Is it discriminatory to pay a man on shared parental leave less than a woman on adoption leave?

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Is it discriminatory to pay a man on shared parental leave less than a woman on adoption leave?

In Price v Powys County Council, the Employment Appeal Tribunal (EAT) has determined that it was not directly discriminatory to enhance pay to a female employee on adoption leave and not to enhance statutory pay for a male employee on shared parental leave.

What does the law say?

Direct sex discrimination occurs where someone treats person A less favourably than person B, because of person A’s sex. If employees wish to claim direct sex discrimination, they must demonstrate that they have been treated less favourably than a real or hypothetical comparator. For these purposes, a comparator must be someone of the opposite sex whose circumstances are not materially different to the complainant. A material difference is one that is significant and relevant.

Where employees adopt a child, they may be entitled to take adoption leave and receive statutory adoption pay. Primary adopters will be entitled to take up to 52 weeks’ leave, which may begin before or after the adoption placement. They may also qualify for up to 39 weeks’ statutory adoption pay. The primary adopter’s partner or spouse may qualify for up to 2 weeks’ paternity leave and pay.

Birth and adoptive parents may be entitled to take shared parental leave and receive statutory shared parental pay. This will only be available where the birth mother/primary adopter has curtailed the maternity/adoption leave and pay. Up to 50 weeks’ shared parental leave and 37 weeks’ statutory shared parental pay may be shared between the parents in blocks of their choosing (subject to certain limits). Shared

parental leave may only be taken after the birth or adoption placement has begun.

What happened in this case?

Mr Price worked for Powys County Council. He applied to take shared parental leave following the birth of his first child. When he asked how much he would be paid during leave, the Council confirmed that he would receive statutory shared parental pay only. By contrast, the Council enhanced both maternity and adoption pay. Because of this, Mr Price decided that he would not take shared parental leave after all.

He went on to claim direct sex discrimination, arguing that he should receive the same pay as female colleagues taking other forms of leave. He identified two comparators:

- a woman on maternity leave receiving enhanced pay; and
- a woman on adoption leave receiving enhanced pay.

He argued that he was entitled to compare himself to these women because all forms of leave served the same purpose, namely the facilitation of childcare.

What was decided?

In Ali v Capita Customer Management Ltd the Court of Appeal ruled that a man taking shared parental leave was not entitled to compare himself to a woman on maternity leave as their circumstances were materially different. The Court said that the primary purpose of maternity leave was for the health and safety of the birth mother and not the facilitation of childcare. Accordingly, the EAT held that Mr Price could not compare himself to a woman on maternity leave.

In relation to the second comparator (the woman on adoption leave), the EAT decided that adoption leave and shared parental leave were similar in that they both had the underlying purpose of facilitating childcare. However, there

were also fundamental differences. The predominant purpose of adoption leave was to allow adoptive parents to prepare a safe environment for the child and secure the parental bond. As a result, Mr Price and the female comparator's circumstances were materially different. For that reason, a person taking shared parental leave was not in a directly comparable position with a person of the opposite sex taking adoption leave. Here, the right comparator would have been a woman taking shared parental leave, who would also have been paid statutory shared parental pay only.

What does this mean for employers?

This decision is helpful to employers who enhance pay for adoption leave but not shared parental leave. That difference in approach will not be directly discriminatory. However, employers should note that it remains possible that such a claim might succeed if framed as an equal pay claim. In the case of Hextall v Chief Constable of Leicestershire Police, the Court of Appeal held that a man being paid statutory shared parental pay only could have compared himself to a woman being paid enhanced maternity pay for the purposes of an equal pay claim. However, in that case, the Court said the equal pay claim was bound to fail because claims are excluded where more favourable terms relate to special treatment for women in connection with pregnancy or childbirth. However, that exclusion would not apply where a man sought to compare himself to a woman taking adoption leave.

This case also highlights the wider issue that many parents remain reluctant to take shared parental leave because employers tend not to offer enhanced pay. The charity, Maternity Action, estimates that the take up rate stands at between 3% to 4% among eligible couples. Indeed, in the last few days, a group of organisations including the TUC, the National Childbirth Trust and the Royal College of Midwives have described the shared parental leave system as a "deeply flawed and chronically failing policy". They have called for

it to be scrapped and replaced with a period of non-transferable paid leave for both mothers and fathers.

Price v Powys County Council

If you would like to discuss any issues arising out of this decision please contact Blair Wassman (blairwassman@bdbf.co.uk), Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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