



BRIEFING

Discrimination Risks with Shared Parental Leave

As the 5 April 2015 draws closer, discussions about the legal implications of the new Shared Parental Leave (SPL) regime have started to heat up. HR teams across the UK need to gear up for this change in legislation. For most employers the burning question is whether those with enhanced maternity packages should match those benefits for anyone taking SPL.

The centre of the discussion has been whether or not an employer that enhances maternity pay would discriminate directly or indirectly against men if it failed to similarly enhance Shared Parental Pay (ShPP).

In relation to a direct discrimination claim, the question is, who should men be compared with; a woman on maternity leave (who gets enhanced pay) or a woman on SPL (who does not get enhanced pay). In the case of *Shuter v Ford Motor Company Ltd [2014]* a man on paternity leave brought a claim for direct discrimination against Ford on the basis that he did not get enhanced paternity pay but a woman got enhanced maternity pay. He was unsuccessful in that claim because the Tribunal determined that there were substantial differences between a woman on maternity leave who had given birth and a man on paternity leave, such that they could not be 'compared' to each other. The Tribunal found that the correct comparator for the purposes of that claim was a woman who applied for paternity leave (a female spouse or civil partner) and there was no evidence that they would have been treated differently.

The logic of that decision would dictate that the correct comparator for a man on SPL is a woman on SPL, not a woman on maternity leave. That argument however may not yet be over. The Ford decision is a first instance Tribunal decision and there is a 2009 decision of the European Courts of Justice (ECJ) of *Roca Alvarez v Sesa Start Espana* which concerned a man who brought a direct

discrimination claim on the basis that women were entitled to time off for bottle or breast feeding but men were not. The ECJ found that the point of the leave was not just to bottle or breast feed but to bond with the child and participate in family life and as such the position of the father of the child was comparable to that of the mother and therefore it was directly discriminatory to not permit the father the same protected time off as the mother. The Tribunal in the *Ford* case considered this question and dismissed it on the basis that given the particular impact of childbirth on a mother, Parliament specifically introduced a protection for women in the form of maternity leave and there was nothing to suggest that it was designed to simply relate to child care alone; as such, a man could not be in a comparable position. It remains to be seen however if that logic would apply to enhanced maternity schemes which cover a longer period of leave than the first few weeks after child birth.

The Claimant in the *Ford* case also brought a claim for indirect discrimination which again failed but for reasons which seemed to specifically relate to Ford as an employer. Indirect discrimination is when there is a Provision, Criteria or Practice (PCP) applies to all employees (SPL applies to both men and women) but has a detrimental impact on one group of employees more than another (for example, women have the option of enhanced maternity pay and men do not). If that detrimental impact is established, indirect discrimination may not be unlawful if an employer can show that there is an 'objective justification' for it.





This involves demonstrating that the PCP and disparate impact is a 'proportionate means of achieving a legitimate aim'. This was what was established in the Ford case but it was very much based on the specific facts of that case.

The particular finding was that Ford had enhanced maternity pay as an incentive for female employees, to tackle the significant under-representation of women in the company. The Tribunal found that Ford could clearly demonstrate its reasons for enhancing maternity pay and it also produced statistical evidence confirming that it had retained more women in the workforce as a result of the enhanced pay policy. As such, it was a proportionate means of achieving a legitimate aim.

Although in the *Ford* case, direct and indirect discrimination were not found, the risk of claims still exists, in particular with indirect discrimination because not many employers will have the same arguments as Ford about a male-dominated workforce.

Employers should review their policies and consider whether or not they are going to offer enhanced pay over SPL and if so, at what level.

As ever, we would be delighted to discuss these issues with any business or individual who may be affected.

If you would like any further information about how this guide could impact you, or any other employment issue, please contact
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