Welcome

With the gender pay gap reports now published, we know that there is a significant gender pay gap in the UK with men at many companies being paid on average more than women. It does not necessarily mean that those businesses have an equal pay problem – that depends on the reason for the gap. One reason can be that women often take on the primary childcare role which can have a knock-on effect on their earnings potential.

The government had hoped that the introduction of shared parental leave in 2015 would help to address this societal difference. The legislation allows for either parent to take shared parental leave if the mother curtails her maternity leave. Shared parental leave is paid at a statutory rate. Many employers pay an enhanced rate of maternity pay, but less employers have chosen to do the same for shared parental pay. This is thought to have contributed to the slow uptake for shared parental leave (as low as 2% according to the Department for Business recently).

In Capita v Ali, Mr Ali raised an employment tribunal claim against his employer for direct sex discrimination when he was not given enhanced shared parental pay, in line with the enhanced maternity pay that a woman on maternity leave would have received. Mr Ali argued that as the shared parental leave regime allows parents to choose which of them takes leave to care for their child (after the mother's two-week compulsory maternity leave period) it was discrimination if a man was not paid the same as a woman for the remaining leave. The tribunal agreed with him, highlighting that men were now being encouraged to take a greater role in childcare and there should not be an assumption that the mother is always best placed to do that.

The Employment Appeal Tribunal disagreed. Women who gave up their maternity leave and instead took shared parental leave with the father were not paid enhanced shared parental pay. They were paid the same as men – the statutory rate. The purpose of the relevant EU legislation on maternity leave is the health and wellbeing of the pregnant and birth mother, rather than the care of the child. Mr Ali should have been compared with a woman on shared parental leave and not a woman on maternity leave. He was paid the same as a woman on shared parental leave, so he lost his sex discrimination claim.

Interestingly, the EAT did comment that after 26 weeks the purpose of maternity leave might change from biological recovery from childbirth and the special bonding period between mother and child. It may be possible after that to draw a valid comparison between a father on shared parental leave and a mother on maternity leave. We expect further case law in this area. For now, you should ensure that you pay men the same shared parental pay rate as you pay women who take shared parental leave.

Paul Housego
Beers LLP

About Us

Beers LLP has a national reputation and is recognised and named in the Chambers and Partners and Legal 500 directories for expertise in employment law. From our offices in the South West of England our specialist solicitors provide advice, representation and training on all aspects of employment law.

We advise strategically and tactically on how to resolve problems and disputes arising from HR issues. We look to you for your intended outcome, agree a way forward and implement it. We work with you to solve problems in a constructive and cost effective manner.

We are experienced at dealing with unfair dismissal, capability, misconduct, discrimination, union related issues, redundancy exercises and ex-employee problems.

We will represent you cost effectively in the Employment tribunals and the County Court.

We will provide you with up to date employment contracts for your staff; update your policies and procedures handbook and provide training for your managers to help you maintain best practice throughout your organisation.

Contact
Plymouth Office
North Quay House
Sutton Harbour,
Plymouth, PL4 0RA
Tel: 01752 246000

Kingsbridge Office
29 Fore Street
Kingsbridge, TQ7 1AA
Tel: 01548 857000

Shared Parental Leave – indirect discrimination

Hextall v Chief Constable of Leicestershire Police also deals with not enhancing shared parental leave; but in this case, the claim was one of indirect discrimination. PC Hextall took shared parental leave when his self-employed wife gave birth to their second child in April 2015. His leave lasted from June to September, and over that time he was paid at the statutory minimum rate. Had he been a female police officer who had given birth to a child he would have been able to take maternity leave and would have been paid his full salary over that period.

The Tribunal rejected his claim of direct discrimination and his alternative claim of indirect discrimination. In each case the Tribunal held that women taking maternity leave were not appropriate comparators for a man taking shared parental leave. PC Hextall's appeal focussed on the issue of indirect discrimination.

The EAT held that for indirect discrimination the question was whether the 'provision, criterion or practice' at issue caused a particular disadvantage to those who shared a protected characteristic. In this case the question was whether men were placed at a particular disadvantage when compared with women by the employer's policy of providing fully paid maternity leave but only statutory shared parental leave. The Tribunal had held that both men and women taking shared parental leave received the same pay and that men were not therefore at a disadvantage. But that was the wrong approach. It was inherent in an indirect discrimination claim that the 'provision criterion or practice' was applied to women as well as men. The point was that, as the Tribunal accepted, men were overwhelmingly more likely than women to take shared parental leave without first being entitled to take maternity leave. The whole matter of indirect discrimination was sent back to a different Tribunal to be considered afresh.

It seems likely that at the fresh hearing it will be found that the employer's policy causes men a particular disadvantage. The question will then be whether it is justified as a 'proportionate means of achieving a legitimate aim'. Judging from this initial appeal, it may be some time before we get clear guidance on that issue.

Claim struck out for speaking to journalist during evidence

A claimant who spoke to a journalist while she was under oath during a break in her evidence has had her claim struck out for unreasonable conduct. Ms Chidzoy was a journalist who brought various claims against the BBC including whistleblowing and sex discrimination. During her cross-examination she was asked about an email referring to a story about the Dangerous Dogs Act which referred to her as 'Sally Shitsu' - a term she had objected to. The BBC responded that Ms Chidzoy had said that she would not have objected if she had been called 'Sally Rottweiler.' The use of those words was discussed during the tribunal proceedings.

The tribunal adjourned for a break and Ms Chidzoy was warned by the tribunal not to discuss her evidence or any aspect of the case with any person during the adjournment. During the break she was seen talking to another journalist and overheard using the words 'dangerous dogs' and 'Rottweiler.' The tribunal decided that Ms Chidzoy's disregard for its instruction not to discuss the case meant that its trust in her was irreparably damaged. This amounted to unreasonable conduct and it struck out her claim. The Employment Appeal Tribunal agreed. If you face tribunal proceedings you should remind your witnesses not to discuss their evidence during the hearing.

Giving references

Employers have a duty of care to employees when writing a reference. You must exercise reasonable care and skill. The reference should be true, accurate and fair. You must take reasonable care that it is not misleading by what is included or omitted from it. If you provide a reference and it contains information that is inaccurate then you could be sued for any resulting loss. This can be seen in a recent High Court case where Mr Hincks sued Sense Network Ltd. He argued that they had made a 'negligent misstatement' about him in a reference.

Sense Network Ltd had set out negative opinions in a reference based on a previous investigation into Mr Hincks' conduct. Mr Hincks argued that the person giving the reference should have satisfied himself that the investigation was reasonable and procedurally fair. He said that some of the reference was not accurate, overall gave a misleading impression and was based on a sham investigation.

The High Court dismissed his claim. A reasonable reference writer did not need to look into the procedural fairness of earlier investigations. Instead a referee should conduct an objective and rigorous appraisal of facts and opinions, particularly negative opinion. The referee should take reasonable care to be satisfied that the facts in the reference are accurate, there was a proper and legitimate basis for the opinion and that the resulting reference was fair and not misleading. This case involved the financial services industry where the employer had a duty to provide a more detailed reference. Most employers will be safer restricting their references to facts only.

Notice of termination

Where an employment contract is silent on when notice is deemed to be given, notice of termination takes effect when it is actually received by the employee and s/he has read it (or had a reasonable opportunity to read it).

In April 2011, Ms Haywood was told she was at risk of redundancy. She turned 50 on 20 July 2011. Redundancy after her 50th birthday would have entitled her to a considerably more generous pension than redundancy beforehand. Ms Haywood was contractually entitled to be given 12 weeks' notice, but her contract was silent about how notice was deemed given.

On 19 April 2011, Ms Haywood went on holiday. On 20 April, her employer sent notice of termination by recorded delivery and ordinary post. She read it on her return from holiday, on 27 April. If delivery was deemed effective before 27 April, she would have received the much lower pension. But if it was deemed effective on the day she returned from holiday and read it, she would have received the much more generous pension.

The majority of the Supreme Court held there was no good reason to disturb the long-standing line of case law from the EAT. The notice was only deemed effective when it was read by the employee (or s/he had a reasonable opportunity to read it). Thus it was not deemed effective until 27 April, and she was entitled to the higher pension.

Bringing tribunal claims without the correct information

Two recent cases have dealt with the question of whether an employment tribunal claim can proceed without the right information. In the first case the Court of Appeal allowed a claim to proceed when the claimant hadn't provided any details of the claim. Ms Parry had presented an employment tribunal claim form to her employer Haberdashers' Monmouth College. She claimed unfair dismissal and arrears of wages by ticking the relevant boxes. However, in the box which requires details of the claim she simply put, "Please see attached." Her solicitors then mistakenly attached information relating to a different case. The Tribunal allowed the claim to proceed anyway and the school argued that it should not as it could not sensibly be responded to and was now out of time.

The Court of Appeal ruled that the claim could have been responded to by the school even without the correct details from Ms Parry as they knew that she had been dismissed. This does not mean that the employer will always be assumed to have knowledge of everything that has occurred. The Court highlighted that if Ms Parry had brought a discrimination claim without any detail, then the claim may have been properly rejected.

In the second case the claimant Ms Aynge worked in a pub, fell out with the licensee Mr Trickett and left before the end of her shift. Mr Trickett said, "This is your last shift tonight. That's it, you're done." Ms Aynge brought a claim for unfair dismissal but said nothing about constructive dismissal. She was unrepresented. The employment tribunal dismissed her

claim as it had not been properly plead as constructive dismissal. The Employment Appeal Tribunal disagreed. It ruled that the judge should not take an overly technical approach in these sorts of cases. Ms Aynge had raised enough information about the row and what Mr Trickett had said on her claim form, even though she had not stated she was claiming constructive dismissal. Her claim was allowed to proceed.

And Finally…

The billionaire Elon Musk has reportedly sent an email making various unusual suggestions to promote productivity at his plants which are making the Tesla model 3 electric car. Mr Musk suggests walking out of meetings and ending phone calls if they fail to serve a useful purpose. Describing large meetings as the 'blight of big companies' Mr Musk apparently wrote, "*It is not rude to leave, it is rude to make someone stay and waste their time*."

Other reported tips for improving productivity include avoiding acronyms or nonsense words, sidestepping the chain of command to get the job done and ignoring company rules if following them is 'obviously ridiculous'.

Paul Housego

Julian Parry