EMPLOYMENT TRIBUNALS

Claimant: Mr A Hextall

Respondent: The Chief Constable of Leicestershire Police

FINAL HEARING

Heard at: Leicester (in public) **On:** 15, 16 & [deliberations] 17 August 2016

Before: Employment Judge Camp Members: Mrs C A Pattison
Mr R Gosai

Appearances
For the claimant: Mr Douglas Leach, counsel
For the respondent: Mr Jonathan Davies, counsel

RESERVED JUDGMENT

All of the claimant's complaints fail and are dismissed.

REASONS

Introduction & background

1. This claim is a bold and ingenious attempt to gain for men – or men who are police officers at least – a right to payment of a kind of paternity pay at the same rate as maternity pay is paid to women.

2. The claimant makes the attempt using the Equality Act 2010 ("EqA") and by referring to the police equivalent of the Shared Parental Leave Regulations 2014 ("Regulations"). The attempt fails for a number of reasons, principal amongst which are that the claim involves wrongly:

   2.1 assuming that discriminating in favour of women who are on maternity leave necessarily involves discriminating against men;

   2.2 drawing a qualitative distinction between non-birth mothers in same-sex couples and fathers;

   2.3 treating maternity and paternity leave as the same thing;

2.4 ignoring, or at least glossing over, the fact that, in our society at the present time, having children tends to cause women significantly more difficulties – generally, but in particular in connection with work – than it does men; and that this regrettable state of affairs is unlikely to change any time soon, notwithstanding the Regulations.

3. There is a summary of our decision on each of the issues in the case at the end of these Reasons.

4. This case began life as a claim for direct sex and sexual orientation discrimination. By the time of the final hearing before us, because of amendment and withdrawal, the respondent was facing the following complaints:

4.1 direct and indirect sex discrimination, pursuant to EqA sections 13, 19, 39 and 42;

4.2 equal pay, pursuant to EqA Part 5, Chapter 3 ("Chapter 3").

From here onwards, unless otherwise indicated, where we refer to sections, we mean sections of the EqA.

5. This was effectively a trial on agreed facts. The parties had two witnesses each: on the claimant's side, the claimant himself and a Mr Kirkpatrick, someone in a near identical situation to that of the claimant (the relevance of whose evidence is unclear to us; that evidence appears to be being used as something akin to 'similar fact' evidence in a criminal case); on the respondent's side, Julie Ann Saunders, an HR Business Partner and Alexandra Stacey-Midgley, a Senior HR Business Partner and the individual who was (if anyone was) the relevant decision-maker in this case. Only Mrs Stacey-Midgley was cross-examined to any significant extent and even her evidence was not really challenged. Her cross-examination consisted simply of questions seeking clarification on a handful of matters.

6. We don't think there are any significant factual disputes between the parties. Whether or not there are, what follows immediately below are the facts as we find them to be.

7. The claimant is a serving police constable. He joined the respondent force in 2003 and currently works in the Roads Armed Policing Team. His wife runs her own business. She gave birth to their second child on 29 April 2015. He took Shared Parental Leave ("SPL") from 1 June to 6 September 2015. Over that period of SPL, he was paid at the rate of £139.58 per week.

8. Had the claimant been a female police constable on maternity leave ("ML"), he would have been entitled to be paid his full salary for the period over which he took SPL. Within the respondent (and, as we understand it, within the police generally) women on ML and male or female primary carers on adoption leave

are[1] contractually entitled to full pay – Occupational Maternity Pay and Occupational Adoption Pay – for 18 weeks.[2] We shall focus on maternity leave rather than adoption leave and shall refer to Occupational Maternity Pay as "enhanced MP". Although the respondent has strong arguments that rely on a comparison between the position of the claimant and his wife and that of the adoptive parents of a newly adopted child, it has proved unnecessary for us to consider them because we have made our decision in the respondent's favour without having to do so. In a nutshell, the claimant's case is that he was unlawfully discriminated against as a man because the rate of enhanced MP is higher than the rate of SPL pay ("SPLP").

9. SPLP is paid at the same rate to anyone on SPL. People other than fathers who would be entitled to take SPL include:

   9.1 women who are the wives or civil partners of women who have just given birth;

   9.2 women who are the secondary carers of a recently adopted child;

   9.3 birth mothers who took some ML and who returned to work for a time while their partners took SPL, meaning they lost the right to take any more ML.

10. SPL is not, then, just available to fathers; nor just to men. However, it is accepted by the respondent for the purposes of these proceedings that the overwhelming majority of people taking and likely to take SPL are men. The claimant submits, and we accept, that, for example, it is highly improbable (absent special circumstances) that birth mothers who are police constables within the respondent force would take SPL during the 18 week period when enhanced MP would be payable. Further, the claimant relies on the self-evident biological fact that only women can bear children; and that, consequently, only women can get enhanced MP.

11. Under the Regulations, SPLP was at the relevant time fixed at £139.58 per week, being the same rate as the rate of statutory maternity pay ("statutory MP"), and, as above, the rate at which it was paid to the claimant. We shall refer to that rate as the "statutory rate". For technical reasons, the Regulations do not apply to police officers, although they do apply to civilian personnel within the police. However, the respondent has an SPL policy for police officers which is in all relevant respects identical in effect to the Regulations, including as to the rate of SPLP.

---

[1] We mainly use the present tense in these Reasons; "*and was/were at all material times*" is implicit.

[2] There are length of service qualifying criteria for Occupational Maternity Pay and Occupational Adoption Pay, but this is not relevant to the claimant's claim. Also, it may not be strictly correct to refer to an entitlement to "*full salary*" without qualification. For present purposes, what matters is that the claimant would have been paid significantly more for this period of leave had he been a woman on maternity leave.

12. Normally within the police, the introduction of something like SPL would be done nationally, by the Home Office using the Police Regulations 2003, following discussions with various 'stakeholders'. In relation to SPL, however, what has happened is that: first, it was agreed, in or around July 2014, that the principles contained within the Children and Families Act 2014 ("the Act") [the piece of legislation which created SPL] should extend to police officers; secondly, on 27 March 2015, the Home Office issued a circular (number 11/2015) ("circular") stating that: "*From 5 April 2015, mothers, fathers and adopters may choose to share parental leave around their child's birth or placement.*" Although the circular doesn't in terms specify the rate of SPLP, it does refer to "*the statutory rate*"; and therefore, by implication, envisages that the police will pay SPLP at the same rate it is paid under the Regulations, i.e., the rate at which it was paid to the claimant. The circular goes on to suggest that the Home Office will be introducing a national SPL policy in due course; but this has yet to happen.

13. On the basis of the evidence that is before us, which is not in this respect comprehensive, there appears not to be a single police force that has decided to pay SPLP at any rate other than the statutory rate.

14. The relevant reasons for the respondent's decision to pay SPLP at this rate and not to pay it at the same rate as enhanced MP are said to be:

    14.1 "*the aim of alleviating pressure on mothers to return to work prematurely while they are recovering from childbirth and perhaps breastfeeding and giving them an unpressurised choice of whether they wish to return to work*" (respondent's counsel's written submissions, paragraph 10.6(b));

    14.2 "*the aim of offsetting the occupational disadvantages specific to women who have given birth*" (ditto, sub-paragraph (c));

    14.3 "*the aim of protecting the special relationship between a woman and her child over the period which follows childbirth*" (ditto, sub-paragraph (d));

    14.4 "*the aim of giving police offices the same rights relating to shared parental leave and pay as* [civilian] *police staff*" (ditto, sub-paragraph (e) – civilian staff within the police are employees and the Regulations therefore apply to them);

    14.5 following the "*steer*" (the word used by Mrs Stacey-Midgeley in her oral evidence) given in the circular;

    14.6 acting consistently with other police forces;

    14.7 the fact that a definitive decision by the Home Office is expected and that it would cause significant discontent amongst police officers were the rate of SPLP to be raised to the rate of enhanced MP pending that decision if (as seems likely given the 'steer') the decision were to the effect that the rate should be reduced back down to the statutory rate.

15. We note that the first three of the above allegedly relevant reasons are not, in fact, relevant at all. They may well be very good reasons for paying women on

ML enhanced MP, but they are not reasons for not paying people on SPL at the same enhanced rate. It is not and never has been any part of the claimant's case that the entitlements of mothers should be reduced. His case is no more than that his rights as a father should, in one particular respect, be the same as those of a mother, i.e. he seeks a levelling-up and not a levelling-down of rights. One possible outcome of an appellate decision in his favour might be that some employers reduce the rights of mothers, but that is certainly not his intention and is anyway not a relevant consideration for us.

16. There is one further matter that perhaps ought to be mentioned before we move on to dealing with the issues in this case. The claimant places considerable reliance on the laudable aims behind the relevant parts of the Act and the Regulations. Reference is made to the document setting out the coalition Government's final response to the 'Modern Workplaces' consultation of May to August 2011 [the consultation exercise that ultimately resulted in the Act and the Regulations], "*Modern Workplaces – Government Response on Flexible Parental Leave (November 2012)*", which includes the following: "*Our approach will enable working fathers to take a more active role in caring for their children and working parents to share the care of their children. It is also a crucial step towards reducing the gender bias that currently applies to women's careers ... we retain a highly gendered, inflexible approach to parental leave rights, one that entrenches the assumption that the mother must be the primary carer in the early stages of a child's life and prevents fathers from getting involved … employers are increasingly concerned by the existing extended period of maternity leave … this may result in discrimination by employers against women … If childcare responsibility is shared more equally between mothers and fathers, maternal employment and earnings may increase, enabling businesses to maximise the pool from which they recruit and to retain skilled employees*".

17. The claimant argues that to pay mothers more in respect of periods of ML than would be paid to fathers in respect of comparable periods of SPL undermines the policy behind the Regulations. If there is a choice between the father taking SPL and the mother taking ML, the family is likely to choose whichever is better for the household budget. If ML is the more financially advantageous option, as it usually will be as things stand, and is therefore chosen, the very evil the Regulations were supposed to address would be perpetuated.

18. The claimant may well be right in this argument. However, even if he is (and we are in no position properly to assess this one way or the other), this would not affect our decision or our decision-making process. This claim is not made under the Regulations but under the EqA. In so far as the claimant is inviting us to use the Regulations or the policy behind them as an aid to interpreting the EqA, we decline that invitation. We think we would be making an error of law were we to accede to it.

    18.1 Had the Government wanted to amend relevant parts of the EqA, it would presumably have done so.

18.2 As has been highlighted by the claimant himself, the EqA stems from European law. The relevant parts of the Act and the Regulations do not. We know of no mechanism by which pieces of purely domestic legislation could affect the interpretation of provisions in (essentially) European legislation to which they do not even refer.[3]

18.3 It would be wrong for us to assume that because one incarnation of the Government and of Parliament may have had particular aims when they enacted the Act and made the Regulations, all other incarnations of the Government and of Parliament share those aims; still less to assume that there are no competing or conflicting aims that the administration and the legislature may consider to be more important and/or that fall to be considered in relation to other legislation, such as the EqA.

18.4 To a significant extent, the Act and the Regulations are red herrings. The core legal argument that gives rise to this claim is that there will be unlawful discrimination if fathers are denied benefits given to mothers in connection with pregnancy and maternity that go beyond the minimum necessary to comply with the requirements of the Pregnant Workers Directive[4]. As is rightly submitted by respondent's counsel, this is an argument that could always have been made. For example, the Pregnant Workers Directive gives a right to only 14 weeks maternity leave and pay. Women in Britain have for some time enjoyed a right to significantly more than this. If the claimant's argument is right, then denying fathers equivalent rights from week 15 onwards has always been unlawful. The fact that SPL now exists doesn't affect the argument's validity one way or the other.

18.5 The decision that has been taken to fix the rate of SPLP under the Regulations at the same rate as statutory MP and not to require employers to give fathers the same contractual rights as mothers is a political and economic one. It was no doubt influenced by a multitude of factors. Given this, we would only seek to go behind that decision, and analyse and weigh-up the reasons for it, if it was strictly necessary to do so and we don't think it is. The risk referred to in paragraph 15 above – of employers reducing contractual maternity benefits in response to a legal requirement to give fathers and mothers the same rights – is just one of the many things that would have to be thought about by anyone deciding the appropriate rate of SPLP. It is the kind of decision that Courts and Tribunals are ill-equipped to make.

Discrimination or Equal Pay

---

[3] There are a few references in both the Act and the Regulations to the EqA, but none to relevant parts of it. It may be noteworthy that we have not been asked by the claimant to examine any specific provision in the Regulations or the Act.

[4] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the health and safety of pregnant workers and workers who have recently given birth or are breastfeeding.

19. We turn to the issues in the case.

20. The first issue that logically falls to be decided is the jurisdictional point of whether the claim is properly brought as a discrimination claim (under EqA Part 5, Chapter 1) or whether, instead, it has to be brought as an equal pay claim (under Chapter 3). The claimant contends, as he has done throughout the proceedings, that it is a discrimination claim. Before trial – or, at least, before the claimant was given permission to amend to add an equal pay claim in the alternative – the respondent had been vigorously asserting that it is an equal pay claim. Its position now is that it is neutral on the issue; although respondent's counsel's stance seems still to be that, technically, the claim belongs in the equal pay category.

21. The question posed by this issue is largely an academic one, given: that both types of claim are properly before us; that the issues in dispute that arise in relation to both types of claim are broadly the same; and that, in practice, it is vanishingly unlikely that (ignoring the jurisdictional point) the claim would succeed as a discrimination claim but fail as an equal pay claim or vice versa. Nevertheless, we still have to answer the question.

22. Section 70(1) states: "*The relevant sex discrimination provision has no effect in relation to a term of A's that – (a) is modified by, or included by virtue of, a sex equality clause or rule, or (b) would be so modified or included but for section 69 or Part 2 of Schedule 7.*" A "*relevant sex discrimination provision*" is that prohibiting workplace discrimination against police officers (section 39, taken together with section 42). A sex equality clause is defined in section 66(2) as: "*a provision that has the following effect – (a) if a term of A's* [contract] *is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable; (b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term.*" In that section, "A" is the claimant and "B" is a comparator of the opposite sex. We are not concerned with sex equality rules and for the time being we can ignore section 69 and Part 2 of EqA schedule 7 ("Part 2").

23. The effect of section 70(1) is that if a claim is in reality an equal pay claim, which is a claim made under a term in the claimant's contract that has been modified pursuant to section 66(2)[5], it may not be brought as a discrimination claim. A shorthand is often adopted in relation to the question of whether a claim is properly one of discrimination or of equal pay: it is said that if the claim is about pay, it falls into the latter category. That shorthand is, though, potentially misleading; and certainly is liable to mislead on the facts of this case.

24. The parties have identified a comparator. (The respondent has agreed only that she is an appropriate comparator in accordance with the claimant's case

[5] A succinct explanation of how equal pay claims 'work' is provided by Mummery LJ in Hosso v European Credit Management Limited [2011] EWCA Civ 1589 at paragraph 34.

and is engaged on 'like work'. Its agreement is without prejudice to its contention that the correct comparator is a woman taking SPL.). Who she is doesn't matter; she is referred to as "PC 836". PC 836 is a police constable who took ML and was paid enhanced MP. What does matter is that her contract and that of the claimant are the same in all relevant respects. His contract includes a right to enhanced MP, but, obviously, he will never get it in practice because only women can. Her contract includes a right to SPLP but in practice (as things stand) she is unlikely ever to get it, at least not during the period in respect of which she would be entitled to enhanced MP. Why would she take SPL and get paid less when she could take ML and get paid more?

25. For this to be an equal pay claim, there would have to be a relevant term of PC 836's contract more favourable than a corresponding term of the claimant's contract.[6] There is no such term. The two contracts are in fact identical. In addition, the claimant is not seeking to rely on any such term. Instead, he is asking for a term of his contract (which is also a term of PC 836's) – the term relating to SPLP – to be upgraded so as to be equivalent to a different and non-corresponding term of her contract – the term relating to enhanced MP.

26. As an 'aside', we note that were the claimant to succeed in having fathers' SPLP upgraded or enhanced as he is claiming it should be, this would almost certainly give the respondent's female officers – including PC 836 – a valid equal pay claim unless their SPLP were similarly upgraded. This serves to highlight the peculiarity of the claim he is making.

27. The argument that this is in truth an equal pay claim is based principally on the fact that there is something of a contradiction between: the above argument that there is no term of PC 836's contract more favourable than a corresponding term of the claimant's contract; the argument being put forward as part of the claimant's direct discrimination complaint (which we shall come on to in a moment) that there is no material difference between ML and SPL and that the only differences between a father's SPLP and a mother's maternity pay are the labels that have been put on them. However, we think the reason for this contradiction is that the former argument is right and the latter argument wrong.

28. In conclusion on this point, the claimant's claim is one of discrimination and not one of equal pay.

Direct discrimination – less favourable treatment

29. Section 13(1) states: "*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats*

[6] Here, we are intentionally giving only the gist of the requirements of an equal pay claim. As above, such a claim can be based on the existence of a less favourable term in the claimant's contract or on there being a beneficial term in the comparator's contract which does not exist in the claimant's contract. No one has suggested in the present case that PC 836's contract has a beneficial term in it which has no equivalent in the claimant's contract, less favourable or otherwise.

or would treat others." The first issue that arises in relation to the direct discrimination complaint is therefore: did the respondent treat the claimant less favourably than it treated or would have treated others?

30. Dealing with this issue requires us to compare the claimant's treatment with that of a relevant comparator. Section 23(1) states that: "*On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.*" In other words, the relevant comparator for the purposes of the direct and indirect discrimination complaints must be one or more individuals whose circumstances are not materially different to those of the claimant. "*What matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator*": paragraph 3.23 of the "*Equality and Human Rights Commission: Code of Practice on Employment (2011)*".

31. Fundamental to the claimant's case is that PC 836 having borne and given birth to her child and her being on ML rather than SPL are not material differences between her circumstances and his. We disagree.

    31.1 The link between maternity and pregnancy and what is labelled ML still exists to a significant extent. Most of the 18 week period of ML with which we are concerned is made up of the 14 week period of ML that the Pregnant Workers Directive requires employers[7] to allow mothers to take in recognition of the fact that, "*pregnant workers, workers who have recently given birth or who are breastfeeding must be considered a specific risk group in many respects, and measures must be taken with regard to their safety and health*"[8]. No such considerations apply to fathers. Most working mothers have to take some leave around the time of birth whether they want to or not, in the interests of their own health and well-being. No father is forced to take leave in the same way. Further, the right to ML is something that a woman acquires only through pregnancy and maternity and she has to choose to give it up and effectively gift it to the father in order for him to have any right to SPL at all.

    31.2 There are significant differences between ML and SPL, including the fact: that women can take leave before the birth of their child whereas SPL can only be taken after birth; that part of ML – two weeks' worth – is compulsory whereas SPL is entirely voluntary; and that it is impossible to take SPL without one's partner's agreement, whereas ML can be taken whatever one's partner's views. Indeed, a woman can – of course – take ML even if she doesn't have a partner.

    31.3 This is a claim about pay and the fact that the mother has been pregnant and has given birth to a child whereas the father has not is, we think, highly relevant in relation to such a claim. Having children tends

[7] More accurately, the directive requires Member States to require employers to do this.

[8] From one of the recitals to the Pregnant Workers Directive.

adversely to affect the mother's finances far more than it does the father's (or those of her partner, if her partner is not the father).

32. We also ask ourselves why (other than that it is convenient to the claimant that we should do so) we are considering as a comparator someone whose circumstances so obviously differ from the claimant's when far more apt comparators exist. The claimant's situation was all but identical to that of a woman taking SPL who is the wife or civil partner of a woman who has just given birth. The difference in sexual orientation between such a woman and the claimant is clearly not material, nor does the claimant suggest it is.

33. To explain the argument that such a person is not an appropriate comparator whereas PC 836 is, claimant's counsel made the singularly unattractive submission that being the biological parent of the newborn child is a material factor. Apart from anything else, if that were so and if the claimant is entitled to succeed in his direct discrimination complaint on that basis, we would be in the absurd situation where it would remain permissible for the respondent to pay men less in SPLP than it pays women in enhanced EP so long as the men are cuckolds. We unhesitatingly reject the submission.

34. Accordingly, our view is that the circumstances of the claimant's chosen comparator are materially different from his own. A valid comparator – a hypothetical woman taking SPL who is the wife or civil partner of a woman who has just given birth – would be treated in exactly the same way as the claimant was treated. There was therefore no relevant less favourable treatment and the direct discrimination complaint must fail.

"*because of a protected characteristic*"

35. A further reason why the direct discrimination complaint fails is that even if there was less favourable treatment, it was neither because the claimant is a man, nor because of sex [maleness] generally.

36. It is a well established legal principle that mistreating a woman in connection with pregnancy or maternity is necessarily direct sex discrimination because only women bear children. The claimant, through counsel, takes this principle, turns it on its head and submits that if one treats a man less favourably than a woman for reasons connected with her pregnancy or maternity, this, too, is necessarily direct sex discrimination (or would be if section 13(6) were ignored, a section considered later in these Reasons).

37. The submission is wrong, in logic and in law. It ignores the fact that at any given time lots of women are not pregnant and/or on maternity leave. "*…discrimination on a particular ground will only be treated as discrimination on the grounds of a protected characteristic if that ground and the protected characteristic exactly correspond*": Onu v Akwiwu & Anor [2014] EWCA Civ

279, *per* Underhill LJ at paragraph 49.[9] A group consisting of people who are pregnant and/or on maternity leave would be 100 percent female. A group consisting of people who are not pregnant and/or on maternity leave would not be 100 percent male.

38. Returning to the facts of this case, the reason the claimant was paid SPLP and not enhanced MP is that he was not the birth mother. One doesn't have to be a man in order to be someone who is not the birth mother and who is taking SPL. Once again, the example of the wife or civil partner of the birth mother is apposite.

39. We emphasise that the legislation requires us to determine the reason for the less favourable treatment of the claimant. Claimant's counsel made a suggestion to the effect that this will be essentially the same as the reason for the more favourable treatment of the comparator. Once again, we disagree. The reasons for the less and the more favourable treatment will usually be interlinked but to some extent different. For example, the reason for the more favourable treatment of PC 836 in the present case is that she had given birth and was on ML. That is a reason inextricably linked with her sex. However, the reason for the claimant's less favourable treatment is not that PC 836 had given birth and was on ML. Instead it was that he had not given birth and was not on ML, something not inextricably linked with his sex.

Section 13(6)(b)

40. The third and final reason why the direct discrimination complaint fails is that, in our view, section 13(6)(b) applies.

41. Section 13(6)(b) states: "*If the protected characteristic is sex … in a case where B* [the claimant] *is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth*." The issue that falls to be decided is therefore whether paying enhanced MP is, "*special treatment afforded to a woman in connection with pregnancy or childbirth*" in accordance with that section.

42. Our starting point on this issue, something that seems obvious to us (albeit claimant's counsel would not concede it), is that ML and maternity pay are, by definition, special treatment afforded to a woman in connection with pregnancy or childbirth.

---

[9] Much the same point was made by Advocate General Sharpston in her opinion in Bressol v Gouvernement de la Communauté Française (Case C-73/08) [2010] 3 CMLR 559: "*I take there to be direct discrimination when the category of those receiving a certain advantage and the category of those suffering a correlative disadvantage coincide exactly with the respective categories of persons distinguished only by applying a prohibited classification.*" This was approved by Lady Hale in the Supreme Court in the Onu case (which in the Supreme Court was known as Taiwo & Anor v Olaigbe & Ors [2016] UKSC 31). In the same vein, Lady Hale went on to refer, at paragraph 28 of the decision, to the need for there to be, "*exact correspondence between the advantaged and disadvantaged groups and the protected characteristic*".

43. Why, then, is it said on behalf of the claimant that section 13(6)(b) does not apply? Claimant's counsel puts forward three arguments.

44. The first argument relies on Gillespie & others v Northern Health and Social Service Board & others (Case C-342/93) [1996] IRLR 214 (ECJ). We shall refer to it as the "Gillespie argument". We understand it to be as follows:

44.1 section 13(6)(b) implements the exception to the fundamental principle of equal treatment referred to in Article 28 ("Article 28") of the Equal Treatment Directive 2006/54/EC ("ETD 2006") that permits "*provisions concerning the protection of women, particularly as regards pregnancy and maternity*";

44.2 given that it is an exception to a fundamental principle, section 13(6)(b) must be construed narrowly. What is permissible by way of exceptions to fundamental principles is no more than that which is reasonably necessary to fulfil the aims for which the exceptions were created;

44.3 the relevant exception was created to address issues of health and safety and the protection of women in connection with pregnancy and maternity, i.e. the matters dealt with in the Pregnant Workers Directive. Women covered by that directive are in a "*special position which requires them to be afforded special protection, but which is not comparable either with that of a man or with that of a woman actually at work*" (Gillespie, Judgment paragraph 17);

44.4 in paragraph 18 of the Judgment in Gillespie, the ECJ sets out the minimum that European law requires by way of "*special protection*". This includes "*maintenance of a payment to and/or entitlement to an adequate allowance for*" women on ML;

44.5 European law leaves it member states to set the minimum permissible level of maternity pay. The statutory rate is the minimum permissible level of MP in England and Wales – no one is suggesting otherwise;

44.6 what Gillespie does, then, albeit indirectly, is to set out that which is reasonably necessary to fulfil the aims for which the exception to the fundamental principle of equal treatment encapsulated in section 13(6)(b) was created. A minimum requirement is no more and no less than what one reasonably needs to do to fulfil one's obligations. If one does – or on the facts of the present case pays – more than the minimum, one is doing more than one reasonably needs to do;

44.7 what this means for maternity pay is that paying it at any rate higher than the statutory rate falls outside the scope of the exception to the fundamental principle of equal treatment with which we are concerned – outside the scope of section 13(6)(b), in other words;

44.8 in summary, if a mother is paid more during her ML than statutory MP, it will be direct sex discrimination not to pay the same amount to a father on paternity / parental leave, because paying more than statutory MP loses the employer the protection otherwise provided by section 13(6)(b).

45. We don't accept this argument. Gillespie merely refers to the minimum standards to ensure the health and safety of pregnant women that are contained within the Pregnant Workers Directive. It does not and does not purport to set out the permissible limits of the exception to the general principle of equal treatment. Further, we don't think it follows from the fact that, in European law, the right to maternity pay originated from a piece of health and safety legislation that we should ignore such legitimate non-health and safety reasons as exist for giving women additional benefits in connection with pregnancy and maternity that would not be given to others. We don't read Gillespie or any other authority to which we have been referred as requiring us to pretend that women don't suffer disadvantages in work connected with pregnancy and maternity that have nothing to do with health and safety, leading to inequalities between men and women.

46. We note that recital (24) at the start of the ETD 2006 includes the following: "*The Court of Justice has consistently recognised the legitimacy, as regards the principle of equal treatment, of protecting a woman's biological condition during pregnancy and maternity and of introducing maternity protection measures as a means to achieve substantive equality*" [our emphasis]. The directive itself thus recognises that the reason for permitting special treatment of women in connection with pregnancy and maternity is about more than just health and safety.

47. We also note that what the claimant is really asking us to do by the Gillespie argument is to use the Pregnant Workers Directive as an aid to interpreting Article 28 (and its predecessor, Article 2(3) of the 1976 Equal Treatment Directive[10] ("ETD 1976")), which is some 16 years older.

48. The claimant places particular reliance on two further decisions of the European Court: Álvarez v Sesa Start España ETT SA, C-104/09 [2010] ECR I-8661 CJEU and Maïstrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton, C224/14 [2015] IRLR 944. In both these cases, there was found to be direct sex discrimination where the conditions under which men and women were granted particular types of parental leave were different.

49. Maïstrellis concerned what we view as a deeply sexist provision of Greek law relating to civil servants and judges whereby women got parental leave unconditionally whereas, absent special circumstances, men only got it if their wives worked or exercised a profession. The CJEU's decision in the case does not assist us. The CJEU was principally concerned with the Framework Agreement on parental leave, which is not in issue in the present case. Article 28 was mentioned at the end of the Judgment almost as an afterthought. As best one can tell, no serious attempt was made to justify the provision in question. There certainly doesn't seem to have been any real discussion or

[10] Council Directive (EEC) 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

argument at all about whether what would otherwise be unlawful positive discrimination in favour of a mother in connection with parental / maternity leave can in principle be justified on grounds other than health and safety.

50. Álvarez concerned what was mis-named 'breastfeeding leave', which was the right, available both to men and women, to take an hour a day off work during their child's first 9 months of life. There was a sexist precondition to fathers taking the leave not applied to mothers, namely that a father could only take it if the mother was employed. As with Maïstrellis, the arguments raised in the present case were not in play. There seems to have been some attempt to suggest that the leave was something to do with "*the biological condition of the woman following pregnancy or the protection of the special relationship between a mother and her child*" (Judgment, paragraph 29), but the attempt failed on the facts. The main argument raised on the employer's behalf was that the treatment was a kind of positive discrimination that is permissible under what at the time was Article 2(4) of ETD 1976. Neither that article, nor its ETD 2006 equivalent (Article 3), have even been mentioned during the hearing before us. That argument, too, failed on the facts: the treatment in question was found not to be genuinely "*intended to eliminate or reduce actual instances of inequality which may exist in society*" (Judgment, paragraph 33).

51. Finally on the Gillespie argument, we don't think it adds anything to the claimant's third argument, which relies on Eversheds Legal Services Ltd v De Belin [2011] IRLR 448 (the "De Belin argument") and which we shall consider in a moment.

52. We found the claimant's second argument difficult to grasp. To the extent we understand it, it is that because (supposedly) the introduction of SPL has broken "*the link between the fact of pregnancy and entitlement to leave*"[11] connected with the birth of children, this means that remunerating a woman even though she is not in work because she has recently given birth is not "*special treatment afforded to*" her "*in connection with pregnancy or childbirth*". We cannot see how, even if the link between pregnancy and childbirth and leave had been broken, this could change the meaning of words. We repeat what we described as our "starting point" in relation to section 13(6)(b) – see paragraph 42 above.

53. The third argument is the De Belin one. We note the respondent reserves the right to argue, if this matter goes on appeal, that that case was wrongly decided by the EAT. However, whether right or wrong, it is binding on us. Both parties, through counsel, accepted that the effect of the decision is that we have to read section 13(6)(b) (and the corresponding provision relating to equal pay claims – part 2) as if it ended with something along these lines, "…special treatment afforded to a woman in connection with pregnancy or childbirth that is reasonably necessary to compensate them for the

[11] Claimant's skeleton argument, paragraph 37.

disadvantages occasioned by their condition"[12], or, "…special treatment afforded to a woman in connection with pregnancy or childbirth that is appropriate and necessary for achieving the aim of ensuring that women do not lose out through their absence from work on maternity leave"[13].

54. Accordingly, De Belin obliges us to undertake an exercise in deciding whether paying enhanced MP is a proportionate means of achieving the legitimate aim of ensuring that women are not substantially disadvantaged through their absence on maternity leave.

55. The claimant submits that what is proportionate or "*reasonably necessary*" cannot be any more than that which is required to satisfy the requirements of the Pregnant Workers Directive, i.e. that which is set out in paragraph 18 of Gillespie. We reject that submission and repeat the reasons given above for rejecting the Gillespie argument. Additionally, we note there was no suggestion in De Belin that the only things we should be considering in terms of relevant "*disadvantages*" are those associated with health and safety.

56. Claimant's counsel confirmed in oral submissions that if we do not accept the argument that payment to women on ML at any rate above the statutory rate, there is no fall-back position; it is not suggested that any rate above the statutory rate would be more proportionate than the rate at which enhanced MP is paid. Putting it another way, paying enhanced MP is alleged by the claimant to be disproportionate simply because it is more than statutory MP. In the circumstances, given that we have rejected the claimant's only arguments and that no one has put forward any other reason why the rate of enhanced MP is or might be disproportionate, we accept the respondent's submission that paying women on ML full pay for 18 weeks is reasonably necessary to compensate them for the particular disadvantages caused to them by pregnancy and childbirth.

57. In summary, section 13(6)(b) applies and the claimant's direct discrimination complaint would fail for this reason even if it were otherwise unimpeachable.

Indirect discrimination

58. The relevant parts of section 19 are:

> *(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –*
>
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*

[12] See De Belin paragraph 29.

[13] See De Belin paragraph 25.

(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.

59. The first reason why the claimant's indirect discrimination complaint fails is: that section 23 applies as much to an indirect discrimination as to a direct discrimination complaint; and that the claimant's indirect discrimination complaint requires us to accept that women on ML are valid comparators for men on SPL, something we have already rejected.

60. The other reason it fails is that the "*provision, criterion or practice*" ("PCP") relied on does not put men "*at a particular disadvantage when compared with*" women.

61. The PCP relied on by the claimant was discussed a number of times during the hearing. Ultimately, the claimant, through counsel, stuck with this formulation: "*paying only the statutory rate of pay for those taking a period of shared parental leave*"[14]. Presumably, one of the reasons why this was the preferred formulation was that it was the only one of the possible PCPs that have been suggested in this case that the respondent applies or would apply to both men and women in accordance with section 19(2)(a).

62. To form the basis of a valid indirect discrimination complaint by the claimant, the PCP must itself cause particular disadvantage to men. The PCP involves paying money at a particular rate – for convenience we'll refer to it as "£x" – to people taking SPL. When it is applied to men, they get paid £x. When it is applied to women, they get paid £x. It isn't suggested that because of some particular paternal or masculine attribute, £x is in practice less valuable to men taking SPL than it is to women taking SPL; or anything of that kind. How can paying the same sum of money to men and women be said to be particularly disadvantageous to men?

63. Another way of looking at the indirect discrimination complaint is to ask what the alleged particular disadvantage is and then ask whether men are put to that particular disadvantage by the PCP. The particular disadvantage relied on is getting less money than women get in enhanced MP. But there is no causal link between paying SPLP at the rate of £x and paying enhanced MP at a different rate; the difference in rate, which is what the claimant is complaining about, is not a disadvantage to which anyone, male or female, is put by setting the rate of one of the two types of pay at a particular level.

[14] Section 7 of the claimant's application to amend to add an indirect discrimination complaint dated 21 December 2015.

64. We have on our own initiative considered two further possible PCPs that seem to us to accord with the claimant's indirect discrimination arguments.

    64.1 If the PCP were "receiving £x for SPLP rather than the greater sum of £y", then there is still no particular disadvantage to men because a woman to whom that PCP was applied would be in an identical position to a man to whom it was applied – she, too, would be receiving £x rather than £y.

    64.2 If the PCP were "having a right to be paid £x for SPL", then, again, there is no particular disadvantage caused because having such a right as a man is at least as good as having such a right as a woman. It could even be argued that that PCP is better for men than for women because men are much more likely to take SPL than women are.

65. The claimant's true case is that men are disadvantaged not by any PCP connected with SPL but by the fact that in practice, one has to be a woman to get enhanced MP. A contractual right to enhanced MP is infinitely less valuable for men than for women because men will never be able to exercise that right. To put in another way, men are infinitely less likely to be able to satisfy the key criterion – giving birth – that has to be satisfied in order to qualify for enhanced MP. The difficulty the claimant has is that no indirect discrimination complaint could get off the ground based on the right to or rate of enhanced MP because any relevant PCP would never be applied to a man because men can't bear children. A PCP that applies only to one sex is the basis of a direct discrimination complaint or it is nothing.

66. Accordingly, indirect discrimination is a non-starter for the claimant.

Justification

67. Even though we have decided that no indirect discrimination complaint – or none that has been put forward before us – could get off the ground, we think it is appropriate for us to consider the issue of whether, even if everything else was in the claimant's favour, the complaint would fail because the PCP is justified, i.e. is a "*proportionate means of achieving a legitimate aim*" pursuant to section 19(2)(d). In short, we don't think a defence of justification[15] would succeed.

68. When thinking about justification, we have to pretend that the indirect discrimination complaint is otherwise meritorious, i.e. we have to assess justification as if we were satisfied that the PCP relied on did indeed put men at a particular disadvantage when compared with women.

[15] We appreciate that under the EqA, it is strictly speaking wrong to refer to a "*defence of justification*"; as is hopefully obvious, what we mean is there being no unlawful discrimination because the respondent has shown the PCP to be a proportionate means of achieving a legitimate aim.

69. We set out the allegedly legitimate aims relied on in paragraph 14 above. We have already, in paragraph 15 above, dismissed as irrelevant a number of them. We shall now consider the four remaining aims relied on.

70. The "*aim of giving police offices the same rights relating to shared parental leave and pay as* [civilian] *police staff*" is a legitimate one in the abstract. However, when applied to the facts of this case, it does not assist the respondent. The fact that one may be treating one group of staff – male civilian staff – badly and discriminating against them does not excuse discrimination against others. The obvious way to deal with the situation where one discovers one is discriminating against one part of the workforce is to stop discriminating against everybody. Even if it is the case that the respondent does not itself have the power to improve the terms and conditions of civilian staff without the say-so of the Home Office, that doesn't provide a good reason for waiting before tackling discriminatory practices that it <u>is</u> within its power to address.

71. Very similar considerations apply to the aim of acting consistently with other police forces. Again, it is a perfectly legitimate aim in the abstract, but it falls apart when applied to the facts of this case. This attempt at justification amounts to arguing that the respondent should be able to get away with discrimination because others are discriminating just as badly.

72. So far as concerns the aim of following the 'steer' given in the circular, we accept that, all other things being equal, the respondent will legitimately want to follow non-binding guidance given to it by the Home Office. However, this provides no proper basis for a justification defence. "I discriminated because I was told to" is a hopeless argument; "I discriminated because someone suggested I might do so" is even worse.

73. Much the same goes for the argument that the Home Office may decide to impose what (in this hypothetical case where we had found there was a *prima facie* case of indirect discrimination) would be a discriminatory SPLP regime. If by then the respondent had granted fathers, on an interim basis, the right to SPLP at the enhanced MP rate, it would be forced to take that right away; or so it is argued on the respondent's behalf.

74. We accept that granting on an interim basis a right to payment of SPLP at the enhanced MP rate and then taking it away would probably cause more industrial strife within the respondent than never granting that right at all. If the aim is minimising industrial strife, then it is a legitimate one; but the means adopted are not proportionate.

    74.1 First, we are not satisfied that the respondent would be obliged to take away a right to payment of SPLP at the enhanced MP rate if directed to do so by the Home Office. This is because any such direction would surely – in this scenario – be *ultra vires*.

74.2 Secondly, if [in this scenario] the respondent did act in this way then fathers would be able to obtain a right to the enhanced MP rate by bringing tribunal claims along the lines of the present claim.

74.3 Thirdly, it seems to us to be wrong in principle to seek to justify discrimination now by reference to the possibility that one might be obliged to discriminate in the future. Surely the responsible employer does its best to avoid unlawful discrimination whenever it is within its power to do so.

75. In reality, the respondent's real argument seems to us to boil down to arguments about cost; and cost *per se* does not justify the perpetuation of otherwise unlawful discrimination. An employer cannot be heard to say "we can't afford not to discriminate". See O'Brien v Ministry of Justice [2013] UKSC 6.

Equal pay

76. We shall now consider what the situation would be were the respondent correct in its submission that section 70 requires the claimant's claim to be brought under the equal pay jurisdiction.

77. The first thing to note is that any equal pay claim would fail because of our earlier decision about section 13(6)(b). That section is similar in terms and effect to Part 2. The parties agree that if the direct discrimination complaint fails because of section 13(6)(b), any equal pay claim will necessarily fail because of Part 2.

78. The second reason why an equal pay claim would fail is that, as mentioned earlier in these Reasons, such a claim requires there to be a woman with a term in her contract that either corresponds to but is more favourable than a term in the claimant's contract, or that has no equivalent in the claimant's contract, in accordance with section 66. No such term exists. The claimant's contract and that of his comparator are identical in all relevant respects. Moreover, even the claimant accepts that the term in his contract relating to SPLP does not correspond with the term in hers relating to enhanced MP; and that there is a corresponding term in his to the term relating to enhanced MP in hers.

79. The respondent also raises the "*material factor*" defence set out in section 69. The parties seem to agree that the material factor defence to an equal pay claim and the justification defence to an indirect discrimination claim would stand and fall together. In so far as they do agree this, they are right to do so.

80. Counsel conceded in closing submissions that the only things the respondent could potentially rely on as material factors were those set out in paragraphs 14.4 to 14.7 above. In relation to each of those alleged material factors, the main thing we have to decide is whether or not they are a proportionate means of achieving a legitimate end. We have already decided that they aren't: see paragraphs 70 to 75 above. Any material factor defence would therefore fail.

Summary

81. This claim was properly brought as a discrimination claim rather than as an equal pay claim. See paragraphs 20 to 28, above.

82. The direct discrimination complaint fails because: there was no relevant less favourable treatment; any less favourable treatment was not because of the claimant's sex or because of sex [maleness] generally; any relevant more favourable treatment of a comparator was lawful pursuant to section 13(6)(b). See paragraphs 29 to 57, above.

83. The indirect discrimination complaint fails because: we do not accept that a woman on maternity leave getting enhanced maternity pay is a valid comparator for a man on share parental leave getting shared parental leave pay; the relevant PCP does not put men at a particular disadvantage when compared with women; other PCPs that have been put forward would only be applied to women and not to the claimant or to other men. See paragraphs 58 to 66, above.

84. Were the indirect discrimination complaint otherwise valid, a 'justification' defence would fail. See paragraphs 68 to 75, above.

85. Any equal pay claim fails because: part 2 of EqA schedule 7 applies; the claimant's contract and that of his comparator are in all relevant respects the same. See paragraphs 77 and 78, above.

86. Were the equal pay claim otherwise valid, a 'material factor' defence would fail. See paragraphs 79 and 80 above.

2601332/2015

22 August 2016

Employment Judge Camp

SENT TO THE PARTIES ON

24 August 2016

.....

FOR THE TRIBUNAL OFFICE