

UK: EMPLOYMENT UPDATE

This month we examine the implications of a recent ECJ decision on an employer's record keeping obligations in relation to hours worked by their staff. We also consider the Court of Appeal's decision that lack of parity between the rates of maternity pay and shared parental leave pay does not amount to discrimination.

Key issues

- Working time: do employers need to change their time recording practices?
- Different rates of maternity and shared parental leave pay do not amount to discrimination

Working time: do employers need to change their time recording practices?

The Working Time Regulations 1998 (WTR) adopt a 'light touch' approach to an employer's record keeping obligations; requiring employers simply to keep 'adequate records' to show whether weekly and night work limits are being complied with. There are no recording obligations to ensure that daily and weekly rest break entitlements are being met.

A recent European Court of Justice (ECJ) decision casts some doubt on whether the WTR comply with the Working Time Directive (the Directive). The ECJ held that workers have a fundamental right to a maximum limit on working hours and to daily and weekly rest breaks. In order to ensure that those rights are effectively protected, Member States must require employers to set up an objective, reliable and accessible system enabling the duration of time worked by each worker, each day to be measured. The specific arrangements can take into account the characteristics of the sector or activities in question.

Practical implications

In practice, the ECJ's decision does not mean that employers in the UK must immediately start to record the number of hours worked by staff each day; the WTR have not been amended and it is difficult to see how an individual employee could bring a claim against a private sector employer because it has not maintained such records.

Although national courts are obliged to ensure that national legislation is interpreted in line with this ECJ decision, that would not extend to imposing a "new" requirement which is not contained in the WTR.

Until such time that the WTR are amended to impose more specific record keeping obligations and/or that the Health and Safety Executive issues revised guidance on record keeping, it is questionable on what basis a private sector employer could be subject to any sanctions for continuing to comply with the 'adequate records' requirements of the WTR.

It does, however, seem inevitable that more detailed record keeping requirements are likely to come into effect, although the time frame for this is necessarily speculative. As such, employers should start to consider what changes they may need to make to their current record keeping arrangements in order to capture more precisely the duration of time worked by each worker each day.

[Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE]

Different rates of maternity and shared parental leave pay do not amount to discrimination

In an eagerly anticipated judgment, the Court of Appeal has now ruled on the question of whether an employer that operates enhanced maternity pay arrangements but only pays statutory rates to employees on shared parental leave (SPL) is

potentially exposed to sex discrimination or equal pay claims from men who are paid less than women on maternity leave.

Direct sex discrimination: The Court held that there had been no direct sex discrimination. In order to succeed, the claimant must have been treated less favourably than a comparator whose circumstances are not materially different. The court held that a man on SPL is not in comparable circumstances to a birth mother on maternity leave; SPL is taken for childcare purposes whereas maternity leave is for more than just facilitating childcare it is special treatment for health and safety purposes.

Indirect sex discrimination: The Court also held that it does not amount indirect discrimination to have a policy of paying statutory SPL pay to men on SPL. For an indirect sex discrimination claim to succeed there must be a neutral "*provision, criterion or practice*" (PCP) which puts persons of the claimant's gender at a particular disadvantage when compared to persons of the opposite sex and the employer cannot demonstrate that the PCP is a proportionate means of achieving a legitimate aim.

In this case, the PCP was paying only statutory SPL pay. The Court of Appeal, taking a different view to the Employment Appeal Tribunal, held that women on maternity leave should be excluded from the pool for testing whether that PCP put men at a particular disadvantage as they are materially different from men and women on SPL. Having identified the pool, the Court held that men were not placed at any particular disadvantage by the PCP of paying only statutory SPL pay. In any event it would be justified as it was a proportionate means of achieving a legitimate aim of applying EU law to ensure the special treatment of mothers in connection with pregnancy or childbirth.

Equal pay claim: The Court held that where the complaint is that contractual SPL pay is less favourable than contractual maternity pay this should be brought as an equal pay claim; i.e. that the more favourable contractual terms in the maternity leaver's contract had to be included in the male claimant's contract by operation of the sex equality clause provisions of the Equality Act 2010 which requires men and women in like circumstances to be paid equally.

However, the Court then went on to hold that an equal pay claim by a man on SPL would fail because the sex equality clause does not apply where there is special treatment relating to pregnancy or childbirth, even if the terms in the maternity leaver and SPL leaver's contracts were truly comparable.

For all employers who operate enhanced maternity pay arrangements that are not mirrored in their shared parental leave pay arrangement the Court of Appeal's clarification that this will not provide a platform for claims of direct or indirect sex discrimination or an equal pay claim contract provides some welcome certainty. However, this may not be the last word on the matter as leave to appeal to the Supreme Court is being sought.

[Ali v Capita and Hextall v Chief Constable of Leicestershire Police]

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