

In the Know....

Shared Parental Pay Woes



A father has successfully claimed sex discrimination in relation to his employer's shared parental pay policy, which treated male employees less favourably than female employees. Here, we take a look at why.

Employees took shared parental leave

A mother and father both worked for Network Rail and decided to take shared parental leave after they had a baby – the mother would take 27 weeks leave and the father would take the remaining 12 weeks of the paid section of the leave. Network Rail ran a shared parental leave and pay policy which provided that mothers would receive a pay level during leave which was much higher than the statutory amount; she would receive full pay for 6 months. However, the policy did not offer the same level of enhancement to fathers who would only receive pay at the statutory minimum for the entire length of their leave (currently £139.58).

Government guidance

Guidance produced by the Government on shared parental leave and pay states that it could be a case of discrimination if an occupational pay scheme is offered by an employer to mothers whilst on shared parental leave, but is not also offered to fathers, or mothers' partners.

What did the Tribunal decide?

The Employment Tribunal decided that Network Rail's shared parental pay policy was indirectly discriminatory towards the father in this case. When compared with the treatment of a woman during shared parental leave, he would be treated less favourably and the reason for the less favourable treatment was that he is a man.

Enhanced maternity pay

Indirect discrimination is often unintentional because employers have not thought through the potential consequences an apparently neutral rule has on all employees. It is possible that Network Rail operated

the policy in this way because it had in its mind the principle of special protection towards women who have had a baby as a result of their biological position as the mother and this can justify different treatment and different pay. It is because of this reason that it has not historically been seen as an act of sex discrimination to offer enhanced maternity pay to women who are on maternity leave, but not to offer enhanced paternity pay to men who are on paternity leave.

However, this concept does not easily attach itself to shared parental leave because, under this scheme, the mother is giving up her right to time off and transferring it to the father/her partner. When leave is taken in this way, it is arguably no longer given as special treatment for women and so to maintain a higher rate of pay for women would not seem appropriate.

What does this mean for employers?

The special treatment concept does not mean that employers cannot offer women on shared parental leave enhanced pay if they wish by way of alignment with an enhanced maternity pay policy that they provide. However, where enhanced shared parental pay is provided to women, both government guidance and this case shows that it may well be an act of sex discrimination to fail to provide it to men on shared parental leave too. In this situation, keeping paternity pay at the statutory level, whilst appearing as somewhat of an anomaly in the entirety of the system, would still be perfectly legitimate due to the special protection concept.

The content of this briefing is correct at the time of publishing.

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