Imposition of Saturday working requirement on a single mother was sex discrimination

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In Keating v WH Smith Retail Holdings Ltd an Employment Tribunal ruled that a female employee was indirectly discriminated against on the grounds of sex when her employer sought to impose Saturday working on her. It also said that she had been constructively unfairly dismissed.

What does the law say?

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 Keating was employed as a retail assistant by WH Smith. She was contracted to work flexibly for 20 hours per week (with a further eight hours per week when more staff were required). Her contract also stated that she may be required to work Saturdays, Sundays and/or public and Bank Holidays. She was a single parent with one dependent child aged eight and her

childcare responsibilities meant, in practice, she only worked on weekdays.

In the early summer of 2018, her manager, Mr Cruickshanks, identified a business need to introduce a Saturday rota for the weekday staff. This was due to falling sales revenue in the store and budget constraints that followed from this. There was an anticipated departure of University students who worked weekends and Mr Cruickshank wanted to fill those shifts with the weekday staff. The proposal was for the weekday staff to work one in every four Saturdays.

Numerous meetings followed between Ms Keating and Mr Cruickshanks, where she highlighted her concerns about childcare. Ms Keating heard no more about the proposed Saturday working until September 2018 when she was rostered to work Saturdays. She reiterated her concerns and Mr Cruickshanks told her she would need to arrange shift swaps with her colleagues.

Ms Keating worked the first rostered Saturday but had to bring her daughter to work with her due to lack of childcare. Once again, she explained to Mr Cruickshanks that she had no one to look after her daughter on Saturdays. No satisfactory response was given. Ms Keating resigned on 22 October 2018 and claimed indirect discrimination on the grounds of sex and constructive unfair dismissal.

What was decided?

The Employment Tribunal upheld both claims.

Indirect sex discrimination

The Tribunal concluded that the PCP of requiring weekday staff to work one in four Saturdays put women at a particular group disadvantage when compared with men because, statistically, women are still the primary carers of dependent children and more women than men are single child carers.

The Tribunal used its collective experience and judicial discretion to assess the impact of the PCP to women at large as WH Smith did not clearly identify the pool of staff in the store (i.e. how many were men and how many were women, how many had childcare responsibilities of dependent children and how many had partners). The Tribunal concluded that Ms Keating was put at a disadvantage: she was a woman, a single mother who could not afford childcare and had no network she could call on.

The Tribunal also accepted WH Smith had the legitimate aim of needing to manage costs and the desire to share Saturday working fairly amongst the team. However, the aim was not proportionate. Mr Cruickshanks had not considered less discriminatory alternatives. For example, he had not asked any other employee whether they could work the Saturday shifts for Ms Keating and/or considered recruiting one dedicated member of staff to work Saturday shifts.

Constructive unfair dismissal

The Tribunal concluded that WH Smith failed to have any regard to Ms Keating's childcare issues, despite there being several opportunities to address it. This conduct was likely to destroy or seriously damage the relationship of trust and confidence. In particular, the Tribunal noted that the express flexibility provisions in Ms Keating's contract were fettered by the implied term of trust and confidence. Ms Keating had resigned in response to WH Smith's reliance on this clause and she had done so promptly.

What does this decision mean for employers?

This case, and the recent decision in **Dobson v North Cumbria Integrated Care NHS Foundation Trust**, show that Tribunals are willing to accept as a fact that women bear the primary responsibility for childcare and this may limit their ability to work certain hours or working patterns. Any rigid

requirement to work weekends, nights or unpredictable hours may well mean that group disadvantage will follow.

Employers should avoid imposing rigid and onerous working patterns on women with childcare responsibilities, especially single mothers without a support network as was the case here. Try to be as flexible as possible and open a dialogue with the employee to identify a pattern that works for both parties. Ignoring an employee's repeated concerns is a dangerous strategy. Even if no compromise is possible, the efforts made here will help employers demonstrate that they have acted proportionately and also not breached the duty of trust and confidence.

Keating v WH Smith Retail Holdings Ltd

If you would like to discuss any issues arising out of this decision please contact Hannah Lynn (hannahlynn@bdbf.co.uk), Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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