

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal  
On 16 January 2018  
Judgment handed down on 1 May 2018

**Before**

**THE HONOURABLE MRS JUSTICE SLADE DBE**  
**(SITTING ALONE)**

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MR A HEXTALL

APPELLANT

(1) CHIEF CONSTABLE OF LEICESTERSHIRE POLICE  
(2) WORKING FAMILIES (INTERVENOR)

RESPONDENTS

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Transcript of Proceedings

JUDGMENT

**APPEAL & CROSS-APPEAL**

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## APPEARANCES

For the Appellant

MR DOUGLAS LEACH  
(of Counsel)  
Instructed by:  
Penningtons Manches LLP  
125 Wood Street  
London  
EC2V 7AW

For the Respondent

MR JONATHAN DAVIES  
(of Counsel)  
Instructed by:  
East Midlands Police Legal Services  
Lincolnshire Police HQ  
PO Box 999  
Lincoln  
LN5 7PH

For the Intervenor

Written submissions  
MR CHRISTOPHER MILSOM  
(of Counsel)

## **SUMMARY**

### **EQUAL PAY ACT**

#### **SEX DISCRIMINATION - Indirect**

The Claimant claimed indirect sex discrimination under provisions in the Respondent Police Force in that the only option for men taking leave after the birth of their child is shared parental leave (“SPL”) at the statutory rate of pay whereas women have the option of taking maternity leave (“ML”) on full pay. The Employment Tribunal did not err in holding that the claim was for indirect sex discrimination and not for equal pay within the meaning of **Equality Act 2010** (“EqA”) section 66. The exclusion in **EqA** Schedule 7 Part 1 paragraph 2 in relation to terms of work affording special treatment for women in connection with pregnancy or childbirth did not apply. Cross-appeal dismissed. The ET erred in adopting their reasons for rejecting women on maternity leave as a comparator for a direct discrimination claim for the purposes of the indirect discrimination claim. The identifying of a pool for testing disparate impact of a PCP on men and women in materially indistinguishable circumstances is a different exercise from that in a direct discrimination claim. Further the ET erred in failing to base their decision on the disparate impact relied upon : fathers have no choice but to take SPL at the statutory rate of pay whereas mothers have the option of ML at full pay. Appeal allowed. Claim of indirect sex discrimination remitted for rehearing to a differently constituted ET.

**A**      **THE HONOURABLE MRS JUSTICE SLADE DBE**

**B**

1.      This appeal is linked to that of **Capita Customer Management Ltd v Mr M Ali**. Both appeals raise the question of whether it is sex discrimination giving rise to a claim, for an employer not to pay a man who takes shared parental leave following the birth of his child, at the same rate as a woman on maternity leave. The Employment Tribunal (“ET”) in the case of Mr Ali held that this was direct sex discrimination. The issue on appeal in his case was whether

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the ET erred in so finding. The appeal of **Capita Customer Management** has been allowed and the finding of sex discrimination set aside. In the case of Mr Hextall (“the Claimant”) Employment Judge Camp and members (“the ET”) dismissed his claims of direct and indirect

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sex discrimination and of equal pay in a Judgment sent to the parties on 24 August 2016 (“the Judgment”). The Claimant does not appeal the dismissal of his claim of direct sex discrimination or for equal pay but appeals the dismissal of his claim for indirect sex

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discrimination. The Chief Constable of Leicestershire Police (“the Respondent”) cross-appeals the decision of the ET that the claim was one of discrimination and not of equal pay. The Respondent contends that the claim is one of equal pay and is precluded by **Equality Act 2010** (“EqA”) Schedule 7 Part 1 paragraph 2.

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2.      In support of his claim of indirect sex discrimination the Claimant relied upon a provision criterion or practice (“PCP”) of paying only the statutory rate of pay for those taking

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a period of shared parental leave. The Respondent does not appeal the finding that the PCP, if found to be discriminatory, was not justified. As before the ET Mr Leach appeared for the Claimant and Mr Jonathan Davies for the Respondent. The Intervenor, Working Families, were not represented but the helpful written submissions prepared by Mr Christopher Milsom were

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taken into account.

**A** 3. The ET characterised the claim made by the Claimant as:

“... a bold and ingenious attempt to gain for men - or men who are police officers at least - a right to payment of a kind of paternity pay at the same rate as maternity pay is paid to women.”

**B** Mr Leach disavowed this characterisation of the claim. Counsel made it clear that the Claimant was not asking for maternity pay. He wanted pay for men taking shared parental leave (“SPL”) following the birth of their child at a rate equivalent to that which women on maternity leave are paid.

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### **Outline Relevant Facts**

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4. The relevant facts were not in dispute and are taken from the Judgment of the ET. The ET held:

“7. The claimant is a serving police constable. He joined the respondent force in 2003 and currently works in the Roads Armed Policing Team. His wife runs her own business. She gave birth to their second child on 29 April 2015. He took Shared Parental Leave (“SPL”) from 1 June to 6 September 2015. Over that period of SPL, he was paid at the rate of £139.58 per week.

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8. Had the claimant been a female police constable on maternity leave (“ML”), he would have been entitled to be paid his full salary for the period over which he took SPL. Within the respondent (and, as we understand it, within the police generally) women on ML and male or female primary carers on adoption leave are contractually entitled to full pay - Occupational Maternity Pay and Occupational Adoption Pay - for 18 weeks. ...”

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The ET observed:

“8. ... In a nutshell, the claimant’s case is that he was unlawfully discriminated against as a man because the rate of enhanced MP is higher than the rate of SPL pay (“SPLP”).”

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5. The ET continued:

“9. SPL is paid at the same rate to anyone on SPL. People other than fathers who would be entitled to take SPL include:

9.1. women who are the wives or civil partners of women who have just given birth;

9.2. women who are the secondary carers of a recently adopted child;

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9.3. birth mothers who took some ML and who returned to work for a time while their partners took SPL, meaning they lost the right to take any more ML.

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10. SPL is not, then, just available to fathers; nor just to men. However, it is accepted by the respondent for the purposes of these proceedings that the overwhelming majority of people taking and likely to take SPL are men. The claimant submits, and we accept, that, for example, it is highly improbable (absent special circumstances) that birth mothers who are police constables within the respondent force would take SPL during the 18 week period when enhanced MP would be payable. Further, the claimant relies on the self-evident biological fact that only women can bear children; and that, consequently, only women can get enhanced MP.

11. Under the Regulations, SPLP was at the relevant time fixed at £139.58 per week, being the same rate as the rate of statutory maternity pay (“statutory MP”), and, as above, the rate at which it was paid to the claimant. We shall refer to that rate as the “statutory rate”. For technical reasons, the Regulations do not apply to police officers, although they do apply to civilian personnel within the police. However, the respondent has an SPL policy for police officers which is in all relevant respects identical in effect to the Regulations, including as to the rate of SPLP.”

### The Relevant Statutory Provisions

#### Equality Act 2010

Section 19:

“19. (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B’s if -

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are -

...  
sex;  
...”

Section 23:

“23. (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.”

**A** Section 39:

“39. ...

(2) An employer (A) must not discriminate against an employee of A’s (B) -

(a) as to B’s terms of employment;

**B**

...

(d) by subjecting B to any other detriment.”

Section 42:

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“42. (1) For the purposes of this Part, holding the office of constable is to be treated as employment -

(a) by the chief officer, in respect of any act done by the chief officer in relation to a constable or appointment to the office of constable;

(b) by the responsible authority, in respect of any act done by the authority in relation to a constable or appointment to the office of constable.”

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Section 66:

“66. (1) If the terms of A’s work do not (by whatever means) include a sex equality clause, they are to be treated as including one.

(2) A sex equality clause is a provision that has the following effect -

(a) if a relevant term of A’s is less favourable to A than a corresponding term of B’s is to B, A’s term is modified so as not to be less favourable;

(b) if A does not have a term which corresponds to a term of B’s that benefits B, A’s terms are modified so as to include such a term.”

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Section 69:

“69. (1) The sex equality clause in A’s terms has no effect in relation to a difference between A’s terms and B’s terms if the responsible person shows that the difference is because of a material factor reliance on which -

(a) does not involve treating A less favourably because of A’s sex than the responsible person treats B, and

(b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.”

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Section 70:

“70. (1) The relevant sex discrimination provision has no effect in relation to a term of A’s that -

(a) is modified by, or included by virtue of, a sex equality clause or rule, or

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(b) would be so modified or included but for section 69 or Part 2 of Schedule 7.

(2) Neither of the following is sex discrimination for the purposes of the relevant sex discrimination provision -

(a) the inclusion in A's terms of a term that is less favourable as referred to in section 66(2)(a);

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(b) the failure to include in A's terms a corresponding term as referred to in section 66(2)(b).

(3) The relevant sex discrimination provision is, in relation to work of a description given in the first column of the table, the provision referred to in the second column so far as relating to sex."

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Section 71:

"71. (1) This section applies in relation to a term of a person's work -

(a) that relates to pay, but

(b) in relation to which a sex equality clause or rule has no effect.

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(2) The relevant sex discrimination provision (as defined by section 70) has no effect in relation to the term except in so far as treatment of the person amounts to a contravention of the provision by virtue of section 13 or 14."

Schedule 7 Part 1:

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"2. A sex equality clause does not have effect in relation to terms of work affording special treatment to women in connection with pregnancy or childbirth."

Police Officers: Regulations

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Regulation 33(7) of the **Police Regulations 2003** provides that:

"(7) A female member of a police force qualifies for maternity leave in such circumstances as shall be determined by the Secretary of State."

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Regulation 29 of the Police Regulations provides for entitlement to pay for maternity leave as follows:

"29. The Secretary of State shall determine the entitlement of female members of police forces to pay during periods of maternity leave."

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In accordance with these provisions and determinations the Leicestershire Police Force has a Maternity Leave and Pay Policy in place. Relevant to the issues in this appeal, the Maternity

A Policy provides that a woman entitled to and taking ordinary maternity leave was entitled at the relevant time, to full pay for a period of eighteen weeks.

B 6. Home Office Circular 011/2015, reflecting the introduction of shared parental leave by the **Children and Families Act 2014**, makes provision for shared parental leave (“SPL”) and pay (“SPLP”). The length and timing of SPL depends upon the curtailment and unexpired position of maternity leave and pay. SPL is paid at the statutory rate, which at the relevant time  
C was £139.58 per week.

Leicestershire Police Maternity and Shared Parental Leave and Pay Provisions

D *Maternity Procedure - Police Officers:*

Ordinary maternity leave (“OML”) and additional maternity leave (“AML”):

E “• *Ordinary Maternity Leave (OML) and Additional Maternity Leave (AML) - All individuals, regardless of length of service have the right in law to take up to 26 weeks’ Ordinary Maternity Leave and up to a further 26 weeks Additional Maternity Leave and to resume work afterwards. Individuals are therefore entitled to a total of 52 weeks’ Maternity Leave. Additional Maternity Leave follows on immediately from the end of the period of Ordinary Maternity Leave.*

In accordance with Police Regulations, Police Officers, regardless of their length of service and hours of work, are entitled to take a maximum of 15 months Maternity Leave (taken in one or more periods of leave) within a ‘Maternity Period’ commencing at the earliest 6 months before the child is expected and ending no later than 12 months after the birth.”

F Occupational maternity pay (“OMP”):

G “• *Occupational Maternity Pay (OMP) is a Police benefit afforded to Police Officers who have the required amount of continuous service and is currently full pay, paid for a period of 18 weeks. Officers have the option, with the agreement of their Chief Officer, to spread the final five weeks of Maternity Pay over 10 weeks at a reduced rate*”

Death of a baby/miscarriage:

H “6.9. If a baby dies or is stillborn after 24 weeks pregnancy the normal provisions regarding material benefits still apply. Where this occurs before 24 weeks pregnancy, Compassionate Leave and / or Sick Leave will be granted as appropriate.”

**A** *Shared Parental Leave (“SPL”) - Police Officers:*

“1.2. Shared Parental Leave (SPL) enables eligible officers to choose how to share the care of their child during the first year of birth or adoption. Its purpose is to give parents as much flexibility as possible in considering how best to care for their child.

...

**B** 3.3. The amount of SPL available is calculated using the mother/adopter’s entitlement to maternity/adoption leave, which allows them to take up to 52 week’s leave. If they end (curtail) their maternity/adoption leave entitlement then they and/or their partner may opt-in to the SPL system and take any remaining weeks as SPL. This means their partner could begin to take SPL while the mother/primary adopter is still on maternity/adoption leave.

...

**C** 3.7. The mother/adopter’s partner can begin a period of SPL at any time from the date of the child’s birth/placement for adoption (but the partner should bear in mind that he/she is entitled to take up to two weeks’ Ordinary Paternity Leave following the birth/placement of the child, which they will lose if SPL is taken first).”

*Statutory Shared Parental Pay (“ShPP”):*

**D** “7.1 For officers to be eligible for ShPP, both parents must meet certain eligibility requirements.

*Mother/Adopter’s eligibility for ShPP*

The mother/adopter is eligible for ShPP if he/she:

...

- E**
- Has, at the date of the child’s birth/placement date, the main responsibility (apart from the partner) for the care of the child;
  - Is absent from work and intends to care for the child during the week in which ShPP is payable;

...

In addition, for the mother/adopter to be eligible for ShPP, the partner must:

**F**

...

- Have, at the date of the child’s birth/placement date, the main responsibility (apart from the mother/adopter) for the care of the child.

*Partner’s eligibility for ShPP*

The partner is eligible for ShPP if he/she:

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...

- Has, at the date of the child’s birth/placement date, the main responsibility (apart from the mother/adopter) for the care of the child; and
- Is absent from work and intends to care for the child during the week in which ShPP is payable.

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In addition, for the partner to be eligible, the *mother* must:

...

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- Have, at the date of the child's birth/placement date, the main responsibility (apart from the partner) for the care of the child;

...

11.4. If a child dies before the parents have submitted a notice of entitlement to take SPL then they cannot opt into SPL because a qualifying condition is caring for a child. The mother will remain on maternity leave and the partner could still qualify for statutory paternity leave."

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### **The Judgment of the Employment Tribunal**

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7. The first issue to be considered by the ET was the jurisdictional point of whether the claim was properly brought as a discrimination claim under EqA Part 5 Chapter 1 or whether it was an equal pay claim under EqA Chapter 3. The Claimant asserted that his was a discrimination claim, the Respondent that it was an equal pay claim.

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8. The parties identified a comparator, PC 836. She is a police constable who took maternity leave ("ML") and was paid enhanced maternity pay ("MP") at the rate of full pay. The contract of the Claimant includes a right to enhanced MP but he will never get it as only women can. The ET held at paragraph 24:

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"24. ... Her contract includes a right to SPLP [Shared Parental Leave Pay] but in practice (as things stand) she is unlikely ever to get it, at least not during the period in respect of which she would be entitled to enhanced MP. Why would she take SPL and get paid less when she could take ML and get paid more?"

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9. The ET held:

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"27. The argument that this is in truth an equal pay claim is based principally on the fact that there is something of a contradiction between: the above argument that there is no term of PC 836's contract more favourable than a corresponding term of the claimant's contract; the argument being put forward as part of the claimant's direct discrimination complaint (which we shall come on to in a moment) that there is no material difference between ML and SPL and that the only differences between a father's SPLP and a mother's maternity pay are the labels that have been put on them. However, we think the reason for this contradiction is that the former argument is right and the latter argument wrong.

28. In conclusion on this point, the claimant's claim is one of discrimination and not one of equal pay."

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**A** 10. Although there is no appeal from the dismissal of the claim of direct discrimination, the ET reminded themselves of **EqA** section 23 and that it applies to both direct and indirect discrimination. The ET stated in paragraph 30:

**B** “30. ... the relevant comparator for the purposes of the direct and indirect discrimination complaints must be one or more individuals whose circumstances are not materially different to those of the claimant. ...”

The ET held:

**C** “31. Fundamental to the claimant’s case is that PC 836 having borne and given birth to her child and her being on ML rather than SPL are not material differences between her circumstances and his. We disagree.”

The reasons for that decision include:

**D** “31.1. The link between maternity and pregnancy and what is labelled ML still exists to a significant extent. Most of the 18 week period of ML with which we are concerned is made up of the 14 week period of ML that the Pregnant Workers Directive requires employers to allow mothers to take in recognition of the fact that, “*pregnant workers, workers who have recently given birth or who are breastfeeding must be considered a specific risk group in many respects, and measures must be taken with regard to their safety and health*”. No such considerations apply to fathers. ...”

**E** 11. The ET recorded at paragraph 61 the PCP relied upon by the Claimant for his indirect discrimination claim. It was:

“paying only the statutory rate of pay for those taking a period of shared parental leave.”

**F** 12. The ET stated at paragraph 59 that the first reason why the Claimant’s indirect discrimination claim failed was that **EqA** section 23 applies as much to indirect as to direct discrimination claims. They said that they had already rejected the contention that women on ML are valid comparators for men on SPL. The ET applied that finding to the claim of indirect discrimination.

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**A** 13. Further, at paragraph 60 the ET held that the PCP did not put men “*at a particular disadvantage when compared with*” women. The ET asked themselves at paragraph 62:

“62. ... How can paying the same sum of money to men and women be said to be particularly disadvantageous to men?”

**B** The ET concluded at paragraph 63:

“63. ... The particular disadvantage relied on is getting less money than women get in enhanced MP. But there is no causal link between paying SPLP at the rate of £x and paying enhanced MP at a different rate; the difference in rate, which is what the claimant is complaining about, is not a disadvantage to which anyone, male or female, is put by setting the rate of one of the two types of pay at a particular level.”

**C** 14. The ET expressed the opinion that:

“65. The claimant’s true case is that men are disadvantaged not by any PCP connected with SPL but by the fact that in practice, one has to be a woman to get enhanced MP. ...”

**D** 15. The ET held that the claim of indirect discrimination was “*a non-starter*”. They summarised their conclusion dismissing the indirect discrimination claim in paragraph 83:

“83. The indirect discrimination complaint fails because: we do not accept that a woman on maternity leave getting enhanced maternity pay is a valid comparator for a man on share[d] parental leave getting shared parental leave pay; the relevant PCP does not put men at a particular disadvantage when compared with women; ...”

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**F** 16. If the ET had found the claim was properly brought as one for equal pay they would have found that it failed because Part 1 paragraph 2 of EqA Schedule 7 applies and the Claimant’s contract and that of his comparator are in all relevant respects the same. If the equal pay claim were otherwise valid, the ET held at paragraph 86 that a ‘material factor’ defence was not made out. There is no appeal from that finding.

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**A**     **The Cross-Appeal**

17.     Mr Davies contended on behalf of the Respondent that the ET erred in their identification of the nature and categorisation of the claim. In the cross-appeal it is asserted that:

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“... The issue is whether the claim itself (whatever its merits and whatever defences can be applied) is an attempt to argue that the terms of the Claimant’s contract should be equal to the terms of the comparator’s contract. The essence of the Claimant’s claim was that his contract should contain a term which his comparator has which he does not have: the term relating to payment in respect of maternity leave (which in reality is a claim that he should enjoy the term relating to maternity leave). ...”

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By the cross-appeal it is said that:

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“... The fact that such a claim is envisaged by Section 66(2)(b) but precluded by paragraph 2 of Part 1 of Schedule 7 of the Equality Act 2010 ... demonstrates that Parliament intended such claims to be considered under Chapter 3 Part 5. ...”

18.     The Claimant’s Answer to the Cross-Appeal states that the ET did not err in the application of **EqA** sections 66 and 70. By paragraph 2 of the Answer it is stated:

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“2. The terms of the Claimant’s “contract” are identical to the terms of the comparator’s contract. His contract contains terms as to shared parental leave and pay, and terms as to maternity leave and pay ...”

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The Claimant was not asking for an existing term in his contract to be modified or for a term to be included in his contract which existed in that of his comparator. He already had a term as to maternity pay included (but which he was unable to make use of). It is said that the Claimant was not asking for a sex equality clause under **EqA** section 66 to operate.

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19.     The Respondent challenges by way of cross-appeal the finding in paragraph 28 that the claim is one of discrimination and not one of equal pay.

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**A** 20. As did the ET, on appeal the first issue to be decided is whether the claim was properly categorised as an equal pay claim or as a discrimination claim. It is therefore necessary to consider the cross-appeal before the appeal.

**B** 21. Mr Davies for the Respondent contended that the claim was for equalisation of pay. The PCP relied upon is a difference in the rate of pay for leave taken by men and women after the birth of their child.

**C** 22. Counsel referred to **Hosso v European Credit Management Ltd** [2012] IRLR 235 in which the Court of Appeal held of the predecessor legislation to the **EqA** that if a claim were made for equalisation of a term in a contract of employment it would fall within the equal pay provisions. Mr Davies contended that the claim in this case was by virtue of the Equality of Terms provisions of the **Equality Act 2010** deemed to be under contract; the equal pay provisions of **EqA** applied. He submitted that the claim is that the Claimant should be paid the same as a woman in the circumstances in which she is paid. As the payment to a woman on maternity leave is special treatment in connection with pregnancy or childbirth, such a claim is precluded by **EqA** Schedule 7 Part 1 paragraph 2. It was submitted that the ET failed to have regard to **EqA** section 71 which makes clear the mutual exclusivity of an equal pay claim and one for indirect sex discrimination. This clear divide was explained by HH Judge Hand QC in paragraph 71 of **BMC Software Ltd v Shaikh** [2017] IRLR 1074.

**G** 23. It was submitted that the ET erred in failing to hold that the claim made was one of equal pay and that therefore no sex discrimination claim could be entertained. It was said that whether the equal pay claim was made out or not was immaterial. If it was so properly characterised, the ET could not find that the act relied upon was actionable sex discrimination.

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A 24. Mr Leach contended that the ET did not err in holding that this was not an equal pay  
claim. The Claimant and his comparator were engaged on the same terms. He was not saying  
B he does not have a term which is present in a woman's contract or that a term in his contract is  
less favourable than that of his comparator. His complaint is that shared parental leave for all is  
paid at the statutory rate which disadvantages men as they do not have the option of remaining  
on maternity leave at full occupational pay.

C **Discussion and Conclusion on the Cross-Appeal**

D 25. The PCP relied upon in making the indirect discrimination claim was "*paying only the*  
*statutory rate of pay for those taking a period of shared parental leave*". This PCP is derived  
E from the *Shared Parental Leave - Police Officers* material and is to be treated as having  
contractual force. The Shared Parental Leave provisions, as do the Maternity Leave and Pay  
provisions, apply to both men and women police officers. The Claimant is not claiming that his  
F contract does not have a provision for maternity leave and pay, although, naturally he will not  
be able to benefit from it. He is claiming that the provision of only the statutory rate of pay for  
shared parental leave disadvantages men as they do not have the option, available to women  
who have given birth, of taking maternity leave at a higher rate of pay. In my judgment the ET  
did not err in paragraph 25 in holding that the Claimant:

"25. ... is asking for a term of his contract (which is also a term of PC 836's) - the term  
relating to SLP - to be upgraded so as to be equivalent to a different and non-corresponding  
term of her contract - the term relating to enhanced MP."

G 26. The ET did not err in holding that the claim made by the Claimant did not fall within the  
equal pay provisions of EqA section 66. The exclusion in EqA Schedule 7 Part 1 paragraph 2  
relied upon by the Respondent therefore does not arise.

H 27. The cross-appeal is dismissed.

**A**     The Appeal

*Ground 1*

28.     By ground 1 it is contended that:

**B**                     “The employment tribunal misapplied, and/or misdirected itself in relation to, s.19 EqA 2010 in concluding that because the identified “PCP” applies to men and women equally, there could be no indirect discrimination.”

**C**     29.     Mr Leach contended that the error referred to in ground 1 led to the wrong conclusion in paragraph 62 that because the PCP relied upon, paying only the statutory rate of pay for shared parental leave, resulted in the same payment to men and women, it could not be disadvantageous to men.

**D**     30.     Counsel for the Claimant submitted that it is in the nature of indirect discrimination that a PCP is applied to men and women equally. In Rutherford v Secretary of State for Trade and Industry [2006] IRLR 551 Baroness Hale observed at paragraph 72:

**E**                     “72. It is of the nature of such apparently neutral criteria or rules that they apply to everyone, both the advantaged and disadvantaged groups. So it is no answer to say that the rule applies equally to men and women ...”

**F**     It is the resultant disadvantage which must be considered in deciding a claim of indirect discrimination. The disadvantage in this case was that the only option for men wishing to take leave after the birth of their child was to take SPL at the statutory rate. However, women wishing to take such leave had the possibility of taking ML at full pay.

**G**     31.     Mr Davies accepted that the question in an indirect discrimination claim is not whether the PCP applies to men and women equally. However, he contended that the ET based their decision on the answer to the question of whether the PCP of “*paying only the statutory rate of pay for those taking a period of shared parental leave*” put men at a particular disadvantage. It

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A was submitted that the ET did not err in concluding that the PCP caused no particular  
disadvantage to men. They were paid the same rate as women for SPL. The particular  
disadvantage relied upon was SPL being paid at a lesser rate than ML. Counsel contended that  
B the ET did not err in holding in paragraph 63 that there was no causal link between the PCP and  
that disadvantage.

C *Ground 2*

32. By ground 2 it is contended:

“The employment tribunal misapplied, and/or misdirected itself in relation to, s.19 EqA 2010  
in concluding that the identified “PCP” did not put men at a particular disadvantage in  
comparison with women.”

D 33. Mr Leach contended that the ET wrongly applied the test for direct discrimination to the  
claim for indirect discrimination. In paragraph 59 the ET relied on their finding on EqA  
E section 23 in the direct discrimination claim that a woman on ML was not a comparator for a  
man on SPL. This led the ET to compare a man on SPL with a woman on SPL and erroneously  
F paying a man on SPL less than a woman on ML as the disadvantage relied upon. As the ET  
had rejected a woman on ML as a comparator and men and women on SPL were paid the same,  
the ET found that the rate of SPLP did not put men at a particular disadvantage.

G 34. Mr Leach contended that the fact that men and women on SPL were paid less than  
women on ML was not a PCP or a disadvantage but a ‘context factor’. Counsel referred to  
paragraph 26 of the judgment of the Supreme Court in Essop v Home Office (UK Border  
Agency) and Naeem v Secretary of State for Justice [2017] ICR 640 in which the Court  
H accepted that the reason for the disadvantage relied upon may not be unlawful in itself. The  
Supreme Court held that the examples of context given in Naeem:

“26. ... show that both the PCP and the reason for the disadvantage are “but for” causes of  
the disadvantage: removing one or the other would solve the problem.”

**A** The context in this case that women on ML receive full pay and those on SPL statutory pay, assists in establishing the reason for the disadvantage.

**B** 35. It was submitted that the ET erred in failing to take into account the fact that women on ML were paid more than men on SPL as context for the claim rather than simply rejecting that fact as irrelevant because men and women on SPL were paid the same. Counsel for the Claimant submitted that the ET failed to decide the claim on the disadvantage asserted: that the PCP disadvantaged men because women had the advantage of being able to take leave after the birth of their baby on full pay for those on ML rather than at the statutory rate of SPL.

**C**

**D** 36. Mr Leach pointed out that the ET themselves found that the overwhelming majority of people taking and likely to take SPL are men. Further the ET recognised at paragraph 10 that it was highly improbable that eligible police officer birth mothers would take any SPL during the first eighteen weeks, when maternity pay at the rate of full pay would be available instead.

**E**

**F** 37. Mr Davies submitted that the ET did not err in their conclusion. For indirect discrimination to be made out the disadvantage to men which is alleged must flow from the PCP. Counsel contended that all of the arguments of Mr Leach were ‘shot through by Essop’. Baroness Hale held in Essop at paragraph 33:

“33. ... The essential element is a causal connection between the PCP and the disadvantage suffered, not only by the group, but also by the individual. ...”

**G**

**H** The disadvantage of men not being paid at a higher rate for SPL did not flow from the PCP. It was said that the cause of the disadvantage to men of being paid less for leave taken following the birth of a child is women being treated more advantageously on a different type of leave, maternity leave.

A 38. Mr Davies contended that properly analysed the claim made is one of direct  
discrimination. In the comparison made, the PCP of being paid only at the statutory rate for  
leave taken on the birth of a child is inextricably linked with gender. Only women have the  
B advantage of taking leave at full rate of pay if they choose to remain on ML. Men do not have  
that option. Mr Davies contended that the proper categorisation of the claim is that decided in  
James v Eastleigh Borough Council [1990] ICR 554 as direct discrimination. Only women  
C can be on ML and benefit from the higher rate of MP just as only women had concessionary  
rates at a swimming pool at the age of 60, the retirement age for women, from which they but  
not men benefitted.

D *Ground 3*

39. By ground 3 it is contended:

**“The employment tribunal misapplied, and/or misdirected itself in relation to, s.19 EqA 2010,  
in its construction of the “pool” for comparison. The tribunal erred in concluding:**

**(a) that women on maternity leave should be excluded from the indirect discrimination  
analysis because of s.23 EqA 2010; and**

**(b) that the PCP of the rate of pay for Shared Parental Leave (“SPL”) only “applies”  
when anybody actually takes SPL.”**

F 40. At paragraph 59 the ET adopted for considering the indirect discrimination claim their  
finding in dismissing the direct discrimination claim that women on ML are not valid  
comparators for men on SPL. Mr Leach contended that the ET erred in doing so. Counsel  
G contended that the correct comparison for the purpose of the claim of indirect discrimination  
was between men and women with an interest in the PCP. It was submitted that women have  
an interest in the PCP of the rate of pay of SPL, without actually taking it because they have a  
full pay alternative available to them. Counsel contended that it is those men and women  
H having no interest in the PCP who should be excluded. These are those who have not become  
or are not imminently about to become parents.

A 41. Mr Leach contended that a mother taking what is labelled ‘maternity leave’ from weeks  
three to eighteen after she has given birth is not doing anything different from a father taking  
what is labelled ‘shared parental leave’ in those weeks. Counsel contended that since the  
B **Shared Parental Leave Regulations 2014**, such leave taken by men is materially  
indistinguishable from maternity leave. Men on SPL and women on ML are in the same  
circumstances for the purposes of **EqA** section 23. Accordingly, the ET erred in excluding  
C women on maternity leave from the pool for comparison relevant to the indirect discrimination  
claim.

D 42. Further, Mr Leach contended that the ET erred in concluding at paragraph 62 that the  
PCP only applies when someone takes SPL. It was submitted that the PCP of the rate of pay for  
SPL applies at all times as it is part of the terms of service of police officers.

E 43. Mr Davies helpfully outlined the principles to be applied when construing the relevant  
pool to determine the issue of comparative disadvantage. He wrote in his skeleton argument:

“7.9. The following principles are also important in construing the relevant pool:

(a) in general, the pool should consist of the group which the PCP affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively (EHRC Code of Practice, paragraph [4.18]);

(b) the pool chosen must test the particular discrimination complained of. A pool so narrow that no comparison can be made at all is unlikely to serve this end; nor a pool so large that the comparison is no longer of like with like: *Grundy v British Airways plc* [2008] IRLR 74, Sedley LJ at paragraphs [27] - [28])

(c) people who have no interest in the advantage or disadvantage should not be in the pool: *Rutherford v Secretary of State for Trade and Industry* [2006] IRLR 551, Baroness Hale at paragraphs [72] - [82].”

G 44. Mr Davies referred to a number of material differences between the Claimant and  
women on maternity leave which were set out by the ET in paragraphs 30 to 34 and 59 of their  
H Judgment. He contended that these differences supported the decision of the ET to exclude  
women on maternity leave from the comparative exercise.

**A** 45. Mr Davies contended that there is no reason to treat weeks three to eighteen differently from the first two weeks after the birth of a child. It appears that the Claimant accepts that there is a difference in the circumstances of a woman and a man in the first two weeks after the birth.

**B** There is no reason why that difference, leave given for the purpose of the needs and health of the mother, does not continue up to the eighteenth week after the birth. Accordingly, it was submitted that the ET did not err in considering the issue of comparable disadvantage.

**C** 46. Counsel for the Respondent submitted that provided that the ET tested the allegation of indirect discrimination against a suitable pool they did not err. Individuals who have no interest in the application of the PCP are rightly excluded from the pool. Accordingly, it was submitted that the ET did not err in choosing a pool consisting only of those actually taking shared parental leave.

**D**

**E** 47. In his written submissions on behalf of Working Families, the Intervenor, its counsel, Mr Milsom, referred to the fact that having accepted at paragraph 10 that the overwhelming majority of people taking and likely to take SPL are men, the ET nevertheless determined that the PCP of paying SPL at the statutory rate was incapable of giving rise to a particular disadvantage. It is rightly said that:

**F**

**G** “67. ... It is no answer to an indirect discrimination complaint that some women may be equally disadvantaged [by application of the PCP]. The question is whether the group in issue (men) faced a *particular* disadvantage whether by reference to sheer number or by reference to ratio within the disadvantaged pool or by reference to the specific features of those in the protected class.”

Mr Milsom continued:

**H** “68. Here, men whose employers enhance SMP but do not enhance ShPP face a particular disadvantage not [applicable] to mothers who are eligible to SPL: if they wish to take SPL, those men have no choice but to accept it at statutory rates. ...”

**A**     **Discussion and Conclusion**

48.     It is usually unnecessary to say that an ET considering an indirect discrimination claim must identify and decide all the elements necessary to establish such a claim. However, in my judgment at the heart of this appeal is the issue of whether the ET failed properly to identify and therefore decide one of those elements.

**B**

49.     The ET set out the relevant statutory provision, **EqA** section 19. There was no issue between the parties that the ET correctly identified the first element of indirect discrimination, **EqA** section 19(2)(a). By permitted amendment the Claimant relied upon the PCP set out in paragraph 61:

**C**

**D**

“paying only the statutory rate of pay for those taking a period of shared parental leave.”

50.     Of their own initiative in paragraph 64 the ET posited two “*further possible PCPs*” which they considered would not cause any particular disadvantage to the Claimant. However, it is the effect of the PCP relied upon by the Claimant which must be considered.

**E**

51.     The next statutory element to be established in an indirect discrimination claim is that the PCP puts or would put persons with whom the Claimant shares the relevant protected characteristic at a particular disadvantage when compared with persons with whom the Claimant does not share it. In this case the protected characteristic is the sex of the Claimant, being a man.

**F**

**G**

52.     The application of **EqA** section 19(2)(b) required the ET to identify the particular disadvantage alleged and to undertake comparative exercise to decide whether the PCP put men at a particular disadvantage when compared with women in no materially different

**H**

A circumstances. It is not sufficient to show that men are disadvantaged by a PCP. What has to be shown is a comparative disadvantage. EqA section 23 applies to section 19. It provides:

“23. (1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.”

B 53. In order to determine whether a PCP puts people sharing the particular characteristic at a particular disadvantage with those not sharing that characteristic, a logically relevant pool is to be chosen. In Naeem Baroness Hale held when considering the pool in that case held:

C “40. ... In the equal pay case of *Grundy v British Airways plc* [2008] IRLR 74, para 27, Sedley LJ said that the pool chosen should be that which suitably tests the particular discrimination complained of. In relation to the indirect discrimination claim in *Allonby v Accrington and Rossendale College* [2001] ICR 1189, para 18, he observed that identifying the pool was not a matter of discretion or of fact-finding but of logic. Giving permission to appeal to the Court of Appeal in this case, he observed that

D “There is no formula for identifying indirect discrimination pools, but there are some guiding principles. Amongst these is the principle that the pool should not be so drawn as to incorporate the disputed condition.”

41. Consistently with these observations, the Statutory Code of Practice (2011), prepared by the Equality and Human Rights Commission under section 14 of the Equality Act 2006, at para 4.18, advises that:

E “In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively.”

F In other words, all the workers affected by the PCP in question should be considered. Then the comparison can be made between the impact of the PCP on the group with the relevant protected characteristic and its impact upon the group without it. This makes sense. It also matches the language of section 19(2)(b) which requires that “it” - i e the PCP in question - puts or would put persons with whom B shares the characteristic at a particular disadvantage compared with persons with whom B does not share it. There is no warrant for including only some of the persons affected by the PCP for comparison purposes. In general, therefore, identifying the PCP will also identify the pool for comparison.”

G Baroness Hale held in Rutherford that people who have no interest in the advantage or disadvantage of which complaint is made should not be in the pool.

H 54. The Claimant applied for and was granted permission to amend his ET1 to claim indirect discrimination. The particular disadvantage asserted was:

“The PCP puts the claimant as a man, at a particular disadvantage in comparison with women, in that he is proportionately less likely to be able to benefit from an equivalent rate of pay when taking leave to act as primary carer for his child, to that received by women on maternity leave.”

**A** 55. The written submissions on behalf of the Claimant before the ET at paragraphs 44 and 46 taken together identify the particular disadvantage as few men taking shared parental leave because of the application of the PCP.

**B** 56. Perhaps understandably the ET did not clearly identify the particular disadvantage relied upon by the Claimant. It could not be paying only the statutory rate of pay for those taking a period of shared parental leave as this was the PCP. The application of the PCP must be shown  
**C** to cause the comparative particular disadvantage relied upon. The PCP and the particular disadvantage cannot be the same.

**D** 57. At paragraph 62 the ET rightly stated that:

**“62. To form the basis of a valid indirect discrimination complaint by the claimant, the PCP must itself cause particular disadvantage to men. ...”**

**E** 58. By the time the Notice of Appeal was drafted, the ‘particular disadvantage’ was more clearly formulated than appears in the written submissions before and in the Judgment of the ET. Under ground 2 it is said at paragraph 12:

**“12. The disadvantage to men is obvious: it is more difficult for men to take the leave available to them than it is to stay at work. If a man stays at work, he receives full pay, but if he takes the available leave, he receives only the statutory rate of pay. Whereas, the overwhelming majority of women in materially the same circumstances suffer no such disadvantage, because they have a full-pay alternative available to them in the form of occupational maternity pay: making the choice to take the available leave is very much easier.”**

**G** 59. Following the Rule 3(10) Hearing at which the appeal was ordered to proceed to a Full Hearing HH Judge Richardson stated:

**“... The argument is that the rate of pay for shared parental leave is the same for both father and mother, but it has a disparate impact on fathers because they, as opposed to mothers, have no other choice and are or would be deterred from taking leave to care for a child.”**

**H**

**A** 60. The difficulty highlighted by both ground 2 and ground 3 is that unless the comparative disadvantage relied upon was identified with precision the ET were not in a position to reach a conclusion on whether men seeking leave to care for a newborn child are put at a particular disadvantage compared with women in comparable circumstances.

**B**

**C** 61. On the basis that the particular disadvantage now relied upon is that summarised by HH Judge Richardson, the relevant pool for testing whether men suffered a relative disadvantage by the application of the PCP would be those police officers with present or future interest in taking leave to care for their newborn child. Whilst, as explained in **Rutherford**, people who have no interest in taking such leave are to be excluded from the pool, those who have an interest in taking leave to care for their newborn child are to be included. The terms relied upon by the Claimant as constituting a disadvantage or advantage apply to all police officers.

**D**

**E** 62. At paragraph 59 the ET adopted their reasons for rejecting women on maternity leave as a comparator for the direct discrimination claim as applying to and the basis for rejecting the claim of indirect sex discrimination. The identifying of a pool for testing disparate impact of the application of a PCP on men and women in materially indistinguishable circumstances is a different exercise from that of deciding whether the circumstances of one chosen comparator of the opposite sex are materially indistinguishable from those of the Claimant. In my judgment the ET erred in relying on their rejection of a woman on ML as a comparator for the purposes of the direct discrimination claim as a reason, which was their first reason for rejecting the complaint of indirect discrimination.

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**H** 63. The identification of the logically appropriate pool for testing whether a PCP disproportionately disadvantages men is the next necessary step to be taken after ascertaining

**A** the particular disadvantage said to be caused by the PCP. Whilst the outlines of the categories of police officers who should and should not be included in the pool may be ascertained from the Judgment of the ET, no facts have been found to enable a decision to be taken on the size or composition of the appropriate pool.

**B**

64. There may be submissions to be considered as to whether the different purposes of ML and SPL are to be taken into account in determining the relevant pool and if so how that is to be done. The papers before the Court show no more than that three fathers including the Claimant had taken SPL between 5 April 2015 and the date of compiling the data for the claim. The figure for women taking SPL in that period is one. Findings of fact on such material would be needed to determine disparate impact. Although not raised as a ground of cross-appeal, any material differences in circumstances could be said to have been relevant to and should have been considered under **EqA** section 19(2)(d).

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65. The other reason relied upon by the ET for dismissing the claim of indirect discrimination is in paragraph 60: that the PCP did not put men at a particular disadvantage when compared with women. In paragraphs 62 and 63 the ET elaborated on the second reason for dismissing the claim of indirect discrimination.

**F**

66. In paragraph 62 the ET did not refer to the particular disadvantage asserted in the amended ET1, being “*proportionately less likely to be able to benefit from an equivalent rate of pay when taking leave to act as a primary carer for his child, to that received by women on maternity leave*”. In paragraph 63 the ET did get near to considering the proportionate disadvantage asserted by the Claimant in the ET1. However, again understandably, the ET

**G**

**H**

A understood the disadvantage as being paid at a different rate for SPL than a woman on ML rather than that rightly identified by HH Judge Richardson at the Rule 3(10) Hearing.

B 67. Mr Leach is correct in asserting that the ET erred in holding in paragraph 62 that since the application of the PCP resulted in payment of the same amount to men and to women on SPL the PCP could not be particularly disadvantageous to men. Counsel rightly relied upon what Baroness Hale said at paragraph 72 of **Rutherford**:

C “72. It is of the nature of such apparently neutral criteria or rules that they apply to everyone, both the advantaged and disadvantaged groups. So it is no answer to say that the rule applies equally to men and women ...”

D 68. Mr Leach rightly contended that a Claimant does not have to show a particular threshold of disparate impact to establish that a PCP has a disproportionate adverse effect. Counsel suggested that the disparate impact was self evident in that only women have the choice of taking maternity leave at full rate of pay to care for their child. If the suggestion were that this factor renders consideration of disparate impact unnecessary, the comparison made by the E Claimant would be with an advantaged group all of whom were women and the submission by F Mr Davies that as in **James v Eastleigh Borough Council** [1990] ICR 554 the claim would not be one of indirect but of direct discrimination would be well made.

G 69. The ET erred in both reasons expressed in paragraphs 59 and 60 for dismissing the claim of indirect discrimination.

### **Disposal**

H 70. All grounds of appeal succeed.

71. The cross-appeal is dismissed.

**A** 72. The dismissal of the claim of indirect sex discrimination is set aside.

73. The claim of indirect sex discrimination is remitted for rehearing before a differently constituted Employment Tribunal.

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