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FLASH REPORT

Country:	United Kingdom
Title:	Ali v Capita Customer Management Ltd and Hextall v Chief Constable of Leicester Police (CA) [2019] EWCA Civ 900
Date:	28 June 2019
Expert:	Grace James
<u>Context</u>	
Issue at stake:	Shared parental leave (SPL) – is it sex discrimination to pay men less on SPL than women are paid on maternity leave?
Grounds of discrimination:	Sex
Field of application:	Employment, Family related leave
Source:	National court decision
Applicable law:	Equality Act 2010, Employment Rights Act 1996 and Maternity and Parental Leave etc Regulations 1999 (SI 1999/3312); Shared Parental Leave regulations 2014 (SI 2014/3050); Pregnant Workers Directive 92/85/EEC of October 1992 and CJEU interpretations

Content

Case: Two cases joined in this appeal. In *Ali v Capita Customer Management Ltd* – Mr Ali was claiming that a decision to pay him less (on SPL) than would have been paid to a woman taking maternity leave (after the two weeks compulsory leave) amounted to direct sex discrimination. In *Hextall v Chief Constable of Leicester Police*, Hextall argued that the policy of paying women on maternity leave more than those on shared parental leave indirectly discriminated against men.

Note: The Shared Parental Leave Regulations (2014) allow parents to share leave entitlement following the birth of a child. The mother must take two weeks leave immediately after the birth (Employment Rights Act 1996 S.72(1) and Maternity and Parental Leave Regulations 1999 (Reg. 8)) in order to recover from childbirth, but the remaining leave entitlement can be shared between the parents. In relation to pay: statutory maternity pay is, during the first six weeks of leave, paid at 90 % of the mother's average weekly earnings (with no upper limit) and, thereafter, paid at a basic rate (GBP 140.98 per week or 90 % of salary if that is lower) for the remaining 33 weeks leave entitlement. Shared parental leave (SPL) is paid, from day one, at the statutory rate (GBP 140.98 per week). Employers are able to 'top up' the statutory entitlement to both maternity pay and shared parental leave by paying some or all of it at a higher rate if they wish to do so.

Decision of the court: On 24 May 2019, the Court of Appeal held that paying a man on shared parental leave less than a woman on maternity leave would be paid amounted to *neither* direct nor indirect discrimination.

Key points of analysis: the Court held that a woman who had given birth cannot be compared with a man who has not. In relation to *Ali v Capita* the judges suggested that to argue for equality in pay amounted to an “attack against the whole statutory scheme” under which special treatment is given to women on maternity leave and that the ‘predominant purpose’ of the latter is ‘not childcare but other matters exclusive to the birth mother resulting from pregnancy and childbirth and not shared by the husband or partner’ (para 72). The Court felt that it helps women prepare and cope with the later stages of pregnancy, recuperate from giving birth, bond with their child, breastfeed and care for their new born. Shared parental leave was predominately, they suggested, about childcare.

In Hextall, the Court decided that the facts are such that it is not a straightforward case of indirect discrimination but a case of equal pay. However, because there was no evidence that men taking SPL were any worse off than women taking SPL, the Court held that there could not, in any event, be indirect discrimination because enhanced maternity pay was a proportionate means of achieving a legitimate end. Moreover, because the terms of specific to pregnancy and maternity they are excluded from equal pay claims. Hence there was, according to this judgment, no challenge possible.

Internet link source: see <https://www.bailii.org/ew/cases/EWCA/Civ/2019/900.html>.