Was it direct sex discrimination to withhold an allowance during maternity leave?

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In Commissioner of the City of London Police v Geldart the Court of Appeal held that an employer did not discriminate against a female employee when it mistakenly withheld an allowance during her maternity leave.

What does the law say?

Individuals on maternity leave are entitled to receive all of their contractual benefits while on leave, excluding pay.

The Equality Act 2010 sets out that it is unlawful for an individual to be treated less favourably than someone else because of their sex. For individuals to succeed in such a claim they need to be able to show that they have been treated less favourably than a real or hypothetical comparator whose circumstances are not materially different from their own.

Previous case law has established the principle that discrimination on grounds of pregnancy is automatically discrimination on grounds of sex. Since pregnancy is a condition that only affects women there is no need for a claimant to find a male comparator in such cases.

What happened in the case?

Mrs Geldart was a police officer with the City of London Police and her terms and conditions of service were prescribed by the Police Regulations 2003.

In December 2016, Mrs Geldart started maternity leave. During this period, she received enhanced occupational maternity pay for 18 weeks and statutory maternity pay for a further 16 weeks. Ms Geldart was paid her usual London allowance during the 18 weeks in which she received occupational maternity pay. After this period, the employer ceased payment of the London allowance. The Police believed that the London allowance formed part of her “pay”, which individuals are not entitled

to receive when they are on maternity leave.

Mrs Geldart brought a claim against the Police for direct sex discrimination relating to the non-payment of the London allowance after the first 18 weeks of her maternity leave. She argued that the London allowance was not treated as "pay" under the Police Regulations 2003. Instead, it, was dealt with separately under a section headed "allowances". As such, she argued it was payable throughout her maternity leave and the fact that it had not paid was because she was on maternity leave and this was inevitably because of her sex.

At first instance the employment tribunal upheld Mrs Geldart's claim for direct sex discrimination and this was also upheld on appeal to the Employment Appeal Tribunal.

What was decided?

The Police appealed again to the Court of Appeal where it was decided that the Police had not directly discriminated on the grounds of sex.

The Court accepted that the fundamental issue was the distinction between "pay" and "allowance" in the Police Regulations 2003. The "pay" section expressly provided that the entitlement to pay was suspended during periods of absence from work, including maternity leave. By contrast, the "allowance" section provided that the only condition of an entitlement to an allowance was that the recipient was in office of one of the London police forces.

The Court noted that the correct approach when looking at discrimination was to focus on why the claimant had been treated in the way that she had. In this case the reason why Mrs Geldart had not received the London allowance during the whole of her maternity leave was because the Police had wrongly understood it to be a form of pay and, as such, not payable in respect of any period of absence from duty.

Therefore, the reason why it had not been paid to Mrs Geldart was simply that she was absent from work. The Court said this was distinct from being because she was absent on maternity leave. Therefore, maternity was not the reason she stopped receiving the London allowance.

However, the Court also decided that the London Allowance did not constitute "pay" for the purposes of the Police Regulations 2003. Therefore, Ms Geldart had been entitled to receive the London allowance for the duration of her maternity leave and this money was owed to her.

What does this mean for employers?

Although fact-specific, this decision reminds employers to check that maternity policies are crystal clear about entitlements during maternity leave, particularly where complex remuneration arrangements are in place. Although genuine mistakes should not result in liability for direct discrimination, as here, they can still lead to time-consuming and costly disputes, damage the relationship with the employee and, potentially, cause wider reputational damage. Employers can avoid mistakes by ensuring that those with responsibility for determining entitlements during maternity leave (and similar forms of leave) understand both the internal rules and the impact of equality law.

Commissioner of the City of London Police v Geldart

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

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