



EMPLOYMENT TRIBUNALS

Claimant: Mr R Wooder

Respondent: Jaguar Land Rover Limited

Heard at: Manchester by CVP **On:** 9 September 2020

Before: Employment Judge Holmes (sitting alone)

Representatives

For the claimant: In person

For the respondent: Miss K Barry, Counsel

RESERVED JUDGMENT ON PRELIMINARY HEARING

It is the judgment of the Tribunal that:

- 1.The claimant's claims of indirect sex discrimination are struck out as having no reasonable prospects of success.
- 2.The determination of whether the claimant's claims of direct sex discrimination have no reasonable prospects of success , and should be struck out pursuant to rule 37(1) of the 2013 rules of procedure, is postponed.
- 3.The claims are further stayed until the determination of the appeal proceeding in the Employment Appeal Tribunal in **Price v Powys County Council UKEAT/0133/20/LA** or further order;
- 4.The respondent may , by giving 14 days written notice to the Tribunal and the claimant , seek to have the determination of its application concluded.

REASONS

1. The "Code "V" in the heading indicates that this was a remote hearing by CVP , to which the parties have consented. A face to face hearing was not held because both parties were able to deal with the hearing remotely. The respondent provided the Tribunal , and all other parties with a copy of the bundle, which was in hard copy format. Whilst the Tribunal had by email of 6

April 2020 directed that the respondent must provide written submissions to the claimant and the Tribunal no later than 14 days before the hearing, this had not been done. The claimant was directed to prepare his submissions in response, and submit them to the Tribunal and the respondent no later than 7 days before the hearing. He had, of course, been unable to do so. It was unfortunate that the Tribunal's directions had not been carried out (and was certainly not Ms Barry's fault), but not, she submitted, fatal to the hearing carrying on.

2. The Employment Judge asked the claimant if he was content to proceed, and wished for a postponement so that he could receive and properly consider, and respond to, the respondent's submissions. Ms Barry urged the Tribunal to carry on with the hearing, saying that she had little to add to the respondent's application, to which the claimant had already responded in correspondence, and her focus would be upon the Court of Appeal's judgment in **Ali v Capita Consumer Management Ltd and Hextall v Chief Constable of Lincolnshire Police [2019] IRLR 695**, (hereinafter referred to as "**Ali/Hextall**"), a copy of which was in the bundle and had been provided to the claimant.
3. The claimant, after time for consideration, did not object to the respondent's application to proceed, and the Employment Judge accordingly did hear the issue. The Tribunal reserved its judgment, and in the meantime has ascertained the position in relation to an appeal against an Employment Tribunal judgment which raises similar issues, **Mr B Price v Powys County Council Case No. 16013312/2018**. It has taken some time to ascertain the position, but the Employment Judge has now had sight of the Grounds of Appeal and the order made by Eady, J. on the sift. This has caused some delay in promulgation of the judgment, for which the Tribunal apologises.

The claims.

4. The undisputed facts are that the claimant is employed by the respondent at its Halewood factory. He complains that, following the birth of his son, he wished to take time off beyond his initial paternity leave. This would have been shared parental leave. Had he taken that leave, he would only have been paid at the statutory rate of £142 per week. He could not afford to do this so did not take the leave. His complaint is that a mother on maternity leave is in a much better position, in that she would be paid at the full enhanced rate for 20 weeks. He claims that this is direct, or indirect, discrimination. In relation to the former he relies on actual comparators.
5. The PCP for his indirect discrimination claim was identified, in the first preliminary hearing, as being the respondent's practice of not paying enhanced pay for fathers on shared parental leave, or, put another way, paying only the statutory rate of pay for those taking a period of shared parental leave, as was identified as being the relevant PCP in **Ali/Hextall**. The respondent denies direct and indirect discrimination. In relation to the latter, it will plead, in the alternative, justification.

The Respondent's submissions.

6. In support of the respondent's case, reference was made to the Court of Appeal's judgment in *Ali/Hextall*. Ms Barry, for the respondent, put the respondent's application on three bases. The first was that the claims of direct discrimination cannot succeed in the light of *Ali/Hextall* because the claimant has identified the wrong comparators, and there are no appropriate hypothetical comparators. The correct comparator would be a woman who applied for SPL, who would be paid it at the same rate as the claimant, so would have been treated exactly the same.
7. If, however, that was not sufficient alone, then her second contention was that any indirect claims must also fail. Miss Barry pointed out a passage in the judgment of the Court of Appeal's judgment, which reads as follows:

"116. The ET were right to say that it is not the PCP which causes a particular disadvantage to men when compared with women. Mr Hextall's true case, as the ET observed, is that men in his position are disadvantaged not by the PCP but by the fact that only a birth mother is entitled to statutory or contractual maternity pay. To formulate the PCP as "paying only the statutory rate of pay for those taking shared parental leave" is ingenious but entirely artificial. Mr Hextall's complaint is in reality an attack on the whole statutory scheme, in turn derived from EU law, under which special treatment is given to birth mothers. Moreover, the argument on behalf of Mr Hextall ignores the fact that shared parental leave is not available at all (whether to the father or to the mother) unless the mother has decided to terminate her maternity leave."

That PCP was the same one that the Tribunal identified in the preliminary hearing held on 11 February 2019 at para.(6) of the Case Summary. The Court of Appeal has made it clear that this is an incorrect PCP. Further, it is not the PCP which puts men in a disadvantaged position. Thus, the claimant in this case cannot rely upon this PCP either.

8. Finally, in the third alternative, she submitted that the Court of Appeal made it clear that, even if the claimant could raise an indirect discrimination claim on the facts, it would have found any disadvantage to the claimant was justified as a proportionate means of achieving a legitimate aim, namely the special treatment of mothers in connection with pregnancy or childbirth (see para. 112 of the Court of Appeal's judgment).
9. In summary, the claimant could not distinguish his situation from those of the claimants in *Ali/Hextall*. The fact of more generous provision by the respondent was a red herring, his arguments as to the relevant PCP, and the relevance of any enhanced adoption leave provision, were flawed, and the claims should now be struck out.

The claimant's submissions.

10. The claimant is not legally qualified or represented. His submission basically was to the effect that he considered that *Ali/Hextall* could be distinguished, because the respondent in these proceedings offered more than the statutory minimum by way of enhanced maternity pay and leave, and had an enhanced

adoption leave scheme. That , he considered, left it open as to whether the judgment in **Ali/Hextall** was in fact fatal to his claims.

11. Whilst not appearing in the judgment , he recalled it being put in argument by one of the members of the Court of Appeal (he watched the hearing which was broadcast live) what the position would have been in that case had the employer operated a scheme which gave more than the 18 weeks of statutory benefits, with the implication , at least, that this may be an important distinction. It was not one at issue in **Ali/Hextall** because neither employer in those cases did so.
12. He also made reference to a case proceeding in the Wales Region, **Mr B Price v Powys County Council Case No. 16013312/2018** , (hereinafter "**Price**") on the same , or similar, issues. Although the claimant had been unsuccessful , the claimant believes that he has appealed. He was unable to provide the Tribunal with the judgment of the Employment Tribunal, but the judgment, or rather the Reasons, have now been obtained and read by the Tribunal.
13. The parties were invited to make any further submissions in relation to those Reasons , which were provided to them. The claimant did so by email of 27 September 2020, to which he attached a 9 page document setting out his argument why the **Price** case, which is apparently proceeding to a full hearing may yet, if the appellant claimant is successful on appeal, afford him a sustainable claim. In support of this contention he points out that the Court of Appeal in **Ali/Hextall** were not considering cases where the employer provided benefits to mothers which went beyond 14 weeks enhanced maternity leave (**Ali**), or 18 weeks enhanced maternity leave (**Hextall**). Neither employer offered enhanced additional maternity leave.
14. The respondent in this case, however, offers 52 weeks enhanced maternity leave, which could be split.
15. Further , the respondent in this case offers 41 weeks enhanced (paid) adoption leave. The claimant in **Price** also relied upon the fact that his employer too offered enhanced adoption leave. He relied upon, as one of his comparators, a female worker in receipt of adoption pay. He was, however, unsuccessful, as the Tribunal (at paras. 48 to 57 of its Reasons) rejected this worker as a correct comparator.
16. He also cites comment from legal commentators (Lexology website, quoting an employment lawyer) to the effect that as **Ali/Hextall** was concerned only with the first 14 (or 18) weeks of maternity leave there remained the possibility of an argument that the nature of maternity leave changes after the first 14 or 26 weeks, and that enhancement beyond that point may yet be discriminatory. (That appears to be the same point apparently raised in the course of argument by one of the members of the Court of Appeal, referred to by the claimant, but not considered any further , as being outside the scope of the facts in **Ali/Hextall**) Reference is also made to the fact that in **Ali/Hextall** there was no enhanced adoption pay offered by the employer , which may afford a further ground for distinguishing the Court of Appeal's judgment.

The respondent's reply.

17. Miss Barry for the respondent by email the same day made further submissions on the potential effect of the **Price** appeal. In answer she contended that there was no basis for distinguishing **Ali/Hextall** in this way.
18. She referred the Tribunal to paras. 36 to 43 of the Tribunal's Reasons. She pointed out that the Tribunal rejected the claimant's chosen comparators, as they were in materially different circumstances. The claimant's situation in this claim cannot be distinguished from the claimants' in **Ali/Hextall** and in **Price**. The correct comparator in both cases would have been a female worker who had applied for SPL, and in this situation that comparator would have been paid at the same statutory rate, and the treatment would have been the same.

Discussion and ruling.

19. Many employers pay enhanced rates of maternity pay. By no means all such employers are willing to apply the same (or indeed any) enhancements to payments in respect of SPL. This leads to the question whether failure to do so may lead to potential liability for sex discrimination. This issue arose in relation to the predecessor benefit, Additional Paternity Leave, in the employment Tribunal case of **Shuter v Ford Motor Co (Case 3203504/13), [2014] EqLR 717**. Women employed by the respondent were entitled to enhanced rates of maternity pay, but men taking Shared Parental Leave under the predecessor scheme were not afforded any enhancement of the flat rate of ASPP. A male employee claimed that this constituted sex discrimination.
20. The Tribunal rejected the claim. It first rejected the claim of direct sex discrimination, holding that the correct comparator was not a woman on maternity leave but a woman on APL, who would on the facts have been paid at the same rate as the man had received. The alternative claim of indirect discrimination failed on the employer's defence of justification, in this case the need to recruit and retain women in a predominantly male workforce. The Tribunal also indicated that if it had found that the relevant comparator for the direct discrimination claim was a woman on maternity leave, it would have held that the more favourable treatment of the woman fell within the provision of the Equality Act 2010 permitting more favourable treatment of women in connection with pregnancy or childbirth (see EqA 2010 s 13(6)(b)).
21. The issue of whether an employer which pays enhanced maternity pay to a woman on maternity leave, but does not similarly enhance the pay of a male employee who is taking SPL, was unlawfully discriminating in some way was precisely what was considered by the Court of Appeal in two joined appeals: **Ali v Capita Consumer Management Ltd and Hextall v Chief Constable of Lincolnshire Police [2019] IRLR 695**. The firm and comprehensive answer was 'no'.
22. In **Ali** the employee wished to take leave to care for his new child, following his wife returning to her work. Whereas his employer would have paid a new mother enhanced maternity pay for up to 14 weeks, it would not pay him that enhanced rate. He claimed direct sex discrimination. The Employment Tribunal considered

that the purpose of maternity leave is partly to cater for the implications of childbirth for the mother, but partly also to enable her to care for the child. During the first two weeks after the child is born, maternity leave is compulsory. But it held that, in respect of the period after that, Mr Ali could compare himself with a woman taking maternity leave to provide care, and on that basis his claim succeeded.

23. The EAT (Slade J) overturned that decision. It held that the purpose of both maternity leave and maternity pay, in both domestic and Community law, is purely to secure the well-being of a woman during pregnancy, childbirth, and following childbirth. This was said to be clear from *Montull v Instituto Nacional de la Seguridad Social*: C-5/12, [2013] IRLR 976, [2013] ICR 1323; *Hofmann v Barmer Ersatzkassen* [1985] ICR 731; and *Gillespie v Northern Health and Social Services Board* ECLI:EU:C:1996:46, [1996] ICR 498. A father seeking paid leave to care for the child is therefore not in comparable circumstances for the purposes of EqA 2010 s 23(1). In any event, maternity pay fell within the exemption in EqA 2010 s 13(6)(b) for special treatment afforded to women in connection with pregnancy or childbirth. *Eversheds v De Belin* [2011] IRLR 448, [2011] ICR 1137 could therefore be distinguished. The proper comparison was with a woman taking advantage of shared parental leave, but that was afforded to men and women on the same terms. The overall conclusion, therefore, was that there was no direct discrimination.
24. In *Hextall*, a police officer received shared parental pay at the statutory rate, but complained that a new mother would have been entitled to maternity pay at an enhanced rate. He claimed indirect discrimination. The EAT (Slade J) considered that his claim was properly so framed, rather than falling within the province of the equality of terms provisions of EqA 2010 Part 5 Ch 3. Identifying the provision, criterion or practice (PCP), as paying no more than SSPP to both men and women, pointed to the conclusion that new or prospective mothers must be included in the pool alongside new or prospective fathers. It would have remitted the matter for consideration of whether the application of that PCP to that pool does put men at a disadvantage.
25. The Court of Appeal gave a single decision of the whole Court. In *Ali* it dismissed the appeal and essentially upheld the reasoning of the EAT. In particular, it held that the purpose of the entire period of maternity leave (in both domestic and Community law) is for more than just childcare. It rejected arguments that developments since the decision in *Hofmann* meant that the law had moved on, and noted that the reasoning in the much more recent case of *Montull* essentially mirrored that in *Hofmann*. In any event (again agreeing with the EAT), the effect of EqA 2010 s 13(6)(b) was to preclude a direct discrimination claim.
26. In *Hextall* the Court of Appeal held, first, that the claim was properly characterised as being for equal terms. That meant it could not also be framed as one of indirect discrimination (because of the operation of EqA 2010 s 70). Further, the equality of terms claim itself foundered on the rock of EqA 2010 Sch 7 para 2, which provides that an equality clause has no effect in relation to any special treatment given to women in connection with pregnancy or childbirth.

The court did not regard it as of any significance that, in relation to indirect discrimination, there is no provision, equivalent to Sch 7 para 2 or s 13(6)(b).

27. For good measure, the court also held that, even if there could have been an indirect discrimination claim, it would have found (disagreeing with the EAT) that women on maternity leave should not be included in the pool, and that there would therefore have been no disadvantageous treatment as between men and women in the pool. Even if that was wrong, it would have found that any such disadvantage would have been justified, having regard to the purposes of maternity leave, as found by it in the Ali appeal.
28. It was the court's conclusion as to the unique policy purposes behind maternity leave that drove this overall decision. In Ali, the Intervenor in both cases, Working Families, had argued that a different view might have been taken of the purpose of maternity leave in the period after the first 26 weeks of ordinary maternity leave. However, the Court of Appeal's decision effectively shuts the door on any such argument. The court also indicated that allowing for the possibility of an indirect discrimination claim, and employers having to justify enhanced payment arrangements on a case-by-case basis, would also have undermined the policy of according unique protection to birth mothers in connection with pregnancy and childbirth.
29. The claimant in this case accepts that the effect of this judgment is that his claims cannot succeed, unless he can distinguish his case from these cases before the Court of Appeal. The basis upon which he seeks to argue that the facts of his case may lead to a different result is the fact that the maternity pay scheme operated by the respondent in favour of women on maternity leave is an enhanced scheme, providing benefits considerably over and beyond the statutory minimum. Further he relies upon the enhanced adoption pay scheme, arguing that this is more akin to the shared parental leave provision. He considers that this warrants (or may warrant, it only has to be arguable) the Tribunal taking a different approach at a full hearing of his claims.
30. The Tribunal has considered this contention. It is, with respect based upon a slightly false premise. The claimant seems to be under the impression that the two maternity pay schemes in Ali/Hextall were not enhanced schemes. They were. As the following passages of the judgment of the Court of Appeal show:

The facts in Ali.

“The Social Security Contributions and Benefits Act 1992 (“the SSCBA”) and the Statutory Maternity Pay (General) Regulations 1986 (SI 1986/1960) (“the Statutory Maternity Pay (General) Regulations”) together define the duration and rate of pay during statutory maternity leave. Maternity pay is available for 39 weeks. For the first 6 weeks it is payable at the higher of 90% of the mother’s average weekly earnings or the prescribed rate (£138.58 in April 2016), and for the following 33 weeks it is payable at the lower of those two rates.

19. Mr Ali is an employee of Capita, the respondent. Mr Ali’s employment was transferred to Capita from Telefonica in July 2013. Transferred employees were

entitled to maternity pay under a Telefonica policy adopted in December 2011. So far as relevant, that policy provides that female employees are entitled to maternity pay of up to 39 weeks, with the first 14 weeks paid at full pay for the relevant employee, followed by 25 weeks of lower rate statutory maternity pay.

20. Telefonica adopted a shared parental leave policy in March 2015. It allows for parents to share up to 50 weeks' leave and 39 weeks' pay if the mother brings her maternity leave and maternity pay to an end and opts instead for shared parental leave. The rate of pay during the shared leave is that prescribed by the Shared Parental Pay Regulations.

The facts in Hextall.

Leicestershire Police Force adopted a maternity leave policy mirroring the statutory entitlements. The policy also provided for "Occupational maternity pay", during 18 weeks of maternity leave, paid on full pay. The Police Force also adopted a shared parental leave policy mirroring the statutory shared parental leave scheme.

Mr Hextall is a serving police constable. He joined Leicestershire Police Force in 2003. His wife, who runs her own business, gave birth to their second child on 29 April 2015. Mr Hextall took shared parental leave from 1 June to 6 September 2015. Over that 14 week period he was paid the statutory rate for shared parental leave. He brought a claim alleging that the policy of only remunerating shared parental leave at the statutory level caused particular disadvantage to men and was unlawful discrimination.

31. Thus, the Court of Appeal was not troubled by the fact that the female comparators in **Ali/Hextall** received enhanced entitlements. That point alone is insufficient to distinguish **Ali/Hextall**.
32. The conclusion to which this Tribunal is driven is that, as far as comparators who are provided with maternity benefits during the period of up to 26 weeks, are concerned, the claimant would be bound to fail, for the reasons given by the Court of Appeal.
33. There are, however, two aspects upon which there may have been grounds for distinction. The first is in relation to the position in relation to female comparators whose maternity leave is enhanced considerably beyond the statutory maximum period of 26 weeks. That is the position here, where the respondent enhances to 52 weeks, and even beyond. That the nature of maternity leave changes, and loses its health and safety rationale, at some point during the 52 weeks was suggested in the EAT judgment in **Ali/Hextall**, but was rejected by the Court of Appeal's judgment, which endorsed the rationale in **Hofmann**. That argument, given the refusal of the Supreme Court of permission to appeal, is not open to this claimant.
34. The other relates to the respondent's provision of enhanced adoption leave. That was not a consideration in **Ali/Hextall**, but was advanced by the claimant in **Price**. It failed, but is the subject of an appeal to the EAT.

35. The Tribunal's enquiries have revealed that the **Price** appeal is proceeding to a full hearing, under reference **UK/EAT0133/20**. The EAT (Eady, J.) on 6 August 2020 allowed the appeal to proceed to a full hearing on Grounds 6(b) and (c) of the Notice of Appeal.

36. Those are:

“(b) The Employment Tribunal erred in law in rejecting the Claimant’s second comparator namely a female employee on adoption leave in receipt of adoption pay in that the factors referred to and relied on by the Employment Tribunal in paragraphs 53,54 and 55 of its judgment failed to have regard to the underlying purpose of adoption leave which is the same or similar to that of shared parental leave, namely the facilitation of childcare.

(c) Further, the Employment Tribunal erred in law in paragraphs 53,4 and 55 of its judgment in treating one or more of the conditions attached to taking adoption leave and/or parental leave referred to in paragraph 53 and 54 of its judgment as a ‘material difference’ for the purpose of Section 23 of the Equality Act 2010 as the factors do no more than set out the terms on which adoption leave and/or parental leave can be taken and therefore do not amount to a ‘material difference’ for the purpose of Section 23 of the Equality Act 2010. In particular the Judge erred in taking into account:-

- (i) The factor referred to in Paragraph 53(a) is immaterial;*
- (ii) The factor referred to in Paragraph 53(b) is immaterial;*
- (iii) The factor referred to in Paragraph 53(c) is immaterial;*
- (iv) The factor referred to in Paragraph 53(d) is immaterial;*
- (v) The factor referred to in Paragraph 53(e) is immaterial;*
- (vi) The factor referred to in Paragraph 54) is immaterial; “*

37. No date for the hearing is yet fixed, as far as this Tribunal is aware.

38. The conclusion that the Tribunal has reached is this. If the claimant cannot distinguish his position from that of the claimants in the **Ali/Hextall** appeal, his direct discrimination claims cannot succeed. There are, however, two bases upon which he may be able to do so, which are, or appear to be, at issue in the **Price** appeal. The fact that that appeal is proceeding to a full hearing indicates that the EAT considers that one or both of the points is at least arguable, and if the claimant succeeds in that appeal, such a judgment may be of assistance to the claimant, and applicable to his case. If the appeal fails, however, that would seem to be the end of any prospect that this claimant may have of these claims succeeding.

39. Whilst the **Price** appeal is proceeding, providing the claimant with at least a scintilla of a chance of success, therefore, this Tribunal considers that it would be premature to rule that these claims have no reasonable prospect of success. It will not, therefore strike them out, but will postpone this application generally pending the determination of the appeal in **Price**. There is no point in these claims proceeding any further until the EAT has determined the **Price** appeal. If

that appeal fails, the respondent can restore this application, or the claimant may then accept that his claims cannot succeed, and withdraw. If the **Price** appeal succeeds, however, these claims can probably proceed to a full hearing, subject to any further argument that the respondent may wish to raise in the light of any judgment of the EAT in the **Price** appeal.

40. It is, however, clear, that no indirect claims can succeed, by virtue of the effect of s.70 of the Equality Act 2010, considered and discussed by the Court of Appeal in paras. 108 to 113 of its judgment in **Ali/Hextall**. Those claims are struck out.
41. The remaining claims are accordingly stayed pending the determination of the **Price** appeal, or further order.

Employment Judge Holmes

DATE : 7 October 2020

RESERVED JUDGMENT SENT TO
THE PARTIES ON
9 October 2020

FOR THE TRIBUNAL OFFICE