

XpertHR Weekly Podcast

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Jeya Thiruchelvam: Hello and welcome to XpertHR Weekly with me, Jeya Thiruchelvam. So today I am joined once again by Jo Broadbent who is a professional Support Lawyer at Hogan Lovells. Thank you again for joining us today, Jo.

Jo Broadbent: Good to be here again.

Jeya Thiruchelvam: This is, of course, the second podcast in a two-part series, answering your questions on shared parental leave and pay. Last week we dealt with questions such as whether parents in a surrogacy situation and same-sex couples are entitled to shared parental leave and when exactly employers can stop worrying about additional paternity leave. This week we start by looking at the shared parental leave procedure.

Okay, so if we go through the process then, sort of chronologically. You said that in order to take shared parental leave, a mother's got to either return to work or to serve a curtailment notice ending her maternity leave. So what's the difference between those two things then? [0:00:57.4]

Jo Broadbent: Well obviously as you said, two ways to enter the system. Mother either returns to work, so she gives her employer eight weeks' notice that she's intending to come back to work early, for example at the end of her ordinary maternity leave period, comes back to work. At

that point the balance of any leave outstanding could be converted into shared parental leave at a later date if either parent wanted to access the system.

Alternatively, a woman can agree to bring her maternity leave to an end at a future point in time and she does that by giving her employer a leave curtailment notice. And the amount of shared parental leave that's going to be available to the family is going to be calculated by reference to how much maternity leave the mother will have taken at the date – that future date – that she wants the maternity leave period to come to an end. But the key point is that the mother remains on maternity leave in the meantime. And that's important because it means that a mother could give her employer a leave curtailment notice before the baby is even born saying, for example, 'I'm going to end my maternity leave after 39 weeks.' That would free up thirteen weeks of maternity leave that could be converted into shared parental leave, which in turn could allow the father to take shared parental leave in the early weeks of the child's life while the mother remains on maternity leave.

Jeya Thiruchelvam:

And you said that parents can share up to 50 weeks' leave, and we've probably covered some of these points before, but it's worth repeating because we've had so many queries on these things. So does there have to be a gap between one parent ending a period of shared parental leave and another parent starting a period of shared parental leave? [0:02:27.7]

Jo Broadbent:

No there doesn't. There's total flexibility really, about how the parents choose to use their leave. So for example, the parents could agree to work a 'four weeks at work, four weeks on leave' pattern that would allow both parents to split work and caring responsibilities for a period of approximately six months.

- Jeya Thiruchelvam: And just to confirm then, to be absolutely categorically sure, both parents can be on shared parental leave at the same time? [0:02:52.0]
- Jo Broadbent: That's right, both parents can be on shared parental leave at the same time if they wish, or Mum could be on maternity leave while Dad or partner is on shared parental leave.
- Jeya Thiruchelvam: And again to reiterate, the mother can be on maternity leave at the same time that the father's on shared parental leave and that involves your scenario of where she served a future curtailment notice? [0:03:09.8]
- Jo Broadbent: That's right. She would need to have given her employer a leave curtailment notice in those circumstances in order to release a period of maternity leave to be converted into shared parental leave.
- Jeya Thiruchelvam: Now you said that shared parental leave needs to be taken in the first year of a child's life. So when's the last possible point in that twelve-month period that the employee can give notice then to take shared parental leave? [0:03:30.9]
- Jo Broadbent: Well the latest point at which an employee could give notice is going to be nine weeks before the child's first birthday, and the reason for that is that an employer is always going to be entitled to at least eight weeks' notice of leave. Shared parental leave can only be taken in blocks of a minimum of a week, so giving notice nine weeks before the child's first birthday would then allow the parent to take one week of shared parental leave before the child's first birthday.
- Jeya Thiruchelvam: And you said that one of the great things about shared parental leave is that it can be quite flexible and you can go into work and come out of work. So it can be taken in instalments. If the employee chooses to do

this, rather than taking one long period, does the employee have to tell the employer about all the instalments of shared parental leave that they intend to take at the outset? [0:04:16.9]

Jo Broadbent:

Yes. One of the steps that the employee needs to take in order to be eligible for shared parental leave is to give their employer what is called a 'notice of entitlement'. What that document does is basically confirm that the employee is eligible for shared parental leave. It tells the employer how much shared parental leave is available to the parents in total and also how much leave that individual employee is planning to take out of the total family entitlement.

The other thing that the employee has to do in that notice is to give an indication of when the leave that they are intending to take is going to be taken. So the employer should have a heads-up at a relatively early stage about what leave the employee wants, how many periods of leave the employee's planning and also when those periods of leave are likely to be taken.

Now it's important to make the point that those are only a notification; they're not actually a binding request. The employee will still have to go on and give a formal request for leave and that will need to be done at least eight weeks' before any period of leave requested.

Jeya Thiruchelvam:

And what kind of flexibility does an employer have then to refuse a particular period of shared parental leave that the employee has requested? [0:05:24.6]

Jo Broadbent:

That's really going to depend on what the employee has asked for. If they've asked for a single period of leave, for example four weeks of leave starting on a particular date, the employer has got to agree to that

request. It doesn't have any flexibility to refuse it. The employee is entitled to take it.

Jeya Thiruchelvam:

So the key thing there is that they're asking for a single period of leave? [0:05:44.7]

Jo Broadbent:

That's right. Now you may have a situation in which an employee uses a single period of leave notice to ask for more than one period of time. So they might say, 'Well I'd like four weeks of leave starting on a particular date and I'll have a further four weeks of leave starting at a date sometime after that.' So they've effectively asked for two periods of leave with a period back at work in the middle. And the employer does have some discretion about how it treats that, which is known as a 'discontinuous leave request'. It can obviously agree to it if it's happy with the pattern of leave that the employee's requested. It can refuse it. Or it can seek to negotiate a different pattern of leave that works both for the employer and for the employee. If an agreement can't be reached within fourteen days, the employee then has a choice and the employee can either take all of the leave requested as a single period...

Jeya Thiruchelvam:

The total number of weeks requested? [0:06:36.0]

Jo Broadbent:

Total number of weeks. So if they'd asked for four weeks and then another four weeks, they could take eight weeks in total. And that can start on a date of the employee's choice, provided that the employer's got at least eight weeks' notice.

Or the employee could say, 'Fine, I'm just going to withdraw my leave request if you're not prepared to agree it.' And the important point then is that the request that the employee made which has been withdrawn then doesn't count towards the total number of requests for leave which the employee can make.

Jeya Thiruchelvam:

And how many is that? [0:07:03.4]

Jo Broadbent:

That's three in total. So assuming it was the first request for leave which the employee had made and they'd withdrawn it because the employer hadn't agreed it, they would still have a further three requests that they could make.

Jeya Thiruchelvam:

So how many times then can an employee do that? So how many times can they request more than one period of leave in a single notice, presuming the employer does the same thing and doesn't agree to it? And you said it doesn't count towards the number of requests that an employee can make. How many times can that happen? [0:07:31.2]

Jo Broadbent:

Well theoretically the employee could keep putting in discontinuous leave requests and the employer could keep refusing them. I suppose the bottom line for the employee is that if they know their employer isn't going to agree to discontinuous leave and they still want to take a period of shared parental leave, in order to be able to take that, they need to give their employer eight weeks' notice so I think it's more likely that the employee would simply ask for a single period of shared parental leave in a single leave notice, which the employer would then not have any discretion about turning down.

Jeya Thiruchelvam:

So lots of employers are understandably nervous then about receiving requests for discontinuous periods of shared parental leave because it's quite interrupted, so can an employer actually have a policy of refusing all discontinuous leave requests? [0:08:18.0]

Jo Broadbent:

In theory yes it could. I think provided that an employer makes it clear that an employee's entitled to make three separate leave requests, there's in principle

nothing wrong with that approach. Obviously as we've seen, an employer isn't under any obligation to agree to discontinuous leave requests where they're made in a single notice. I think there's some potential possibly for an indirect sex discrimination claim if an employer did have such a policy, but I think the strength of such a claim is quite difficult to assess until we've got a clearer picture of the way in which shared parental leave is actually being used. I think the downside of adopting that approach might mean that an employer actually get less notice of the periods of leave that an employee wants to take than if the employee does feel able to ask for the periods of leave that they want upfront, as it were.

As we know, the employee's only got to give eight weeks' notice per period of leave if they're making individual leave requests but in contrast, if the employee asked for all the leave they want to take at the outset, the employer's going to have much more notice of the likely pattern of leave, they're going to know from the information in the notice of intention whether any further shared parental leave is going to be available if the employee takes the period of discontinuous leave that's been requested, and that probably gives the employer a better opportunity to arrange appropriate cover than they would have if they're insisting on these requests just being made as sort of single requests for periods of leave.

Jeya Thiruchelvam:

And there's been much talk about a loophole in the regulations that allows employees to insist on taking three periods of shared parental leave at a time of their choosing and you've already touched on this and explained this actually, but I just wanted to repeat it so people can put two and two together. So just remind us how that loophole...not loophole... [0:09:55.9]

Jo Broadbent:

It's been regarded, it's been sort of referred to as a loophole but actually I think it is very clear that that is how the regulations are intended to work. As we've seen, an employee is entitled to make up to three leave requests and if a leave request asks for a single period of leave, the employer's got to accept that. So what that means is that the employee can ask for three separate periods of leave in three separate leave requests and the employer is going to have to agree to those, even though it wouldn't have been obliged to agree to those if they'd been made in a single period of leave notice asking for three periods of leave. So it means that the employee's always going to be able to take shared parental leave in three separate periods if they choose to do so.

Jeya Thiruchelvam:

What about evidence? Because there's also been some concern about employees fraudulently taking shared parental leave. So can, for example, the father's employer insist on evidence, for example, of the mother's pregnancy? [0:10:46.0]

Jo Broadbent:

No. It's clear that the father's employer is not entitled to see the MATB1. However, there are two pieces of evidence that the father's employer can ask for when it gets a notice of entitlement from the father. It can ask for a copy of the child's birth certificate and it can also ask for the name and address of the mother's employer. And the employee has then got fourteen days in which to respond to the request, although there are some special rules about what happens if the birth certificate, for example, hasn't yet been issued. That might be because either the notice of entitlement's been given before or shortly after the child's birth and broadly in that situation, the employee's just going to have to provide a signed declaration confirming the date and place of the child's birth.

Jeya Thiruchelvam:

And so moving on then to terms and conditions during shared parental leave. Does an employee accrue holiday during shared parental leave in the same way that they would do on maternity leave? [0:11:36.0]

Jo Broadbent:

Yes they do. All terms and conditions of employment other than pay continue during any period of shared parental leave in the normal way, so holiday's going to continue to accrue just as it does during a period of maternity leave, for example.

Jeya Thiruchelvam:

And what about if the mother has more than one job? Can she claim shared parental leave and shared parental pay from each employer? [0:11:58.0]

Jo Broadbent:

Yes she can. If she's got more than one job and she meets the various eligibility requirements, she will be able to claim shared parental pay and leave from both employers. However, in order to do that, she's going to need to have returned to work from both jobs or to have given notice to curtail her maternity leave to both employers at the same time in order to be eligible for shared parental leave.

Jeya Thiruchelvam:

And in terms of liability for shared parental pay, who's responsible for paying the father shared parental pay? Because there's some concern that employers might have to fork out for shared parental pay for somebody else's...

Jo Broadbent:

...employee. That's clearly not the case. If it's the father that's taking shared parental leave, it's the father's employer who's responsible for paying his statutory parental pay.

Jeya Thiruchelvam:

And what's the position where the mother's employment comes to an end but she's already established her entitlement to shared parental pay? Is she still entitled to receive it? [0:12:49.9]

Jo Broadbent:

She is, provided that she otherwise qualifies for shared parental pay and she remains in the qualifying employment until the week before the first statutory shared parental pay period begins. She's going to remain entitled to payment in the event that he or she leaves the employment, and that's also reflected in the ACAS guidance, which says, 'If an employee's employment comes to an end while they are still entitled to some shared parental pay, any remaining weeks will usually remain payable unless they start working for someone else.' So it's important to point out that that will only apply to statutory shared parental pay. If an employer's topping up, whether or not they would get it, would depend on the employer's own procedures but normally they wouldn't be entitled to those.

Jeya Thiruchelvam:

Is there anything else that you wanted to draw our attention to? [0:13:33.6]

Jo Broadbent:

I suppose the only other thing I would say is that it's moderately complicated. The way that shared parental leave works is quite tricky. There are various eligibility requirements that couples need to satisfy that we haven't had time to go in to today and if people are uncertain about those and the other steps that an employee needs to go through in order to establish their entitlement to shared parental leave, those are obviously all set out in the XpertHR shared parental leave note and it'd be worth cross-checking with that to make sure that you have fully understood the main principles of the way the new right is going to work.

Jeya Thiruchelvam:

Thanks Jo, that's a really good point. Jo was the original author and is the updating author of the shared parental leave section which sits in the Employment Law Manual on the XpertHR site. The Employment Law Manual also houses a section on shared parental pay.

That brings us to the end of this week's XpertHR Weekly, which you've been listening to with me, Jeya Thiruchelvam. Remember, you can listen to the first part of this two-part shared parental leave series by going to the audio-video section on the site or by searching for XpertHR Weekly on iTunes. We're back next Friday but until then, it's goodbye from us.