

Maternity pay v Shared parental leave pay – discrimination?

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The introduction of shared parental leave (SPL) was intended to allow both parents of a child to take time out to care for that child during their early life. As with any new legislation, it has brought about uncertainty for employers regarding their obligations in relation to pay for SPL.

Within the legislation there is only a right to receive statutory payment for SPL and no reference to enhanced payment being made.

Statutory pay for SPL is currently paid at the same as Statutory Maternity Pay (SMP) except that during the first six weeks SMP is paid at 90% of whatever the employee earns (with no maximum).

Maternity legislation only provides the right to receive statutory pay, but as maternity leave has existed for a long period of time, many organisations have created policies which make enhancements to the statutory pay rate. When it comes to SPL, such organisations have not necessarily matched the enhanced rates of pay to SPL, even when it exists for those on maternity within the same organisation.

Two recent Court of Appeal cases considered whether it is discriminatory on the grounds of sex for employers to make enhanced payments to women during maternity leave but only pay the statutory rate to both men and women on SPL.

When originally heard at tribunal both cases (*Ali v Capita Customer Management & Hextall v Chief Constable of Leicestershire Police*) were successful in proving discrimination. The former case was, however, overturned on appeal.

These cases led to much uncertainty and ambiguity for employers and the implications of these claims being upheld would have been far reaching in terms of cost and potential liability.

In May 2019 the Court of Appeal found there was no direct discrimination in these cases as a man on SPL is not in comparable circumstances to a birth mother on maternity leave. They concluded it was not indirect discrimination to have a policy of paying statutory pay to men on SPL because men and women in the comparison pool were not placed at any particular disadvantage by such a policy or practice.

This finding means employers now have clarification on this matter and can ensure their policies are fit for purpose taking the findings into account.

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