



EMPLOYMENT TRIBUNALS

Claimant: Mr B Price

Respondent: Powys County Council

Heard at: Pontypridd County Court **On:** 5 and 6 September 2019

Before: Employment Judge Rhian Brace
Ms J Kiely
Ms C Izzard

Representation

Claimant: In Person

Respondent: Mr J Walters (Counsel)

WRITTEN REASONS

1. The claimant is an employee of the respondent and the claims of direct and indirect discrimination arose following the claimant's application for shared parental leave ("SPL").

Preliminary Matters

2. The claimant and his wife had their first child in August 2018. Under the respondent's SPL policy, an employee on SPL is paid at the statutory rate of parental leave pay, and not at an enhanced rate at which the respondent pays either its employees on maternity leave or employees on adoption leave.
3. The issues for determination were initially discussed at a Case Management preliminary hearing before Employment Judge McDonald on 14 January 2019 when two distinct issues were identified, referred to as the SPL:
 - a. "Pay Complaint" and
 - b. "Delay Complaint".
4. I make references to that terminology throughout this Judgment.

5. The Pay Complaint related to the respondent's policy of paying those on SPL at a rate that is the statutory rate rather than an enhanced rate and the Delay Complaint related to the delay on the part of the respondent in processing the claimant's application for SPL.
6. The claimant was provided with an opportunity to particularise his claims following that case management preliminary hearing which he did by way of further and better particulars on 25 February 2019.
7. In that document the claimant confirmed:
 - a. his Pay Complaint was a claim under section 13 of the Equality Act 2010 ("EqA 2010") of direct discrimination as being the absence of enhanced pay for SPL. In that case the comparator was a woman/mother on maternity leave; and
 - b. his Delay Complaint was a claim under Section 19 EqA 2010 of indirect discrimination. It appeared to be that the claimant was seeking to argue that the PCP of processing pay entitlements was applied to him in a way that was lengthy and delayed and the delay in processing payments was applied to him in a way that disadvantaged men. The claimant in that further and better particulars identified the pool for comparison as those applying for maternity leave and those applying for SPL.
8. At the outset of this hearing we sought to get further clarity on the issues before us insofar as the further and better particulars did not marry with the statement for the claimant that was before us, nor indeed with one of the statements from the respondent, both of which referred to comparators (in a the s.13 EqA 2010 direct discrimination claim) of those on adoption leave and in the indirect discrimination claim, of a employees on adoption leave also.
9. It was clear that the claimant was seeking to rely on additional comparators, of a female being on or applying for adoption leave, in relation to the Pay Complaint i.e. the direct sex discrimination claim and that an additional inclusion into the pool for comparison, namely parents applying for adoption leave was relied upon, for his indirect sex discrimination claim under section 19 EqA 2010.
10. After considering representations on the amendment application from both the claimant and the representative for the respondent, we had agreed to allow the amendments to the claims, as requested by the claimant, and our oral judgment on that issue was given earlier on in the day.
11. The issues before us were therefore:

s.13 EqA 2010 / Pay Complaint

- a. Under section 13 EqA 2010 whether the payment of the SPL pay was less favourable treatment i.e. did the respondent treat the claimant less favourably than it treated or would have treated other comparators in not materially different circumstances as defined by section 23 EqA 2010?

- b. The claimant relied on two potential hypothetical comparators; the first being women on maternity leave receiving enhanced maternity pay; and the second being women on adoption leave receiving enhanced adoption pay.
- c. No indirect discrimination was alleged on the Pay Complaint was brought by the claimant.

s.19 EqA 2010 / Delay Complaint

- a. No direct discrimination claim was brought by the claimant on the Delay Complaint.
 - b. Rather the issue was whether under s.19 EqA 2010 the respondent had applied a PCP of a thirteen-week processing time for SLP pay.
 - c. Did the respondent or would the respondent have applied the PCP to persons with whom the claimant did not share that protected characteristic of sex i.e. women?
 - d. Did the PCP put persons with whom the claimant had the characteristic i.e. women, at one or more particular disadvantages when compared to persons with whom the claimant did not share the characteristic i.e. men?
 - e. Did the PCP put the claimant at a disadvantage?
 - f. If so, did the respondent show that the PCP was a proportionate means of a legitimate aim?
12. We had before us an agreed bundle of documents (the "Bundle"). At the outset of the hearing the claimant also brought along a forty-five page document which the claimant and the representative for the respondent Mr Walters had agreed were to be treated as additional written submissions by the claimant. These were therefore not included in the Bundle and none of the witnesses were cross examined on its contents. It was therefore treated by us as written submissions from the claimant.
13. We heard evidence from the claimant and from the respondent: from Mr Davies (Payroll Team Manager) and Mr Graham Evans (Professional Head of Employment Services). Both the claimant and the respondent's representative had the opportunity, and took that opportunity, to cross examine each other's witnesses.
14. Witness statements had been exchanged prior to the hearing albeit Mr Davies' statement had not been disclosed to the claimant until after 5.00pm the day before the commencement of the hearing. The claimant did not object to that witness statement being relied upon and the tribunal allowed that statement to be relied upon in accordance with the overriding objective.

Facts

15. The respondent's "Supporting Working Parents" policy provided that:
 - a. an adopter i.e. a person who has been matched by an employment agency for the purposes of taking statutory adoption leave, is entitled to the same provisions as a woman on maternity leave.
 - b. In the case where two people have been matched jointly, including same sex partnerships, the adopter is whichever of them has opted to be the child's adopter for the purposes of taking statutory adoption leave.
 - c. Maternity and adoption pay (under the same policy,) is the same i.e. an enhanced rate to the statutory regime. Therefore, only mothers on maternity leave and the adopter (either male or female,) who has opted to be the child's adopter for the purposes of statutory adoption leave, has the enhanced adoption pay.
 - d. Employees who are biological or adoptive fathers or same sex partners who are fully involved in the upbringing of the child and are taking time off to support their partner taking maternity or adoption leave are eligible for ordinary Paternity and Partner Leave subject to eligibility.
 - e. Additional Paternity and Partner leave pay is also available as statutory paternity pay.
16. The Council has a shared parental leave policy available to mothers and adoptive parents of either sex, when a child has been placed for adoption.
17. The amount of shared parental pay depends on the statutory maternity pay or maternity allowance the mother uses up, or statutory adoption pay the adopter uses up in an adoption situation.
18. This definition is contained in the Glossary of Terms at the outset of the Shared Parental Policy. This also stated that '*some employers will offer enhanced shared parental pay*'. This caused some confusion for the claimant, but it is clear from the reading of the policy, that the respondent did not offer enhanced shared parental pay.
19. The claimant and his wife, on finding out that they were to have a child, sought to understand the claimant's rights and entitlements under the respondent's policies on and following the birth of their child.
20. The claimant's Team Manager contacted HR on 15 February 2018 highlighting that the claimant would be wanting to stay home to care for the baby while his wife returned to work. The respondent's policies were not inconsiderable in size and a summary guide was requested. In little over an hour, the respondent's HR manager replied highlighting that she believed they meant shared parental leave and attached the policy for their attention.

21. On 19 April 2018, the claimant contacted HR and confirmed that he and his wife were deciding how to split shared parental leave and, in order to make an informed decision, asked for a monthly breakdown in pay if he was to take thirty-seven weeks leave, with his wife taking just the two weeks compulsory maternity leave. The HR manager forwarded this request the same day to Mr Davies, as Head of Payroll who forwarded this, onto payroll team.
22. Unfortunately, it was only when the claimant chased up on the position on the 8 May 2018, did Mr Davies become aware that payroll had not responded to the claimant's request for this information.
23. Payroll responded on 14 May 2018, advising the claimant of his right to two weeks' paternity leave and holiday entitlement but simply confirmed that they were looking at the claimant's shared parental leave position. No further contact was made, and the claimant's line manager was forced to chase by emails on 25 June 2018 and again on 10 July 2018; the latter email being just two weeks shy of the claimant's wife's due date.
24. On 12 July 2018, the HR officer appeared to be seeking to resolve matters and by 16 July 2018, it was confirmed that the claimant would only be entitled to an amount equal to statutory maternity pay, as the respondent did not provide enhanced parental leave pay.
25. On 17 July 2018, the claimant retracted his application for shared parental leave.
26. We heard evidence from Mr Davies, the Payroll Team Manager, and from Mr Evans, Professional Head of Employment Services. We have accepted Mr Davies' explanation that the delay was an oversight and human error. This has also been accepted by the claimant. Whilst this was deeply unfortunate and wholly unsatisfactory for both the claimant and his wife, there is no evidence of any purposeful delay in the processing of the claimant's SPL request, or indeed anything in the policy documentation on time processing.
27. We find that it was human error that it caused the processing time and not anything in the policy for the claimant's application for SPL to take thirteen weeks.
28. For completeness we also noted, and it was agreed, that the average processing time for maternity pay was around six weeks, and the average processing time for adoption pay was around three weeks.

Law

29. The EqA 2010 implements the principle of equality in opportunities and equal treatment of men and women in matters of employment.
30. Section 13 EqA 2010 defines direct discrimination as:

"A person (A) less favourably than another (B) if, because of any protected characteristic, A treats B less favourably than A treats or would treat others"

31. By virtue of section 13(6)(b) EqA 2010, if the protected characteristic is sex, in a case where B is a man, no account is to be taken of special treatment afforded to a woman B in connection with pregnancy or childbirth.
32. Section 19 EqA 2010 defines indirect discrimination in the following terms:
- “A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice (PCP) which is discriminatory in relation to a relevant protected characteristic of B’s.*
33. *A PCP is discriminatory in relation to a relevant protected characteristic of B:*
- a. if 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, would put B at that disadvantage, and*
 - d. A cannot show it to be a proportionate means of achieving a legitimate aim.*
34. Section 23 EqA 2010 provides that a comparison between A and B for purposes of either direct or indirect discrimination can only be made if there is no material difference between their circumstances.
35. We have also had our attention drawn to the Court of Appeal decision in the case of **Ali v Capita Customer Management Ltd** which has been conjoined **Hextell v Chief Constable of Leicester 2019 EWCA Civ 900**. We have had our attention drawn to the discussions in the Ali section of the judgment at paragraphs 39 – 77.

Conclusions

s.13 EqA / Pay Complaint

36. It is not in dispute that the respondent treated the claimant as follows:
- a. The claimant was paid SPL pay at a reduced statutory wage whereas women on maternity leave, and men and women on adoption leave, were paid an enhanced maternity pay or enhanced adoption pay rate.
37. The next question we have to consider is whether that was less favourable treatment i.e. did the respondent treat the claimant less favourably than it treated or would have treated others referred to as comparators in not materially different circumstances as set out in section 23 EqA 2010.
38. In this regard, the claimant relies on two comparators:
- a. The first being a female worker on maternity leave in receipt of maternity pay; and

- b. the second being a female worker on adoption leave in receipt of adoption pay.
39. Dealing with each in turn we consider whether the comparators were or were not in materially different circumstances.
40. With regards to the first comparator, the female worker in receipt of enhanced maternity pay, we considered the position was very clear currently.
41. Following consideration and the position determined by the Court of Appeal decision in Ali, we concluded that there was a material difference in the circumstances of this claimant, Mr Price a male worker in receipt of SPL pay, and a female worker in the respondent's employment, in receipt of enhanced maternity pay.
42. The entitlements payable to each did serve a different purpose because as the Court of Appeal in Ali confirmed, there are numerous important differences between SPL and SML.
43. The claimant in this case cannot establish that he has been treated less favourably than or would have been treated less favourably than this comparator i.e. a female on maternity leave in the respondent organisation.
44. We then turn to the second comparator: that of the female worker in receipt of enhanced adoption pay at the respondent.
45. This specific comparator is not referred to in Ali. Rather the Court of Appeal pointed out that it was not dealing with a position on adoptive parents.
46. We reminded ourselves that the appropriate and correct comparator for the purposes of s13 and s23 EqA 2010, was a question of fact and degree and that all characteristics do not have to be precisely the same; just that they must not be materially different if one is to compare for like for like.
47. Mr Price has invited us to find that a female worker on adoption leave is an appropriate comparator as a male worker on shared parental leave as:
 - a. they do not have to undergo childbirth or have the trauma of childbirth;
 - b. He invites us to find that their role is on a par with a worker on shared parental leave;
 - c. He additionally argues that he has been with the birth mother from the outset of her pregnancy which places him in a closer personal relationship with the child as a result, than an adoptive parent would have with a child being placed with them.
48. Mr Walters on behalf of the respondent argues that the circumstances of a worker on SPL is materially different to a female worker on adoption leave for a number of reasons. Although he does accept Ali does not deal with any comparators other than a female worker on maternity leave, he invites us to

find that a female worker on adoption leave is materially different to the claimant for the following reasons:

- a. Adoption leave can commence before formal adoption leave (Paternity and Adoption Leave Regulations 2002”);
 - b. The adopter does not need the agreement or consent of the other adopter to take adoption leave;
 - c. Adoption leave is acquired through the fact of adoption;
 - d. It can be taken at an age before maturity of the adopted child.
 - e. SPL cannot begin before two weeks after the birth date or, in the case of adoption leave, could not commence until the end of the compulsory adoption leave (as prescribed by Regulation 10(2) of the Maternity and Adoption Leave (Curtailed of Statutory Rights to Leave) Regulations 2014 (“Curtailed Regulations “);
 - f. SPL could be taken up to fifty-two weeks after this period and it can be ‘dipped in and out’.
 - g. SPL can only be taken with a partner’s agreement. It is acquired as a result of the adoptive parent giving up the statutory adoptive leave.
49. Mr Walters has also invited us to distinguish the purpose of adoption leave compared to the purpose of shared parental leave, and invited us to find that the adopter who has availed themselves and chosen to take the statutory adoption leave has to deal with third parties as part of that adoption process, whereas the worker on shared parental leave is not necessarily so burdened.
50. He further invited us to find that the correct comparator is a female worker who is on shared parental leave.
51. Whilst we accepted, as has been put by the claimant, that a worker on adoption leave does not have the fact of childbirth, the biological impact of childbirth or the trauma of childbirth, we did not conclude that in all other aspects they were not materially different to a male worker on shared parental leave, essentially for the reasons provided to us by Mr Walters, which was reflected in many ways with some of the decision in Ali at paragraph 73.
52. We also took note of the fact that employees, who had availed themselves of the statutory adoption leave, were to fulfil the requirements of the formal adoption procedure such as counselling, screening, interviews, meeting the child at a time when the child was under full-time care of an adoptive parent. This is reflected in the policy of the Council at paragraph 5 and also Regulation 10(2) of Curtailed Regulations.
53. We concluded that a female employee on adoption leave was materially different to an employee on SPL as:
- a. Statutory adoption leave was in part compulsory, whereas SPL was entirely optional,

- b. Statutory Adoption Leave could begin before placement, whereas SPL could not;
 - c. Statutory Adoption Leave was an immediate entitlement on placement, whereas SPL was not;
 - d. SPL could only be taken with the partner's agreement to give up Statutory Adoption Leave;
 - e. SPL had to be taken within fifty-two weeks of placement and within the period and could be 'dipped in and out'.
54. It was also significant that a woman on adoption leave had chosen to be the main adopter for the purposes of Statutory Adoption Leave and would have been the main role in any matters relating to the adoption.
55. Whilst the similarities were more marked between an adopter and the claimant, than a woman on maternity leave and the claimant, we concluded as a result of these findings, that the comparator of a female on adoption leave was not materially the same.
56. In the circumstances, we concluded that the correct comparator was a female worker who had applied for SPL in an adoption situation i.e. where the partner had taken the statutory adoption leave.
57. We further concluded that this comparator would have had the same treatment since both would have been paid at the same statutory rate. In that regard the claimant's direct discrimination claim on both comparators was not well founded and was dismissed.

s.19 EqA 2010 / Delay Complaint

58. In relation to the complaint of indirect discrimination, the disadvantage complained of is the lengthier average processing time for SPL pay (i.e. 13 weeks).
59. The PCP relied upon is the processing time of thirteen weeks.
60. Mr Walters argued that the length or delay in processing time cannot be a PCP for these reasons:
- a. that it was not a policy or criterion, but a one-off error;
 - b. equally, that could not amount to a practice.
 - c. The claimant did not assert that the policy itself was indirectly discriminatory.
61. Having reviewed in detail the email exchanges between the claimant, his manager, the claimant's wife and staff of the respondent, whilst not apportioning blame for the error on any one individual in the respondent, it is clearly very unsatisfactory for the claimant and his wife to be put in such a difficult position at a time when what they should have been able to do is look forward to the birth of their first child.

62. However, whilst having every sympathy for the claimant and his wife, we were satisfied that this was a result of genuine errors and there was no evidence before us to form a conclusion that there was a policy or practice in place that could constitute a PCP for the purposes of bringing a claim under s.19 EqA 2010 and on that basis, the claim of indirect sex discrimination fails on the basis of both pools of comparison put forward.
63. In summary, we concluded that both claims of direct and indirect discrimination were not well founded and are dismissed.

Employment Judge Brace

Date: 23 October 2019

WRITTEN REASONS SENT TO THE PARTIES ON

25 October 2019
FOR THE TRIBUNAL OFFICE