

## **XpertHR Weekly Podcast**

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**JEYA THIRUCHELVAM:** Hello and welcome to XpertHR Weekly with me, Jeya Thiruchelvam. This week I'm delighted to be joined by Jo Broadbent of Hogan Lovells. She's a professional support lawyer there. Thank you very much for joining us today, Jo.

**JO BROADBENT:** Oh, it's a pleasure to be here.

**JEYA THIRUCHELVAM:** So we've had lots of questions about shared parental leave from our subscribers, so I'm going to dive straight in and ask you some quite specific questions. So first of all, is it compulsory to take shared parental leave? [0:00:30.0]

**JO BROADBENT:** No it's not. Participation in shared parental leave is completely voluntary. The default position remains that the mother is entitled to 52 weeks of maternity leave. She's got to take at least two weeks of leave after the birth as compulsory maternity leave but apart from that, it's completely up to her how much or little maternity leave she wants to take.

However, if she does decide to bring her maternity leave to an end early, the balance of any leave outstanding at the point at which she brings her maternity leave to an end can then be converted into shared parental leave that either parent can take.

JEYA THIRUCHELVAM: And in terms of who shared parental leave applies to, does it only applies to mothers and fathers, people in a birth situation? [0:01:11.9]

JO BROADBENT: No it doesn't. Shared parental leave also applies to adoptive parents, so provided the adoptive parents meet the eligibility criteria, they can access shared parental leave, and that would apply to parents who were adopting within the UK where they're placed with a child on or after 5<sup>th</sup> April, but it also applies to parents who are adopting a child from overseas where the child enters Great Britain on or after 5<sup>th</sup> April.

And the information that adoptive parents need to provide to access shared parental leave is obviously dependent on whether they're adopting within Great Britain or overseas, and the information that they need to provide is going to be slightly different from that provided by birth parents, but largely similar.

JEYA THIRUCHELVAM: Okay, so it's perhaps more widely available than some of our employers think. What about same-sex couples who are adopting a child or people in a surrogate situation? Are they entitled to take shared parental leave? [0:02:04.6]

JO BROADBENT: They may well be and it will really depend on whether or not they're entitled to adoption leave. If they are entitled to adoption leave and they meet the eligibility requirements, they will be able to access shared parental leave.

It's quite interesting, I think, to note that it's now going to be easier for parents who are having a

child by a surrogacy arrangement to access adoption leave and that's because of some changes that were introduced by the Children and Families Act. Basically now an intended parent in a surrogacy arrangement will be entitled to adoption leave if they have applied or they intend to apply for a parental order in relation to the child and they meet the other eligibility criteria. And what that means is it is going to be much easier now for surrogate parents to access adoption leave.

And then that adoption leave period could then be brought to an end early and that would allow the adoptive parents to access shared parental leave.

JEYA THIRUCHELVAM:

That's really interesting. So adoption leave is the vehicle by which surrogate parents would access shared parental leave?

JO BROADBENT:

That's right.

JEYA THIRUCHELVAM:

And what about in terms of other groups who might be able to take advantage of the right? What about agency workers and other temps? Are they entitled to shared parental leave? [0:03:08.2]

JO BROADBENT:

Normally they won't be and the reason for that is that it's only employees who are going to be eligible to take shared parental leave. And broadly that means that agency workers generally won't be entitled to shared parental leave because they're not normally regarded as employees for these purposes. They may in some circumstances qualify for shared parental pay, but leave normally not.

And similarly if you've got somebody who's a temp and they're not an employee, they won't qualify for shared parental leave. If a temp is an employee, they are only going to qualify for shared parental leave if they meet the continuity of employment, which is basically 26 weeks of service at the fifteenth week before the expected week of childbirth, and they remain in the employment until the period of shared parental leave they want to take. So obviously if you were genuinely dealing with somebody who is a temporary employee, it's going to be quite difficult for them to meet that continuity of employment test.

**JEYA THIRUCHELVAM:**

So going back to birth situations just briefly, what about where a mother was due to have her baby before 5<sup>th</sup> April and so wouldn't have been entitled to shared parental leave but actually has the baby slightly later and ends up falling into that shared parental leave regime? Will she then be entitled, on the basis of when her baby's actually been born, to take shared parental leave? [0:04:25.0]

**JO BROADBENT:**

Normally not. The way the system works is completely dependent on the date the baby was due, not the date that the baby actually arrived. So if you've got a baby who's due before the 5<sup>th</sup> April, the parents aren't going to be eligible for shared parental leave, even if the baby actually arrives a week or two later. The father in that situation, or the mother's partner potentially, may be still eligible to take additional paternity leave, but that would only be if the mother returned to work early.

JEYA THIRUCHELVAM: And so staying with this birth scenario then, does the father taking shared parental leave have to be the child's biological father? Because there is some confusion around this issue of who a partner is. [0:05:02.8]

JO BROADBENT: Yes, that's right, and in the regulations it's very clear that it doesn't necessarily have to be the actual biological father of the child that takes the leave. The way the regulations work is that the mother's entitled to share her leave either with the father or with her spouse or partner, and that would include a same-sex partner, where the spouse or partner isn't the father of the child. And the parent who's going to be eligible to take shared parental leave with the mother is whichever person has main responsibility for the child's care other than the mother on the date when the child is actually born.

JEYA THIRUCHELVAM: Okay, so shared parental leave applies then to children who are expected to be born or placed for adoption on or after the week commencing 5<sup>th</sup> April. So it replaces, as you said, additional paternity leave. Does that mean now that employers can basically tear up their additional paternity policies? [0:05:51.5]

JO BROADBENT: Not yet. I think that would be a bit premature at this stage. As we've seen, the parents of babies that were due before 5<sup>th</sup> April are still going to be eligible to take additional paternity leave, so I think it's a bit too early to destroy those policies now.

JEYA THIRUCHELVAM: And when can employers then stop worrying about additional paternity leave? Because we all know

that the take-up of that was notoriously low, wasn't it? [0:6:13.9]

JO BROADBENT:

That's right. For a period of around a year, employers are going to have working parents in their organisation with different rights – one set of people who are entitled to additional paternity leave, and another set of people that are entitled to shared parental leave. Now additional paternity leave can obviously be taken in the first year of a child's life, so that right is going to run for another year or so, given that some babies that were due shortly before 5<sup>th</sup> April may in fact have arrived late.

JEYA THIRUCHELVAM:

Okay, so eventually shared parental leave will abolish additional paternity leave but we've got, like you say, this transitional period. But does shared parental leave also replace ordinary paternity leave which, just to remind people, is the right for the father or partner to take one or two weeks' leave within 56 days of the child's birth or adoption? Because people are getting quite confused, aren't they, because there are various sort of paternity and parental leave terms around? [0:07:04.0]

JO BROADBENT:

That's right, and the terminology all sort of gets a bit muddled. But no, that one- or two-week paternity leave period remains in place, so that is still there for fathers or the mother's partner to take advantage of. What that means is that somebody who's eligible for paternity leave can take that before taking a period of shared parental leave if they want to do so. And in fact it's really important

for fathers and partners to take their leave in the right order because if the parent does in fact take a period of shared parental leave first, they will lose their right to paternity leave, that one- or two-week paternity leave period, and the statutory paternity pay that goes with it.

JEYA THIRUCHELVAM:

So eligible employees are entitled to take shared parental leave, and you've touched on the eligibility criteria very briefly earlier. But can you tell us just first of all, we've been talking about who's entitled to take shared parental leave – what is it, in a nutshell? [0:07:52.5]

JO BROADBENT:

Shared parental leave is designed to allow parents to take a period of leave in the year following a child's birth or adoption in a more flexible way than has been the case previously. So as we've seen, if the mother chooses to do so, she can bring her maternity leave period to an end early and she can convert the balance of her maternity leave into a period of shared parental leave that either parent can take, and up to 50 weeks of leave in total can be converted into shared parental leave, and that's because of the two-week compulsory maternity period that the mother must take.

And similarly, parents who are entitled to adoption leave, the parent taking adoption leave could choose to bring that period of leave to an end early and free up the balance of adoption leave for the other parent or for the parent taking adoption leave to take.

So to give a short example, if a mother decided that she only wanted to take 39 weeks of maternity

leave, she could convert the remaining thirteen weeks of her maternity leave into shared parental leave. She could take some of that, the father could take some of that or they can split it between them as they see fit.

And I think the other really important thing is that shared parental leave doesn't have to be taken as a single period. So it's not like maternity leave which you started it and you finished it and that was that. Here, you can take it in different periods, and additionally the parents are allowed to be away from work on leave at the same time. And that's really important as well. So Dad could take a period of shared parental leave while Mum's on maternity leave, provided that she had already agreed to bring her maternity leave to an end early.

**JEYA THIRUCHELVAM:**

So before we drill down into various aspects – and that was a really, really helpful explanation – there's been so much publicity around shared parental leave and about how radical it is and how transformative it is. So do you think that's true in terms of rebalancing the gender roles and childcare et cetera? [0:09:39.2]

**JO BROADBENT:**

I think it could be. It's got potential to be transformative. And I think particularly if fathers embrace the opportunity to take time off in the first year of a child's life. There are some barriers to that. I think there's a question mark still about, 'Will the women want to give up a period of maternity leave that they see as their time off at home with their new baby to allow their partner to allow some



leave?' I think there's also an issue about whether or not employers are going to pay for shared parental leave at enhanced rates. I think there is still going to be limited incentive to take shared parental leave if statutory pay isn't being topped up by the employer. And that's particularly going to be the case where the father is the family's main breadwinner. I certainly don't think we're going to see a sort of big bang effect, but more likely to be a sort of slow, cultural change over time. And even in Scandinavian countries where shared parental leave has been in place for a relatively long period, there's been a fairly gradual increase over a number of years in the proportion of fathers taking shared parental leave.

JEYA THIRUCHELVAM:

And do you think fathers will be reluctant because of some sort of perceived or actual stigma in terms of taking shared parental leave and being away from the workplace for periods of time? [0:10:50.0]

JO BROADBENT:

I think there's certainly an issue around that but the only way to overcome that is as it becomes more common, more and more fathers, I think, will feel empowered to do it. But certainly initially where it's very uncommon for fathers to take extended periods of time off, and as you've said, the take-up for things like additional paternity leave has been very low, I think that initial resistance is going to take a little while to overcome.

JEYA THIRUCHELVAM:

And can you just remind us, just briefly, how shared parental leave differs then, from the additional paternity leave regime? [0:11:20.0]

JO BROADBENT:

In terms of the difference between the two regimes, the real distinction is the flexibility which surrounds shared parental leave, and the government was really keen on enhancing the flexibility with which leave could be taken in a way of encouraging more people to take it up. So the way the rules work means that leave can be taken in three separate periods or potentially more with the employer's agreement. And what that does is allow parents to alternate periods of leave with periods back in the workplace.

In addition, as we've seen, parents could choose to be at home at the same time, which simply isn't possible really with additional paternity leave, where the mother has to have returned to work before the father is able to take additional paternity leave.

So I think what that means is we may see more take-up of shared parental leave than we have of additional paternity leave where, as you've said, the levels of take-up really have been extremely low.

JEYA THIRUCHELVAM:

That's it for this week but please do join us again next week when we will continue our journey through the shared parental leave regime and answer more of the questions that you have been asking. Until then it's goodbye from us.