

## Enhancing shared parental pay - what to think about

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Enhanced shared parental pay presents both opportunity and potentially some thorny legal issues. No one can say how many employees will actually make use of shared parental leave, meaning the question marks over enhanced shared parental pay could turn out to be a storm in a teacup. That said, employers will want to be alert to the issues involved.

Government guidance is explicit that there is no obligation on an employer to enhance shared parental pay, regardless of whether it enhances maternity pay. But employers who follow this guidance without thinking further about the issue may run into difficulty.

### The battle for talent

The clearest advantage to offering employees enhanced shared parental pay is that it is an attractive benefit and one that is likely to help those organisations which offer it to draw in and retain talented employees. It is noted that the soon-to-be-abolished additional paternity leave regime was not well received. Only 0.6% of those eligible to take additional paternity leave ever exercised that right (see BBC, 'Few fathers' take extra paternity leave - TUC report, 15 June 2013). By contrast, shared parental rights afford eligible employee parents with much greater flexibility than that available under the rigid additional paternity regime. Shared parental rights may therefore prove far more attractive. However, given the rate of statutory shared parental pay, the appeal or otherwise of the shared parental regime is likely to turn on whether employers offer enhanced shared parental pay.

### Discrimination

The potential issues mentioned earlier take the shape of discrimination questions. The case of *Shuter v Ford Motor Company Ltd ET/3203504/13* highlighted the issues that could arise when an employer decides not to offer enhanced shared parental pay. Although this case related to additional paternity pay, the facts and legal questions involved are analogous to those expected to emerge under the new rules. In this case a male employee at Ford Motors argued that he has suffered direct and indirect sex discrimination on the grounds that his employer paid enhanced maternity pay but only statutory additional paternity pay. The Tribunal held that the employee had suffered neither.

On the first point, the Tribunal ruled that the correct comparator for direct discrimination was not a female receiving enhanced maternity pay, but rather a female receiving additional paternity pay. Since the latter would have received the same payment there was no direct sex discrimination. This suggests, and the Government and ACAS have now both produced guidance in agreement, that where an employer does not offer enhanced shared parental pay, but does offer enhanced maternity pay this will not equate to direct sex discrimination.

However, as regards indirect discrimination, the implications of the Tribunal's ruling are more complex. Ford conceded that its policy of enhancing maternity pay but not additional paternity pay disadvantaged men in general and Mr Shuter in particular. However, the Tribunal accepted that Ford could objectively justify its policy on the grounds that a) the policy was designed to promote female recruitment and retention in a workforce that was overwhelmingly male; and b) if enhanced additional paternity pay were available, it would be overly disruptive given the company's predominantly male workforce.


If a case of this sort arises under the shared parental rules, it may be more difficult for a claimant to establish that they had suffered a group disadvantage; this is because the extent to which shared parental rights are exercised is likely to be more evenly distributed between men and women than additional paternity rights. Nevertheless it is conceivable that an analogous case could emerge under the shared parental pay regime. Employers should therefore consider what justification they will put forward if they decide not to match the pay elements of their shared parental pay and maternity pay policies and are challenged by employees.


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