

## **Employment Law Update: Changes to Family Rights**

2015 has brought significant changes to family rights including the introduction of Shared Parental Leave. [Jane Klauber](#) of [Russell-Cooke LLP](#) summarises the developments in this area.

### **Parental Leave**

The entitlement to 18 weeks unpaid leave was extended to up to the child's 18th birthday on 5 April 2015.

### **Time off to attend Ante-Natal Appointments**

Since 1 October 2014 fathers (and partners of pregnant women and those having children via surrogacy) have been entitled to time off work to attend two ante-natal appointments (each lasting up to 6½ hours). Employees must have a "qualifying relationship", meaning:

- they are the parent, woman's husband or civil partner;
- live with the pregnant woman in an enduring family relationship and are not the parent, grandparent, sibling, aunt or uncle of the pregnant woman;
- are the expected child's father;
- are one of a same-sex couple who is to be treated as the child's other parent; or
- are a potential applicant for a parental order in relation to a child who is expected to be born to a surrogate mother.

If the employer requires it, the employee must provide a written declaration stating:

- the qualifying relationship they have with the pregnant woman or expected child;
- that the purpose of taking the time off is to attend an ante-natal appointment;
- the appointment has been made on the advice of a registered medical practitioner, midwife or nurse; and
- date and time of appointment.

An employer has the right to refuse time off where it is reasonable to do so. If time off is unreasonably refused, employees can make a claim in the Employment Tribunal.

### **Adoption Leave**

Adoption rights have been extended to those fostering for adoption. Since 5 April employees proposing to adopt have the right to take time off to attend up to 5 adoption meetings. The time off must be paid where the employee is adopting on their own. If the adoption is joint, one adopter is entitled to paid leave and the other unpaid leave.

Acas has published a new guide that explains leave rights for ante natal and adoption appointments.

### **Requests for Flexible Working**

Since 30 June 2014 all employees with 26 weeks continuous service have the right to apply for flexible working and they no longer need a specific reason for making an application. On receipt of an application the employer must deal with the request in a reasonable manner and within three months from receipt of the request unless an extension is agreed. The prescribed procedure that applied to parents and carers has been abolished.

The following changes can be requested:

- a change to working hours;
- a change to the times the employee is required to work; and/or
- a change to the location of work;

If the request is accepted this results in a permanent change and there is no right to revert back to the former working pattern.

The employer may still refuse based on the prior business reasons namely:-

- burden of additional costs;
- detrimental effect on the ability to meet customer demand;
- inability to reorganise work among the existing staff;
- inability to recruit additional staff;
- detrimental impact on quality;
- detrimental impact on performance;
- insufficiency of work during the periods the employee proposes to work; and
- planned structural changes.

There is no longer a statutory right to be accompanied at any meeting to discuss a request but it is good practice to offer. Similarly it is good practice to allow an employee to appeal against a refusal or part-refusal.

An employee has the right to complain to a Tribunal if the employer has not followed the right procedure or has rejected the application on a ground that is not a permissible reason or based on incorrect facts. The Tribunal can order the employer to reconsider the request and/or pay compensation of up to 8 weeks pay subject to the statutory cap.

Acas has published a [Code of Practice](#) and a guide on the right to request flexible working.

### **Shared Parental Leave (SPL)**

Shared parental leave applies to children born or adopted after 5 April 2015 and replaces additional paternity leave. Mothers can still take their full entitlement of 52 weeks maternity leave

and fathers can take basic paternity leave so SPL is optional and dependant on both parents working.

SPL is designed to give parents flexibility to share the care of their child in the first year. A mother can opt to end her maternity leave and pay after the 2 week period of compulsory maternity leave and exchange the remaining 50 weeks of leave for SPL which can be divided between the parents who take leave at different times or at the same time.

### **Eligibility**

- SPL is available to the mother, father or main adopter of the child or their partner;
- The employee must have or share the main responsibility for the care of the child;
- Have at least 26 weeks continuous employment by the 15th week before the expected week of childbirth (EWC) or at the week in which the main adopter was notified of having been matched for adoption with a child ("the relevant week").

In addition the other parent must have:

- at least 26 weeks employment (or self-employment) out of the 66 weeks prior to the relevant week;
- average weekly earnings of at least £30 during at least 13 of the 66 weeks prior to the relevant week.

### **Amount and Timing of SPL**

- SPL must be taken in blocks of at least one week and within one year of the baby's birth or placement for adoption. Parents can take leave separately or at the same time either as a continuous block or as up to three discontinuous blocks (for each parent);
- SPL is in addition to the statutory right to two weeks paternity leave but paternity leave must be taken before SPL.

### **Eligibility for Shared Parental Pay (SHPP)**

- In addition to the eligibility conditions for SPL an employee who wishes to claim ShPP must have average weekly earnings of at least the lower earnings limit (currently £111 a week) over the 8 week period ending with the relevant week;
- ShPP is payable for up to 39 weeks, reduced by the number of weeks statutory maternity/adoption pay or maternity allowance already taken by the mother or the main adopter. It is paid at a standard weekly rate (£139.58 from 5 April 2015) or 90% of normal weekly earnings whichever is lower.

### **Shortened Maternity Leave**

- Maternity leave must be shortened by the mother serving a curtailment notice to end maternity leave early of at least 8 weeks and also by giving notice to end her maternity pay period;
- Normally the leave curtailment notice cannot be revoked. However if served before the baby is born, it can be revoked before the child is 6 weeks old and a fresh curtailment notice can be served at a later date.

## **Entitlement and Intention Notice**

Employees must provide a non-binding notice of their entitlement and intention to take SPL including: both partners details, maternity leave taken, the balance remaining, the baby's date of birth, how much SPL and ShPP each employee intends to take, a non-binding indication of when the employee plans to take SPL and a declaration from both partners that they qualify for and agree to the division of SPL/ShPP and agree to the data being processed.

The Acas Guide Shared Parental Leave suggests that on receipt of a notice of entitlement and intention to take SPL, it is good practice for the employer to seek an informal discussion about the employee's plans to cover the proposed leave arrangements, what impact the employee's absence will have on the business and what steps can be taken to mitigate this and whether any modification of the proposed pattern of leave to reduce the impact on the business might be agreeable to the employee.

## **Period of Leave (Booking) Notice**

- Employees must give 8 weeks notice before taking a period of SPL which confirms the proposed leave dates and division of pay;
- Each partner can give up to three notices to book a period of continuous or discontinuous SPL. Employers cannot refuse continuous SPL.
- If the employee requests discontinuous SPL the employer must respond in writing within 14 days of the request. If the discontinuous pattern is refused the employee may take the total number of weeks requested as a continuous period beginning on the original start date or take a continuous block starting on a new date provided that the employee notifies the employer of the new date within five days of the 14 day period above or may withdraw the request at any time up to the 15th day after it was originally made. If it is withdrawn, it will not count as one of the employee's three requests.

## **Varying a Period of Leave**

An employee may submit a request to vary a period of leave in the following ways:

- vary the start or end date provided the variation is requested at least 8 weeks before the original start date and new start;
- vary or cancel the amount of leave requested at least 8 weeks before the original start date;
- request a continuous period of leave becomes a discontinuous period of leave or vice versa.

A variation will count towards one of the employee's three period of leave unless:

- It is made as a result of the child being born earlier or later than the expected week of childbirth;
- The employer has requested the variation;
- The employer has agreed to allow more than three period of leave notices.

## **Rights during SPL and Return to Work**

The employer is entitled to make reasonable contact with an employee on SPL in the same way as during maternity leave.

An employee on SPL can, by agreement, work up to 20 days during any SPL period without losing their entitlement to SPL or ShPP. These days are referred to as “SPLIT” days and are in addition to any ‘keeping in touch’ (KIT) days worked during maternity or adoption leave. Once an employee starts a period SPL any unused KIT days are lost.

An employee on SPL has the same rights and duties as an employee on maternity leave.

An employee returning from SPL is normally entitled to return to the same job if they are coming back from statutory leave including SPL of 26 weeks or less. If the period exceeds 26 weeks and it is not reasonably practicable to permit the employee to return to the same job, they are entitled to return to a suitable alternative.

While there have, to date, been no reported cases there has been plenty of commentary about potential risk areas. One issue that has arisen is whether it will be discriminatory not to offer enhanced ShPP if maternity pay is enhanced. The case of *Shuter v Ford Motor Company Limited* concerned a Claimant who claimed sex discrimination on the grounds that the company’s practice of offering women on maternity leave 100% of their basic pay for the duration of their maternity leave compared to his statutory additional paternity leave (APL) was discriminatory. The claims of direct and indirect discrimination failed, the Tribunal finding that the correct comparator would have been a female member of staff taking APL and not a mother taking maternity leave and (in the case of Ford’s male dominated workforce) the employer was justified in offering enhanced maternity pay in order to retain and increase the number of women in the workforce. Following the same argument, we do not believe the prospects of a successful direct sex discrimination challenge are high but query whether indirect discrimination could be justified in a more gender balanced workplace.

Other commentators have questioned whether there is any objection to enhancing ShPP for the first few months and then reverting to ShPP in order to encourage parents to return to work. What about making enhancements for the first period but not the second and third periods of SPL to encourage continuous leave? Again this may be an area for litigation but probably difficult to establish one gender would be more disadvantaged than the other. Organisations need to update their policies and consider whether they prefer staff to take short periods of discontinuous leave as easier to manage in the workforce than a lengthy period of SPL. Depending on their preference, it is worth considering steps to structure arrangements to minimise disruption.

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