

European Employment Law ALERT

UK Update on enhanced additional paternity pay: Employer was justified in not providing enhanced additional paternity pay.

By Tessa Cranfield and Georgina McAdam

In *Shuter v Ford Motor Co Ltd* the Employment Tribunal held that an employer was justified in paying female employees on maternity leave their unreduced salary, but paying only the statutory minimum rate of pay to a male employee on additional paternity leave.

Overview - Maternity and paternity leave in the UK

In the UK following the birth of her child a mother may take up to 52 weeks maternity leave. Statutory maternity pay is available for 39 of these weeks subject to a minimum seniority condition, currently at around £139 per week.

The mother's spouse, civil partner or partner can take two types of paternity leave, again subject to minimum seniority: (i) ordinary paternity leave, which can be taken for one whole week or two consecutive weeks within 56 days of the child's birth; and (ii) additional paternity leave that can be taken for a period of between two and 26 weeks, which must be taken within a window that starts 20 weeks after, and ends 12 months after, the child's birth, provided the mother has returned to work from her maternity leave. Statutory paternity pay is payable at the same rate as statutory maternity pay.

Parents of children born on or after 5 April 2015 will benefit from a new system of shared parental leave, meaning they can share most of the 52 weeks' leave, and 39 weeks' pay, between them on a flexible basis.

Background - the Claim

Mr Shuter was paid statutory pay only while on additional paternity leave in line with Ford's policy. However, Ford's maternity policy was to pay women on maternity leave 100% on their basic salary for up to 52 weeks. This meant that Mr Shuter was paid approximately £18,000 less than a woman receiving the enhanced maternity pay provided by Ford over the same period.

Mr Shuter brought claims for direct and indirect gender discrimination based on the difference in pay between maternity leave and additional paternity leave.

Decision

The Employment Tribunal held that the policy of paying more generous maternity than paternity pay did not directly discriminate against men. This was on the (somewhat counter-intuitive basis) that both women and men could take additional paternity leave - for example adoptive parents or a woman in a same-sex relationship could potentially take additional paternity leave. This was significant as direct discrimination cannot be justified and is simply unlawful.

The Employment Tribunal did however accept that Ford's policy of paying full pay during maternity leave potentially amounted to indirect discrimination, because only women could take maternity leave and access this benefit. However, indirect discrimination can potentially be justified and in this case, the Employment Tribunal held that Ford's maternity pay policy was justified as it was necessary to achieve Ford's aim to recruit and retain more women. This was a legitimate aim and the policy was proportionate. In making this decision the Employment Tribunal took into consideration the fact that Ford was able to show that the number of women in its workforce had increased and there were more women in managerial roles. The Employment Tribunal therefore dismissed Mr Shuter's claim.

Implications for shared parental leave

Additional paternity leave and shared parental leave are different but they are based on similar concepts. Therefore, although the decision is by a lower level court and so is not binding in future cases, it may provide an indication of how a tribunal will approach a disparity in pay between men and women taking shared parental leave.

Claims such as Mr Shuter's have been rare to date. This may be related to the fact that only 1% of all employees entitled to take additional paternity leave have taken up this right, even for a short period. With more men expected to take advantage of the new shared parental leave system which will apply from April of next year, what are the implications of this case for employers currently drawing up their shared parental leave policies, and wondering whether to offer enhanced rates of pay?

Men will now potentially be able to take shared parental leave at an earlier stage (from as early as 2 or 4 weeks after the birth) rather than the current system of waiting to take paternity leave until at least 20 weeks after the birth. This means it is now more likely that they will take a period of leave during a period when a female colleague on maternity leave would have received enhanced maternity pay - opening the door for them to compare themselves against a female colleague and argue discrimination. Although there is conflicting case law at European level, there are suggestions that there should no longer be an automatic right to treat women on maternity leave for reasons related to childbirth, certainly when looking at periods of leave up to 12 months after the birth (see the *Roca Alvarez* case).

Shuter suggests a challenge to differential pay would generally be based on indirect rather than direct discrimination, meaning it can potentially be justified. A policy cannot be justified solely on grounds of saving cost, though; Ford for example instead referred to the need to retain more women, and apparently produced evidence that the policy had in fact succeeded in this regard.

To avoid the need to justify any difference in pay, the safest course in the context of shared parental leave is to provide both parents with access to the same level of enhanced pay. Before making changes to maternity or shared parental pay policies, employers may however want to weigh up the risk in practice. The Government estimates that only 2-8% of eligible fathers will take up shared parental leave, and it may be that a number of these do not take their leave during the period in which the employer would have paid enhanced maternity pay to a woman out for the same period. In practice, Ford is unusual in offering 12 months enhanced maternity pay. Most employers only offer enhanced maternity pay for 3 or 6 months, and in practice the majority of this period may still be taken by mothers rather than by their partners. As such, the number of claims brought by fathers on shared parental leave may, in the end, be low.

For more information on this case or on the implications of shared parental leave for employers, please contact any member of our International Employment Law practice:

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