Appeal No. UKEAT/0133/20/LA (V)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 26 January 2021
Judgment handed down on
31 March 2021

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

MS K BILGAN

MISS S M WILSON CBE

MR B PRICE APPELLANT

POWYS COUNTY COUNCIL RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	Mr Anthony Korn (Of Counsel) Instructed by: Berry Smith LLP Haywood House Dumfries Place Cardiff CF10 3GA
For the Respondent	Mr Jonathan Walters (Of Counsel) Instructed by: Powys County Council Legal Service Llandrindod Well Powys LD1 5LG

SUMMARY

MATERNITY RIGHTS ANS PARENTAL LEAVE

When the Claimant and his wife found out that they were to have their first child, they decided together that the Claimant would stay at home to care for the baby while his wife returned to work. The Respondent's Policy on Shared Parental Leave provided for those taking such leave to receive an amount equivalent to statutory maternity pay, whereas those on Adoption Leave were entitled to full pay. The Claimant compared his position to that of a female employee on Adoption Leave and contended that the Respondent's Policy gave rise to direct discrimination. The ET dismissed the claim. It followed the decision of the Court of Appeal in **Capita Customer Management Ltd v Ali** [2019] EWCA Civ 900, in concluding that there were material differences (within the meaning of s.23 of the Equality Act 2010) between the scheme for Adoption Leave and that for Shared Parental Leave, so as to render inappropriate the Claimant's chosen comparator.

Held, dismissing the appeal, that the predominant purpose of Adoption Leave was not simply to facilitate childcare and it was not the same as Shared Parental Leave. Furthermore, although one of the factors identified by the Tribunal as giving rise to a material difference was incorrect, it had reached correct conclusions in law in respect of the other matters relied upon, and its overall decision that there were material differences between the Claimant and his chosen comparator was correct. Accordingly, there was no prima facie sex discrimination in paying the Claimant less under the terms of the Respondent's Policy than the amount that a female employee would receive when taking Adoption Leave.

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

Introduction

1. The issue in this appeal is whether it is discriminatory for a male employee on shared parental leave ("ShPL") to be paid less than a female comparator on statutory adoption leave ("AL"). The Employment Tribunal sitting in Pontypridd ("the Tribunal"), Employment Judge Brace presiding, found that the Appellant, Mr Price, had failed to establish his claim of direct sex discrimination because there were material differences between his circumstances and those of the comparator. We shall refer to the parties as "the Claimant" and the "Respondent" as they were below.

Background

2. The Claimant is employed by the Respondent. When the Claimant and his wife found out that they were to have their first child, they decided together that the Claimant would stay at home to care for the baby while his wife returned to work. Accordingly, about six months before the due date, the Claimant began to inquire about his entitlements under the Respondent's Shared Parental Leave Policy ("the ShPL Policy"). By April 2018, the Claimant confirmed that he and his wife were considering how to split any ShPL entitlement, and, in order to be able to make an informed decision, sought a monthly breakdown of the pay that he would receive if he were to take 37 weeks' ShPL, and his wife just the two-week period of compulsory maternity leave.

3. The process of providing the Claimant with the requested information took some time. Eventually, in July 2018, the Claimant was informed that, in accordance with the Respondent's

policy, he would only be entitled to an amount equal to statutory maternity pay ("SMP"). The Claimant did not proceed with his application for ShPL.

4. The Claimant contended that the Council's policy was discriminatory in that employees on Statutory Maternity Leave ("ML") and on AL were entitled to pay at higher rates during their leave periods than those on ShPL. The Respondent's Supporting Working Parents Policy ("the SWP Policy") provided that the rates of pay for those on ML and AL with more than a year's service were: 6 weeks at 90% of average weekly earnings; followed by 12 weeks at half pay plus SMP; followed by 21 weeks at SMP. The Claimant lodged a claim in the Tribunal for direct and indirect discrimination on the grounds of gender. The indirect discrimination claim was based on the delays that had occurred in providing the Claimant with the requested information.

5. The Claimant's claim was heard by the Tribunal in September 2019.

The Tribunal's Decision

6. The Tribunal set out the principal features of the Respondent's policies as follows:

> **"15. The respondent's "Supporting Working Parents" policy provided that:**
> **a. an adopter i.e. a person who has been matched by an employment agency for the purposes of taking statutory adoption leave, is entitled to the same provisions as a woman on maternity leave.**
> **b. In the case where two people have been matched jointly, including same sex partnerships, the adopter is whichever of them has opted to be the child's adopter for the purposes of taking statutory adoption leave.**
> **c. Maternity and adoption pay (under the same policy,) is the same i.e. an enhanced rate to the statutory regime. Therefore, only mothers on maternity leave and the adopter (either male or female,) who has opted to be the child's adopter for the purposes of statutory adoption leave, has the enhanced adoption pay.**
> **d. Employees who are biological or adoptive fathers or same sex partners who are fully involved in the upbringing of the child and are taking time off to support their partner taking maternity or adoption leave are eligible for ordinary Paternity and Partner Leave subject to eligibility.**

e. Additional Paternity and Partner leave pay is also available as statutory paternity pay.

16. The Council has a shared parental leave policy available to mothers and adoptive parents of either sex, when a child has been placed for adoption.

17. The amount of shared parental pay depends on the statutory maternity pay or maternity allowance the mother uses up, or statutory adoption pay the adopter uses up in an adoption situation."

7. The Tribunal considered the two comparators initially relied upon by the Claimant: the first was a female worker on ML in receipt of maternity pay; and the second was a female worker on AL in receipt of adoption pay. The Tribunal, following the judgment of the Court of Appeal in **Capita Customer Management Ltd v Ali** [2019] EWCA Civ 900, rejected the first comparator on the basis that there was a material difference between the Claimant's circumstances and those of his comparator. As to the second comparator, the Tribunal concluded as follows:

"51. Whilst we accepted, as has been put by the claimant, that a worker on [AL] does not have the fact of childbirth, the biological impact of childbirth or the trauma of childbirth, we did not conclude that in all other aspects they were not materially different to a male worker on [ShPL], essentially for the reasons provided to us by Mr Walters, which was reflected in many ways with some of the decision in Ali at paragraph 73.

52. We also took note of the fact that employees, who had availed themselves of the [AL], were to fulfil the requirements of the formal adoption procedure such as counselling, screening, interviews, meeting the child at a time when the child was under full-time care of an adoptive parent. This is reflected in the policy of the Council at paragraph 5 and also Regulation 10(2) of Curtailment Regulations.

53. We concluded that a female employee on adoption leave was materially different to an employee on [ShPL] as:

a. [AL] was in part compulsory, whereas [ShPL] was entirely optional,

b. [AL[could begin before placement, whereas [ShPL] could not;

c. [AL] was an immediate entitlement on placement, whereas [ShPL] was not;

d. [ShPL] could only be taken with the partner's agreement to give up [AL];

e. [ShPL] had to be taken within fifty-two weeks of placement and within the period and could be 'dipped in and out'.

54. It was also significant that a woman on [AL] had chosen to be the main adopter for the purposes of Statutory Adoption Leave and would have been the main role in any matters relating to the adoption.

55. Whilst the similarities were more marked between an adopter and the claimant, than a woman on maternity leave and the claimant, we concluded as a result of these findings, that the comparator of a female on [AL] was not materially the same.

56. In the circumstances, we concluded that the correct comparator was a female worker who had applied for [ShPL] in an adoption situation i.e. where the partner had taken the statutory adoption leave.

57. We further concluded that this comparator would have had the same treatment since both would have been paid at the same statutory rate."

8. Accordingly, the claim of direct discrimination was dismissed.

9. The claim of indirect discrimination was also dismissed, the Tribunal accepting that the delays were down to genuine errors and not because of any provision, criterion or practice on the part of the Respondent.

10. The Claimant appeals against the judgment in respect of direct discrimination only.

Legal Framework

11. Section 13 of the **Equality Act 2010 ("EqA")** provides:

> **"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."**

12. Gender is a protected characteristic: section 4, EqA.

13. Section 23, EqA provides:

> **"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."**

14. Whilst authorities over the years have explored what is meant by the need for there to be 'no material difference', the Court of Appeal stated recently in **Ali** at [62] that:

> **"62. So far as concerns the appropriate comparator for Mr Ali in relation to EA s 13(1), that is to say for the purpose of assessing whether Mr Ali was treated less favourably than Capita treats others, EA s 23(1) provides that there must be no material difference between the circumstances relating to each case. [Counsel] referred us to Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, [2003] NI 174, Lockwood v Department of Work and Pensions [2013] EWCA Civ 1195, [2013] IRLR 941 and R (on the application of Coll) v Secretary of State for Justice [2017] UKSC 40, [2018] 1 All ER 31 but they do not appear to us to add anything about the requirements of a comparator beyond the plain words of s 23(1). The passages to which she referred us in those cases (which in the case of Shamoon and Lockwood relate to legislation before the enactment of the EA) merely confirm that the situations being compared must**

> **be such that, gender apart in a sex discrimination case, the situation of the man and the woman are in all material respects the same: Shamoon at [4], Lockwood at [33]–[34] and Coll at [32]…"**

15. Thus the sole question to be considered in determining whether the chosen comparator is appropriate is whether there is any material difference between the circumstances of the Claimant and those of the comparator. A difference that is material would be one that is significant and relevant: see **Rainey v Greater Glasgow Health Board** [1987] IRLR 26 at [14] per Lord Leith of Kinkel (dealing with the meaning of similar wording used in s.1(3) of the Equal Pay Act 1970).

16. Given that the Claimant in this case seeks to compare his position with that of a comparator on AL it is necessary to consider the relevant provisions of the regulations governing each type of leave and on which the Respondent's policies are closely based. It was not suggested by the Claimant that the policies had incorrectly implemented the requirements under the various regulations or that the entitlements thereunder were not at least as beneficial as those under the regulations.

17. We begin with AL.

AL

18. This is governed by the **Paternity and Adoption Leave Regulations 2002** ("**PALR**"). Regulation 15, PALR confers an entitlement to ordinary AL and provides:

> **"15 Entitlement to ordinary adoption leave**
>
> **(1) [Subject to paragraph (1A), an] employee is entitled to ordinary adoption leave in respect of a child if he**
>
> **(a) satisfies the conditions specified in paragraph (2), and**
> **(b) has complied with the notice requirements in regulation 17 and, where applicable, the evidential requirements in that regulation.**
>
> **[(1A) An employee is not entitled to be absent from work under paragraph (1) in relation to a child if the employee has already taken ordinary adoption leave as a result of that child being placed, or expected to be placed, with the employee under section 22C of the Children Act 1989.]**
> **(2) The conditions referred to in paragraph (1) are that the employee**

(a) is the child's adopter; [and]
(b)
(c) has notified the agency that he agrees that the child should be placed with him and on the date of placement.

(3)
(4) An employee's entitlement to leave under this regulation shall not be affected by the placement for adoption of more than one child as part of the same arrangement."

19. A child's 'adopter' for these purposes means: "a person who has been matched with the child for adoption, or, in a case where two people have been matched jointly, whichever of them has elected to be the child's adopter for the purposes of these Regulations": Reg 2(1), PALR. A person elects to be a child's adopter for the purposes of PALR in a case where the child is matched with him and another person jointly, if he and that person agree, at the time at which they are matched that he and not the other person will be the adopter": Reg 2(4A), PALR.

20. It is clear from these provisions that adoptive parents have a clear choice as to which of them will be the "adopter" for the purposes of PALR. That choice is undoubtedly a significant one given that it is the adopter who can exercise the right to AL and who can curtail AL.

21. Regulation 16, PALR, deals with the commencement options in respect of ordinary AL. So far as relevant it provides:

"16 Options in respect of ordinary adoption leave

(1) Except in the case referred to in paragraph (2), an employee may choose to begin a period of ordinary adoption leave on:

(a) the date on which the child is placed with him for adoption, or
(b) a predetermined date, specified in a notice under regulation 17, which is no more than 14 days before the date on which the child is expected to be placed with the employee and no later than that date.

…"

22. Reg 18, PALR provides that the duration of an employee's ordinary AL is a period of 26 weeks, and by Reg 19, PALR, an employee taking such leave is entitled during the period of

leave to the benefit of all of the terms and conditions of employment (save in respect of remuneration) which would have applied had he not been absent.

23. Reg 22, PALR makes provision for what is to happen if the placement of a child is disrupted in the course of AL, by reason, for example, of a change in the decision as to placement or the return of the child to the adoption agency by the prospective adopters: see Reg 22(1), (3A), PALR.

ShPL

24. ShPL is governed by the **Shared Parental Leave Regulations 2014** ("**ShPLR"**). Part 2 of the ShPLR contains the provisions for ShPL in the case of birth parents. Reg 4, ShPLR confers an entitlement on the mother to ShPL, and provides:

> **"4 Mother's entitlement to shared parental leave**
>
> **(1) M is entitled to be absent from work to take shared parental leave in accordance with Chapter 2 to care for C if she satisfies the conditions specified in paragraph (2) and P satisfies the conditions specified in paragraph (3).**
> **(2) The conditions are that**
>
> **(a) M satisfies the continuity of employment test (see regulation 35);**
> **(b) M has, at the date of C's birth, the main responsibility for the care of C (apart from the responsibility of P);**
> **(c) M is entitled to statutory maternity leave in respect of C;**
> **(d) M has ended any entitlement to statutory maternity leave by curtailing that leave under section 71(3)(ba) or 73(3)(a) of the 1996 Act (and that leave remains curtailed) or, where M has not curtailed in that way, M has returned to work before the end of her statutory maternity leave;**
> **(e) M has complied with regulation 8 (notice to employer of entitlement to shared parental leave);**
> **(f) M has complied with regulation 10(3) to (5) (evidence for employer); and**
> **(g) M has given a period of leave notice in accordance with regulation 12.**
>
> **(3) The conditions are that**
>
> **(a) P satisfies the employment and earnings test (see regulation 36); and**
> **(b) P has, at the date of C's birth, the main responsibility for the care of C (apart from the responsibility of M).**

(4) Entitlement under paragraph (1) is not affected by the number of children born or expected as a result of the same pregnancy."

25. Regulation 5, ShPLR confers a similar entitlement on the Father or Partner. However, there are additional conditions to be satisfied by the Mother before the entitlement can arise. Those conditions are set out in Reg 5(3)(c) and (d), ShPLR, and provide:

"(3) The conditions are that

(a) M satisfies the employment and earnings test (see regulation 36);
(b) M has, at the date of C's birth, the main responsibility for the care of C (apart from the responsibility of P);
(c) M is entitled to statutory maternity leave, statutory maternity pay, or maternity allowance in respect of C; and
(d) where
(i) M is entitled to statutory maternity leave, she has ended any entitlement to statutory maternity leave by curtailing that leave under section 71(3)(ba) or section 73(3)(a) of the 1996 Act (and that leave remains curtailed) or, where M has not curtailed in that way, M has returned to work before the end of her statutory maternity leave,
(ii) M is not entitled to statutory maternity leave but is entitled to statutory maternity pay, she has curtailed the maternity pay period under section 165(3A) of the 1992 Act (and that period remains curtailed), or
(iii) M is not entitled to statutory maternity leave but is entitled to maternity allowance, she has curtailed the maternity allowance period under section 35(3A) of that Act (and that period remains curtailed)."

26. Thus, the Father is only entitled to ShPL where the Mother, if entitled to ML, has curtailed her entitlement to such leave or has returned to work before the end of that leave. Regulation 6, ShPLR contains detailed provisions for calculating the total amount of shared leave available and how this can be shared between the mother and father or partner. The effect of these provisions was summarised by the Court of Appeal in **Ali** as follows:

"8… These [regulations] enable a mother to bring her maternity leave to an end after the two-week compulsory period (reg 4), and opt instead to take the remainder of the leave under the shared parental leave regime for a maximum of 52 weeks less the two-week compulsory period (reg 6). That 50-week period can be split between the mother and her partner and need not be taken all at once by either partner (reg 6). There is no freestanding entitlement to shared parental leave: the entitlement arises only if and when the mother decides to bring her maternity leave to an end, and there is no requirement that she do so.
9 The Statutory Shared Parental Pay (General) Regulations 2014 (SI 2014/3051) ('the Shared Parental Pay Regulations') make pay available in respect of shared parental leave for a maximum of 37 weeks (the 39-week period provided for in the Regulations less the two-week period of compulsory leave) (reg 10). The weekly entitlement to pay in respect of that leave is the lower of the statutory rate (£138.18 in April 2016) or 90% of the partner's average weekly earnings (reg 40)."

27. Part 3 of the ShPLR deals with the entitlement to ShPL for adopters. The entitlements are structured in a similar way to those under Part 2 of the ShPLR for birth parents. Thus, Regulations 20 and 21 of ShPLR set out the entitlement to ShPL for the adopter and the adopter's partner. As with the case of birth parents, the adopter's partner's entitlement to ShPL can only arise if the adopter is entitled to AL and has curtailed that leave or has returned to work before the period of AL has ended. The Court of Appeal in **Ali** did not consider the position of adoptive parents as it was not necessary to do so in that case: **Ali** at [53].

Curtailment Regs

28. Curtailment of ML and AL is governed by the **Maternity and Adoption Leave (Curtailment of Statutory Rights to Leave) Regulations 2014** ("**Curtailment Regs**"). By Reg 6, Curtailment Regs, the requisite notice to be given to an employer that ML is to be curtailed must specify the date on which the Mother's ordinary or additional ML period is to end. That date must be at least one day after the end of the compulsory ML period; in other words, ShPL cannot commence until after the conclusion of the compulsory ML period.

29. The provisions relating to the curtailment of AL are similar to those in respect of ML. Reg 10 of the Curtailment Regs provides:

> **"10.— Leave curtailment notice: adoption**
> **(1) A leave curtailment notice must be in writing and must state -**
> **(a) where A curtails A's ordinary adoption leave period, the date on which A's ordinary adoption leave period is to end; or**
> **(b) where A curtails A's additional adoption leave period, the date on which A's additional adoption leave period is to end.**
> **(2) The date specified in the leave curtailment notice must be—**
> **(a) at least eight weeks after the date on which A gives the leave curtailment notice to A's employer;**
> **(b) at least two weeks after the first day of A's ordinary adoption leave period; and**
> **(c) where A curtails A's additional adoption leave period, at least one week before the last day of A's additional adoption leave period." (Emphasis added)**

30. Thus, whilst there is no compulsory two-week AL period as there is with ML, any ordinary AL that is taken can only be curtailed after the first two weeks of that leave.

The Grounds of Appeal

31. The Claimant's Notice of Appeal contained three grounds of appeal. The first of these was contingent on permission being granted by the Supreme Court to challenge the decision in **Ali**. That ground fell away once the Supreme Court refused permission. The two remaining grounds, permitted to proceed by Eady J, may be summarised as follows:

a. Ground 1 – The Tribunal erred in rejecting the Claimant's comparator of a female employee on AL in that it failed to have regard to the underlying purpose of AL, which is the same as or similar to that of ShPL, namely the facilitation of child care.

b. Ground 2 – The Tribunal erred in considering that there was a material difference between the Claimant's circumstances and those of his comparator in that the matters relied upon at [53] to [55] of the Judgment are either immaterial or irrelevant.

Submissions

32. Mr Korn, who appears on behalf of the Claimant, submits that the underlying purpose of the ShPLR is to give parents greater flexibility in determining who is responsible for the care of a child, and that they reflect the modern approach which rejects the "outdated stereotype that assumes that men are the breadwinners and the role of women is to stay at home and look after children". Mr Korn noted that the same argument was made by the Appellant before the Court of Appeal in **Ali**, albeit in support of a claim in that case based on a comparison with a woman on ML. He therefore adopted those arguments in **Ali** set out in paragraphs 46, 51, 56 and 57 to

61 in that case, save to the extent that those arguments related to the specific rights guaranteed to women by the Pregnant Workers Directive.

33. The Court of Appeal summarised that argument at [64] of Ali as follows:

> **"64. In short, Ms Omambala's argument was that EA s 13 should not be interpreted in such a way as to undermine the policy and principle that there should no longer be a financial incentive to a birth mother to stay at home as the primary childcarer and to the father to stay at work as the primary breadwinner. She cited Case C-366/99 Griesmar v Ministre de L'Economie, des Finances et de L'Industrie C-366/99, EU:C:2001:648, [2003] 3 CMLR 95 and Roca Álvarez v Sesa Start España Ett SA (C-104/09), EU:C:2010:561, [2011] All ER (EC) 253 as illustrations of the principle that, in determining whether there is unequal treatment on grounds of sex, a distinction must be made between, on the one hand, a legitimate advantage given to a biological mother for objective reasons connected to pregnancy and childbirth and, on the other hand, an illegitimate advantage to such a mother which relates merely to the status of parenthood and to enable her to perform functions which can equally well be carried out by the father or partner. Mr Ali's skeleton argument for the appeal referred to Maïstrellis v Ypourgos Dikaiosynis, Diafaneias Kai Anthropinon Dikaiomaton (C-222/14) EU:C:2015:473, [2015] IRLR 944 for the same point but that case was not mentioned by [Counsel for Mr Ali] in her oral submissions."**

34. The Court of Appeal, however, rejected that submission, stating as follows at [66]:

> **"66. We do not accept her fundamental proposition that, after the compulsory two weeks of maternity leave following birth, the purpose or predominant purpose of statutory maternity leave is the facilitation of childcare. There is nothing in the EU or domestic legislation or the relevant jurisprudence in support of that conclusion. In his oral submissions for the Chief Constable in the Hextall appeals Mr Basu described the following six purposes of statutory maternity leave: (1) to prepare for and cope with the later stages of pregnancy, (2) to recuperate from the pregnancy, (3) to recuperate from the effects of childbirth, (4) to develop the special relationship between the mother and the newborn child, (5) to breastfeed the newborn child (recommended for a period of six months by the World Health Organisation), and (6) to care for the newborn child. We agree with that enumeration of the purposes of statutory maternity leave, the first four of which are endorsed by the ECJ in Hofmann and other cases to which we refer below.**
>
> **67. None of the EU legislation and other instruments, to which Ms Omambala referred, contradict the express purpose highlighted in the PWD that maternity leave of at least 14 weeks before and/or after confinement is given for the safety and health of pregnant workers and workers who have recently given birth or are breastfeeding and that such workers should continue to receive payment or be given an adequate allowance during that period.**
>
> **68. In particular, the Equal Treatment Directive, on which Ms Omambala placed so much weight, particularly because recital (26) referred expressly to the 2000 Resolution, specifically stated that it was without prejudice to the PWD. Recital (24) said as follows, so far as relevant:**
>
> **"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. This Directive should therefore be without prejudice to Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of**

pregnant workers and workers who have recently given birth or are breastfeeding …"
For completeness, although we do not place any particular weight on the point, it is to be noted that the 2000 Resolution was in any event not binding on member states and was in the nature of a statement of aspirations.
72 It is clear, therefore, that at the EU level, the promotion of shared parental leave and the principles underlying it have not in any way qualified the need for, and the reasons for, the minimum period of 14 weeks' maternity leave specified in the PWD, as described in Hofmann. The predominant purpose of such leave is not childcare but other matters exclusive to the birth mother resulting from pregnancy and childbirth and not shared by the husband or partner.
73. Turning to UK legislation, we cannot see any principle of statutory interpretation which would confer on the primary and secondary legislation relating to shared parental leave the intention or effect of making the predominant purpose of statutory maternity leave in weeks 3 to 14 after childbirth the facilitation of child-care. Shared parental leave confers on families, and mothers in particular, a greater choice. As summarised in Capita's skeleton argument on the appeal, there are numerous important differences between shared parental leave and statutory maternity leave: (1) statutory maternity leave is in part compulsory, whereas shared parental leave is entirely optional; (2) statutory maternity leave can begin before birth, whereas shared parental leave cannot; (3) statutory maternity leave is an immediate entitlement, whereas shared parental leave is not; (4) shared parental leave can only be taken with a partner's agreement, whereas statutory maternity leave can be taken regardless of whether the woman has a partner or of that partner's views; (5) statutory maternity leave is acquired through pregnancy and maternity, whereas shared parental leave is acquired by a mother choosing to give up statutory maternity leave and effectively to donate it as shared parental leave; (6) a birth mother is entitled to statutory maternity leave and statutory maternity leave even if there is no child to look after, whereas, for a father or partner to take shared parental leave, there must be a child to look after.
74. Shared parental leave does not alter the predominant purpose of statutory maternity leave. Consequently, as Mr Burns submitted, the proper comparator for Mr Ali for the purposes of EA s 13(1) is not a female employee who wishes to leave work to look after her child but a female worker who is on shared parental leave." (Emphasis added)

35. Mr Korn's submission is that, by contrast with the conclusion of the Court of Appeal in relation to ML, the predominant purpose of AL *is* childcare. As such, AL is directly comparable to ShPL, and a male taking ShPL should not be treated any differently from a female taking AL.

36. Mr Korn submits that, leaving aside the special provision made for women during the first 14-week ML period, the effect of the Court of Appeal's decision in **Ali** and the Tribunal's decision in the present case is that, in economic terms, it undermines the real and effective choice of those parents who choose to share responsibility for childcare in financial terms and thereby serves to perpetuate the assumption that women will continue to have primary responsibility for

childcare. As ShPL is about giving parents a choice in relation to childcare, those taking such leave are in a directly comparable position to those taking AL during which the adopter takes on the primary responsibility for the care of the child. He further submits that the health and safety considerations that were at the heart of the decision in **Ali** do not apply in the present case because an adopter is not in the special protected position that the birth mother of the child is in. He referred us to an extract from the Green Paper on Work & Parents (2000), which stated as follows at paragraph 18:

> **"…where parents adopt jointly it will be for them to choose who should take adoption leave. As adoption leave is not required to satisfy the same health and safety requirements of the mother and new born child as maternity leave, it is possible to allow adoptive parents to decide who is best placed to use the entitlement."**

37. It was submitted that this amounted to an acknowledgement by government that health and safety considerations are not the main reason for conferring the right to AL thereby putting it in a different category from ML. He submits that, by contrast with ML, the purpose of ShPL and AL is the same: to allow parents to be at home to care for the child and develop their bond.

Discussion

38. We see a number of difficulties with Mr Korn's submission, not least that it invites us, at least in part, to accept a criticism of a decision by which we are bound:

a. First, the submissions in **Ali** which Mr Korn seeks to adopt were mainly directed to establishing that the predominant purpose of ML is the facilitation of childcare outside the compulsory two-week period of maternity leave. Those submissions were rejected. It is not easy to see how those submissions can effectively be transposed to the entirely different case of AL. As the Court of Appeal stated, the position of adoptive parents was not before it and it did not consider the underlying purpose of such leave.

b. In any event, there is nothing in those submissions (or from the Court of Appeal's conclusions in **Ali**) from which one could glean any real support for the proposition that we understand Mr Korn to be making, which is that the predominant purpose of AL, unlike ML, is the facilitation of childcare. Even Mr Korn's skeleton argument notes the terms of section 1(2) of the **Adoption and Children Act 2006**, which provides that "the paramount consideration of the court or adoption agency must be the child's welfare, throughout his life". Considerations as to a child's welfare go well beyond those pertaining merely to the facilitation of child care, and would include matters such as, in the case of an adoption, the forming of a parental bond, becoming a family, and the taking of steps to prepare and maintain an appropriate and safe environment for the adopted child. Given that adoption can take place when a child is older and more independent than an infant, the challenges in terms of forming such a bond and of ensuring the child's acceptance of the new environment in the adopter's home, may be very different and potentially more difficult. A period of AL may be essential to enable the adopter to succeed in doing so. In our view, the purpose of AL goes far beyond the provision of childcare.

c. Whilst the health and safety concerns are more obvious in the case of the birth mother, that is not to say that there are none where adoptive parents are concerned. The Green Paper referred to such concerns not being the same. We consider that health and safety (of both the child and the adopter), whilst not the main reason for conferring AL, do form part of the reason.

d. We also note that AL can commence from even before a child is placed with the adopter: Reg 16(1)(b), PALR. Clearly, childcare *per se* cannot be the reason for leave at that stage. Rather, the purpose would be to enable the adoptive parents to prepare both themselves and their environment for the placement of the child.

A

39. We do not therefore consider that there is material before us that would enable us to accept Mr Korn's submission that the predominant purpose of AL is the facilitation of childcare.

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40. Whilst the purpose of ShPL includes the facilitation of childcare, it is also about choice. As the Court of Appeal states, ShPL "confers on families, and mothers in particular, a greater choice.": **Ali** at [73]. Mr Korn submitted that there is an element of choice available in the case of AL too: where a child is matched with a person jointly with another, they can agree, at the time

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at which they are matched, that one of them will be the adopter (Reg 2, PALR). However, it seems to us that a choice made at the outset of an adoption placement as to which adoptive parent will be the adopter for the purposes of the PALR, is different in character from the choice made

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by that adopter at a later stage to curtail AL so as to enable the adopter's partner to take ShPL. The former choice is made between the parents as to which of them will be the adopter and have the right to AL conferred by PALR. That choice is made by agreement between both. However,

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once that choice is made and one of them is elected the adopter, the adopter then has the right to curtail AL so as to enable the adopter's partner to take ShPL.

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41. Taking all of the above into account, we find ourselves unable to accept Mr Korn's primary submission that the underlying predominant purpose of AL and ShPL is the same one of facilitating childcare. That purpose is an element of both types of leave, but the purposes of conferring the right to AL, in our view, extend well beyond childcare alone. On that footing, we

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do not consider that a person taking ShPL is in a directly comparable position to that of one on AL. There are differences between the two types of leave that are clearly material within the meaning of s.23, EqA.

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A 42. Turning then to the Tribunal's decision, Mr Korn submits that each of the matters identified by the Tribunal in paragraphs 53 and 55 of the Judgment as giving rise to a material difference was either irrelevant or immaterial (or both). We consider each of the factors in turn.

B 43. The first matter relied upon by the Tribunal was that AL was "in part compulsory", whereas ShPL was entirely optional. Mr Korn would appear to be correct in saying that the Tribunal erred in relying upon this factor. AL is not compulsory for any part of the leave period. C Whereas a woman is obliged to take two weeks' maternity leave (four, in the case of a factory worker: s.205, **Public Health Act 1936**), there is no such obligation under the PALR in respect of AL. Section 72, ERA provides that an employer *shall not permit* an employee who satisfies D prescribed conditions to work during a compulsory ML period. Section 75A, ERA (under which the PALR were made) by contrast, provides that an employee who satisfies prescribed conditions *may* be absent from work at any time during an ordinary adoption leave period.

E 44. Mr Walters, for the Respondent, submitted that it is necessary to read the whole of the judgment to understand what the Tribunal intended to mean by the reference to AL being "in part F compulsory". At [51] of the Reasons, the Tribunal indicated that it accepted the Respondent's submissions as to why ShPL was not comparable to AL. One of those reasons was set out at [48(e)] of the Reasons as follows:

> **"SPL cannot begin before two weeks after the birth date or, in the case of adoption leave, could not commence until the end of the compulsory adoption leave (as prescribed by Regulation 10(2) of the [Curtailment Regs]"**

G 45. There is of course, no compulsory period of leave referred to in that regulation; what the H Tribunal describes (incorrectly) as "compulsory" is, submits Mr Walters, simply a case of imprecise drafting and is a reference to the minimum period of AL that must be taken before a

curtailment notice can take effect. We are not inclined to agree with Mr Walters that such a benevolent interpretation can be applied here: it can be inferred that when the Tribunal used the term "compulsory", it did so because it was of the view that the adopter had no choice but to take some AL in the same way that a birth mother must during the two-week period of compulsory ML. However, even if Mr Walters is correct, it still does not establish any material or relevant difference in this regard between ShPL and AL, since ShPL cannot commence until after the initial two weeks of AL have expired. (We note that ShPL is subject to a minimum duration of one week: Regulations 7(4) and 23(4), ShPLR as compared to the two-week minimum for AL, but that does not appear to us to be a material difference between the schemes and is not a difference to which the Tribunal had alluded).

46. We conclude therefore that the Tribunal did err in relying upon compulsion. However, the question is whether that error would vitiate the Tribunal's conclusion overall as to the suitability of the Claimant's chosen comparator. We return to that question below having considered the other factors relied upon by the Tribunal.

47. The second factor relied upon is that AL could commence before a child's placement, whereas ShPL could not. Mr Korn accepts that AL commences on the date of placement of the child or not more than 14 days before the date on which the child is expected to be placed for adoption. He submits, however, that that difference between the regulatory provisions is not significant in the context of a leave period which amounts to 52 weeks and does not affect the core purpose of the leave which is to look after the child.

48. We do not consider that the difference is immaterial. We note that the Court of Appeal in **Ali** relied upon a similar differentiating factor between ShPL and ML considered in that case.

There, the Court noted that ML could begin before birth whereas ShPL could not and considered that to be one of a number of "important differences" between the two types of leave: **Ali** at [73]. Furthermore, the underlying premise of Mr Korn's submission is that the primary or predominant purpose of adoption leave is to look after the child. For reasons already set out we do not accept that there is a clear basis for accepting that premise. It is not the potential length of the pre-placement leave that is significant for present purposes but the fact that it can commence at a time before there is a child to look after. That highlights, as we have already discussed, that AL is about more than just the facilitation of child care. There can, of course, be no question of taking ShPL at such an early stage when there is no child to look after.

49. For these reasons, and in view of the Court of Appeal's decision in **Ali,** we consider that the difference in the operation of the two regimes for leave in this regard is not immaterial. The Tribunal did not err in taking a similar approach.

50. The third matter relied upon by the Tribunal was that AL is an immediate entitlement upon placement whereas ShPL is not. Mr Korn submits that this does not add anything to the previous factor and is therefore irrelevant and immaterial. Once again we note that a similar differentiating factor was considered by the Court of Appeal in **Ali** to be an important difference: see **Ali** at [73]. Moreover, ShPL, consistent with the objective of giving parents more choice, can commence at any stage during the first year of a child's birth or, in the case of adoption, before the first anniversary of the date of placement (Reg 23(1), ShPLR); whereas AL commences, at the latest, on the date of placement (Reg 16, PALR). That is a material difference underlining the need for an adopter to have time at the commencement of the placement to prepare and maintain a safe and stable environment for the child and to develop a parental bond. The Tribunal did not err in treating it as similarly material in the present case.

51. The fourth factor is that ShPL can only be taken with the partner's agreement to give up AL. Mr Korn submits that far from being a distinguishing factor between the two types of leave, it is actually a common one in that a female adopter and her partner must agree between them who will be the primary adopter entitled to take AL. In that situation, submits Mr Korn, just as with ShPL, the other partner agrees to *give up* his or her entitlement to AL.

52. The difficulty with this submission is that it depends on the notion that at the point of electing which adoptive parent is to be the adopter for the purposes of the PALR, the partner who is not elected is giving up an entitlement. At the point at which that election is made, neither partner has any entitlement to forego. By regulation 2(4A) of the PALR, a person elects to be a child's adopter, in the case where the child is matched with him and another person jointly, if he and that person agree, *at the time at which they are matched* that he and not the other person will be the adopter. The election therefore takes place at the point when the adoption agency matches a child with a person either individually or jointly with another person. That exercise necessarily takes place before any entitlement to AL arises since that leave is only available to an employee who is the child's adopter and has notified the adoption agency that he agrees that the child should be placed with him and on the date of placement: Regulation 15, PALR. The adopter then remains so. We also refer to our analysis at paragraph 40 above as to the different character of the choice made in respect of election and the curtailment of AL.

53. The upshot, it seems to us, is that there is a material difference between ShPL and AL in this respect as identified by the Tribunal.

54. The fifth and final factor relied upon by the Tribunal is that ShPL must be taken within 52 weeks of the placement and that within the period it could be "dipped in and out". It is clear

A from the provisions of Reg 23, ShPLR that ShPL may be taken in discontinuous periods if the employer agrees. Mr Korn submits that this is not a significant difference because "The fact that it is possible for ShPL to move back and forth between the parents does not impact on the nature and purpose of the time spent on leave by a birth father or primary adopter". We do not accept that submission. It seems to us that this flexibility in relation to ShPL is consistent with the purpose of giving parents (whether birth or adoptive) greater choice when it comes to childcare responsibilities. By contrast, ordinary ML and AL may be taken by the birth mother or adopter in a continuous period of up to 26 weeks commencing (in the case of AL) no later than the date of placement of the child. Such leave is consistent with the purposes described above which, in our view, extend beyond childcare. The Tribunal did not err in treating this as a material difference.

55. In our judgment, the Tribunal only erred in relying upon compulsion as a differentiating factor. The other four factors did give rise (individually and cumulatively) to relevant and significant differences between ShPL and AL. The error in respect of compulsion does not, therefore, vitiate the Tribunal's conclusion overall. Accordingly, the Tribunal was correct to reject the Claimant's chosen comparator of a female on AL. The circumstances of that comparator are materially different to those of a male on ShPL. A more appropriate comparator, as the Tribunal found, would be a female on ShPL. Such a comparator would receive the same pay under the ShPL Policy as the Claimant and there would be no *prima facie* case of discriminatory treatment.

Conclusion

56. For these reasons, and notwithstanding Mr Korn's careful submissions, both grounds of appeal fail and the appeal is dismissed.