

Board/Committee:	POLICY AND ORGANISATION BOARD
Date of meeting:	24 NOVEMBER 2021
Title:	ADOPTION LEAVE AND PAY POLICY
Author:	ACTING HEAD OF HR
Status:	FOR DECISION

Purpose

To advise the Policy and Organisation Board of the recommended policy draft changes.

Recommendation

That the Board approves the adoption leave and pay policy for a child under 5 with enhanced pay that reflects the current maternity provisions.

1.0 Background

1.1 The council adoption policy must be reviewed as it does not currently meet the statutory requirements for adoption leave and pay. It has been removed from the Infonet whilst being reviewed.

The pay entitlement currently provided to staff is very limited in length and the policy does not provide any information about statutory entitlements.

The council has not had any requests for adoption leave but a policy must be in place to ensure that staff are aware of any entitlement they have.

1.2 The current policy is detailed in Appendix 1, however, it is shown below in brief:

- Staff with at least six months' continuous service with Gosport Borough Council who are adopting a child under 16 years of age where there is no previous relationship with either of the parents.
- Five weeks' leave at 90% of average weekly pay, and up to a maximum of twelve weeks' unpaid leave. Such leave may be taken either en bloc, or in separate periods, but must be taken within the first twelve months of the date of the adoption.

1.3 The new occupational enhanced pay, once adopted, will be included within a clear adoption policy and published on the council Infonet for access by managers and staff.

2.0 Report

2.1 In 2007, the National Joint Council (NJC) circular stated that the NJC agreed that an adoption policy would be included in the National

Agreement on Pay and Conditions of Service (Green book) in line with the maternity policy and that the full text for inclusion in the Green book would follow shortly. However, subsequently, the Green book was not updated and when asked to provide advice, the Local Government Association (LGA) confirmed that the change was not formally implemented. The statement in the Green book therefore continues to say:

Authorities are recommended to introduce adoption leave schemes for employees adopting children.

- 2.2** South East Employers has confirmed that although the Green book was not updated, the intent from the NJC was clear and that the NJC were anticipating that the Adoption Leave and Pay Policy, when introduced would mirror the maternity policy.

The NJC circular suggests a 'should' match approach rather than a 'must' match. However, in the absence of a Green book policy, councils are expected to implement their own locally determined policy.

- 2.3** The current adoption policy does not reflect the Green book maternity provisions.
- 2.4** Since 2015, statutory payments for adoption leave have matched the statutory payment for maternity leave (albeit during maternity there is access to maternity allowance when SMP can't be accessed). However, there is no government requirement that stipulates that occupational adoption pay should reflect occupational maternity pay.
- 2.5** The council has the option to enhance adoption pay to reflect the maternity policy or pay at the statutory rate and the decision made can be supported either way by case law. Not all councils reflect the maternity pay policy in their adoption policy as there is caselaw that can support a policy that pays a lower rate compared to the maternity policy.

2.6 Legislation and case law examples

- 2.6.1** In choosing to enhance maternity pay but not adoption pay, a court may consider the special treatment afforded to mothers in connection with pregnancy or childbirth. The special provision for a woman in connection with her pregnancy, childbirth or maternity leave is not sex discrimination against a man provided that the action an employer takes does not go beyond what is necessary to rectify her disadvantage. This is supported by the Equality Act 2010.

In addition, the comparator for a man on adoption leave has previously been found to be a woman on adoption leave and not a woman on maternity leave.

- 2.6.2** When recommending to enhance adoption pay, the impact on other policies in the council has been considered. Specifically, the current shared

parental leave policy. The caselaw currently supports the view that maternity pay and adoption pay can be the same and can be higher than shared parental leave pay. Therefore, the council can choose to enhance adoption leave whilst still paying shared parental leave at a statutory rate.

2.6.3 Currently the legal argument the council relies on in terms of how enhanced maternity pay is provided whilst not providing enhanced pay for shared parental leave lies in the special provision afforded to mothers in connection with pregnancy or childbirth. Also, case law shows that the correct comparator for a man on shared parental leave is a woman on shared parental leave, not a woman on maternity leave or adoption leave.

2.6.4 In a recent case this view regarding paying adoption leave at an enhanced rate whilst paying shared parental leave at a statutory rate is confirmed. In brief;

Can a man on Shared Parental Leave base a sex discrimination claim on being paid less than a woman on Adoption Leave?

No, held the Employment Appeal Tribunal (EAT) in [Price v Powys County Council](#); the two are not comparable. Comparing himself to a female colleague on Adoption Leave, the Claimant alleged direct sex discrimination. The tribunal dismissed the claim as the comparator was wrong, listing five differences between employees on Shared Parental Leave and on Adoption Leave.

The EAT dismissed the appeal, applying the Court of Appeal's decision in [Capita Customer Management Ltd v Ali](#). Adoption Leave is materially different to Shared Parental Leave, its purpose goes beyond providing childcare. The requirement in section 23 of the Equality Act 2010 that there must be no material difference in circumstances between the Claimant and his comparator was not met, therefore the claim failed.

2.6.5 In addition, it is supported by the Court of Appeal ruling of no indirect sex discrimination or unequal pay in [Chief Constable of Leicestershire Police v Hextall](#)

[Lewis Silkin - Failing to enhance pay for SPL is not sex discrimination](#)

Equal pay claim - a sex equality clause does not apply to contractual terms giving women special treatment in connection with pregnancy or childbirth. Maternity leave is part of this special protection, so the equal pay claim must fail.

Indirect sex discrimination - The provision, criterion or practice was the application of the contractual provisions relating to Shared Parental leave, so the pool for comparison should not include birth mothers on maternity leave because they are in a different situation.

This meant that men were not caused a particular disadvantage, because

women on Shared Parental Leave were also limited to statutory pay. Any indirect discrimination could also be justified in any event as special treatment of mothers on maternity leave. Although this special treatment exemption is missing from the indirect discrimination provisions in the Equality Act, the Court of Appeal regarded this as an error by Parliament because the exemption was included in EU law and in the previous UK legislation.

- 2.6.6** It is noted that there may however still be some risk encountered where the enhanced pay lasts for all or most of the period of maternity leave. Therefore, it is the council's intention to closely monitor any cases regarding adoption, maternity and shared parental leave, both within the council and in external caselaw. The policy will be reviewed as and when necessary to reflect up to date practice.

2.7 Adoption pay rate recommended

The criteria and pay rates for the recommended policy are summarised below, however the full document is shown in Appendix 2:

Qualification criteria:

Qualification period is at least 1-year continuous local government service (which includes continuous service with bodies covered under the Redundancy Payments Modification Order) into the week in which the employee is notified of being matched with a child for adoption.

Rate of pay:

6 weeks at 9/10ths of contractual pay, and 12 weeks at half contractual pay.

Period of return to work to retain occupational adoption pay:

Employees must return to local government employment for a minimum of 3 months or repay the 12 weeks' half pay received under the occupational adoption pay policy.

3.0 Consultation

The changes have been consulted on with the Trade Union and with the council's Equality Officer. No changes have been requested as a result of this consultation.

At the Local Joint Staff Committee (LJSC) meeting on 19 August 2021, the committee agreed to approve the enhanced pay adoption policy for onward approval at the P&O Board.

4.0 Conclusion

The recommendation is made to ensure that staff requesting adoption leave have access to the same level of benefits as staff requesting maternity leave.

This can be met by approving an adoption policy for an adoption of a child under 5 with enhanced pay that reflects the maternity provisions.

Once the adoption policy is agreed, the current maternity policy and current shared parental leave policy will be updated in the new format, however, no terms and conditions changes will need to be made to those policies.

Financial Services comments:	There is no specific funding for this policy; costs will come from staff costs budget.
Legal Services comments:	No further comments
Equality and Diversity:	I/A completed and attached
Climate Change implications:	No further comments
Crime and Disorder:	N/A
Service Improvement Plan implications:	N/A
Corporate Plan:	N/A
Risk Assessment:	N/A
Background Papers:	N/A
Appendices:	Appendix 1 - Current Adoption Policy Appendix 2 - Recommended Adoption Policy criteria
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