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Legal Opinion: Additional paternity leave

The Additional Paternity Leave Regulations 2010, which apply in relation to children due, or placed for adoption, on or after 3 April 2011, confer on fathers (or the partner of the mother or adopter) the benefit of up to 26 weeks of additional paternity leave, which can be taken at any time between the 20th and the 52nd week after the child is born or placed for adoption.

Additional statutory paternity pay is available only to the extent that the child's mother returns to work with an amount of her statutory maternity pay entitlement intact. The Regulations give fathers who opt to take additional paternity leave similar protection to mothers on statutory maternity leave, including the right to be given preferential treatment for available posts in redundancy situations.

Although the Regulations are as yet unchallenged, it is already clear that they will give rise to some interesting questions for the courts and tribunals in the near future.

Will it be discriminatory for an employer that pays enhanced maternity pay not to pay fathers enhanced paternity pay?

The previous Government thought not. In its view, given that women could also take additional paternity leave (for example, the civil partner of the birth mother), in deciding whether or not there was direct sex discrimination, the correct comparison would not be between a man on additional paternity leave and a woman on statutory maternity leave but between a man on additional paternity leave and a woman on additional paternity leave. In such a comparison, providing that men and women were treated equally, a claim for direct discrimination at least would be unlikely to succeed. However, that the courts and tribunals would take this view is far from certain and, despite the Government's position, a challenge on this point is a possibility.

What will be the effect of recent European case law?

Under European law, there is an exception that provides that it is lawful to discriminate in favour of mothers where that is intended to ensure the "protection of the biological condition of the woman following pregnancy or the protection of the special relationship between a mother and her child". The recent European Court of Justice case *Roca Alvarez v Sesa Start Espana ETT*, concerned a Spanish law that permitted all mothers to take time off for feeding a baby less than nine months old, whereas fathers were permitted to take the leave only if the child's mother was also an employee. This discrimination in favour of women was found to be unlawful given that: in reality, the purpose of the leave had become to spend time with the baby; fathers were equally capable of fulfilling that function; and it was not therefore something that genuinely fell within the exception. The decision in *Roca* could encourage employees on additional paternity leave seeking to challenge the lawfulness of any enhanced rights given to mothers on maternity leave - and particularly during the later parts of that leave - on the basis that the reason for any positive discrimination would not genuinely fall within the exception.

What problems will arise from giving preference to fathers in redundancy scenarios?

While, for obvious reasons, this has never been a concern with mothers taking maternity leave, one possible problem is that employers could see fathers opting to take paternity leave tactically in order to avoid redundancy. This may become a standard tactic for eligible fathers in such circumstances. However, a father would need to get wind of a potential redundancy situation in good time in order to give sufficient notice (eight weeks) of his intention to take the leave, therefore such cases are likely to be few in practice.

The second potential problem is the question of how employers should treat the competing rights of mothers and fathers on maternity, paternity and adoption leave in a redundancy situation. Clearly, arguments will arise over who should be given preference if more than one employee is entitled to be offered a suitable alternative vacancy; clear guidance will have to be developed through case law. Any employer

unfortunate enough to be faced with such a situation in the immediate future should seek professional legal advice.

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