

**Extract from the Local Government Association (LGA) Advisory Bulletin
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Shared Parental Leave

One issue that has arisen in the run up to the introduction of the new right to SPL is whether it is necessary to offer employees taking SPL the same occupational pay as women receive when taking maternity leave e.g. the current six weeks at 90% of full pay, followed by 12 weeks at 50% of full pay, plus statutory pay, which is payable to women who qualify under the Green Book. There are currently no plans to introduce national occupational shared parental pay schemes. Individual authorities will need to consider the approach they wish to take locally on this issue.

Obviously, the concern is that to not provide the same pay could result in claims of sex discrimination. However, currently the decisions in the few cases that have considered similar issues have not upheld such claims.

As far as direct discrimination is concerned, this should not be a problem as the comparator for a man on SPL should be a woman who is also taking SPL, and provided she receives the same pay as a man on SPL, there will be no discrimination on the grounds of sex.

The chink in the armour, however, relates to the extent to which someone can successfully argue that someone taking SPL is, in practice, no different to someone taking maternity leave, and therefore a man may be able to point to a woman on maternity leave as their comparator.

However, in the case of *Montull v Instituto Nacional de la Seguridad Social* (C-5/12) arrangements in Spain were under scrutiny, whereby an employed woman had maternity leave and could transfer some of her that leave to the father, but there was no free-standing right to leave for employed men. The wife of the father in this case was self-employed. He brought a claim alleging that the difference in treatment between employed women and employed men was discriminatory. The ECJ dismissed his claim, holding that the difference in treatment was justified under the Equal Treatment Directive. This provides that provisions which are more favourable to women than men will not be discriminatory if they relate to the protection of women during pregnancy and maternity. The fact that a woman could decide to give her partner some of this leave did not detract from this.

This principle was followed in a recent employment tribunal case *Shuter v Ford Motor Company Ltd* (case number 3203504/2013). This case concerned the fact that Ford paid women on maternity leave full pay for 52 weeks. However, employees taking additional paternity leave only received statutory pay. The tribunal adopted the same approach as the ECJ in the *Montull* case, holding that a man on additional paternity leave could not compare himself with a woman on maternity leave. The fact that a woman could choose to end her maternity leave to allow the father to take paternity leave did not affect this.

Claims may also arise around indirect discrimination. The employment tribunal in

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Shuter rejected such a claim in relation additional paternity leave. Ford's policy of paying women on maternity leave full pay during the same time scale that a man could be on additional paternity leave (i.e. after 20 weeks' maternity leave) and who would only receive statutory pay disadvantaged more men than women. The employment tribunal in the circumstances of this case found that the discrimination was justified due to the recruitment and retention of women in the predominantly male workforce. And of course in the case of additional paternity leave far more men than women take leave, whereas this is much less likely to be the case when the new shared parental leave scheme comes in as both men and women would take the leave. It is therefore less likely that a male claimant could demonstrate group disadvantage to men.

Therefore, although there will always be the possibility that a claim may be made, it appears at the moment that the chances of success are limited. However, if a decision is made not to provide occupational shared parental pay, it is advisable to keep the situation under review. If a claimant were able to demonstrate that men suffer a disadvantage then it would be necessary to have arguments that would justify the policy. It needs to be remembered that cost alone cannot justify discrimination. Therefore arguments that an authority cannot afford to increase its costs by introducing a new occupational pay scheme would probably not be sufficient. However, other arguments that could be advanced are that the authority would not wish to reduce occupational maternity pay as this is a valuable recruitment and retention tool. Local government pay occupational half pay on the basis that a woman will return to local government for three months, and hopefully continue thereafter, and it is therefore designed to retain her skills and knowledge in the sector. Given the fact that the workforce is predominantly female, this is an important policy. Retaining women in the workforce, without significant breaks away from work, may also help to address in due course any gender imbalance in more senior grades.

Bearing this in mind, consideration should be given to the collection of evidence to back up any justification put forward. For example, records of numbers of employees who receive half pay and do come back to work for at least three months, and also of any employees who take maternity or shared parental leave and do not return, may assist should any claims arise in the future.