Employment Law Brief

with

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We are likely to hear a lot about flexible working in the next year or so. There may be reforms to the way in which the right to request flexible working operates – and as we reassess how work is done post-covid we can expect greater emphasis on hybrid working arrangements. After the crisis we have faced, work-life balance is even more important.

From a legal perspective I have always been rather impatient with the right to request flexible working. There just isn't much substance to the right as it is so easy for the employer to refuse the request. The refusal simply has to be for one of a specified list of business reasons and that list is so comprehensive that it is literally impossible to think of a rational reason for refusing the request that isn't on it!

We hardly ever see a Tribunal case that is relying purely on the right to request flexible working. But what we do see are claims for indirect sex discrimination. It is the fact that a refusal of a flexible working request may be discriminatory that gives the issue its real legal bite.

Indirect discrimination is a rather technical concept. It happens when an employer applies a 'provision criterion or practice' which places those who share a protected characteristic at a particular disadvantage and which the employer cannot show to be a 'proportionate means of achieving a legitimate aim'. So if an employer has a rule that disproportionately impacts on women, for example, then that will be discrimination unless the employer can show that the rule is justified.

Most flexible working requests are made because an employee needs to adjust their working hours to accommodate their caring responsibilities. That means that an employer who does not try to accommodate flexible working requests will be at risk of a sex discrimination claim – provided we accept that women are more likely than men to need to make that adjustment.

Do we accept that?

That question was at the heart of the recent EAT decision in Dobson v North Cumbria Integrated Care NHS Foundation Trust. Here however, it was the employer who wanted more flexibility from the employee. She was a community nurse and the mother of three children – two of whom were disabled, with additional care needs. She was dismissed when she refused to agree to a new working pattern that would have required her to work more flexibly – including at least some work over weekends. She claimed unfair dismissal and indirect sex discrimination.

The Tribunal rejected these claims. They held that there was no evidence that the requirement to work at weekends placed women at a disadvantage. Indeed the team of community nurses in which the claimant worked consisted mostly of women. All of them, apart from the claimant, were able to accommodate the change.

On appeal, the EAT held that in only looking at the particular team in which the claimant worked the Tribunal had adopted a 'pool for comparison' that was too narrow. It appeared that the requirement to work at weekends was applied to a wider group of employees that that – possibly encompassing all of the community nurses employed by the Trust. It was the impact on that wider group that needed to be considered.

The second question was one of evidence. Did the claimant have to show evidence that within this wider group of nurses, women were more adversely affected by the requirement than men?

Generally a court or tribunal must base all of its findings of fact on the evidence in front of it. But there are circumstances where a tribunal can take 'judicial notice' of a fact that is either so well established and accepted that no evidence is needed, or where it has been possible to research the point by consulting some authoritative source.

In this case the EAT ruled that the Tribunal should have taken judicial notice of the fact that there is what it called a 'childcare disparity' – that women 'bear the greater burden of childcare responsibilities'. This was a well-established fact and the EAT pointed out that judicial notice had been taken of it in earlier cases going as far back as the case of London Underground v Edwards (No. 2) in 1999. While society had moved on somewhat in following decades, the position was still far from equal.

Taking judicial notice of the childcare disparity did not necessarily mean that the employer's policy on flexible working placed women at a particular disadvantage. That was always going to be a fact sensitive question depending on the specifics of what the employer had done. Here however the employer was requiring employees to be available for work as and when required by the Trust. The employees themselves did not have any flexibility to choose specific working hours or days. This meant that the employer's approach was 'inherently more likely to produce a detrimental effect, which disproportionately affected women'.

The Tribunal had found that even if there was a disproportionate impact on women there was no discrimination because the employer's requirement to work flexibly was a proportionate means of achieving a legitimate aim. But it had reached this conclusion based only on the impact of the measure on the claimant's small team. Justification involved a balancing exercise and the Tribunal needed to consider the impact of the employer's policy on community nurses as a whole.

Finally, since the Tribunal had based its finding that the dismissal was fair on the assumption that it did not involve discrimination, that meant that this issue also needed to be reconsidered.

So the case will now need to be heard again, but this time the Tribunal will have as its starting point the fact that women are more likely to have childcare responsibilities than men and that a working pattern that does not allow for this will cause women a particular disadvantage.

The employer may still win the case if it can show that its requirement is a proportionate means of achieving a legitimate aim. Health services must of course be provided throughout the week and so it would seem legitimate for the employer to want to ensure that it has adequate resources in place over the weekend. It may be that the only way to do that was to insist that all community nurses were available on that basis and that it was not possible to make provision for those with childcare needs. When you put it like that, however, it does seem that the employer faces an uphill task.

Don't forget to check more about Darren Newman on his blog at A Range of Reasonable Responses or on twitter at @DazNewman