Neutral Citation Number: [2019] EWCA Civ 900

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
(MRS JUSTICE SLADE DBE)
[2018] UKEAT 161 AND [2018] UKEAT 139

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/2019

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE BEAN
and
LADY JUSTICE ROSE DBE

- -

Case No: A2/2018/1311

Between:

MR MADASAR ALI **Appellant**

- and –

CAPITA CUSTOMER MANAGEMENT LTD **Respondent**

WORKING FAMILIES
Intervener

Case No: A2/2018/1429

Between:

THE CHIEF CONSTABLE OF LEICESTERSHIRE POLICE
Appellant

- and-

MR ANTHONY HEXTALL
Respondent

WORKING FAMILIES
Intervener

Case No: A2/2018/1205

Between:

MR ANTHONY HEXTALL

Appellant

- and-

THE CHIEF CONSTABLE OF LEICESTERSHIRE POLICE

Respondent

WORKING FAMILIES

Intervener

- -
- -

Ms Ijeoma Omambala and Deshpal Panesar (instructed by UnionLine) for Mr Ali
Mr Andrew Burns QC and Ms Lucinda Harris (instructed by **Irwin Mitchell LLP**) for Capita Customer Management Ltd
Mr Douglas Leach (instructed by Penningtons Manches LLP) for Mr Hextall
Mr Dijen Basu QC and Mr Jonathan Davies (instructed by East Midlands Police Legal Services) for the Chief Constable of Leicestershire Police
Mr Christopher Milsom provided written submissions on behalf of the Intervener

Hearing dates : 1 and 2 May 2019

- -

Approved Judgment

Sir Terence Etherton MR, Lord Justice Bean, Lady Justice Rose:

Introduction

1. The central issue in these two appeals is whether it is unlawful discrimination on the basis of sex – whether direct, indirect, or because the operation of the sex equality clause implied into all terms of work by the Equality Act 2010 ("the EA") – for men to be paid less on shared parental leave than birth mothers are paid on statutory maternity leave.

2. In the first appeal, Mr Madasar Ali appeals against the order dated 11 April 2018 of Mrs Justice Slade, sitting in the Employment Appeal Tribunal, by which she set aside the finding by the Employment Tribunal (Employment Judge Rogerson sitting with two lay members) of direct sex discrimination by Capita Customer Management Limited ("Capita") and dismissed his claim.

3. In the second appeal, Mr Anthony Hextall appeals against the order dated 3 May 2018 of Mrs Justice Slade, sitting in the EAT, by which she set aside the dismissal by an ET (Employment Judge Camp sitting with two lay members) of the finding of indirect discrimination by the Chief Constable of Leicestershire Police and remitted the matter for rehearing to a differently constituted Tribunal. Mr Hextall seeks an order dispensing with remission and upholding the claim of indirect discrimination. The Chief Constable also appeals the order on the basis that it incorrectly characterises the claim as an indirect discrimination claim, rather than a breach of Mr Hextall's terms of work as modified by the sex equality clause.

Legislative framework

4. Entitlement to the various kinds of parental leave derives from both EU law and domestic law. Relevant provisions are set out in Appendix 1 to this judgment. The statutory framework, so far as relevant, may be briefly summarised as follows.

Statutory Maternity Leave

5. The right to statutory maternity leave is set out in 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 1992 ("the PWD").

6. Section 71 of the Employment Rights Act 1996 ("the ERA") and the Maternity and Parental Leave etc Regulations 1999 (SI 1999/3312) ("the Maternity and Parental Leave Regulations") together implement the PWD by providing an entitlement to 26 weeks of ordinary maternity leave and 26 weeks of additional maternity leave. Statutory maternity leave must be taken as a continuous block, up to the maximum. If it is brought to an end early, there is no continuing entitlement to statutory maternity leave.

7. 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.

Shared Parental Leave

8. The right to shared parental leave is provided by way of amendments to the ERA and SSCBA made by sections 119-126 of the Children and Families Act 2014. The content of the right to shared parental leave is prescribed by the Shared Parental Leave Regulations 2014 (SI 2014/3050) ("the Shared Parental Leave Regulations"). These enable a mother to bring her maternity leave to an end after the two week compulsory period (regulation 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 (regulation 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 (regulation 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) (regulation 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 (regulation 40).

Equality Act 2010

10. The EA implements Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) ("the Equal Treatment Directive").

Part 2 chapter 2 of the EA defines certain kinds of prohibited treatment.

11. Section 13 defines "direct discrimination" as conduct that treats a person (A) less favourably than another (B) on the basis of any protected characteristic. Both "sex" and "pregnancy and maternity" are protected characteristics (section 4).

12. By virtue of section 13(6)(b), when conducting the comparison between A and B in a direct discrimination claim, if A is a man, no account is to be taken of special treatment afforded to a woman (B) in connection with pregnancy or childbirth.

13. Section 19 defines indirect discrimination in the following terms:-

> "19 Indirect discrimination
>
> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice ["PCP"] 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,
>
> (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."

14. Section 23 provides that a comparison between A and B for the purposes of either direct or indirect discrimination can be made only if there is no material difference between their circumstances.

15. Part 5 chapter 1 deals with equality of treatment of employees. Section 39(2) prohibits discrimination by an employer against any of its employees as to the employee's terms, access to any benefits, dismissal, or by subjecting that employee to any other detriment. It also prohibits the discriminatory subjection of any employee to any detriment.

16. Part 5 chapter 3 deals with equality of terms. Section 66 implies into all terms of work a "sex equality clause". It has the following effect—

> "(a) if a term of A's 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."

17. By virtue of section 70, section 39(2) has no effect in relation to terms of A's contract that are modified or included by virtue of the sex equality clause, or which would be so modified or included but for section 69 or Part 2 of Schedule 7. Section 69 provides that, subject to certain conditions, the sex equality clause has no effect where the difference in terms is based on a material difference between A and B. The reference to "Part 2" of Schedule 7 must be a drafting error (since that part does not concern terms of work) and is intended to refer to paragraph 2 of Schedule 7. This provides that a sex equality clause does not have effect in relation to terms of work affording special treatment to women in connection with pregnancy or childbirth.

18. The effect of section 71 is to save direct discrimination claims that would otherwise be excluded by the operation of section 70, where the term in question relates to pay.

Factual Background

Ali

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.

21. Mr Ali's daughter was born on 5 February 2016, after which he immediately took two weeks of leave. During that leave his wife was diagnosed with post-natal depression, and was advised by her doctor to return to work. Mr Ali sought to take further time off work to care for his daughter to enable this to happen, and wished to be paid the same rate as a female employee would have been paid on maternity leave. He was informed by Capita that he was only eligible for shared parental leave at the statutory rate of pay, which was far lower than his ordinary rate of pay.

22. Mr Ali brought a claim for unlawful direct sex discrimination. He accepted that there was no valid comparison between himself and a mother during the two weeks compulsory maternity leave, because those two weeks were set aside for the mother to recover after giving birth. His complaint was in respect of the subsequent 12 weeks of leave at full pay received only by female employees under the maternity pay policy.

Hextall

23. 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.

24. 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.

25. Mr Hextall's claim was originally made as one of direct discrimination. He applied for and was granted permission to amend his ET1 to claim indirect discrimination. As the ET in his case recorded, the formulation of the "provision, criterion or practice" ('PCP') relied on by the claimant was stated as "paying only the statutory rate of pay for those taking a period of shared parental leave". The disadvantage asserted before the tribunal was:-

> "The PCP puts the claimant as a man, at a particular disadvantage in comparison with women, in that he is proportionately less likely to be able to benefit from an equivalent rate of pay when taking leave to act as primary carer for his child, to that received by women on maternity leave."

Judgments below

Ali

26. The ET found that Mr Ali's complaint of direct sex discrimination was made out. The essential reason for this conclusion was that during the 12 week period following the mandatory 2 weeks of maternity leave Mr Ali wished to perform the same role as the equivalent female employee on maternity leave: namely, caring for his child. There was, in the view of the ET, no material difference between a man and a woman during that period such as to engage EA section 23. In the ET's view (at [5.41-5.42]):-

> "It was not clear why any exclusivity should apply beyond the 2 weeks after the birth. In 2016, men are being encouraged to play a greater role in caring for their babies. [….]
>
> The caring role he wanted to perform was not a role exclusive to the mother. It was not special treatment in connection with pregnancy and child-birth it was about special treatment for caring for a newborn baby. This was not about denying full pay to women, it was about equality of treatment in relation to pay for the Claimant to access the same benefits for performing the same role".

27. The EAT allowed Capita's appeal and overturned that finding. In Slade J's view, there was a material difference in the circumstances of Mr Ali and a female comparator taking maternity leave because the entitlements payable to each serve a different purpose. Maternity leave is provided expressly, in both the PWD and Telefonica policy, for the health and safety of the mother following pregnancy and childbirth. That policy objective is confirmed in the CJEU case law, including particularly Case C-184/83 *Hofmann* v *Barmer Ersatzkasse* [1985] ICR 731. Shared parental leave, by contrast, is provided in order to enable parents to look after their newborn children. There was, therefore, no valid comparison between Mr Ali and a female comparator taking maternity leave and receiving maternity pay. The appropriate comparison was with a female colleague taking shared parental leave, not maternity leave; and there was no difference in treatment between Mr Ali and that comparator, since both were paid the same (statutory) rate. For the same reason, the EAT also concluded that section 13(6)(b) was engaged, and so the direct discrimination claim was unsustainable. Finally, since the maternity leave and shared paternity leave policies in place were exactly aligned with the requirements of the PWD, the issue of the proportionality of the special treatment afforded to women in connection with pregnancy and childbirth, raised in *Eversheds v De Belin* [2011] ICR 1137 ('De Belin'), did not fall to be considered.

Hextall

28. The ET made the following findings in relation to Mr Hextall's claim relevant to this appeal. First, they rejected the Chief Constable's contention that the appropriate head under which to bring the claim was the sex equality term implied by EA section 66, on the basis that both Mr Hextall's terms of work and the terms of a female constable were identical. There was, therefore, nothing in the terms of that female comparator that was more favourable than those in Mr Hextall's terms of work. For that reason, the claim could not be brought under section 66. Even had the claim been a claim for breach of the sex equality clause, it would have failed under EA Schedule 7 para 2, which was in similar terms to section 13(6)(b).

29. Second, they rejected the claim of indirect discrimination, for the following three reasons. There was no valid comparison to be drawn between women on maternity leave and men on shared paternity leave, for the same reasons as were articulated in the Ali case. Accordingly, section 23 applied. The claim also failed for lack of causation. The disadvantage of male officers receiving less pay than their female counterparts was not caused by the payment for shared paternity leave, which was accepted to be paid at an equal rate to both males and females. That differential in pay was a consequence of the rate of pay for a different entitlement, maternity leave, having been set at a different rate. In any case, the indirect discrimination complaint was said to be a non-starter because the true complaint was that one had to be female to receive maternity leave, and that was a direct discrimination claim which would fail for the reasons given in the Ali case.

30. The ET rejected Mr Hextall's claim, whether put as direct or indirect discrimination.

31. There was no appeal against the ET's dismissal of the direct discrimination claim, but Mr Hextall did appeal to the EAT against the rejection of the indirect discrimination claim. By the time the notice of appeal to the EAT was drafted, the disadvantage relied upon was formulated as follows:-

> "The disadvantage to men is obvious: it is more difficult for men to take the leave available to them than it is to stay at work. If a man stays at work, he receives full pay, but if he takes the available leave, he receives only the statutory rate of pay. Whereas, the overwhelming majority of women in materially the same circumstances suffer no such disadvantage, because they have a full-pay alternative available to them in the form of occupational maternity pay: making the choice to take the available leave is very much easier."

32. It appears that on the paper sift under Rule 3(7) of the EAT Rules a judge held that the notice of appeal disclosed no reasonable grounds for bringing the appeal. Mr Hextall exercised his right to have the matter heard at an oral hearing before a judge, pursuant to Rule 3(10). At that hearing HHJ Richardson allowed the appeal to proceed to a full hearing. He stated:-

> "The argument is that the rate of pay for shared parental leave is the same for both father and mother, but it has a disparate impact on fathers because they, as opposed to mothers, have no other choice and are or would be deterred from taking leave to care for a child."

33. The Chief Constable cross-appealed the decision of the ET that the claim was properly characterised as a claim of indirect discrimination rather than as a breach of Mr Hextall's terms of work as modified by the sex equality clause.

34. In Slade J's judgment, the ET had correctly characterised the claim as a discrimination claim rather than an equal terms claim. She agreed that there could be no claim based on section 66 because the terms of work of Mr Hextall and the female comparator were identical. She held that Mr Hextall was asking for the term of his contract relating to shared paternity leave to be "upgraded" to match the non-corresponding term relating to a female officer's entitlement to maternity leave. Slade J disagreed, however, with the ET's conclusion on indirect discrimination, for the following two reasons. First, she held that the issue of indirect discrimination had not been properly considered because the ET had wrongly relied on its finding that there was a material difference in the circumstances of Mr Hextall and a female colleague when constructing the pool of people to which the PCP was to be applied in order to assess particular disadvantage. In Slade J's view, the persons in the pool are those officers with a present or future interest in taking leave to care for their newborn child. Second, she held that the ET had not properly considered the issue of particular disadvantage. The ET had rejected the indirect discrimination complaint on the basis that men and women were paid the same rate when taking shared paternity leave, and so there could be no particular disadvantage to men. That was inconsistent with the approach to considering complaints of indirect discrimination set out by Baroness Hale in *Secretary of State for Trade and Industry v Rutherford* (No 2) [2006] UKHL 19, [2006] ICR 785, in which she held that it is no answer to such a claim to say that the PCP applies equally to everyone. Slade J, therefore, set aside the ET's judgment and remitted the case to be reheard by a differently constituted tribunal.

Grounds of appeal

Ali

35. Mr Ali appeals on five grounds:-

Ground 1: The EAT erred in law finding that the purpose of either (a) maternity leave in the period after the first two weeks after birth, or (b) all maternity leave, is the health and safety of the mother and not the care of the child, and that the pay provisions for parental leave should be construed accordingly.

Ground 2: The EAT erred in relying upon the cases of *Hofmann* and Case C-5/12 *Betriu Montull v Instituto Nacional de la Seguridad Social (INSS*) [2013] ICR 1323 in dismissing the Mr Ali's claim for sex discrimination. That jurisprudence precedes, and has been surpassed by, the change in approach to parental roles in favour of more equal treatment of men and women as indicated by the Statutory Parental Leave Regulations, and as applied by the ET.

Ground 3: The EAT erred in finding that De Belin did not apply to Mr Ali, and in applying a bright line distinction in this case between maternity related matters and sex discrimination.

Ground 4: The EAT erred in finding that the proportionality test set out in De Belin did not fall to be considered in this case. The ET were correct in finding that the test is

applicable in the present case, and that it is no longer (in light of the change of caring roles found by the ET) legitimate to maintain a pay differential between shared parental leave and maternity leave on the basis of compensating the disadvantages of pregnancy on her maternity leave (or otherwise).

Ground 5: The EAT erred in finding that Mr Ali and his wife were not appropriate comparators. In so finding the EAT is submitted to have failed to determine Mr Ali's contention that the difference in treatment accorded by Capita to Mr Ali was due solely the employer's own election and not by reason of any legislation that requires differential pay to be maintained.

Hextall

36. Mr Hextall appeals against the EAT's decision on three Grounds:-

Ground 1: the EAT erred in its application of section 35(1) of the Employment Tribunals Act 1996 in that the decision to remit the matter for consideration was contrary to the guidance in *Jafri v Lincoln College* [2014] EWCA Civ 449, [2014] IRLR 544 and/or perverse because there is only one available answer.

Ground 2: the EAT erred in law in concluding on a contingent basis at [68] of its judgment that the Chief Constable's submission based upon *James v Eastleigh Borough Council* [1990] 2 AC 751, [1990] ICR 554 was well founded.

Ground 3: the EAT erred in suggesting at [64] that EA section 23 might involve considering the differences of purpose as between maternity leave and shared parental leave in order to determine whether "group particular disadvantage" arises in this case.

37. At the outset of the hearing, the Chief Constable indicated that in the event that his appeal was dismissed, he would consent to an order upholding the indirect discrimination claim. The Chief Constable, however, also appeals against the EAT's decision on seven grounds:-

Ground 1: Both the ET and the EAT miscategorised the claim as one of indirect sex discrimination under EA section 19 as opposed to a claim for breach of the sex equality clause under EA section 66 by failing to apply correctly the mutual exclusivity rule that the same claim cannot be both discrimination and a breach of the sex equality clause (whose boundary is defined in this context by EA section 70 and *BMC Software v Shaikh* [2017] IRLR 1074, [71], per HHJ Hand QC).

Ground 2: the EAT failed to apply correctly the 'mutual exclusivity rule' that the same act cannot be both direct and indirect discrimination (whose boundary is defined in this context by *James v Eastleigh Borough Council*).

Grounds 3, 4, 5 and 6: The EAT erred in overturning the ET's findings in relation to the question of whether the PCP defined by Mr Hextall gave rise to a particular (group) disadvantage under EA section 19(2)(b) in that it:-

(a) failed to apply correctly the rule relating to causation in claims brought under EA section 19;

(b) misdirected itself by requiring the ET to determine the issue of particular disadvantage by reference to the proportion of women relative to the proportion of men who were disadvantaged. Such an approach reflects the pre-2003 statutory test for assessing disparate impact and, in any event, does not reflect the way Mr Hextall put his case before the ET;

(c) substituted its own view for that of the ET in relation to the question of: (i) the pool for comparison; and, (ii) whether the PCP Mr Hextall had pleaded gave rise to particular disadvantage;

(d) wrongly found that the ET had misapplied or misdirected itself in relation to section 19(2)(b) by finding that the ET concluded that there could be no indirect discrimination on the basis that the PCP applied to men and women equally.

Ground 7: the EAT erred in remitting the case to a freshly constituted ET in that it failed to consider or apply the guidance in (i) Jafri as to whether a case needed to be remitted at all, and (ii) *Sinclair Roche & Temperley v Heard* [2004] IRLR 763 as to whether the case should be remitted to the same, or a freshly constituted, tribunal.

The submissions of the intervener

38. Working Families, which describes itself as the UK's leading work-life balance organisation, was given permission to make written submissions in both appeals, having previously intervened in both cases in the EAT. In essence, they are supportive of the EAT's decision in Ali, as they believe it remains necessary for women to be afforded special protection given the disadvantages they face as a consequence of pregnancy and childbirth. For the same reason, they argue that, if paying men the statutory rate creates a particular disadvantage to men for the purpose of the indirect discrimination claim in Hextall, the justification defence must still apply so that special protection is secured to birth mothers.

Discussion

The Ali appeal

39. The notice of appeal in Ali set out the five grounds of appeal above but, as the oral submissions of Ms Ijeoma Omambala, for Mr Ali, made apparent, they overlap extensively. At the heart of Mr Ali's appeal lies the proposition that, after the first two weeks of compulsory maternity leave after birth, maternity leave for the following 12 weeks is for neither more nor less than looking after the child and in that respect its purpose is identical to the purpose of shared parental leave.

40. If that proposition is correct, then, Ms Omambala submitted, in that 12 week period (1) a birth mother entitled to maternity pay is a legitimate comparator for Mr Ali for the purposes of assessing under EA section 13(1) whether Capita has treated Mr Ali less favourably than a female employee who transferred from Telefonica entitled to maternity pay; and (2) there is no scope for the application of the qualification of section 13(1) in section 13(6)(b) that no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

41. In short, the appeal fails because, as was held by the EAT, the entire period of maternity leave following childbirth, and not just the first two weeks of compulsory maternity leave, is for more than just facilitating childcare. In his oral submissions for the Chief Constable in the Hextall appeals, Mr Dijen Basu QC identified six different purposes of maternity leave, some of which are directly supported by authority of the European Court of Justice and its successor the Court of Justice of the European Union ("the ECJ"). We agree with his analysis on this point, to which we will return below. Our reasoning more fully is as follows.

42. Mr Ali's claim is for direct discrimination. In his oral submissions in reply Mr Andrew Burns QC, for Capita, said that, on reflection, it might have been more appropriate if Mr Ali's complaint had been formulated as a breach of his terms of work as modified by the sex equality clause rather than an equal treatment claim. It has, however, proceeded at all stages as a direct discrimination claim and his appeal must be addressed by us on that basis.

43. In order to succeed in his direct discrimination claim Mr Ali must satisfy the requirements of EA section 13. Mr Ali's claim is that, for the purposes of section 13(1), Capita has discriminated against him because, by reason of his sex, which is a protected characteristic in EA section 4, Capita's policy as regards parental leave for childcare following the birth of a child is less favourable to him than to a female employee in a comparable position. He is, he contends, treated less favourably because Capita's policy is to pay him only the statutory rate for shared parental leave whereas it pays a female employee who transferred from Telefonica much more as maternity pay for maternity leave in the third to fourteenth week after childbirth, even though maternity leave during that period and shared parental leave are for the same purpose, namely facilitating childcare by the child's parents.

44. EA section 23 requires that, for the purpose of assessing whether there has been direct discrimination within EA section 13, there must be no material difference between the claimant and the comparator. The EAT held (at [82] and [85]) that the purpose of maternity leave and maternity pay at the rate of full pay under Capita's scheme for the 12 weeks which are the subject of Mr Ali's claim was not to enable a hypothetical woman on maternity leave to care for her child but the health and wellbeing of the mother.

45. In reaching that conclusion the EAT relied on the ECJ's decision in *Hofmann*. The issue in that case was whether a provision of German law, under which a woman, but not a man, was entitled to additional maternity leave after a period of eight weeks had elapsed following the birth of her child, and was entitled to receive a daily allowance from the state during that period, was contrary to the principle of equal treatment for men and women as regards working conditions under the Equal Treatment Directive 76/207/EEC. That turned on whether the law in question fell within the provision in Article 2(3) of the Directive, which provided that the Directive was "without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity". The ECJ held that such a law fell within Article 2(3). It said the following:-

> "24. It is apparent from the above analysis that the directive is not designed to settle questions concerned with the organisation

> of the family, or to alter the division of responsibility between parents.
>
> 25. It should further be added, with particular reference to paragraph 3, that, by reserving to Member States the right to retain or introduce provisions which are intended to protect women in connection with "pregnancy and maternity", the directive recognises the legitimacy, in terms of the principle of equal treatment, of protecting a woman's needs in two respects. First, it is legitimate to ensure the protection of a woman's biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth; secondly, it is legitimate to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment.
>
> 26. In principle, therefore, a measure such as maternity leave granted to a woman on expiry of the statutory protective period falls within the scope of Article 2(3) of Directive 76/207, inasmuch as it seeks to protect a woman in connection with the effects of pregnancy and motherhood. That being so, such leave may legitimately be reserved to the mother to the exclusion of any other person, in view of the fact that it is only the mother who may find herself subject to undesirable pressures to return to work prematurely."

46. Ms Omambala submitted that those views of the ECJ about the purpose of maternity leave no longer carry the weight placed on them by the EAT because they precede many of the important developments of policy and the law in this area. She observed that the initial judgment of the German court in *Hofmann* was given in 1982 and the ECJ's judgment was given in 1984. She submitted that since that time legislation relating to parental leave, and in particular shared parental leave, have made clear that, following the first two weeks after childbirth, a choice is given to the birth mother whether to continue with maternity leave or to share parental leave with her co-parent. She submitted that such legislation reflects and furthers implicitly and expressly the policy of encouraging a more equal sharing between parents of responsibility for both childcare and earnings to support the family.

47. In historical terms, the starting point for consideration of maternity leave is the PWD, the purpose of which was (as stated in Article 1) to implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding. Article 8 requires Member States to take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of at least 14 weeks allocated before and/or after confinement, including a two-week period of compulsory maternity leave. The three categories of workers are defined in Article 2, namely pregnant workers, workers who have recently given birth and workers who are

breastfeeding. Article 11 requires payment to, and/or entitlement to an adequate allowance for, such workers.

48. The PWD is given effect within the UK by the ERA and the Maternity and Parental Leave Regulations. Article 7 of the Regulations provides for 26 weeks ordinary maternity leave followed by a further 26 weeks additional maternity leave. Article 8 specifies a period of compulsory maternity leave in respect of the two weeks commencing on the day of the childbirth. Other legislative provisions (in the Public Health Act 1936) require a four week period of compulsory maternity leave for factory workers.

49. The SSCBA and the Statutory Maternity Pay (General) Regulations govern the rate of statutory maternity pay. Statutory maternity pay is payable if a pregnant employee has at least six months continuous employment and has average weekly earnings at least equal to the lower earnings limit for National Insurance contributions. Statutory maternity pay is payable for 39 weeks: for the first six weeks it is paid at the higher of 90% of the average weekly earnings or the fixed statutory rate (£138.58 in April 2016), and subsequently it is payable at the lower of these two rates.

50. Prior to the introduction of shared parental leave by the Children and Families Act 2014 for the period after 5 April 2015, there was a limited right for a father or other partner of the birth mother to parental leave. The precise details do not matter. It is sufficient to say that there was no equivalent law entitling them to enjoy the length of leave or the level of statutory pay during any period of parenting leave equivalent to that in favour of a birth mother entitled to maternity leave and statutory maternity pay.

51. Ms Omambala submitted that the introduction of shared parental leave by the Children and Families Act 2014 as from 5 April 2015 coloured the nature of statutory maternity leave in a new way because, critically, there could be shared parental leave following the two weeks post-birth compulsory maternity leave. A birth mother who is entitled to maternity leave in respect of her child and satisfies the other conditions in regulation 4 of the Shared Parental Leave Regulations can now give up her statutory maternity leave and share parental leave with the father or her partner provided they satisfy the requirements in regulation 5 of the Shared Parental Leave Regulations. As stated in paragraph 7.1 of the Explanatory Memorandum to those Regulations, the purpose of shared parental leave was to create choice for families in how they look after the children, to create more equality in the workplace, to reduce the gender penalty resulting from women taking longer periods of time out of the workplace on maternity leave, and to encourage shared parenting.

52. Pursuant to the SSCBA and the Shared Parental Pay (General) Regulations, upon the birth mother giving up her statutory maternity leave and statutory maternity pay, the mother and father or other partner of the mother are entitled to statutory shared parental pay at the lower of the prescribed statutory rate or 90% of normal weekly earnings for a maximum of 37 weeks.

53. It is not necessary, for the purpose of this appeal, to consider the position of adoptive parents or the rights given to parents of a child born to a surrogate before and after the introduction of shared parental leave. What is important, from Mr Ali's perspective, is that shared parental leave reflects a policy of giving greater choice to the families about childcare and encouraging shared parenting as well as equalising work

opportunities for women and men. Mr Ali's argument is that the fact that shared parental leave can be taken after two weeks of compulsory maternity leave shows that maternity leave after those two weeks is no more than the result of a choice made by the parents, or technically the birth mother, that she is to be the principal childcarer rather than the father or sharing the role equally between them.

54. Ms Omambala relies upon developments in EU law and jurisprudence since *Hofmann* and the PWD in support of that changed approach to the way statutory maternity leave is to be perceived. She relies on the following EU developments.

55. Specific provision for parental leave for both parents was first made by Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave. That Directive was extended to the UK with effect from December 1999 by Council Directive 97/75/EC of 15 December 1997. Both Directives were repealed and replaced by Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave. Clause 2 of the Framework Agreement appended to that document provided for a right to parental leave that was implemented in Part III of the Maternity and Parental Leave Regulations.

56. Mr Ali's skeleton argument for the appeal refers to the following paragraphs in the Preamble to that Framework Agreement as revealing the underlying policy objectives of EU legislation in this area:-

> "8. Whereas family policies should contribute to the achievement of gender equality and be looked at in the context of demographic changes, the effects of an ageing population, closing the generation gap, promoting women's participation in the labour force and the sharing of caring responsibilities between men and women and men.
>
> 12. Whereas in many Member States encouraging men to assume an equal share of family responsibilities has not led to sufficient results; therefore, more effective measures should be taken to encourage a more equal sharing of family responsibilities between men and women;
>
> 20. Whereas experiences in Member States have shown that the level of income during parental leave is one factor that influences the take up by parents, especially fathers."

57. Mr Ali relies on similar policy statements in the earlier Resolution of the Council, and of the Ministers for Employment and Social Policy meeting within the Council of 29 June 2000 (2000/C 218/02) on the balanced participation of women and men in family and working life ('the 2000 Resolution'), and in particular the following recitals:-

> "(1) The Treaty of Amsterdam lays down that the Community shall have as its task the promotion of equality between men and women, and to this end creates new possibilities for Community action in Articles 2, 3, 137 and 141 of the Treaty establishing the European Community."

> "(2) The principle of equality between men and women makes it essential to offset the disadvantage faced by women with regard to conditions for access to and participation in the labour market and the disadvantage faced by men with regard to participating in family life; arising from social practices which still presuppose that women are chiefly responsible for unpaid work related to looking after a family and men chiefly responsible for paid work derived from an economic activity."
>
> "(3) The principle of equality between men and women in relation to employment and labour implies equal sharing between working fathers and mothers, in particular of time off work to look after children or other dependants."
>
> "(4) The balanced participation of men and women in both the labour market and in family life which is an advantage to both men and women is an essential aspect of the development of society, and maternity, paternity and the rights of children are eminent social values to be protected by society, the Member States and the European Community."
>
> "(5) Both men and women, without discrimination on the grounds of sex have a right to reconcile family and working life."
>
> "(10) In the light of Article 141(3) of the Treaty establishing the European Community, it is important to protect both male and female workers exercising rights relating to paternity, maternity or to the reconciling of working and family life."
>
> "(11) The beginning of the twenty first century is a symbolic moment to give shape to the new social contract on gender, in which the de facto equality of men and women in the public and private domains will be socially accepted as a condition for democracy, a pre-requisite for citizenship and a guarantee of individual autonomy and freedom and will be reflected in all European Union policies."

58. The 2000 Resolution contains a declaration that the objective of balanced participation of men and women in family life and working life, coupled with the objective of balanced participation of men and women in the decision-making process, constitute two particularly relevant conditions for equality between men and women.

59. The argument for Mr Ali ties in those statements of general principle with the Equal Treatment Directive as the 2000 Resolution is itself referred to in recital (26) of that Directive as follows:-

> "(26) In the Resolution of the Council and of the Ministers for Employment and Social Policy, meeting within the Council, of 29 June 2000 on the balanced participation of women and men

> in family and working life, Member States were encouraged to consider examining the scope for their respective legal systems to grant working men an individual and non-transferable right to paternity leave, while maintaining their rights relating to employment."

60. Article 14 of the Equal Treatment Directive prohibits direct and indirect discrimination on grounds of sex in the public and private sectors in relation to employment and working conditions. Mr Ali's argument is that the prohibition is to be interpreted in the light of the statements of principle in the 2000 Resolution, and that UK employment and equality law is to be applied in accordance with EU principles.

61. Ms Omambala submitted that those EU legislative and policy considerations affect the proper interpretation of EA section 13 and its application to the facts of Mr Ali's case in two ways. Firstly, they lead to the conclusion that only the two weeks of compulsory maternity leave are for the purposes identified in paragraph 25 of *Hofmann*, namely the protection of a woman's biological condition during pregnancy and thereafter, and the protection of the special relationship between a woman and her child; and so the proper comparator for Mr Ali for weeks 3 to 14 after the birth of his child is a woman who leaves work with the predominant purpose of caring for her child. Secondly, she submitted, it requires a narrow interpretation and application of section 13(6)(b) which provides that, where the protected characteristic is sex, in a case where the complainant of direct discrimination is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth. She elaborated on those two critical points as follows.

62. So far as concerns the appropriate comparator for Mr Ali in relation to EA section 13(1), that is to say for the purpose of assessing whether Mr Ali was treated less favourably than Capita treats others, EA section 23(1) provides that there must be no material difference between the circumstances relating to each case. Ms Omambala referred us to *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337, *Lockwood v Department of Work and Pensions* [2013] EWCA Civ 1195 [2014] 1 All ER 250 and *R (Coll) v Secretary of State for Justice* [2017] UKSC 40, [2017] 1 WLR 2093 but they do not appear to us to add anything about the requirements of a comparator beyond the plain words of section 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]. Ms Omambala submitted that, as regards weeks 3-14 after childbirth, there was no material difference between Mr Ali and a woman who wished to take leave in order to care for her child.

63. So far as concerns EA section 13(6)(b) Ms Omambala submitted that, as its provisions seek to "offset" (as she put it) the general principle of equal treatment, they are to be strictly interpreted; and so the expression "in connection with pregnancy or childbirth" is to be interpreted as restricted to the specific disadvantages of pregnancy and childbirth. She also referred to *De Belin*, a decision of the EAT, which concerned a case of direct discrimination under the Sex Discrimination Act 1975, as authority

that the statutory predecessor to EA section 13(6)(b) was limited to what was reasonably necessary and proportionate to the maternity linked disadvantage.

64. In short, Ms Omambala's argument was that EA section 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* [2003] CMLR 5 and Case C-104/09 *Roca Álvarez v Sesa Start Espana Ett SA* [2011] 1 CML 28 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 Case C-222/14 *Maïstrellis v Ypourgos Dikaiosynis, Diafaneias Kai Anthropinon Dikaiomaton* [2015] IRLR 944 for the same point but that case was not mentioned by Ms Omambala in her oral submissions.

65. Despite Ms Omambala's able and elaborate oral submissions, we reject her analysis and dismiss this appeal for reasons which can be stated relatively briefly.

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:-

> "(24) 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.

69. In *Griesmar* the Advocate General stated (at paragraph AG70) that the biological mother enjoys a special position primarily as a result of the statutory maternity protection comprising a prohibition on employment, a minimum period of maternity leave and an optional extended maternity leave. He referred also referred to protection during the breastfeeding period and the physiological aspect of motherhood. In Roca *Álvarez* the ECJ (at paragraph 30), so far from treating *Hofmann* as no longer good law, was careful to distinguish it on the facts. It said, so far as relevant:-

> "30. This situation [in which the leave conferred by the relevant domestic statute had been detached from the biological fact of breastfeeding] can be distinguished from that which gave rise to the judgement in *Hofmann* in which the national legislation at issue provided for the granting of additional maternity leave, after the expiry of the protective period, and reserved that leave to the mother, to the exclusion of any other person."

70. In *Betriu Montull* the ECJ expressly acknowledged the reasons for the minimum period of 14 weeks maternity leave in terms which mirror those stated in *Hofmann*, and to which it expressly referred. It said as follows, so far as relevant:-

> "48. According to the case law of the court, the right to maternity leave granted to pregnant workers must be regarded as a particularly important mechanism of protection under employment law. The European Union legislature thus considered that the fundamental changes to the living conditions of the persons concerned during the period of at least 14 weeks preceding and after childbirth constituted a legitimate ground on which they could suspend their employment, without the public authorities or employers being allowed in whatever way to call the legitimacy of that ground into question …
>
> 49. Pregnant workers and workers who have recently given birth or who are breastfeeding are in an especially vulnerable situation which makes it necessary for the right to maternity leave to be granted to them but which, particularly during leave, cannot be compared to that of a man or a woman on sick leave …

> 50. That maternity leave from which the female worker benefits is intended, first, to protect a woman's biological condition during and after pregnancy and, second, to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment: see, inter alia, *Hofmann* …."

71. Identical language to that in paragraph 50 was contained in paragraph 34 of the judgment of the Grand Chamber of the ECJ in Case C-167/12 *CD v ST* [2014] IRLR 551. Paragraph 33 of that judgment contained an express reference to the PWD, as follows:-

> "33. As the European Union legislature acknowledged in the 14th recital in the preamble to Directive 92/85, pregnant workers and workers who have recently given birth or who are breastfeeding are in an especially vulnerable situation which makes it necessary for the right to maternity leave to be granted to them but which, particularly during leave, cannot be compared to that of a man or a woman on sick leave …"

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 childcare. 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 section 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.

75. So far as concerns EA section 13(6)(b), we see no reason to interpret and apply it in a particularly strict or narrow way. It is not to be seen simply as a derogation from a general principle of non-discrimination but rather as the preservation and promotion of a protection required by EU legislation for particular categories of female workers identified in the PWD, who share the protected characteristic of "pregnancy and maternity" in EA section 4. It is to be observed that "maternity" in the protected characteristic has been narrowed to "childbirth" in section 13(6)(b) and so giving effect to the rationale behind the PWD.

76. Furthermore, we do not consider it is helpful to assess the application of section 13(6)(b) by reference to concepts of reasonable necessity and proportionality. Whether or not the special treatment afforded to a woman is "in connection with pregnancy or childbirth" is a question of fact and degree to be determined in the usual by the trial judge or tribunal.

77. For those reasons, there is a material difference between Mr Ali and a female worker who is entitled to statutory maternity leave and so such a female worker is not a legitimate comparator for the purposes of EA section 13(1). We therefore dismiss Mr Ali's appeal.

The Hextall appeals: the proper characterisation of Mr Hextall's claim

78. The terms on which a police constable performs his or her office are established by the exercise of powers conferred on the Secretary of State by section 50 of the Police Act 1996. Section 50(2)(j) provides that regulations made under that section may make provision with respect to the hours of duty, leave, pay and allowances of members of police forces. Section 50(5) provides that regulations regulating pay and allowances may be made with retrospective effect although they may not reduce the pay or allowances payable to any person retrospectively. Regulations were made under section 50 on 1 April 2003; the Police Regulations 2003 (SI 2003/527). Those regulations provide by regulation 24 that the pay of members of police forces shall be determined by the Secretary of State and by regulation 29 that the Secretary of State "shall determine the entitlement of female members of police forces to pay during periods of maternity leave".

79. Leave is governed by regulation 33. Regulation 33(1) provides that every member of a police force shall, so far as the exigencies of duty permit, be granted in each leave year such annual leave as may be determined by the Secretary of State. Further, regulation 33 provides:-

> "(6) A female member of a police force who is pregnant shall, in such circumstances as shall be determined by the Secretary of State, have the right not to be unreasonably refused special leave from duty to enable her to keep an appointment for the purpose of receiving antenatal care.

> (7) A female member of a police force qualifies for maternity leave in such circumstances as shall be determined by the Secretary of State.
>
> (8) A member of a police force shall, so far as the exigencies of duty permit, be granted such—
>
> (a) maternity support leave;
>
> (b) parental leave; and
>
> (c) adoption leave,
>
> in such circumstances, as the Secretary of State shall determine; and in this paragraph "maternity support leave" means leave to enable support to be given to an expectant mother at or around the time of birth.
>
> (9) A member of a police force shall, so far as the exigencies of duty permit, be entitled to be permitted to take a reasonable amount of time off during periods of duty in order to take such action, and for such purposes, in respect of a dependant of that member, and subject to such conditions, as shall be determined by the Secretary of State; and for this purpose the Secretary of State may determine the meaning of "dependant" in relation to members of a police force.
>
> (10) The Secretary of State may determine that any period of leave or time off taken in accordance with a determination under paragraph (1), (6), (8) or (9) shall be treated as a period of duty."

80. A set of determinations made by the Secretary of State under the Police Regulations 2003 was published in the form of Home Office Circular 23/2003 on 28 March 2003 in anticipation of the Police Regulations coming into effect ('the Determinations'). Annex L dealt with maternity pay and Annex R dealt with maternity leave. Annex L, as amended in April 2012 by Home Office Circular 010/2012, provides that officers who have 63 weeks continuous service are entitled to police maternity pay which is full pay for the first 18 weeks of maternity leave followed by 39 weeks of statutory maternity pay. To receive maximum benefit, officers must start their maternity leave 24 weeks before the expected week of confinement. Where officers receive police maternity pay, they must return to work for at least 1 month following maternity leave. Police officers who have at least 26 weeks service are entitled to receive statutory maternity pay payable from the 11th week before the expected date of confinement for a maximum of 39 weeks. That pay comprises 90 per cent of average salary for the first six weeks, followed by a statutory rate per week for the remaining 33 weeks. There is also provision for the leave and pay allowed to women members of the force who work part time.

81. Annex R sets out the leave entitlement. Maternity leave is defined as leave taken in accordance with the determination during the maternity period and the maternity

period is defined as the period beginning six months before the expected date of birth as notified by the member and ending nine months after that date. Paragraph 2 provides:-

> "2) Subject to the following provisions of this determination, a female member of a police force qualifies for maternity leave when she has given to the chief officer of police notice stating:
>
> a) that she is pregnant;
>
> b) the expected date of birth of her child; and
>
> c) the date on which she intends to commence maternity leave or, where she proposes to take more than one period of maternity leave, the proposed dates of those periods."

82. Other provisions of Annex R deal with the giving of notice of pregnancy and of the officer's intention to return to duty. Female police officers are entitled to take up to 15 months maternity leave, irrespective of their length of service, but they are not paid for all that leave. Maternity leave can be taken in one or more blocks, 6 months before and 12 months after the week the baby is due and can be started at any time after the 13th week of pregnancy.

83. No determination exists in relation to shared parental leave or pay. On 27 March 2015 the Home Office issued Circular 011/2015 informing people that the Police Negotiating Board, police staff associations and others had written to the Home Office to recommend that the entitlement to shared parental leave and pay introduced for civilian employees be reflected in the Police Regulations. It stated that the Home Office was awaiting further advice before consulting on amendments to the relevant legislation. There has as yet been no amendment to the Police Regulations and no determination issued giving effect to the Circular. Nonetheless most police forces, including the Leicestershire force have unilaterally mirrored the civilian entitlement to shared parental leave in their own local policies. Mr Hextall's claim has therefore proceeded before the tribunal on the basis that officers in the Leicestershire force are entitled to shared parental leave and pay in accordance with the Shared Parental Leave Regulations and the Shared Parental Pay Regulations.

84. It was common ground before us that the relevant provisions of the EA apply to Mr Hextall even though, as a police officer, he is an office holder rather than an employee for the purposes of the ERA and he does not have an employment contract at common law. So far as equal treatment is concerned, the provisions contained in EA section 39(2) apply to police officers by virtue of EA section 42. Section 42 provides that for the purposes of Part 5 of the EA, the office of constable is to be treated as employment by the chief officer in respect of any act done by the chief officer in relation to a constable or appointment to the office of constable. Part 5 of the EA comprises sections 39 to 83 but there is an exception in section 79(8) that disapplies section 42 to chapter 3 of Part 5, that being the chapter which deals with equality of terms. Instead, section 79(8) provides that, for the purposes of chapter 3 of Part 5 only, holding the office of constable is to be treated as holding a personal office. The significance of that is that, according to EA section 64(1)(b), sections 66 to 70

concerning sex equality apply where a person holding a personal office does work that is equal to the work done by a comparator of the opposite sex.

85. The Chief Constable confirmed that the upshot of all this is that for our purposes Mr Hextall can be treated as being in the same position as an employee with a contract of employment so far as the application of the relevant provisions of the EA is concerned.

86. It is convenient to consider first Grounds 1 and 2 of the Chief Constable's cross-appeal raising the correct characterisation of Mr Hextall's claim. EA Section 66 provides as follows:-

> "66 Sex equality clause
>
> (1) If the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one.
>
> (2) A sex equality clause is a provision that has the following effect—
>
> > (a) if a term of A's 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.
>
> (3) Subsection (2)(a) applies to a term of A's relating to membership of or rights under an occupational pension scheme only in so far as a sex equality rule would have effect in relation to the term.
>
> (4) In the case of work within section 65(1)(b), a reference in subsection (2) above to a term includes a reference to such terms (if any) as have not been determined by the rating of the work (as well as those that have)."

87. The Chief Constable's primary argument before the ET and the EAT, as it was before us, is that Mr Hextall's claim must be treated as a breach of his terms of work as modified by the sex equality clause incorporated into Mr Hextall's terms pursuant to section 66. The ET rejected the contention that Mr Hextall's claim was in reality an equal terms claim. The ET referred to the female police officer comparator in Mr Hextall's case as PC 836. She is a police constable who took maternity leave and was paid enhanced maternity pay. The ET said at [24] that section 66 did not apply because Mr Hextall's contract and the contract of PC 836 were the same in all relevant respects. Mr Hextall's contract includes a right to enhanced maternity pay although obviously he will never be able to exercise that 'right' because only women can. PC 836's contract includes a right to shared parental leave but she is unlikely ever to want to exercise that right if she can be paid at a higher rate for taking maternity leave. The ET held that for this to be an equal terms claim, there has to be a

relevant term of PC 836's contract more favourable than a corresponding term in Mr Hextall's contract. There is no such term because the two contracts are identical. Further, the ET said that Mr Hextall was not seeking to rely on any such term. Instead he was asking for a term in his contract setting the pay for shared parental leave to be upgraded to be equivalent to a different and non-corresponding term of her contract, namely, to receive pay at the rate of enhanced maternity pay. The ET concluded that the claim was one of discrimination and not equal terms.

88. Slade J in the EAT dealt briefly with the Chief Constable's cross appeal in the same terms. She noted that Mr Hextall's contract "includes a right to enhanced maternity pay but he will never get it as only women can": [8]. She held at [25]:

> "25. The PCP relied upon in making the indirect discrimination claim was "paying only the statutory rate of pay for those taking a period of shared parental leave". This PCP is derived from the Shared Parental Leave - Police Officers material and is to be treated as having contractual force. The Shared Parental Leave provisions, as do the Maternity Leave and Pay provisions, apply to both men and women police officers. The Claimant is not claiming that his contract does not have a provision for maternity leave and pay, although, naturally he will not be able to benefit from it. He is claiming that the provision of only the statutory rate of pay for shared parental leave disadvantages men as they do not have the option, available to women who have given birth, of taking maternity leave at a higher rate of pay. In my judgment the ET did not err in paragraph 25 in holding that the Claimant:
>
> > "25. … 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. The ET did not err in holding that the claim made by the Claimant did not fall within the equal pay provisions of EqA section 66. The exclusion in EqA Schedule 7 Part 1 paragraph 2 relied upon by the Respondent therefore does not arise."

89. She therefore dismissed the Chief Constable's cross-appeal before her.

The terms of Mr Hextall's work

90. The Chief Constable submits that the decision of the tribunals below was based on a misunderstanding of the factual position, namely their conclusion that there was no difference between Mr Hextall's terms and the terms of the female constable comparator. The Chief Constable argued that this was factually incorrect because Annex L and Annex R expressly apply only to female police officers. In our judgment, that is part but not the whole of the answer.

91. The first step in considering the application of section 66 is to identify "the terms of A's work", A being Mr Hextall. The Determinations made by the Secretary of State comprise a compendium of terms and conditions for police officers, covering a range of posts. It is only those paragraphs in the Determinations which are relevant to Mr Hextall's circumstances that make up his terms of work for the purposes of section 66. It is not right, therefore, to say that Mr Hextall's and PC 836's terms of work are identical merely because the standard set provided to him includes terms even though those expressly do not apply to him. For example, Annex F to the Determinations sets out the rates of pay for constables, sergeants, inspectors, chief inspectors, superintendents and chief superintendents. It provides for additional pay for London weighting and sets out how the rates for part-time workers are calculated. It cannot be the case that all those different rates of pay are terms of Mr Hextall's work simply because they are included in the Determinations. Only the rate of pay for constables is a term of his work despite the fact that the different rates are all contained in the same document. Since he lives in Leicestershire, it is not a term of Mr Hextall's work that police officers who live in London are paid London weighting. If a London-based colleague was not paid the additional sum, Mr Hextall could not bring a claim based on a breach of his own terms arising out of that failure any more than he could seek to enforce a term that a superintendent be paid at the rate set out in Annex F. More relevantly, if PC 836 were wrongly refused maternity leave or pay, that would not be a breach of Mr Hextall's terms of work. The terms of his work are those terms in the Determinations that govern his work because they are terms applicable to a full-time police constable working in the Leicestershire force in his circumstances.

92. The ET and the EAT therefore erred in holding that the terms of Mr Hextall's work for the purposes of applying section 66 include the terms governing maternity leave and maternity pay. Whether or not they are expressly limited to female officers, any terms which are contingent on the police officer being pregnant or giving birth or breast feeding are not terms of Mr Hextall's work because he is not a woman, just as the pay rate of a superintendent is not a term of his work because he is not a superintendent and the leave entitlement for a part time worker is not a term of his work because he works full time.

93. Mr Hextall relies on the judgment of Stanley Burnton LJ in *Hosso v European Credit Management Ltd* [2011] EWCA Civ 1589, [2012] ICR 547. That case concerned the boundary between the Equal Pay Act 1970 and the Sex Discrimination Act 1975. The claim was brought by a female employee under the Equal Pay Act and the Sex Discrimination Act in respect of alleged discriminatory exercise of a discretionary allocation of shares under an employee share option scheme. The Sex Discrimination Act claim had been brought out of time so her claim could only succeed if it fell within the ambit of the Equal Pay Act. The issue there was whether the terms of the claimant's contract included an entitlement to shares under the scheme. There had been no finding by the employment tribunal as to whether the share option scheme had been referred to or incorporated into her contract of employment. The judge drew a distinction between a difference in contract terms which would be covered by the Equal Pay Act and a difference in the exercise of a discretion conferred by a standard contract. Since this was a wholly discretionary scheme and a genuinely discretionary element of pay, it was not covered by the Equal Pay Act.

94. That decision has no application to Mr Hextall's case. We are not dealing here with a broad discretion conferred on the Chief Constable to grant leave to both men and women police officers when they become parents. Where such a discretion is expressed in identical terms in the contract of both male and female employees, but the complaint is that in fact that discretion is being exercised more favourably for women than for men, that would not be an equal terms claim. Here it is common ground that there is no room for the exercise of any discretion on the part of a Chief Constable to vary the availability of leave or the rates or pay. There is no doubt that here the terms of leave and pay are regulated by the terms of work for Mr Hextall and PC 836 and that they are different because the terms of PC 836's work include the entitlements under Annexes L and R and Mr Hextall's terms do not.

Is Mr Hextall relying on the sex equality clause?

95. Mr Hextall denies that he is relying on modifications to his terms of work arising from the sex equality clause for two reasons, broadly the reasons accepted by the ET and the EAT. First, he argues that it is of no use to him to modify his terms to include the maternity pay and maternity leave provisions in PC 836's contract because he would never be able to make use of them. Secondly, he argues that he is not seeking maternity leave and maternity pay rights as conferred on PC 836; he is claiming only the difference in pay between maternity pay and shared parental leave pay for the weeks in which he was absent from work on shared parental leave. He is not seeking to rely on the full entitlement of PC 836; for example, he is not arguing that he was entitled to take shared parental leave during his wife's pregnancy before the baby was born, even though a pregnant police officer would be entitled to take maternity leave before the birth of the baby.

96. As to the first argument, such a limited construction of the potential modification of A's terms of work brought about by the operation of the sex equality clause would largely deprive it of its function. The provision does not say that an identical, more favourable term is included in A's terms, but that a corresponding term is included. This may require some modification of the term to make sense of it as it applies to A. In former times this would be expressed by saying that the term from B's terms of work is included in A's terms mutatis mutandis, in other words, any alterations needed to the particular wording to make it fit the different circumstances can be made without affecting the main point.

97. The correct approach is illustrated by the decision of the House of Lords in *Hayward v Cammell Laird Shipbuilders Ltd* [1988] 1 AC 894 ('Hayward'), the first equal value claim to be brought in the United Kingdom. The claim was brought by Miss Hayward who was employed by the respondent as a cook. An industrial tribunal had held that her work was of equal value to three men employed by the respondent, a painter, a joiner and a thermal insulation engineer. She then brought a claim under the Equal Pay Act 1970 arguing that the equality clause incorporated in her contract by that Act entitled her to claim equal pay on the basis that her contract included a term corresponding to a term benefiting the men.

98. The Equal Pay Act included in section 1 a provision similar to what is now in EA section 66, deeming an equality clause to be included in any woman's contract. The effect of the equality clause was that where a woman was employed on like work with a man in the same employment, any term of her contract less favourable to her than a

term "of a similar kind" in the man's contract should be treated as so modified as not to be less favourable. Secondly, section 1 provided that if her contract did not include a term corresponding to a term benefiting that man, her contract was treated as including such a term.

99. Lord Mackay of Clashfern LC at page 901 of Hayward described the actual terms of Miss Haywards' contract as offering her a basic rate of £4,741 per annum. He said that the corresponding provision with regard to basic pay in the men's contracts was less specific and referred to a national agreement from which the rates of pay to be paid weekly in arrears were to be determined. It was, he said, natural to compare the appellant's basic salary as set out in her contract with the basic salary determined under the men's contract and treat the provision relating to basic pay as a term in each of the contracts. It was not suggested in opposition to Miss Hayward's claim that the effect of the equality clause was to incorporate in her contract a term specifying the basic pay for a painter, a joiner or a thermally insulated engineer. That cannot have been Parliament's intention since none of those terms would have been of any use to Miss Hayward since she was employed as a cook. Further, the term incorporated in her contract was not treated by the members of the Appellate Committee as being a term cross-referring to a national agreement setting the pay. Again, that probably would not have helped her since there appeared to be no national agreement relating to the pay of cooks. The term that they envisaged incorporating into Miss Hayward's contract by reason of the equality clause would therefore have needed to look very different from the wording in fact in the men's contracts. That did not take her claim outside the terms of the Equal Pay Act.

100. Lord Goff of Chieveley said (page 908A-C) that the task of the court when applying the equality clause is to look at the two contracts:-

> "you ask yourself the common sense question - is there in each contract a term of the similar kind, i.e. a term making a comparable provision for the same subject matter; if there is, then you compare the two, and if, on that comparison, the term of the woman's contract proves to be less favourable than the term of the man's contract then determine the woman's contract is to be treated as modified so as to make it not less favourable".

101. Lord Goff went on to say that that construction was consistent with the only possible construction of the other limb of section 1 relating to absent terms which he found to be acceptable. He does not appear to have considered that there was any difference between identifying a term "of a similar kind" and identifying a "corresponding" term in the comparator's contract.

102. Putting on one side the operation of EA Schedule 7 para 2, in Mr Hextall's case, the sex equality clause would operate to modify his terms of work by including in those terms a corresponding term that entitles him to leave and pay at the same rates as a police officer taking maternity leave as set out in Annexes L and R in addition to the entitlement to shared parental leave treated as arising from the Home Office Circular. That corresponding term would not make that entitlement dependent on Mr Hextall having given birth though it would make it contingent on him taking the leave to care for a newborn baby.

103. Mr Hextall's second argument that he is not relying on the inclusion of such a term because he is only seeking to upgrade his pay for the weeks when he was on shared parental leave is misconceived. It confuses the scope of his legal claim with the scope of the contractual term on which that claim is based. Mr Hextall only took 12 weeks of leave to care for his new baby so his claim is necessarily limited to the difference in pay over those 12 weeks. That does not mean that he has to identify a term in PC 836's contract that entitles her, and therefore also him, to exactly 12 weeks leave at the enhanced rate. He can bring a claim to enforce a term of work where the term in fact entitles him to more than that, but he must limit his claim to the loss of pay he has actually suffered.

104. PC 836 is in a similar position. If she decides to take only four months maternity leave rather than the 15 months to which she is entitled and she is wrongly refused maternity pay for that period, she can bring a claim based on Annex L and Annex R but her claim would be limited to the four month period during which she was actually absent from work and so suffered the reduction in pay. She does not have to identify some different term of work which is precisely co-extensive with her claim. Mr Hextall cannot argue that his claim is outside section 66 because he does not, in this instance, wish to rely on the totality of the term as incorporated into his contract by the operation of the sex equality clause. If he had only taken four weeks shared parental leave, his claim would be limited to the difference in pay for those four weeks. That would not affect the identity of the term on which his claim was based.

    The fact that Mr Hextall did not take leave of absence before the birth of his child means that he does not need to rely on that aspect of the more favourable terms in PC 836's contract that would allow her to take time off before the birth. Precisely how one would formulate a corresponding term of Mr Hextall's terms of work and whether it would fall within section 66(2)(a) or (b) does not need to be decided in this case. The difficulty of formulation does not mean that it would be impossible for the sex equality clause to operate. Similarly, the fact that shared parental leave and pay also form part of PC 836's terms of work does not mean that Mr Hextall is not relying on a different term in her contract to make his claim.

105. In our judgment, therefore, the ET and the EAT erred in holding that Mr Hextall's claim was not an equal terms claim. Mr Hextall's claim is in effect that the more favourable terms of work benefiting PC 836 as regards her entitlement to take time off to care for her new baby are included in his terms of work by operation of the sex equality clause and he relies on that term to claim that he has not received his contractual entitlement to pay over the period when he was absent from work to care for his new baby and suffered a reduction in pay.

The application of EA Schedule 7 para 2

106. The Chief Constable argues that, if Mr Hextall's claim is properly characterised as a case falling within section 66, it cannot succeed because of the exception in EA Schedule 7 para 2 (given effect by EA section 80(7)). Para 2 provides:-

> "2. A sex equality clause does not have effect in relation to terms of work affording special treatment to women in connection with pregnancy or childbirth."

107. The wording of the paragraph is the same as the wording used in EA section 13(6)(b) discussed earlier. As we indicated in relation to the application of section 13(6)(b) to Mr Ali's claim, the maternity leave and maternity pay available to PC 836 amount to special treatment afforded to her in connection with pregnancy or childbirth. The sex equality clause does not therefore operate to include those terms in Mr Hextall's terms of work and he cannot make a claim based on such terms.

The application of sections 70 and 71

108. If the Chief Constable is, as we hold, correct in his analysis of the application of the EA to the claim, he argues further that Mr Hextall is precluded from bringing a claim of indirect discrimination under EA sections 39 and 19. This is because of the mutual exclusivity provision in section 70:-

> "70. Exclusion of sex discrimination provisions
>
> (1) 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 [para] 2 of Schedule 7.
>
> (2) Neither of the following is sex discrimination for the purposes of the relevant sex discrimination provision -
>
> (a) the inclusion in A's terms of a term that is less favourable as referred to in section 66(2)(a);
>
> (b) the failure to include in A's terms a corresponding term as referred to in section 66(2)(b).
>
> (3) The relevant sex discrimination provision is, in relation to work of a description given in the first column of the table, the provision referred to in the second column so far as relating to sex."

109. The relevant sex discrimination provision for the purposes of section 70 is section 39(2).

110. We consider that the Chief Constable is right to submit that, even though Mr Hextall's claim is defeated by Schedule 7 para 2, the mutual exclusivity provision of section 70 prevents Mr Hextall from putting forward his claim as an indirect discrimination claim. The effect of section 70(2)(a) is that the inclusion in his terms of work relating to the time he can be absent from work to care for his newborn baby and the pay he receives, being terms less favourable than the corresponding term in PC 836's contract, namely her entitlement to maternity leave and maternity pay, is not regarded as sex discrimination for the purposes of section 39(2). He therefore cannot bring a claim under section 39(2) complaining of that difference in their terms of work.

111. So far as direct discrimination is concerned, the mutual exclusivity specified in section 70 is tempered by section 71:-

> "71 Sex discrimination in relation to contractual pay
>
> (1) This section applies in relation to a term of a person's work-
>
> (a) that relates to pay, but
>
> (b) in relation to which a sex equality clause or rule has no effect.
>
> (2) The relevant sex discrimination provision (as defined by section 70) has no effect in relation to the term except in so far as treatment of the person amounts to a contravention of the provision by virtue of section 13 or 14."

112. As to section 71, the Chief Constable accepts that Mr Hextall' claim is based on a term of his work that "relates to pay" and in relation to which the sex equality clause has no effect for the purposes of section 71(1). Therefore section 71(2) means that section 39(2) still has effect in so far as the treatment of Mr Hextall amounts to a contravention of section 39(2) by virtue of section 13.

113. We find, however, that section 71 does not help Mr Hextall in the circumstances of his case for three reasons. First, his claim for direct discrimination was dismissed by the ET and there was no appeal against that aspect of that decision to the EAT and no appeal before this court. Secondly, any claim for direct discrimination would fail because there is no comparator with whom Mr Hextall can compare himself for the purpose of section 13 to show that there has been any discrimination. As we have decided earlier, the only correct comparator is a woman taking shared parental leave and she has exactly the same entitlement to pay and leave as Mr Hextall. A woman taking maternity leave is in materially different circumstances and is not an appropriate comparator according to section 23. Thirdly, any direct discrimination claim is doomed because maternity leave and pay are special treatment afforded to women in connection with pregnancy or childbirth and so are to be left out of account pursuant to section 13(6)(b).

Hextall: the indirect discrimination claim

114. The remaining grounds of the Chief Constable's appeal and the grounds of Mr Hextall's appeal relate to the disposal of Mr Hextall's indirect discrimination claim and the decision to remit that claim back to a different constitution of the ET. On the view we have formed that (1) Mr Hextall's claim is in reality an equal terms claim; and that (2) the mutual exclusivity provision of EA section 70 prevent him from putting forward his claim as one of indirect sex discrimination, it is not strictly necessary to consider that claim. Since we are differing from Slade J, however, and in deference to the argument of Mr Leach, we will explain why, even as an indirect discrimination claim, it was correctly rejected by the ET.

115. The PCP relied on before the ET was, as we have noted above, "paying only the statutory rate of pay for those taking a period of shared parental leave". The ET held:-

> "59. The first reason why the claimant's indirect discrimination complaint fails is that season 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". 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'll get paid £x When it is applied to women, they get paid £x. It isn't suggested that because of some applied particular paternal or masculine attitude, £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 the alleged 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.
>
> 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 rafter 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 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."

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.

117. On behalf of Mr Hextall, Mr Leach complains that the ET's reasoning failed correctly to identify the indirect discrimination pool. In *Essop v Home Office* [2017] 1 WLR 1343 Baroness Hale of Richmond referred at [41] to the statutory code of practice prepared by the Equality and Human Rights Commission under section 14 of the Equality Act 2006, para 4.18 of which advises that:-

> "In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either

> positively and negatively, while excluding workers who are not affected by it, either positively or negatively."

118. Lady Hale continued:-

> "In other words, all the workers affected by the PCP in question should be considered. Then the comparison can be made between the impact of the PCP on the group with the relevant protected characteristic and its impact upon the group without it. This makes sense. It also matches the language of section 19(2)(b) which requires that "it" - ie the PCP in question - puts or would put persons with whom B shares the characteristic at a particular disadvantage compared with persons with whom B does not share it. There is no warrant for including only some of the persons affected by the PCP for comparison purposes. In general, therefore, identifying the PCP will also identify the pool for comparison."

119. Mr Leach relied on this passage and submitted that the pool should include anyone in the relevant workforce with, as he put it, "a possible future interest in taking shared parental leave". It was suggested to him in oral argument that this meant in effect the whole workforce, save perhaps those individuals who for reasons of age or otherwise have no possible future interest in having children. The phrase "possible future interest" seems to us far too broad: it would be more logical to focus on parents in the workforce who have recently had a child and are considering applying for shared parental leave to look after that child. In any event, the more significant question is whether birth mothers should be included in the pool.

120. The ET at [59], cited above, were not quite accurate in saying that for the purpose of the indirect discrimination claim the question is whether women on maternity leave are valid comparators for men on shared parental leave: that is the terminology appropriate to a direct discrimination case. They were, however, entirely correct to say earlier in the same paragraph that section 23 applies as much to a complaint of indirect discrimination as to one of a direct discrimination. In the words of the editors of Harvey on Industrial Relations and Employment Law at L [312] "the pool of individuals upon whom the effect of the PCP is evaluated must be populated by persons whose circumstances are the same [as], or not materially different from, the claimant". Women on maternity leave are materially different from men or women taking shared parental leave for all the reasons set out above in relation to Mr Ali's case and should therefore be excluded from the pool. Once that is done the PCP can be seen to cause no particular disadvantage to the claimant, and the issue of justification simply does not arise.

121. Even if we were wrong about the composition of the pool, we would, unlike the ET and the EAT, have been prepared to hold that any disadvantage to the claimant was justified as being a proportionate means of achieving a legitimate aim, namely the special treatment of mothers in connection with pregnancy or childbirth.

122. As we noted in dealing with the direct discrimination claim brought by Mr Ali, EA section 13(6)(b) provides that in such a case no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth; and in

relation to equal terms claims, Schedule 7 para 2 to the same Act provides that a sex equality clause does not have affect in relation to terms of work affording special treatment to women in connection with pregnancy or childbirth. Mr Hextall relies on the omission from EA section 19 of a similar provision excluding from indirect discrimination claims special treatment afforded to women in connection with pregnancy or childbirth.

123. The derogation in recital 24 of the Equal Treatment Directive (2006/54/EC) excluding the special treatment of women in connection with pregnancy or childbirth was originally transposed into English law by section 2(2) of the Sex Discrimination Act 1975. That Act provided by section 2(1) that the provisions of section 1 relating to sex discrimination against women (which referred to both direct and indirect discrimination) were to be read as applying equally to the treatment of men; but section 2(2) stated that "in the application of subsection (1) no account shall be taken of special treatment afforded to women in connection with pregnancy or childbirth". When the 1975 Act was replaced by the EA the exception appeared in section 13(6) but not in section 19.

124. Counsel were not able to point to any stated reason why section 19 does not have such a clause. It may be that until the present case no one thought that it was possible to formulate an indirect discrimination claim in the way that has been done here. But we think it extremely unlikely that in passing the EA, Parliament intended contractual provisions making special treatment for birth mothers to be subject for the first time to scrutiny under the heading of indirect discrimination.

125. There is nothing unusual about the respondents' maternity or parental leave provisions. Mr Leach's submissions, and the decision of the EAT upholding them, would lead to the following result. The restriction of maternity pay to birth mothers cannot be the subject of a direct discrimination claim or an equal terms claim because Parliament has made an exception for provisions giving special treatment to a woman in connection with pregnancy or childbirth. That special treatment is by definition not available to anyone other than a birth mother, and accordingly the partners of birth mothers are not eligible to receive it. Nevertheless the provision would in each case have to be considered in detail under section 19, with the tribunal considering whether it has been shown that paying parents on shared parental leave less than is paid to a birth mother on maternity leave is justified as a proportionate means of achieving a legitimate aim. That would be a very odd conclusion. Moreover, if it led to employers having to equalise payment for maternity leave and shared parental leave it would eliminate, at least in respect of the period during which parental leave may be shared, the special treatment afforded to a woman in connection with pregnancy or childbirth. That would be contrary to the policy set out in the ECJ cases referred to above and, we believe, to the policy of the EA.

126. For these reasons we dismiss Mr Hextall's appeal; allow the Chief Constable's cross-appeal; set aside the order of the EAT; and restore the order of the ET dismissing Mr Hextall's claims.

Appendix 1

Statutory maternity leave provisions

Employment Rights Act 1996

Section 71

71. (1) An employee may, provided that she satisfies any conditions which may be prescribed, be absent from work at any time during an ordinary maternity leave period.

(2) An ordinary maternity leave period is a period calculated in accordance with regulations made by the Secretary of State.

(3) Regulations under subsection (2) -

(a) shall secure that, where an employee has a right to leave under this section, she is entitled to an ordinary maternity leave period of at least 26 weeks...

Section 72

72. (1) An employer shall not permit an employee who satisfies prescribed conditions to work during a compulsory maternity leave period.

(2) A compulsory maternity leave period is a period calculated in accordance with regulations made by the Secretary of State.

(3) Regulations under subsection (2) shall secure -

(a) that no compulsory leave period is less than two weeks, and

(b) that every compulsory maternity leave period falls within an ordinary maternity leave period.

Section 73

73. (1) An employee who satisfies prescribed conditions may be absent from work at any time during an additional maternity leave period.

(2) An additional maternity leave period is a period calculated in accordance with regulations made by the Secretary of State.

(3) Regulations under subsection (2) -

(a) may allow an employee to bring forward the date on which an additional maternity leave period ends, subject to

prescribed restrictions and subject to satisfying prescribed conditions;

…

(3A) Provision under subsection (3)(a) is to secure that an employee may bring forward the date on which an additional maternity leave period ends only if the employee or another person has taken, or is taking, prescribed steps as regards leave under section 75E or statutory shared parental pay in respect of the child.

Social Security Contributions and Benefits Act 1992

Section 166

166. (1) There shall be two rates of statutory maternity pay, in this Act referred to as "the higher rate" and "the lower rate".

(2) The higher rate is a weekly rate equivalent to nine-tenths of a woman's normal weekly earnings for the period of 8 weeks immediately preceding the 14th week before the expected week of confinement or the weekly rate prescribed under subsection (3) below, whichever is the higher.

(3) The lower rate is such weekly rate as may be prescribed.

(4) Subject to the following provisions of this section, statutory maternity pay shall be payable at the higher rate to a woman who for a continuous period of at least 2 years ending with the week immediately preceding the 14th week before the expected week of confinement has been an employee in employed earner's employment of any person liable to pay it to her, and shall be so paid by any such person in respect of the first 6 weeks in respect of which it is payable.

…

(8) If a woman is entitled to statutory maternity pay at the higher rate, she shall be entitled to it at the lower rate in respect of the portion of the maternity pay period after the end of the 6 week period mentioned in subsection (4) above.

Maternity and Parental Leave Regulations 1999

Regulation 7

7. (1) Subject to paragraphs (2) and (5), an employee's ordinary maternity leave period continues for the period of eighteen weeks from its commencement, or until the end of the compulsory maternity leave period provided for in regulation 8 if later.

Regulation 8

8. The prohibition in section 72 of the 1996 Act, against permitting an employee who satisfies prescribed conditions to work during a particular period (referred to as a "compulsory maternity leave period"), applies -

(a) in relation to an employee who is entitled to ordinary maternity leave, and

(b) in respect of the period of two weeks which commences with the day on which childbirth occurs.

Statutory Maternity Pay (General) Regulations 1986 SI 1986 No 1960

Regulation 2

2. … (2) The maternity pay period shall be a period of 39 consecutive weeks.

Regulation 6

6. The rate of statutory maternity pay prescribed under section 166(1)(b) of the Contributions and Benefits Act is a weekly rate of £140.98 [£138.18 in April 2016].

Shared parental leave provisions

Employment Rights Act 1996

Section 75E

75E. (1) The Secretary of State may make regulations entitling an employee who satisfies specified conditions -

…

(b) as to being, or expecting to be, the mother of a child,

(c) as to caring or intending to care, with another person ("P"), for the child,

(d) as to entitlement to maternity leave,

…

(2) Regulations under subsection (1) may provide that the employee's entitlement is subject to the satisfaction by P of specified conditions --

…

(c) as to caring or intending to care, with the employee, for the child, …

(4) The Secretary of State may make regulations entitling an employee who satisfies specified conditions --

…

(b) as to relationship with a child or expected child or with the child's mother,

(c) as to caring or intending to care, with the child's mother, for the child...

Section 75F

75F. (1) Regulations under section 75E are to include provision for determining -

(a) the amount of leave under section 75E(1) or (4) to which an employee is entitled in respect of a child;

(b) when leave under section 75E(1) or (4) may be taken.

(2) Provision under subsection (1)(a) is to secure that the amount of leave to which an employee is entitled in respect of a child does not exceed -

(a) in a case where the child's mother became entitled to maternity leave, the relevant amount of time reduced by -

(i) where her maternity leave ends without her ordinary or additional maternity leave period having been curtailed by virtue of section 71(3)(ba) or 73(3)(a), the amount of maternity leave taken by the child's mother […]

(4) Provision under subsection (1)(a) is to secure that the amount of leave that an employee is entitled to take in respect of a child takes into account -

(a) in a case where another person is entitled to leave under section 75E in respect of the child, the amount of such leave taken by the other person;

(b) in a case where another person is entitled to statutory shared parental pay in respect of the child but not leave under section 75E, the number of weeks in respect of which such pay is payable to the other person.

Section 75G

75G. (1) The Secretary of State may make regulations entitling an employee who satisfies specified conditions -

…

(c) as to caring or intending to care, with another person ("P"), for the child...

Shared Parental Leave Regulations 2014

M is the mother P is the partner

C is the child A is the adopter

AP is the partner of the adopter

Regulation 4

4. (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).

Regulation 5

5. (1) P is entitled to be absent from work to take shared parental leave in accordance with Chapter 2 to care for C if P satisfies the conditions specified in paragraph (2) and M satisfies the conditions specified in paragraph (3).

(2) The conditions are that -

(a) P satisfies the continuity of employment test (see regulation 35);

(b) P has, at the date of C's birth, the main responsibility for the care of C (apart from the responsibility of M);

(c) P has complied with regulation 9 (notice to employer of entitlement to shared parental leave);

(d) P has complied with regulation 10(3) to (5) (evidence for employer); and

(e) P has given a period of leave notice in accordance with regulation 12.

(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).

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

Regulation 6

6. (1) Where M is entitled to statutory maternity leave, subject to paragraph (10), the total amount of shared parental leave available to M and P in relation to C is 52 weeks less -

(a) where there is a leave curtailment date, the number of weeks of statutory maternity leave beginning with the first day of statutory maternity leave taken by M and ending with the leave curtailment date (irrespective of whether or not M returns to work before that date), or

(b) where M's statutory maternity leave ends without her curtailing that leave under section 71(3) or section 73(3) of the 1996 Act, the number of weeks of statutory maternity leave taken."

Regulation 20

20. (1) A is entitled to be absent from work to take shared parental leave in accordance with Chapter 2 to care for C if A satisfies the conditions specified in paragraph (2) and AP satisfies the conditions specified in paragraph (3).

Regulation 22

22. (1) Where A is entitled to statutory adoption leave, subject to paragraph (9), the total amount of shared parental leave available to A and AP in relation to C is 52 weeks less -

(a) where there is a leave curtailment date, the number of weeks of statutory adoption leave beginning with the first day of statutory adoption leave taken by A and ending with the leave curtailment date (irrespective of whether or not A returns to work before that date), or

(b) where A's statutory adoption leave ends without A curtailing that leave under section 75A(2A) or section 75B(3) of the 1996 Act, either -

(i) the number of weeks of statutory adoption leave taken; or

(ii) 2 weeks, whichever is greater.

(2) Where A is not entitled to statutory adoption leave, but is entitled to statutory adoption pay, subject to paragraph (10), the total amount of shared parental leave available to AP in relation to C is 52 weeks less -

(a) where A returns to work without reducing A's statutory adoption pay period under section 171ZN(2A) of the 1992 Act, the number of weeks of statutory adoption pay payable to A in respect of C before A returns to work, or

(b) in any other case, the number of weeks of statutory adoption pay payable to A in respect of C up to the pay curtailment date.

Statutory Shared Parental Pay (General) Regulations 2014

Regulation 4

4. (1) M is entitled to statutory shared parental pay (birth) if M satisfies the conditions specified in paragraph (2) and if P satisfies the conditions specified in paragraphs (3).

(2) The conditions are that -

(a) M satisfies the conditions as to continuity of employment and normal weekly earnings specified in regulation 30;

(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 has complied with the requirements specified in regulation 6 (notification and evidential requirements of M);

(d) M became entitled by reference to the birth or expected birth of C to statutory maternity pay in respect of C;

(e) the maternity pay period that applies as a result of M's entitlement to statutory maternity pay is, and continues to be, reduced under section 165(3A) of the 1992 Act;

(f) it is M's intention to care for C during each week in respect of which statutory shared parental pay (birth) is paid to her;

(g) M is absent from work during each week in respect of which statutory shared parental pay (birth) is paid to her (except in the cases referred to in regulation 15 (entitlement to shared parental pay: absence from work)); and

(h) where M is an employee (within the meaning of the Employment Rights Act 1996) M's absence from work as an employee during each week that statutory shared parental pay (birth) is paid to her is absence on shared parental leave in respect of C;

(3) The conditions referred to in paragraph (1) are that -

(a) P has at the date of C's birth, the main responsibility for the care of C (apart from the responsibility of M); and

(b) P satisfies the conditions relating to employment and earnings in regulation 29 (conditions as to employment and earnings of claimant's partner).

Regulation 5

5. (1) P is entitled to statutory shared parental pay (birth) if P satisfies the conditions specified in paragraph (2) and M satisfies the conditions specified in paragraph (3).

(2) The conditions specified in paragraph (1) are that -

(a) P satisfies the conditions as to continuity of employment and normal weekly earnings specified in regulation 30;

(b) P has at the date of C's birth the main responsibility for the care of C (apart from the responsibility of M);

(c) P has complied with the requirements specified in regulation 7 (notification and evidential requirements of P);

(d) it is P's intention to care for C during each week in respect of which statutory shared parental pay (birth) is paid to P;

(e) P is absent from work during each week in respect of which statutory shared parental pay (birth) is paid to P (except in the cases referred to in regulation 15 (entitlement to statutory shared parental pay: absence from work)); and

(f) where P is an employee (within the meaning of the Employment Rights Act 1996) P's absence from work as an employee during each week that statutory shared parental

pay (birth) is paid to P is absence on shared parental leave in respect of C.

(3) The conditions specified in paragraph (1) are -

(a) M has at the date of C's birth the main responsibility for the care of C (apart from the responsibility of P);

(b) M meets the conditions as to employment and earnings in regulation 29 (conditions as to employment and earnings of claimant's partner); satisfies the conditions specified in paragraph (3).

Regulation 40

40. (1) The weekly rate of payment of statutory shared parental pay is the smaller of the following two amounts -

(a) £140.98 [£138.18 in April 2016];

(b) 90% of the normal weekly earnings of the individual claiming statutory shared parental pay determined in accordance with section 171ZZ4(6) of the 1992 Act and regulation 32).

Direct and indirect discrimination

Equality Act 2010

Section 4

4. The following characteristics are protected characteristics -

…; pregnancy and maternity; …; sex...

Section 13

13. (1) 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.

…

(6) If the protected characteristic is sex -…

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

Section 19

(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,

(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.

(3) The relevant protected characteristics are—

… sex...

Section 23

23. (1) 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.

Section 39

39. …

(2) An employer (A) must not discriminate against an employee of A's (B) --

…

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

…

(d) by subjecting B to any other detriment.

Equal terms

Equality Act 2010

Section 66

(1) If the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one.

(2) A sex equality clause is a provision that has the following effect—

(a) if a term of A's 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.

(3) Subsection (2)(a) applies to a term of A's relating to membership of or rights under an occupational pension scheme only in so far as a sex equality rule would have effect in relation to the term.

(4) In the case of work within section 65(1)(b), a reference in subsection (2) above to a term includes a reference to such terms (if any) as have not been determined by the rating of the work (as well as those that have).

Section 69

69. (1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which –

(a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and

(b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.

Section 70

70. (1) 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.

(2) Neither of the following is sex discrimination for the purposes of the relevant sex discrimination provision -

(a) the inclusion in A's terms of a term that is less favourable as referred to in section 66(2)(a);

(b) the failure to include in A's terms a corresponding term as referred to in section 66(2)(b).

(3) The relevant sex discrimination provision is, in relation to work of a description given in the first column of the table, the provision referred to in the second column so far as relating to sex.

Section 71

71. (1) This section applies in relation to a term of a person's work -

(a) that relates to pay, but

(b) in relation to which a sex equality clause or rule has no effect.

(2) The relevant sex discrimination provision (as defined by section 70) has no effect in relation to the term except in so far as treatment of the person amounts to a contravention of the provision by virtue of section 13 or 14.

Schedule 7 Part 1

2. A sex equality clause does not have effect in relation to terms of work affording special treatment to women in connection with pregnancy or childbirth.

Police Forces

Equality Act 2010

Section 42

42. (1) For the purposes of this Part, holding the office of constable is to be treated as employment-

(a) by the chief officer, in respect of any act done by the chief officer in relation to a constable or appointment to the office of constable;

(b) by the responsible authority, in respect of any act done by the authority in relation to a constable or appointment to the office of constable.

Police Regulations 2003

Regulation 29

29. The Secretary of State shall determine the entitlement of female members of police forces to pay during periods of maternity leave.

Regulation 33

…

(7) A female member of a police force qualifies for maternity leave in such circumstances as shall be determined by the Secretary of State.

Home Office Circular 011/2015

2. From 5 April 2015, mothers, fathers and adopters may choose to share parental leave around their child's birth or placement:

- The current statutory maternity leave and pay arrangements will continue to operate.
- However, women will be able to elect to bring their leave and pay to an early end and share the balance with their partner.
- Shared parental leave will be able to be taken after the second week after the baby is born and will last for a maximum of 50 weeks of leave and 37 weeks of statutory pay.

It is intended that the facility to bring police maternity leave and pay to an end will be introduced into the Police Regulations 2003 together with the facility for a partner to take shared parental leave.

Leicestershire Police Maternity and Shared Parental Leave and Pay Provisions

Maternity Procedure - Police Officers

Ordinary maternity leave ("OML") and additional maternity leave ("AML")

All individuals, regardless of length of service have the right in law to take up to 26 weeks' Ordinary Maternity Leave and up

to a further 26 weeks Additional Maternity Leave and to resume work afterwards. Individuals are therefore entitled to a total of 52 weeks' Maternity Leave. Additional Maternity Leave follows on immediately from the end of the period of Ordinary Maternity Leave.

In accordance with Police Regulations, Police Officers, regardless of their length of service and hours of work, are entitled to take a maximum of 15 months Maternity Leave (taken in one or more periods of leave) within a 'Maternity Period' commencing at the earliest 6 months before the child is expected and ending no later than 12 months after the birth.

Occupational maternity pay ("OMP")

… (OMP) is a Police benefit afforded to Police Officers who have the required amount of continuous service and is currently full pay, paid for a period of 18 weeks. Officers have the option, with the agreement of their Chief Officer, to spread the final five weeks of Maternity Pay over 10 weeks at a reduced rate

Shared Parental Leave ("SPL") - Police Officers

1.2. Shared Parental Leave (SPL) enables eligible officers to choose how to share the care of their child during the first year of birth or adoption. Its purpose is to give parents as much flexibility as possible in considering how best to care for their child.

…

3.3. The amount of SPL available is calculated using the mother/adopter's entitlement to maternity/adoption leave, which allows them to take up to 52 week's leave. If they end (curtail) their maternity/adoption leave entitlement then they and/or their partner may opt-in to the SPL system and take any remaining weeks as SPL. This means their partner could begin to take SPL while the mother/primary adopter is still on maternity/adoption leave.

…

3.7. The mother/adopter's partner can begin a period of SPL at any time from the date of the child's birth/placement for adoption (but the partner should bear in mind that he/she is entitled to take up to two weeks' Ordinary Paternity Leave following the birth/placement of the child, which they will lose if SPL is taken first)."

Statutory Shared Parental Pay ("ShPP")

7.1 For officers to be eligible for ShPP, both parents must meet certain eligibility requirements.

Mother/Adopter's eligibility for ShPP

The mother/adopter is eligible for ShPP if he/she:

…

- Has, at the date of the child's birth/placement date, the main responsibility (apart from the partner) for the care of the child;

- Is absent from work and intends to care for the child during the week in which ShPP is payable;

…

In addition, for the mother/adopter to be eligible for ShPP, the partner must:

…

- Have, at the date of the child's birth/placement date, the main responsibility (apart from the mother/adopter) for the care of the child.

Partner's eligibility for ShPP

The partner is eligible for ShPP if he/she:

…

- Has, at the date of the child's birth/placement date, the main responsibility (apart from the mother/adopter) for the care of the child; and

- Is absent from work and intends to care for the child during the week in which ShPP is payable.

In addition, for the partner to be eligible, the mother must:

- Have, at the date of the child's birth/placement date, the main responsibility (apart from the partner) for the care of the child.