Employment Law Brief

with

Darren Newman

The recent case of an estate agent who won over £180,000 in compensation when her employer refused to let her leave the office early to pick up her child from a nursery caused a slight media storm a couple of weeks ago. In Thompson v Scancrown Ltd t/a Manors the employee won her indirect sex discrimination claim because the Tribunal did not accept that the employer had shown that its insistence on her working until 6pm was a 'proportionate means of achieving a legitimate aim'. To read some of the press coverage you would think this was some breakthrough case setting a dangerous new precedent. It is of course no such thing.

The idea that insisting on full-time working might amount to indirect sex discrimination is far from new. In fact the earliest case I can find – Home Office v Holmes – goes back to 1984. In that case a civil servant returning from maternity leave was refused a part-time working arrangement and succeeded in her claim. It is worth noting that this was decades before there was any specific right to request flexible working.

The Right to Request flexible working was introduced in 2003. Originally it was confined to requests that were made to allow the employee to provide care for a dependent. That requirement was removed in 2014 so that now the request can be made for any reason at all. It is, however, a limited right. It provides that an employee can request a variation in contract relating to their hours of work, or their ability to work at home – but it gives employers a wide discretion to refuse the request. A refusal must be based on one of a number of specific reasons set out in Regulations – but those reasons are so wide that it is literally impossible to think of any genuine business reason that does not fall within them.

This is where indirect discrimination comes in. An employer might be fully compliant with the right to request flexible working – to have followed a fair process and refused a request for a genuine business reason - but still lose a claim for indirect sex discrimination. This is because the Equality Act requires that any 'provision criterion or practice' which causes a particular disadvantage to women (or any other group sharing a protected characteristic) must be a proportionate means of achieving as legitimate aim. It is not enough to have a good business reason for refusing – the refusal must also be proportionate. That involves the Tribunal weighing the importance of the business reason against the discriminatory impact of the practice being challenged.

One other key difference is compensation. A breach of the right to request flexible working can lead to compensation of up to eight week's pay. Compensation for indirect discrimination, however, is uncapped. In the Thompson case the employee was a senior estate agent enjoying a high salary plus bonus and commission. She had to leave that job because the working hours did not fit with her childcare arrangements leading to considerable loss of earnings. That together with injury to feelings calculated at £13,500 explains the unusually high award that she received.

As we emerge (hopefully) from the pandemic we are likely to see a surge in flexible working requests focussing not so much on hours of work but on its location. Employees who have benefitted from working at home during lockdown may want to continue the arrangement – or at least agree some hybrid approach that avoids the need to travel into work every day. But in most cases the employer will have the contractual right to require them to come into the workplace. I don't think there can be any serious argument that the arrangements adopted over the last 18 months - in response to strong government

guidance to work at home when possible - have changed that fact.

One mechanism for persuading the employer to accept a change is a flexible working request. This is more accurately termed a right to request a 'contract variation' (S.80F Employment Rights Act 1996) and it expressly covers a request to work from home. The question, however, is whether requests of this sort can also be backed up with the threat of an indirect discrimination claim if the employer refuses.

There can be no argument that women are more likely than men to need to work part-time to accommodate their caring responsibilities. Indeed just recently the EAT held that this fact was so well established that there was no need for a claimant to present evidence of it (Dobson v North Cumbria Integrated Care NHS Foundation Trust). Matters are not quite so straightforward when it comes to home working. It may be, of course, that for similar reasons women are more likely than men to need to work from home – but I doubt the disparity is quite so clear cut. Tribunals are likely to need to see detailed evidence of who is requesting a working from home arrangement before finding that indirect discrimination is in play.

That may mean that employees only have the bare right to request flexible working to rely upon. It was reported recently that the Government is planning to announce that the current 26-week qualifying period for making such a request is to be abolished. That in itself will not make much more than a cosmetic difference. But a change promised in the 2019 Conservative party manifesto could be much more significant. The manifesto said that the Government would encourage flexible working and "consult on making it the default unless employers have good reasons not to". Let's leave aside the fact that grammatically that doesn't make much sense. What the Government seems to be saying is that there should be a test of reasonableness not just in the way in which an employer deals with a request but also in assessing the employer's reasons for refusing it. That would be a significant change and would give considerably more weight to any working from home request.

Whether the Government will act on that commitment remains to be seen. Meanwhile employers facing requests under the current regime would still be well advised to take them seriously. There may be valid reasons why increased home working is not viable for particular roles or for particular individuals. But employers should not assume that they can simply refuse requests without giving them serious consideration. My tip is to try to say yes to a request. If working from home causes particular difficulties, then engage with the employee to try to resolve them. Then if you can't make the request work and have to turn it down, your reasons for doing so will be clear to both the employee and any Tribunal that may have to assess them. Whatever the legal position ends up being, if the Tribunal sees that you have engaged in the process in good faith and genuinely tried your best to accommodate the request, that is likely to stand you in good stead.

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