clause does *not* apply to contractual terms giving women special treatment in connection with pregnancy or childbirth. The whole of maternity leave is part of this special protection, so the equal pay claim must fail.
3. Claims for equal pay and sex discrimination are mutually exclusive. If something is properly characterised as an equal pay claim, it cannot also be indirect sex discrimination. This meant that Mr Hextall's indirect discrimination claim could not be considered, because the CA had found that it fell within equal pay law.
4. For completeness, the CA went on to hold that the indirect discrimination claim would have failed anyway. The PCP was the application of the contractual provisions relating to SPL. The pool for comparison should not include birth mothers on maternity leave, as they are in a different situation from men and women on SPL. Therefore, men in Mr Hextall's situation were not caused a particular disadvantage, because women on SPL were also limited to statutory pay.
5. Finally, the CA said that any indirect discrimination could be justified in any event as special treatment of mothers on maternity leave. Although the special treatment exemption was missing from the indirect discrimination provisions in the EqA, the CA regarded this as an error by Parliament because the exemption was included in EU law and in the previous UK legislation.

Commentary

This judgment is good news for employers, as it sends a very clear message that it is lawful to enhance maternity pay but provide statutory pay only for SPL. The CA has taken the position that the whole period of maternity leave provides special protection for mothers after giving birth, meaning it is always permissible to treat this differently from SPL.

This result is not particularly surprising in Mr Ali's claim for direct discrimination. It was always going to be difficult to show less favourable treatment of men in circumstances where both men and women can take SPL and are treated the same when they do so.

What is more unexpected is the CA's treatment of indirect discrimination, as the EAT had taken the view that such a claim by Mr Hextall was possible. The CA dealt with indirect discrimination quite briefly, with its decision turning on the point that women on maternity leave should not be included in the pool for comparison because they are in different circumstances. This does not seem to engage with the specific argument before the EAT, that women have a choice between maternity leave and SPL, while men have to take SPL. Even if women on maternity leave are excluded from the pool, the PCP of paying statutory pay for SPL will be applied to both men and women. Is it not still arguable that a man on SPL is disadvantaged, because many of the women on SPL would have the choice to take this as maternity leave instead?

This may be something of an academic point, as the CA thought that indirect discrimination was ruled out by the fact this ought to be brought as an equal pay claim. The CA's reasoning on equal pay is quite complex, but the claim ultimately fails for the same reason as the direct discrimination claim – the exemption for special treatment of women in connection with pregnancy and childbirth.

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Mr Ali had put forward detailed arguments that the nature of maternity leave had changed after the introduction of SPL, because after the two-week period of compulsory maternity leave parents can choose how to share leave between them. As this was designed to promote gender equality, there should not be a financial incentive for the mother to stay at home as the primary child carer with the father continuing to work as the primary breadwinner. The CA comprehensively rejected this argument, saying there was nothing in EU law or UK law to support the conclusion that the primary purpose of statutory maternity leave is the facilitation of childcare.

A question remains as to whether the whole period of maternity leave in the UK is legitimately about the protection of the mother after childbirth. The minimum maternity leave period under EU law is 14 weeks, whereas the UK has chosen to extend this to 52 weeks. It is certainly arguable that the purpose of maternity leave ceases to be about the protection of the health and wellbeing of the mother after a certain period of time. The CA did not fully grapple with this argument as both Mr Ali and Mr Hextall took SPL immediately or soon after the birth, expressly referring to the purpose of statutory maternity leave in weeks three to fourteen after childbirth. The CA listed several general differences between maternity leave and SPL, but it remains unclear whether it was saying that the full 52 weeks of leave is for special protection of women after giving birth.

This may be a political issue that only the UK Parliament can resolve. Recognition of the special position of women after childbirth is important, but so is encouraging a more equal sharing of childcare between men and women. The introduction of SPL provided an opportunity to address this, such as by shortening maternity leave to a period more in line with the EU minimum and introducing a new right to additional leave for everyone – but instead the full period of maternity leave was retained.

We understand there is likely to be a further appeal on these issues, in which case the Supreme Court (the UK's highest court) could feel more able to address contentions around gender equality and the purpose behind SPL. So the CA's judgment may not be the end of the story.

Comments from other jurisdictions

Germany (Othmar K. Traber, Ahlers & Vogel Rechtsanwälte PartG mbB): In Germany, parents also have the opportunity to take parental leave and apply for parental allowance. Unlike the UK, the employer does not have to bear the financial burden, but the State through the internal revenue service. The parental allowance is paid regardless of gender. The idea is that the child can experience both parents as caregivers in infancy and, furthermore, to encourage male parents to contribute to their upbringing. Certainly, it is up to the partners how and to what extent they share parental leave among themselves. The maximum parental leave can be three years for each partner until their child turns three. That is the main principle but there a more sophisticated rules concerning the distribution of these parental leave entitlements.

In principle, the parental allowance depends on the net income before giving birth. According to the BEEG (Federal Parental Allowance and Parental Leave Act), at least 67% of the net wages is paid during the parental leave up to 14 months after birth. The minimum payment is 300.00 EUR and the upper threshold is 1,800.00 EUR. Also people who had no income before birth due to, for instance, unemployment, are entitled to the minimum pay. Employees with less than 1,000.00 EUR net per month get, in contrast, 100 % of their net wages.

The parents are jointly entitled to a total of 14 months' basic parental allowance if both take part in the care and the parents lose income as a result. They can divide the months freely among themselves. One parent can claim a minimum of two months and a maximum of twelve months.

Single parents who receive parental allowance to compensate for their loss of income can claim the full 14 months of parental allowance. Basic parental allowance can only be received by parents within the first 14 months of the child's life. After that, they can only receive the Parental 'BenefitPlus' or the Partnership Bonus. This Parental BenefitPlus can be received twice as long as basic parental allowance: One month basic parental allowance equals two months Parental BenefitPlus. If parents do not work after birth, the Parental BenefitPlus is half as high as the base parental allowance. If they work part-time after birth, the monthly Parental AllowancePlus can be just as high as the monthly base parental allowance with part-time work.

Parents who opt for a time arrangement between them can receive a partnership bonus: They get four additional Parental BenefitPlus months if they work between 25 and 30 hours a week simultaneously during this time. This also applies to parents who are raising their children separately and who work part-time together as parents. Single parents are entitled to the full partnership bonus.

As one can see, the German rules on parental leave are very ample as well as complex in order to achieve the legislator's aim of securing the economic existence of families and helping parents to better reconcile family and career.

The Netherlands (Peter Vas Nunes): The author of this case report understatedly comments: "The CA's reasoning on equal pay is quite complex." This is an aspect of discrimination law with which I have never ceased to struggle, and this case illustrates why.

Part 5 of the UK Equality Act 2010 encompasses several chapters. Chapter 1 is headed "Employees". It prohibits

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employers from discriminating against an employee because of a protected characteristic, such as sex, as to "terms of employment". Chapter 3 is headed "Sex equality". It prescribes equal treatment between men and women as to "terms of work".

As I see it, inasmuch as the non-discrimination strand sex is concerned, Chapter 1 deals with equal *treatment* (on all grounds), whereas Chapter 3 deals with equal *pay* (on the ground of sex). The case report refers to equal treatment on the ground of sex as "sex discrimination".

As the case report notes, "Claims for equal pay and sex discrimination are mutually exclusive. If something is properly characterised as an equal pay claim, it cannot also be (…) sex discrimination." Why is this? The short answer is that the Equality Act says so. It provides (in somewhat more complicated wording) that claims for equal *treatment* between men and women and claims for equal *pay* between men and women are mutually exclusive. But why is that? Is paying a female employee less than a male colleague for the same work not a form of discrimination on the ground of sex, a species of the same genus?

The historical reason, if I am not mistaken, is that the rules on equal pay for men and women were introduced in 1957 in the Treaty of Rome (now: the TFEU) and shaped in more detail in 1975 in Directive 75/117, whereas the rules on sex discrimination were not introduced until 1976, in Directive 76/207. As in The Netherlands, the UK originally transposed[1] the two sets of rules in separate statutes: the Equal Pay Act 1970 and the Sex Discrimination Act 1975. The former dealt with 'pay', the latter dealt with non-pay terms of employment. Case law was needed to delineate the boundary between both Acts, both in Luxembourg and locally in the UK. In the 1996 *Gillespie* case (C-342/93),[2] point 24, the ECJ explained the historical rationale for distinguishing equal sex pay from equal sex treatment:

> that the benefit paid during maternity leave constitutes pay and therefore falls within the scope of Article 119 of the Treaty and Directive 75/117. It cannot therefore be covered by Directive 76/207 as well. That Directive, *as is clear from its second recital* in the preamble, does not apply to pay within the meaning of the abovementioned provisions (italics added, PCVN).[3]

That was before Directives 75/117 and 76/207 were replaced by the present 'Recast Directive' 2006/54. Admittedly, that Directive still deals with equal pay and equal treatment in separate chapters. However, there is nothing in the Directive to suggest that equal pay claims and equal treatment claims are mutually exclusive. Recital clause 8 states that: "The principle of equal pay for equal work (…) constitutes an important aspect of the principle of equal treatment between men and women (…)". To my knowledge there is no ECJ case law on a matter arising since the entry into force of the Recast Directive reiterating the doctrine of mutual exclusivity. Would it not be simpler to discard that doctrine, which applies only to sex, not to all other strands of discrimination, such as race, disability, religion and age? That would avoid complex debates, as in the case reported here, where the ET and the EAT found that that Mr Hextall and his comparator policewoman had identical terms of work and where the CA, after analyzing a 1988, not easy to follow House of Lords precedent, held otherwise.

Dutch law still has separate provisions, indeed separate statutory instruments, covering equal pay and equal treatment for men and women. However, the courts and the Human Rights Commission do not seem to be unduly bothered with the distinction.

Subject: Gender discrimination, Maternity and parental leave

Parties: Ali – v – Capita Customer Management Ltd and another; Chief Constable of Leicestershire Police – v – Hextall and another

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1. The Act did not come into force until late 1975, by which time the UK had become a member of the Common Market. Technically, the Equal Pay Act 1970 was not the transposition of a Directive, but following its amendment in 1983 I think it can be said to be so. It is said that the Act was modelled on the American Equal Pay Act 1963.
2. Similar wording in ECJ 9 September 1999 C-281/97 (*Krüger*), point 17.
3. This second recital merely states: "Whereas, with regard to pay, the Council adopted on 10 February 1975 Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women."