

SPL for employers: employment protections for those taking SPL

If one of your employees is having a baby or adopting a child, they may wish to take advantage of the new shared parental leave (SPL) system. This article sets out what employers need to know about the employment protections for those taking, or considering taking, shared parental leave. The protections also apply in cases where you believe it likely your employee will take shared parental leave, even if that doesn't turn out to be the case. These employment protections are very similar to those that already apply to those on maternity or adoption leave.

No disadvantaging employees

You must not put an employee at a disadvantage – subject them to any “detriment” as the law puts it – because of an SPL-related reason.

So you must not disadvantage an employee because they have taken SPL, or have sought to take SPL, or because you believed the employee was likely to take SPL, whether or not that was the case.

Examples

Your employee may have handed you 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 they are entitled to SPL, and they have complied with the formalities, you should not pressure them or penalise them for refusing to alter the date, however inconvenient that date may be for you.

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

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

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What about if an employee refuses to work (or conversely wants to work) 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 the employee carries out such work, or considers doing so, or, on the flip-side, refuses to carry out such work when you want them to, you must not disadvantage the employee as a result.

What counts as a disadvantage or a detriment?

In essence, any action you take, or any inaction, that results in the employee reasonably feeling at a disadvantage compared to other workers, counts. Obvious examples involve financial loss – for example, you reduce their pay, or refuse them a promotion– but it doesn't have to. Threats of disciplinary action, even if not acted on, or a refusal of a training opportunity, or allocating an employee less prestigious tasks, because of an SPL-related reason, can be unlawful, and you could face tribunal proceedings as a result.

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

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

Right not to be unfairly dismissed

The law specifically protects employees from being dismissed for a reason related to SPL, and you could face tribunal proceedings as a result.

If the reason or principal reason for your employee's dismissal was because they have taken SPL, sought to take SPL, or you believed they were likely to take SPL, that would make it an unfair dismissal, regardless of how long they had been employed with you (the normal rules requiring two years service before an employee can claim unfair dismissal would not apply). It would also be unfair to dismiss your employee because you did not wish to pay statutory shared parental pay (notwithstanding you would be reimbursed 92% or 103% of it by HMRC).

Similarly, if you dismissed an employee and the reason or principal reason was because that employee had benefitted from terms and conditions of their employment other than pay while on SPL, or because they had worked, considered working, or refused to work a SPLiT day, that would also be unfair.

As with many other employment rights, you are not entitled to dismiss employees because they alleged - in good faith - that you have infringed their rights in relation to SPL. Such a dismissal would be unfair. It doesn't matter if the employee was

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genuinely mistaken about the right in question, and/or whether or not it had been infringed.

What about agency workers?

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 happens if I dismiss an employee to avoid paying Statutory shared parental pay?

Aside from this being unlawful, you may find that a complaint is made to HM Revenue & Customs office. HMRC have the power to investigate and if they find that you dismissed an employee solely or mainly to avoid paying statutory shared parental pay, they can impose a penalty as well as order you to pay the statutory pay for the remainder of the period of leave that was booked.

What do I need to know about non- discrimination and shared parental leave?

You must not 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. When it comes to SPL, you must not treat individual employees less favourably because of one or more of these protected characteristics, or harass the employee. Similarly, you need to make sure that your policies and practices in relation to SPL and pay are not directly or indirectly discriminatory.

Examples

You should not treat a request from a woman for a period of “discontinuous” SPL any less favourably because of her sex than you 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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You 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. You need 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 an employee badly because of SPL?

Colleagues may take issue with employees taking SPL. In some circumstances it may amount to unlawful harassment if they engage in unwanted conduct which creates a hostile environment for the employee 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. You have a responsibility to take all reasonable steps, such as through training and through disciplinary policies, to prevent this happening, otherwise you could be held responsible for the harassment.

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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.

<http://www.yesslaw.org.uk/sharedleave/about-us/>

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