

SPL for employees: employment protections for those taking SPL

If you or your partner are having a baby, or adopting a child, you may wish to take advantage of the new shared parental leave (SPL) system. This article sets out the employment protections for those taking, or considering taking, shared parental leave. They also apply in cases where an employer believes it likely the employee will take shared parental leave. These employment protections are very similar to those that apply to those on maternity or adoption leave.

Right not to be disadvantaged

You have a right not to be put at a disadvantage by your employer – “not to be subjected to any detriment” as the law puts it – because of an SPL-related reason.

So your employer cannot disadvantage you because you have taken SPL or have sought to take SPL, or because your employer believed you were likely to take SPL, whether or not that was the case.

Examples

You may have handed to your employer a notice of entitlement to SPL, and have sought to book one “continuous” period of SPL starting on a particular day, by submitting a notice of booking leave. If you are entitled to SPL, and you have complied with the formalities, your employer should not pressure you or penalise you for refusing to alter the date, however inconvenient that date may be for your employer.

Even if you are not entitled to SPL but mistakenly thought you were, your employer is not allowed to penalise you for seeking to take SPL (although would be entitled to refuse you the leave).

Similarly your employer should not disadvantage you because you benefited from terms and conditions of your employment other than pay (for example, you had the use of a company car, or you accrued paid annual leave), during a period of SPL. It would almost certainly be unlawful to treat you badly because your employer resented paying you statutory shared parental pay while you were on leave (although given employers are reimbursed 92% of statutory shared parental pay by HMRC, and 103% if they qualify as a small employer, such resentment makes little sense).

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Can I be disadvantaged for refusing to work (or working) during SPL (SPLiT days)

Under the SPL scheme, employees may work for up to 20 days for their employer, on what are called SPLiT (Shared Parental Leave in Touch) days. If you carry out such work, or consider doing so, or on the flip-side refuse to carry out such work when your employer wants you to, you have the right not to be disadvantaged by your employer as a result.

What counts as a disadvantage or a detriment?

In essence, any action or inaction by your employer that results in you reasonably feeling at a disadvantage compared to other workers counts. Obvious examples involve financial loss – for example, a reduction in pay, or the loss of a promotion opportunity – but it doesn't have to. Threats of disciplinary action, even if not acted on, or a refusal of a training opportunity, or allocating you less prestigious tasks, because of an SPL-related reason, can be unlawful.

What if a co-worker treats me badly because of SPL?

Actions by co-workers – such as bullying – are not covered by the definition of “detriment”. However in some circumstances the actions of co-workers could amount to discrimination for which your employer bears responsibility (see below), and if your employer is aware of the bullying that may well trigger an obligation on them to address it.

Right not to be unfairly dismissed

The law specifically protects employees from being dismissed for a reason related to SPL. If the reason or principal reason for your dismissal is because you have taken SPL, sought to take SPL, or your employer believed you were likely to take SPL, that would make it an unfair dismissal, regardless of how long you had been employed by your employer. It would be unfair to dismiss you because your employer did not wish to pay statutory shared parental pay (notwithstanding your employer would be reimbursed 92% or 103% of it by HMRC).

Similarly, a dismissal, whose reason or principal reason was because you had benefitted from terms and conditions of your employment other than pay while on SPL, or because you had worked, considered working, or refused to work a SPLiT day, would also be unfair.

As with many other employment rights, your employer is not entitled to dismiss you because you alleged - in good faith - that your employer has infringed your rights in relation to SPL. Such a dismissal would be unfair. It would not make any difference if in fact you were genuinely mistaken about the right in question, and/or whether or not it had been infringed.

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For agency workers who are not employees, any termination of an assignment due to SPL-related reasons would amount to a “detriment” rather than a dismissal but would also be unlawful.

What can I do if my employer dismisses me to avoid paying Statutory shared parental pay?

If your employer dismisses you or makes you redundant in order to avoid paying you statutory shared parental pay or mainly to avoid paying it, one of the steps you can take is to make a complaint to your local HM Revenue & Customs office. HMRC will investigate and if they find that you were employed for at least eight weeks and your employer dismissed you solely or mainly to avoid paying statutory shared parental pay, HMRC will order your employer to pay it for the remainder of the period of leave you have booked. If your employer does not pay your remaining statutory shared parental pay you can claim it from the Statutory Payments Disputes Team.

Am I protected from discrimination and how?

It is unlawful for employers to discriminate against employees on the basis of “protected characteristics”, namely age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Your employer must not treat you less favourably in relation to SPL because of one or more of these protected characteristics, or harass you. Similarly, your employer must ensure that their policies and practices in relation to SPL and pay are not directly or indirectly discriminatory.

Examples

An employer should not treat a request from a woman for a period of “discontinuous” SPL any less favourably because of her sex than it would treat an identical request from a male employee made in otherwise identical circumstances.

A line manager might make disparaging comments about an individual from a same-sex couple taking SPL to look after their child. If those comments refer to, or are motivated by, that individual’s sexual orientation, and the line manager intended to create an unpleasant working environment for the employee by making those comments, that would amount to unlawful harassment. It would likely also be unlawful if the comments had the effect of creating a hostile working environment for the employee, even if the line manager did not intend to cause offence.

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Your employer may have built up good practice for communication and keeping in touch with women on maternity leave and may even find it natural to continue that good practice for women who opt out of maternity leave and into SPL. Your employer needs to ensure that men taking SPL are not disadvantaged by the practices in place, to avoid any allegations of direct or indirect sex discrimination.

What if a co-worker treats me badly because of SPL?

Your colleagues may take issue with you or others taking SPL. In some circumstances it may amount to unlawful harassment if they engage in unwanted conduct which creates a hostile environment for you at work. For example, a father wishing to take SPL to share the care of his child may be teased or bullied by co-workers for not conforming to gender stereotypes. Your employer has a responsibility to take all reasonable steps, such as through training and through disciplinary policies, to prevent this happening.

What can I do if I think my employer or co-workers have treated me unlawfully?

You should raise the matter with your employer or former employer. You also have three months from the date of the treatment you complain about to raise the matter with ACAS and, if necessary, to bring a claim in the employment tribunal. It is a precondition of bringing a claim in the employment tribunal to have lodged a claim with ACAS, who might be able to help you and your employer reach a compromise solution, avoiding the need for proceedings. If you are uncertain what to do you should seek advice.

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About SPLash

SPLash (SPL advice on sharing) has been created by an alliance of organisations with expertise in employment law and issues affecting parents at work. Its purpose is the sharing of knowledge and best practice on Shared Parental Leave.

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