

# Discrimination? No discrimination where shared parental leave pay and enhanced maternity pay are not paid at the same level

*Published 18 May 2018*

If you offer enhanced maternity pay do you also have to enhance shared parental leave pay? On 11 April the Employment Appeal Tribunal (EAT) clarified that employers which enhance maternity pay for the first 14 weeks but not shared parental pay do not directly discriminate against men. However, in a similar case released on 1 May, the EAT stated that enhancing maternity pay, but not shared parental pay, could amount to indirect discrimination.

Readers may remember that we discussed this issue in an earlier alert when an employment tribunal found in the case of *Ali v Capita Customer Services Limited* that it would be direct sex discrimination for a man on shared parental leave to get less pay than a woman on maternity leave. We expressed at the time that we thought the decision was fundamentally wrong and the EAT has now overturned it.

## **Facts of the *Ali v Capita Customer Services Limited* case and decision:**

Mr Ali worked for Capita Customer Management. After his wife gave birth, she suffered from post-natal depression and was advised to return to work early to help speed up her recovery. Mr Ali requested to take shared parental leave to care for their baby and he was informed that he would only receive the statutory rate of pay. He contended that this amounted to direct sex discrimination because women on maternity leave in his business received 14 weeks' full pay. He argued that men taking shared parental leave should be entitled to receive 12 weeks' full pay as he accepted that the first two weeks of compulsory maternity leave could be treated differently.

An employment tribunal found that Capita had directly discriminated against Mr Ali. The thrust of the employment tribunal's decision was that after the two week compulsory period of maternity leave, men and women are equally well placed to look after their child. A man can therefore compare himself with a female comparator on maternity leave during the 12 week after her compulsory maternity leave ends.

The EAT disagreed and allowed Capita's appeal. They said that the correct comparator in this case is a woman on shared parental leave. As a woman on shared parental leave would also only receive statutory shared parental pay, there would be no difference in treatment.

In any event, the tribunal should have found that the more favourable treatment given to women on maternity leave was in connection with pregnancy or childbirth and special treatment for this reason does not give rise to direct sex discrimination against men. The EAT held that the tribunal was wrong to find that the purpose of maternity leave and pay after two weeks' compulsory maternity leave period is to care for the child. That finding was contrary to the purpose of the Pregnant Workers Directive (the Directive), which requires that women receive statutory maternity leave and pay for a minimum of 14 weeks. The Directive makes it clear that maternity leave and the pay associated with it are for the health and wellbeing of women who are pregnant, have recently given birth, or are breastfeeding.

However, the EAT noted that, as suggested by Working Families, the UK's work life balance charity which intervened in the appeal, it may be that "after 26 weeks the purpose of maternity leave and pay changes from the biological recovery from childbirth and special bonding period between mother and child, to caring for the child. At that point, it may be possible to draw a valid comparison between a father on shared parental leave and a mother on maternity leave". Therefore, the EAT appears to have left open the possibility of a challenge to policies which enhance maternity pay in excess of 14 or 26 weeks but do not enhance shared parental leave in those later weeks.

## **Facts of the *Hextall v Chief Constable of Leicestershire Police* case and decision:**

Mr Hextall is a serving police constable and also took shared parental leave for 14 weeks. He was paid at the statutory rate. Had Mr Hextall been a female police constable on maternity leave he would have been paid his full salary for the period he took shared parental leave.

Unlike Mr Ali's claim, Mr Hextall's claim failed at tribunal as it was decided that being denied the opportunity to take shared parental leave on full pay did not amount to direct or indirect discrimination. Mr Hextall did not appeal the direct

discrimination finding but did challenge the dismissal of his indirect discrimination claim.

The EAT has now decided that the tribunal was wrong in its analysis of the claim and has remitted the case to a fresh tribunal to reconsider Mr Hextall's claim.

The basis of the indirect discrimination claim is that an employer enhancing maternity pay but not shared parental leave pay is applying a practice that puts men at a comparative disadvantage: unlike mothers who can opt to stay on maternity leave with enhanced pay or choose to take shared parental leave, fathers have no choice and can only take shared parental leave at the statutory rate.

If the practice is found to be indirectly discriminatory the tribunal may look at whether it is capable of justification, as a proportionate means of meeting a legitimate aim (for example to encourage recruitment and retention of women).

### **What does this mean for employers?**

For now, from a purely legal perspective, it would appear that employers may pay enhanced rates of pay only to women on maternity leave and not to employees of either sex on shared parental leave.

We understand that Mr Ali has been given permission to appeal to the Court of Appeal and the Hextall case might follow suit. Given that the cases may therefore have some way to run before we get a definitive view from the courts, we expect that there will be more claims of this kind against employers who decide not to change their policies at this stage. Employment tribunals may well stay any such claims until the Court of Appeal has spoken on these issues.

We will, of course, keep you updated on this issue as the cases progress through the courts.

[Capita v Ali](#)

[Hextall v Chief Constable of Leicestershire Police](#)

### **Authors**



**Ceri Fuller**

*London - Walbrook*

[cfuller@dacbeachcroft.com](mailto:cfuller@dacbeachcroft.com)