Dismissal of a working mother for refusal to work occasional weekends may have been indirectly discriminatory and unfair

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custom_padding__hover="|||"][et_pb_text _builder_version="4.7.4" text_orientation="justified" hover_enabled="0" use_border_color="off" sticky_enabled="0"]**In Dobson v North Cumbria Integrated Care NHS Foundation Trust the EAT ruled that Employment Tribunals must accept as fact that women still bear the primary burden of childcare responsibilities and this hinders their ability to work certain hours. This approach may help working mothers show that onerous working patterns are indirectly discriminatory on the grounds of sex.**

What does the law say?

In the employment context, indirect discrimination occurs where:

- The employer applies a provision, criterion or practice (the **PCP**) to a worker who has a protected characteristic for the purposes of the Equality Act 2010 and applies the same PCP to workers who do not share that protected characteristic.
- The PCP puts (or would put) people with whom the worker shares the protected characteristic at a particular disadvantage compared to those who do not share it (the **group disadvantage**).
- The PCP puts (or would put) the worker to that particular disadvantage (the **individual disadvantage**).
- The employer cannot show the PCP to be a proportionate means of achieving a legitimate aim (**objective justification**).

Many employment cases have recognised that women are more likely than men to bear the bulk of childcare responsibilities and that this may disadvantage them as a group.

What happened in this case?

Ms Dobson was employed as a community nurse by an NHS Trust, working in a team made up of nine women and one man. She had

three children, two of whom are disabled. Her childcare responsibilities meant that she only worked on Wednesdays and Thursdays each week. In September 2016, the Trust asked its community nurses to work flexibly, including occasional weekends (but not more than once a month). Ms Dobson refused due to her childcare commitments and was dismissed in July 2017.

Ms Dobson claimed that that her dismissal was unfair and indirectly discriminatory on the grounds of sex. (She also brought a claim for victimisation which is not discussed in this briefing). The Employment Tribunal dismissed the unfair dismissal claim holding that the Trust had explored reasonable alternatives with Ms Dobson, which she had rejected. Ultimately, the increasing demands on the Trust's service meant that it was reasonable for it to conclude that there was no other option but to dismiss.

In relation to the indirect sex discrimination claim, the Tribunal concluded that the claim failed because there was no evidence that the requirement for community nurses to work flexibly including at weekends caused particular disadvantage for women compared to men. Everyone else in Ms Dobson's team, including the eight other women, was able to comply with the PCP.

Although the Tribunal had sympathy with Ms Dobson's particular situation, it said the fact that she is a parent of disabled children is not a protected characteristic that she could rely on in an indirect discrimination claim. In any event, the Tribunal concluded that if it were wrong about the lack of group disadvantage, the Trust would have been able to justify the new week-end working requirement , meaning the claim would still fail.

Ms Dobson appealed to the Employment Appeal Tribunal (**EAT**).

What was decided?

Ms Dobson's appeal was allowed, and the case has been remitted to the Employment Tribunal. We discuss the key grounds of appeal and the EAT's decision on each one below.

Indirect sex discrimination

(i) Wrong pool used for determining group disadvantage

The first key ground of appeal was that the Tribunal had gone wrong by only considering group disadvantage in the context of Ms Dobson's small team, rather than for all community nurses working across the Trust.

The EAT agreed. Since the new rule applied to all community nurses, the logical pool for determining group disadvantage was all the community nurses working for the Trust. It was wrong to look only at Ms Dobson's team. This produced a potentially unrepresentative pool in terms of childcare responsibilities.

(ii) Failure to take judicial notice of the "childcare disparity"

The second key ground of appeal was that the Tribunal had erred in requiring Ms Dobson to produce evidence of group disadvantage. Instead, this was a case where the Tribunal ought to have taken "judicial notice" of the fact that women are more likely than men to bear the bulk of childcare responsibilities and that this may limit their ability to work certain hours. "Judicial notice" means to accept something as fact without it needing to be proved.

This fact has already been recognised in many other employment cases, including by the Court of Appeal in London Underground v Edwards (No.2) and the Supreme Court in Essop v Home Office (UK Border Agency). Requiring evidence on each occasion would make the bringing of such claims more difficult than it already is.

The EAT accepted that authorities have established that women bear the greater burden of childcare responsibilities than men and this limits their ability to work certain hours. It also accepted that judicial notice of this "childcare disparity" had been taken without further enquiry on several occasions. As such, it was a matter that Tribunals must take into account if relevant. However, the EAT accepted that this does not mean the matter is set in stone. Of course, things can change over time. However, this was not the case as far as the childcare disparity is concerned. The EAT said: "Whilst things might have progressed somewhat in that men do now bear a greater proportion of child caring responsibilities than they did decades ago, the position is still far from equal."

The EAT concluded that the Tribunal had erred in not taking judicial notice of the childcare disparity and in treating Ms Dobson's case as unsupported by evidence.

(iii) Objective justification

The EAT agreed that the Tribunal's finding on objective justification was unsafe given the error made in relation to the pool and group disadvantage. Objective justification would, therefore, have to be revisited (however, it is still possible that the Trust may be able to justify the discrimination).

Unfair dismissal

The reason for dismissal was Ms Dobson's inability to comply with the requirement for community nurses to work flexibly, including at weekends. This was inextricably linked to the revised working arrangements giving rise to the alleged indirect discrimination.

Having found that the Tribunal had erred on the indirect discrimination claim, the EAT agreed that a different outcome in that claim might mean that a different conclusion should be reached in the unfair dismissal claim. In other words, if it

is decided that the new working arrangements were indirectly discriminatory, then dismissal for failing to comply with that requirement might be outside the band of reasonable responses and unfair.

What does this decision mean for employers?

The fact that Tribunals must take judicial notice of the childcare disparity (for as long as it persists) helps women bringing indirect sex discrimination claims connected to working patterns. But it's worth remembering that this does not inevitably mean that group disadvantage will be present – it will always depend on the particular rule or practice in issue. A rigid requirement to work weekends, nights or unpredictable hours will usually mean that group disadvantage will follow. But a less onerous provision (e.g. working any period of 8 hours across a fixed window of time) might not necessarily disadvantage those with childcare responsibilities and, in fact, might even favour them.

Employers should also note that in cases like this, "disadvantage" does not have to mean that compliance is impossible. Women can still be disadvantaged by a PCP relating to working patterns, where they could comply, but this would cause them difficulties and/or force them to make arrangements for someone else to take responsibility for childcare (including their husband or partner).

The key take-away for employers is to avoid imposing rigid and onerous working patterns on women with childcare responsibilities. Try to be as flexible as possible and open a dialogue with the employee to identify a pattern that works for both parties. Even if this proves to be impossible, the efforts made here will help employers demonstrate that they have acted proportionately and will help to justify the chosen pattern.

Dobson v North Cumbria Integrated Care NHS Foundation Trust

If you would like to discuss any issues arising out of this decision please contact Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.[/et_pb_text][/et_pb_column][/et_pb_row][/et_pb_section][et_pb_section fb_built="1" _builder_version="3.26.6"][et_pb_row _builder_version="3.26.6"][et_pb_column type="4_4" _builder_version="3.26.6"][/et_pb_column][/et_pb_row][/et_pb_section]