

Leave to pay

With the introduction of shared parental leave, **Charmaine Pollock** considers when equivalent enhanced pay can lead to indirect discrimination by employers



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Shared parental leave (SPL) has arrived for babies due from 5 April 2015 and the rules are giving many organisations a headache, with enhanced pay a particularly tricky issue. Many employers are concerned about discrimination if they do not offer equivalent enhanced pay for SPL as for maternity leave. They are right to be alive to the issue, although the position is not yet settled.

Discrimination risk

The government has issued guidance reassuring employers that enhanced maternity offerings need not be extended to SPL. This is correct from a direct discrimination perspective, which requires employees to point to a comparator to show that they have been treated less favourably. The comparator for a man taking SPL would be a woman taking SPL; hence, no direct discrimination.

But, indirect discrimination is a different matter. Men are potentially more likely to take SPL than women. Accordingly, operating a policy of enhanced pay for maternity leave but not

SPL could disproportionately disadvantage men. Indirect discrimination can, however, be justified if the policy is a 'proportionate means of achieving a legitimate aim'. It, therefore, becomes a question of whether enhancing pay for maternity leave but not SPL is justifiable.

The recent case of *Shuter v Ford Motor Company Ltd* dealt with the outgoing additional paternity leave regime, but provides insight into how tribunals may approach SPL. Mr Shuter's claim of indirect discrimination failed because the tribunal accepted that the policy's aim of retaining and increasing women in the workforce was legitimate, and Ford provided evidence that its enhanced maternity policy had been working, demonstrating proportionality.

While encouraging for businesses, caution is advisable. Although establishing legitimate aims should be straightforward, they could include, for example, the protection of the mother's health and of the 'special relationship' between mother and child following childbirth, the challenge will come when seeking to establish proportionality. Ford's workplace was extremely male-dominated. Proportionality may not be so easily evidenced in more balanced workplaces.

Policy motivations

Given the cost of enhancing pay for both maternity leave and SPL, why might organisations do it? Beyond the obvious employee relations and recruitment advantages, some

organisations are driven by wider policy considerations.

The traditional split of maternity and paternity leave, and pay, arguably disadvantages both women and men, with women entrenched as carers and men restricted from taking on that role. SPL has been viewed as a tool to improve gender equality by, for example, normalising longer periods of leave for both genders. Enhancing pay for SPL may help to accelerate that process.



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Practical issues

Still, businesses have to be practical and cost is an important issue. So how can businesses balance the legal risk with their budgetary concerns?

Some businesses may decide to enhance only for maternity leave. For them, the key consideration is to mitigate risk by recording the reasons for taking this decision, bearing in mind the need for a legitimate aim and proportionality.

Businesses which are particularly concerned about both costs and the discrimination

risk may opt to stop enhancing altogether, or to enhance equally, but to reduce the level of enhancement. This would remove the discrimination risk. However, if it encourages an early return to work for mothers, it could be counter-productive from a health perspective and lessen the chance of the mother being successfully retained. If reducing the level of enhancement for mothers is the only way to afford equal enhancement, then the option above may be more attractive and the decision-making process leading to that conclusion could help to demonstrate a legitimate aim and proportionality.

A halfway-house approach could be to offer a lower level of enhancement for SPL than for maternity leave. Although this would not eliminate the discrimination risk, it may help to reduce the risk of a claim and, if a claim were to be brought, to evidence proportionality.

Businesses may find other ways to help them achieve their aims. For instance, if they wish to support and reintegrate employees who have been out of the workforce for a long period, they could link the level of enhancement to the length of time taken off. If the payment is conditional on a period of service upon return, this may help to achieve the aim of reintegration, although could also incentivise employees to take longer periods of leave.

Ultimately, businesses need to think through the options carefully, to record their thought-process and to feel comfortable that the chosen route strikes the right balance for them. **SJ**