



# EMPLOYMENT TRIBUNALS

**SITTING AT:** LONDON CENTRAL  
**BEFORE:** EMPLOYMENT JUDGE F SPENCER  
**MEMBERS:** MR D CARTER  
MS C BRAYSON

**CLAIMANT** MRS E FRAY

**RESPONDENT** SECRETARY OF STATE FOR JUSTICE

**ON:** 5-8 APRIL 2022

**Appearances:**

**For the Claimant:** In person  
**For the Respondent:** Ms C Darwin, counsel

*This hearing was carried out on CVP (Cloud Video Platform). The parties did not object to it being conducted in this way.*

## JUDGMENT

The unanimous Judgment of the Tribunal is that the Claimant's claim of indirect sex discrimination is not well founded and is dismissed.

## REASONS

1. This is a case of indirect sex discrimination brought by the Claimant, Mrs Fray, who worked, and still works, for the Ministry of Justice. Her claim arises because she became pregnant while on an unpaid career break and in consequence was denied Occupational Maternity Pay (OMP). The Claimant accepts that she was not entitled to Statutory Maternity Pay (SMP), and her claim relates to the contractual element of maternity pay, although this is not a claim for breach of contract.

2. At the start of this hearing the Claimant told the Tribunal that she had previously made an application to amend her claim to include claims of direct sex discrimination and direct maternity discrimination, but that this application had been refused by Employment Judge Professor Neal. She intended to appeal against that refusal but wished nonetheless for this hearing to go ahead to determine the indirect sex discrimination claim only. The Respondent was in agreement with that approach.
3. The Tribunal heard evidence from the Claimant and, on behalf of the Respondent, from (i) Mr Jack Cole, who was the Claimant's line manager at the relevant time and from (ii) Mr Mete Ahmet, who is a Senior Policy Adviser in the Respondent's HR Policy team. We had a bundle of documents, as well as a bundle of authorities and legislative provisions. The agreed issues are set out in the schedule to this Judgment for ease of reference. (All references in this judgment to page numbers in the bundle are to the page numbers in the version in the browser or PDF exchange editor.)

#### The relevant facts

4. The facts in this case are largely undisputed. The Claimant has been employed by the Civil Service since June 2013, and since December 2016 by the Ministry of Justice.
5. In January 2019 Claimant applied for a career break under the Respondent's career break policy for just over 2 years, from 25 February 2019 to 5<sup>th</sup> April 2021, to accompany her husband while he was working abroad in the United Arab Emirates. Her application was granted. It is common ground that an employee on an agreed career break remains employed by the Respondent, although their period of continuous employment is paused (but not ended.) While in the UAE the Claimant undertook some work for another employer before she became pregnant, but did not undertake any work which would have allowed her to access maternity benefits from that employer
6. In about March 2020 the Claimant discovered that she was pregnant. Her baby was due on 10<sup>th</sup> November 2020. On 20<sup>th</sup> July 2020 the Claimant informed the Respondent that she was pregnant and asked if she could transition to maternity leave at the end of her career break in April 2021.
7. After a considerable delay Mr Ahmet (of the Respondent's HR policy department) informed Mr Morrison (Senior HR Business Partner at the Respondent) on 10 September 2020 (99) that the Claimant would not be eligible for maternity pay as she would need to have average weekly earnings for the 8 weeks up to the 15 weeks before the Expected Week of Confinement (EWC) of not less than the Lower Earnings Limit in force at the time of payment of national insurance. As the Claimant was not at

work during this time, she did not qualify for OMP. It is apparent from the emails in the bundle that the Claimant's entitlement to OPM was not immediately clear even to those within the HR Department.

8. Mr Morrison passed this information (99) to the Claimant the same day. The Claimant was understandably disappointed, and Mr Morrison went back to the HR policy department and reported back on 14<sup>th</sup> September (97) and 17<sup>th</sup> September (123), but the response remained the same. A conference call was set up for 24<sup>th</sup> September to explore any options which might enable the Claimant to access maternity benefits. There was a discussion of granting the Claimant OMP on a discretionary basis or granting special paid leave. There was a suggestion that the fact that the Claimant had continued to pay voluntary National Insurance contributions might be relevant to whether or not she qualified for Statutory Maternity Pay (and consequently OMP).
9. In an email dated 28 September 2020 (136) Ms Brain of the Respondent's Policy department told the Claimant that all potential avenues of enquiry had been exhausted in respect of maternity pay, and the use of special leave with pay would be a local business decision. Her voluntary NI contributions (which she had continued to pay during her career break) were significantly below the LEL, and by the time she contacted the Respondent to advise of her pregnancy, the Qualifying Period had passed, so she could not return to work in order to qualify for maternity pay.
10. On 20<sup>th</sup> October the Claimant was advised that, as the maternity policy had been correctly applied, there was no justification for granting her paid special leave in lieu. (166)
11. Thereafter the Claimant lodged a grievance which was unsuccessful. The Claimant then appealed but was advised on 24 December 2020 that her appeal had not been allowed.
12. The Claimant was permitted to extend her career break to the end of November 2021 in order to enable her to remain off work for a year after her baby was born. This was unpaid, and she received no statutory or contractual maternity pay.

### Policies

13. The relevant sections of the Respondent's maternity policy set out the conditions for eligibility for receipt of statutory maternity pay (SMP) and for receipt of contractual Occupational Maternity Pay (OMP). (453) Eligible employees will be paid OMP for up to 39 weeks. The first 26 weeks are paid at full contractual pay, followed by 13 weeks at the lesser of either the

standard weekly rate of SMP or 90% of the employee's average weekly earnings.

14. To be eligible to receive OMP from the Respondent an employee must,
  - *“have at least one year’s continuous government service at the expected week of childbirth”;*
  - *notify their line manager of their pregnancy no later than the 15<sup>th</sup> week before the EWC or as soon as reasonably practicable;*
  - *intend to return to work after the baby has been born;*
  - *undertake to repay any occupational maternity pay received (less SMP) if the employee does not return to work for a period of at least one calendar month;*
  - *produce a maternity certificate (MATB1... specifying the EWC or a birth certificate;*and more relevantly in this case
  - *“be in paid service with [the Respondent] at the time maternity leave starts; and*
  - *fulfil all of the qualifying criteria for Statutory Maternity Pay (SMP).”*
15. The qualifying criteria for SMP require, amongst other things, that the individual must have average weekly earnings during the Qualifying Period (i.e., for the 8 weeks ending with the 15<sup>th</sup> week before the expected week of childbirth) of at least the Lower Earnings Limit (LEL) in force at the time of payment of National Insurance.
16. As with OMP to qualify for Shared Parental Pay (ShPP) the MoJ employee must be in “paid service” when their Shared Parental Leave begins. To qualify for Shared Parental Pay at the more generous, contractual rates the employee must have at least 1 year’s continuous service at the EWC. In addition, as with OMP, the employee must have earnings for the 8-week period prior to the 15<sup>th</sup> week before the EWC over the LEL.
17. Unlike the maternity policy, entitlement to ShPP is a joint entitlement, and requires a birth parent to give up a portion of her rights. The employee must (i) have a partner who shares the main responsibility for the care of the child, (ii) declare that they and their partner meet the employment and earnings test, and (iii) the MOJ employee must have at least 26 weeks service by the end of the 15<sup>th</sup> week before the EWC. As with maternity leave “earnings for the 8-week period prior to the 15<sup>th</sup> week before the EWC must be over the lower earnings limit”. In addition, the birth parent must have given notice to end their maternity leave before any shared parental pay can be taken.
18. (The eligibility criteria for Maternity Support pay, previously called paternity pay, do not require the employee to meet the LEL earnings test; - although it is necessary to be working in the Department from the qualifying week

up to the date of the baby's birth. However, as the Claimant has withdrawn her comparison with those entitled to Maternity Support pay, we say no more about it.)

19. The Career Break policy provides that career breaks for a period, from a minimum of 3 months to a maximum of 5 years, may be granted at the discretion of business managers. A career break will be unpaid and will not count towards continuous employment for qualifying service for annual leave or pension entitlements, but works on a "stop the clock" principle. Employees remain in employment and are advised to carefully consider the effect of the career break on their pension, salary and terms and conditions. The career break policy does not, however, clearly state that those on an unpaid career break may not be entitled to occupational or statutory maternity pay.
  
20. The Civil Service Management Code, (the CSMS) is a Code issued by the Minister for the Civil Service pursuant to Part 1 of the Constitutional Reform and Governance Act 2010. This provides that the Respondent has authority to determine their own maternity leave arrangements, subject to the conditions contained in the CSMS. Those conditions include a condition that departments must ensure that
  - a. an employee is in paid service at the time her maternity leave begins (9.3.2(a)); and
  - b. SMP is offset against paid maternity leave, and that any maternity allowance in payment is deducted from paid maternity leave.
  
21. Statistics in the bundle (45) show that in the 3 years from 1 July 2018 to 30<sup>th</sup> June 2021, 6 employees of the Respondent had taken parental leave (either maternity, paternity share parental or adoption leave) directly following a career break – all of whom were women. It is accepted by the Respondent that female employees are more likely than male employees to take longer periods of parental leave (to include maternity leave and shared parental leave) and that the Respondent's female employees are more likely than its male employees to take a period of parental leave directly after a career break.

#### The Claimant's case - indirect sex discrimination

22. The Claimant says that the Respondent discriminated against her by applying to her a provision criterion or practice which was discriminatory in relation to her sex. The PCP which she relies on is framed as follows:

"Individuals who are on a career break must meet the normal statutory requirements for SMP/SP or SHPP to be eligible for maternity/paternity or shared parental leave contractual benefits including pay".

During the hearing the Claimant withdrew the comparison with men entitled to statutory paternity pay.

23. It is her case that this PCP puts female employees at a particular disadvantage when compared with male employees in that

“being entitled to nil contractual maternity and /or shared parental leave benefits including pay if the career-break sufficiently overlaps with the ‘Qualifying Period’ for the purposes of the equivalent statutory rights. This impacts more heavily on women (so is a particular disadvantage for them) because women are more likely to take longer periods of SPL or maternity leave as compared with men taking periods of SPL or paternity leave.”

“The Claimant relies on a comparison between the Respondent’s female employees taking maternity leave and/or shared parental leave, and the Respondent’s male employees taking periods of paternity leave and/or shared parental leave.”

24. The Respondent accepts that the Claimant was at a disadvantage because she did not receive OMP. Its case is that the Claimant is not entitled to compare herself to men on Shared parental leave because there is a material difference between the circumstances relating to each case. Without prejudice to that defence, they say that the PCP is justified.

### The law

25. Section 19 of the Equality Act 2010, provides that:

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

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a 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. “

26. All four conditions in s.19(2) must be met before a successful claim for indirect discrimination can be established. That is, there must be a PCP which the employer applies, or would apply, to employees who do not share the protected characteristic of the Claimant; that PCP must put

people who share the Claimant's protected characteristic at a particular disadvantage when compared with those who do not share that characteristic; the Claimant must experience that particular disadvantage; and the employer must be unable to show that the PCP is justified as a proportionate means of achieving a legitimate aim.

27. Once it is clear that there is a provision, criterion or practice which puts people sharing a protected characteristic (in this case being female) at a particular disadvantage, then the next stage is to consider a comparison between the workers with the protected characteristic and those without it (i.e., women and men). The circumstances of the two groups must be sufficiently similar for a comparison to be made and that there must be no material differences in circumstances. s.23(1) of the Equality Act, states that "On a comparison of cases for the purposes of [s.19] there must be no material difference between the circumstances relating to each case".
28. Paragraph 4.18 of the ECHR Statutory Code of Practice states that "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 were not affected by it, either positively or negatively."
29. Burden of proof. S.136 of the Equality Act, which applies to any proceedings brought under the Act, requires the Claimant to show 'prima facie evidence' from which the tribunal could conclude, in the absence of any other explanation, that an employer has committed an act of discrimination. S.136 goes on to provide that once the Claimant has shown a prima facie case, the tribunal is obliged to uphold the claim of discrimination unless the Respondent can show that no discrimination occurred.
30. The relationship between the four elements of an indirect discrimination claim and s.136 was considered by the EAT in *Dziedziak v Future Electronics Ltd* EAT 0217/11. The burden lies with the Claimant to establish the first, second and third elements of the statutory definition of indirect discrimination. Only then does it fall to the employer to justify the PCP as a proportionate means of achieving a legitimate aim.
31. The question of section 23 (1) was considered in the joined cases of *Capita Customer Management Limited v Ali* and *Hextall v Chief Constable of Leicester Police* 2020 ICR 87 (the Capita Case). In that case the Court of Appeal held, amongst other things, that for the purposes of an indirect discrimination claim brought by Mr Hextall, a woman taking maternity leave was in materially different circumstances from a man taking shared parental leave and was not an appropriate comparator for section 23 purposes.

32. As to time limits Section 123 of the Equality Act 2010 provides that complaints of discrimination should be presented within three months of the act complained of. The time limits are extended to allow for early conciliation but, if ACAS does not receive the early conciliation request within the relevant three-month period, the Claimant does not get the benefit of any extension of time.
33. Section 123(1)(b) provides that where a discrimination claim is prima facie out of time it may still be brought “within such other period as the Tribunal thinks is just and equitable”.

### Submissions

#### For the Respondent

34. Ms Darwin submitted that the Claimant’s claim was out of time. The Claimant knew by 17 September 2020 of the Respondent’s policies on OMP but did not notify ACAS until 24 December 2020 and did not present her claim until 3 March 2021.
35. On the substantive issues Ms Darwin submitted that the Court of Appeal in the Capita case had rejected the proposition that it was possible, for the purposes of an indirect sex discrimination case, to compare women on maternity leave with men and women on shared parental leave. Equally in *Price v Powys County Council 2021 ICR 1246* the EAT held that the circumstances of the woman on adoption leave were materially different to those of a man on shared parental leave. Ms Darwin submitted that no valid comparison could be drawn between women claiming maternity pay and men claiming shared parental leave pay. The Claimant’s chosen comparators were inappropriate, because there were material differences within the meaning of section 23 of the Equality Act between maternity leave and shared parental leave.
36. Without prejudice to the Respondent’s argument that the comparison was not valid the Respondent also submits that the PCP relied on is justified as a proportionate means of achieving a legitimate aim.
37. The legitimate aims relied on are (individually or cumulatively)
  - a. To reward those who have provided recent paid service and contributed to the work of the Respondent. 26 weeks of full pay is a generous contractual benefit offered to its employees and it is legitimate for the Respondent to expect that those employees who qualify for this benefit to have provided some recent paid service contributing to the work of the Respondent department.
  - b. To comply with the Civil Service Management Code. The Respondent must adhere to the CSMS, which included a condition that an employee must be in paid service at the time her maternity leave begins.



- c. To enable the Respondent to claim back SMP. The CSMC requires the Respondent to ensure that statutory maternity pay is offset against OMP. As the Claimant did not qualify for statutory maternity pay the Respondent would not be able to claim back SMP, which would have increased the overall cost to the Respondent of offering the Claimant OMP.
38. The Respondent also relies on (i) the fact that the PCP in question mirrored the statutory requirements for statutory maternity pay and statutory shared parental leave pay and (ii) that the Claimant had been alerted to the need to check the implications for her terms and conditions before applying for a career break.

For the Claimant

39. The Claimant submitted that insofar as the question of the time limits was concerned, although she was notified of the position on 10<sup>th</sup> September, lines of enquiry were still being followed as to whether the Claimant's voluntary NI contributions might entitle her to maternity pay and it was only when those lines of enquiry were exhausted on 29 September 2020 (151) did she know for sure that she would not be entitled. Thereafter she acted as fast as she could putting in a notification to ACAS on 24 December 2020, just a month after she had had a baby. Further she had been advised by Citizens Advice Bureau to exhaust the grievance procedure before bringing a claim.
40. In relation to the substantive issues the Claimant submitted that the Ali and Hextall cases were distinguishable from her own. In those cases, a man on shared parental leave was comparing his treatment to that of a woman on maternity leave. In her case the comparison was the other way round. The issue was whether a woman on maternity leave was disadvantaged in comparison to a man on shared parental leave. The factors in Hextall which justified better treatment of women on maternity leave than the treatment of men on shared parental leave did not apply when the situation was reversed.
41. However, the fact remained that women are more likely than men to take longer stretches of parental leave and more likely than men to take a career break. The imposition of the earnings requirement would disproportionately affect women because they would lose more money than men. This was a "policy by accident" which disproportionately disadvantaged female employees.
42. In relation to justification the Claimant said that only 6 employees in the last 3 years had taken a period of parental leave immediately following a career break so that the cost to the Respondent would be negligible. The personal impact suffered by the individual significantly outweighed the disadvantage to the Respondent. Although the Respondent could recover 92% of SMP, SMP represented a small cost in the overall context of OMP.

Career breaks and maternity pay conveyed advantages on the employer (as well as on the employee) in encouraging the retention of staff. The CSMC could not of itself justify discriminatory outcomes.

43. The Claimant also submitted that there was nothing to have put her on notice that being on a career break would preclude her entitlement to OMP. The policy was not fairly communicated. There was nothing in the career break policy to indicate that she should have looked elsewhere for further information on potential terms and condition changes. The fact that it took HR two months to answer her enquiry as to her entitlement suggests that the position was not clear. Had she known of the position in advance she could have returned to work for 8 weeks prior to the 15<sup>th</sup> week before the EWC, in order to ensure her entitlement to OMP. (The Tribunal notes that presumably she would have needed the Respondent's agreement for this as the career break policy requires three months notice of a return to work.)
44. Although the CSMC did require departments to ensure that SMP was offset against paid maternity leave, that it did not mandate departments to require that women should be eligible for SMP in order to receive OMP.

### Conclusions

45. Time points. In the Claimant's witness statement she accepts that Mr Morrison notified the Claimant on 10 September 2020 that she would not be eligible for any maternity pay and the reasons for it. However, there was considerable pushback both from the Claimant and from Mr Morrison (120) who said on 15 September that he was pushing back "for further lines on this from HR policy colleagues". On 17<sup>th</sup> September Mr Morrison reported the HR Policy response that they were "bound by the policy on qualifying for maternity pay" and could not do much more, but he did say that the colleagues in the Policy team were willing to discuss it on a conference call. Ms Darwin suggests that this is the date of "the act complained of".
46. However, in the call of 24<sup>th</sup> September the Respondent promised to check again. It was not until 29<sup>th</sup> September that the Claimant received a definitive response, and not until October that she was told she would not get special paid leave. We consider that the act complained of did not occur until 29<sup>th</sup> September 2020.
47. On that basis the Claimant contacted ACAS within 3 months of the act complained of. The EC certificate was issued on 4<sup>th</sup> February 2021 and the claim was presented within one month, on 3<sup>rd</sup> March, so that the claim is in time.

48. Even if we are wrong as to the date of the act complained of and time can be said to run from 17 September 2020 (as the Respondent submits) we consider it would be just and equitable to allow the claim to proceed. The delay, if there was one, was extremely short. The Respondent was on notice from 17 September that the Claimant considered that the policy was discriminatory against women (124). The reason for any delay was that the position was not clear until at least 29<sup>th</sup> September, and possibly not until 20 October 2020 when she was told special paid leave could not be authorised. The Respondent has not been prejudiced in any way in its ability to deal with this case by the short delay, and the Claimant was at the time either pregnant or a very new mother.
49. Is the Claimant entitled to compare women on maternity leave with male employees on shared parental leave? It is clear that if the pool for comparison is all those men and women who take a career break followed immediately by maternity leave or shared parental leave a disproportionate effect is established. Only 6 employees in the last 3 years have taken a career break followed immediately by maternity leave or shared parental leave – all of whom are women. (We had no breakdown of whether those employees had taken maternity leave or shared parental leave.)
50. A disproportionate impact can be established in two ways. The Claimant's case is that while men taking shared parental leave after a career break and women taking maternity leave after a career break are disadvantaged – in that both must have been earning at least the Lower Earnings Limit for the 8 weeks prior to the 15<sup>th</sup> week before the EWC - women are more disadvantaged than men as women are more likely to take longer periods of parental leave than men. That fact is accepted by the Respondent. However disproportionate effect is also established by the fact that where a pool contains a significantly higher proportion of women who are disadvantaged by a policy – that alone is capable of showing disparate impact. If the comparison is a valid one, then there will be disparate impact.
51. In the Capita case, Mr Ali sought to take shared parental leave but was told that he would only receive statutory payments whereas a female colleague would receive full contractual pay for 14 weeks following the birth of her child. He brought a claim of direct sex discrimination claiming that he had been treated less favourably than a woman in comparable circumstances. The Court of Appeal held that Mr Ali could not compare his treatment with a female worker on maternity leave. The purpose of maternity leave was different to the purposes of shared parental leave and that the proper comparator would be a woman on shared parental leave. The Court of Appeal said this:

*“As summarised in Capita’s skeleton argument on the appeal, there are numerous important differences between shared parental leave and statutory maternity leave: (1) statutory maternity leave is in part*

*compulsory, whereas shared parental leave is entirely optional; (2) statutory maternity leave can begin before birth, whereas shared parental leave cannot; (3) statutory maternity leave is an immediate entitlement, whereas shared parental leave is not; (4) shared parental leave can only be taken with a partner's agreement, whereas statutory maternity leave can be taken regardless of whether the woman has a partner or of that partner's views; (5) statutory maternity leave is acquired through pregnancy and maternity, whereas shared parental leave is acquired by a mother choosing to give up statutory maternity leave and effectively to donate it as shared parental leave; (6) a birth mother is entitled to statutory maternity leave even if there is no child to look after, whereas, for a father or partner to take shared parental leave, there must be a child to look after."*

52. Mr Hextall brought claims of direct and indirect discrimination and equal pay. His claims were dismissed on the basis, in part, that women on maternity leave are entitled to special treatment (section 70, 13(6) and 19 of the Equality Act) but in any event the Court of Appeal considered that, had he been able to bring an indirect discrimination claim, it had been correctly rejected by the Employment Tribunal and found that *"women on maternity leave are materially different from men or women taking shared parental leave for the reasons set out in relation to Mr Ali's case and should therefore be excluded from the pool for comparison."*
53. The Claimant says that a comparison of men with women on maternity leave is not necessarily the same as the reverse comparison. We accept that much of the reasoning in those cases emphasized the fact that a woman on maternity leave is in a special position - and an employer will not discriminate against a man if it is providing special treatment to a woman in connection with pregnancy and childbirth (section 13 (6)). Equally, as far as indirect discrimination is concerned, maternity and pregnancy are not protected characteristics for the purposes of section 19 of the Equality Act, given their protected status.
54. We considered whether we could distinguish the Capita case because (unlike the claimants in the Capita case) the Claimant in this case was a woman comparing herself to men taking shared parental leave. We have concluded that we cannot. The Court of Appeal has made it clear that women on maternity leave are materially different from men or women taking shared parental leave and cannot both be in the same pool for comparison purposes. Those differences are quoted above.
55. In order to bring a claim for indirect discrimination the Claimant would need to have a pool which includes both male and female employees. As she cannot make a comparison with men on shared parental leave, she cannot show a relevant pool and the indirect discrimination case must fail.

56. Although difficult, and we have considerable sympathy with the Claimant who was, quite reasonably, not aware of the impact that her Career Break would have on any maternity pay, we think this must be right. Any pool which includes women on maternity leave and men on shared parental leave will necessarily show disproportionate impact because only women can take maternity leave. Very significantly, shared parental leave (and therefore pay) is not available to a man without his partner's agreement, and without the partner having given notice to end their maternity leave early. Further in *Price v Powys County Council* the EAT also rejected the comparison between shared parental leave and (in that case) adoption leave, on the ground that each serves a different purpose, and that there were material differences in their circumstances contrary to section 23 of the Equality Act. Although that also was a claim of direct discrimination, section 23 applies as much to claims of indirect discrimination as it does to claims of direct discrimination.
57. However, for the sake of completeness, and in case we are wrong, and the Capita case can be distinguished (because it involved men comparing themselves with women who are entitled to special treatment by virtue of pregnancy and maternity leave), then we have considered the Respondent's justification defence.
58. We accept that, in providing enhanced contractual benefits it is a legitimate aim to reward those who have provided recent paid service and contributed to the work of the employer. The career break option is a generous benefit. Not all employers provide the benefit of a career break for up to 5 years in which an individual remains in employment while providing no service to the employer (and indeed able to take up paid employment elsewhere). While it is correct that the Respondent is a large employer, that fact alone does not mean that it has to provide valuable contractual benefits to those who may not have been providing any benefit to the Respondent for up to 5 years. (The general principle of having to have provided a benefit to the employer before being entitled to OPM is already part of the Respondent's policy in that it requires an employee to have a year's service before contractual maternity pay can be accessed.)
59. The Claimant does not accept that this is a legitimate aim and says that so few people fall into her position that the cost to the Respondent would be negligible. We regard this as a proportionality argument rather than an argument as to the legitimacy of the Respondent's aim, but we do not accept it. We consider that the exclusion of those who are not in paid employment and cannot meet the LEL test is a proportionate means of achieving a legitimate aim. The Respondent is required to spend taxpayer's money responsibly and is entitled to set limits on its contractual benefits.

60. The Respondent relies on two other legitimate aims, namely the need to comply with the CSMC generally and specifically the need to ensure that statutory maternity pay is offset against OMP. The latter aim is simply a subset of the first aim – i.e., the need to ensure that money is spent on those who have given recent service. We do however reject the submission that the need to comply with the CSMC can be a legitimate aim of itself. If the CSMC operated in a way which was inherently discriminatory, the mere fact that it emanated from the Code would not in our view render it justified. However, as we have said, we consider that in any event, the justification test is met in relation to the Respondent's first pleaded legitimate aim.
61. We would, however, urge the Respondent to review its career break policies to make it clear to employees considering taking a career break that doing so may affect their entitlement to maternity pay benefits.

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Employment Judge Spencer  
7<sup>th</sup> April 2022

JUDGMENT SENT TO THE PARTIES ON  
08/04/2022

FOR THE TRIBUNAL OFFICE

## **SCHEDULE AGREED ISSUES**

### **Indirect Sex Discrimination**

1. Did the Respondent discriminate against the Claimant by applying to her a provision, criterion or practice which was discriminatory in relation to a relevant protected characteristic of the Claimant's (sex)?
  - (1) Did the Respondent apply, or would it apply, the following PCP to its male and female employees?

“Individuals who are on a career-break must meet the normal statutory requirements for SMP/SPP/SHPP to be eligible for maternity/paternity or shared parental leave contractual benefits including pay”.

(2) If so, did it put, or would it put, the Respondent’s female employees at a particular disadvantage when compared with the Respondent’s male employees?

(a) The Claimant relies on the following disadvantage: being entitled to nil contractual maternity and / or shared parental leave benefits including pay if the career-break sufficiently overlaps with the ‘Qualifying Period’ for the purposes of the equivalent statutory rights. This impacts more heavily on women (so is a particular disadvantage for them) because women are more likely to take longer periods of SPL or maternity leave as compared with men taking periods of SPL or paternity leave.

(b) The Claimant relies on a comparison between the Respondent’s female employees taking maternity leave and/or shared parental leave, and the Respondent’s male employees taking periods of paternity leave and/or shared parental leave.

(c) The Respondent will say that the above comparison cannot be made, because there is a material difference between the circumstances relating to each case (s.23(1) EqA 2010 and *Capita Customer Management Ltd v Ali (Working Families intervening)*; *Hextall v Chief Constable of Leicestershire Police (Working Families intervening)* [2020] ICR 87.)

- (d) It is accepted that the Respondent's female employees are more likely than its male employees to take longer periods of Parental Leave. It is also accepted that the Respondent's female employees are more likely than its male employees to take a period of Parental Leave directly following a career break.
- (3) If so, did the PCP put, or would it put, the Claimant at that disadvantage?
  - (b) The Respondent is unclear as to exactly how the Claimant puts her case on particular disadvantage. However, it is accepted that the Claimant was not entitled to Enhanced Maternity Pay because she was not in paid service directly prior to her maternity leave.
- 2. Has the Respondent shown the PCP to be a proportionate means of achieving a legitimate aim?
  - (2) The Respondent relies upon the following:
    - (b) Enhanced Maternity Pay, which includes 26 weeks of full pay, is a generous contractual benefit offered by the Respondent to its employees. Accordingly, it is not unreasonable for the Respondent to expect that those employees who qualify for this generous benefit have provided some recent paid service contributing to the work of the Respondent department.
    - (c) The Respondent is required by the Civil Service Management Code, a Code issued by the Minister for the Civil Service pursuant to Part 1 of the Constitutional Reform and Governance Act 2010, to only allow a female



member of staff to take paid maternity leave if the member of staff in question was in paid service at the time her maternity leave begun and has rendered at least one year's such service.

- (d) The Respondent is also required by the Civil Service Management Code to ensure that Statutory Maternity Pay is offset against Enhanced Maternity Pay. It is implicit in this that only employees who are eligible for Statutory Maternity Pay and/or Maternity Allowance are eligible for Enhanced Maternity Pay.
- (e) The Respondent department will claim back the Statutory Maternity Pay, thus reducing the overall cost to the Respondent of offering its employees Enhanced Maternity Pay and other equivalent benefits and allowing it to continue to do so.

### **Time Limits**

- 3. Are the Claimant's claims in time?
- 4. If not, would it be just and equitable to extend time?

### **Remedy**

- 5. What compensation, if any, should be awarded to the Claimant? This will include, but not be limited to, consideration of the following questions:
  - (2) Was the PCP applied with the intention of discriminating against the Claimant? (s.124(4) and (5) EqA 2010).

- (3) If not, has the ET considered whether to act under s.124(2)(a) (declaration) or (c) (recommendation), before making an order under s.124(2)(b) (compensation)?