The Court of Appeal has handed down judgment in the cases of *Ali v Capita Customer Management* and *Hextall v Leicestershire Police* confirming that offering maternity pay at a higher rate to shared parental pay is not discriminatory.

*Ali* and *Hextall* are two cases, joined on appeal, in which male employees, eligible to take shared parental leave, challenged the rate at which shared parental pay was offered. Mr Ali and Mr Hextall both argued that by offering an enhanced rate of pay to women on maternity leave but offering shared parental pay at the statutory rate only, their employers were unlawfully discriminating against them.

The Court of Appeal has dismissed their claims holding that the special treatment afforded to women in connection with pregnancy and childbirth meant that they were not entitled to compare their circumstances with birth mothers.

**Family leave policies**

It is common practice for employers to operate maternity policies which enhance the statutory rate of maternity pay to offer full pay for a period of several weeks after birth. By contrast, shared parental pay, which is available to both parents, is less commonly enhanced beyond the statutory rate.

This decision offers reassurance to employers that this practice should be lawful and should not be subject to challenge by men claiming that it amounts to sex discrimination.

**Ali v Capita Customer Management**

Mr Ali argued that Capita’s policy of paying women on maternity leave full pay for 14 weeks, while offering those on shared parental leave statutory pay only, was direct discrimination on grounds of sex.
Men cannot compare their treatment with women who are pregnant or have given birth

The Court of Appeal held that Mr Ali was not entitled to compare his treatment with a woman on maternity leave. The purpose of maternity leave is to protect a woman’s biological condition during and after pregnancy and childbirth. By contrast, the purpose of shared parental leave was purely to care for a child. The circumstances of a birth mother were not materially the same as a father taking shared parental leave. Although one of the aims of shared parental leave is to encourage shared parenting, this has not had the effect of altering the purpose of maternity leave. There was therefore no direct discrimination.

Hextall v Leicestershire Police

Mr Hextall took a period of shared parental leave during which he was paid statutory shared parental pay. He claimed that his treatment was indirect sex discrimination, since women on maternity leave received a higher rate of pay.

Equal pay claim

Before the Court of Appeal, the claim was reframed as an equal pay claim. Mr Hextall argued that the sex equality clause in his contract of employment had been breached since he had not been entitled to receive the same rate of pay as a woman taking time off to care for a baby.

Women on maternity leave are afforded special treatment

The Court of Appeal held that the sex equality clause does not have effect in relation to terms of work affording special treatment to women in connection with pregnancy and childbirth. The maternity pay that was available to female police officers amounted to special treatment afforded in connection with pregnancy and maternity. The clause did not therefore operate to include the enhanced rate of pay in Mr Hextall’s contract of employment.

No indirect discrimination

As regards any possible indirect discrimination claim, the Court of Appeal held that any difference in treatment between men on shared parental leave and women on maternity leave could be justified by the special treatment afforded to those who are pregnant or have given birth.
Please do not hesitate to contact us, if you have any questions about this topic.

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