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EMPLOYMENT LAW:

DISMISSING WORKING MOTHER FOR REFUSING TO WORK SPECIFIC SHIFTS - INDIRECTLY DISCRIMINATORY AND UNFAIR?

INTRODUCTION

In a recent decision[1], the Employment Appeal Tribunal ("**EAT**") in the UK concluded that women have a greater burden of childcare than men and that this is a known fact thus judicial notice has been taken as such. The EAT's decision instilled confidence for women with childcare responsibilities to file indirect sex discrimination claims successfully in situations where their employer imposes a requirement to work flexible, volatile and indeterminate patterns.

FACTS

Ms. Dobson (the "**Appellant**") was employed by NHS Trust (the "**Respondent**") as a community nurse. In 2008, after giving birth to her first child who was differently abled, she put in a request for flexible working and was approved. It was agreed that she would only work on Wednesdays and Thursdays. She then went on to give birth to another two children, one of whom was also differently abled. In 2016, a new rostering policy was introduced by the Respondent which required nurses to work flexibly, which included occasional weekends. The Appellant refused and made it known that she could not accommodate the new policy. She was then dismissed in July 2017.

The Appellant then filed a claim against the Respondent, arguing that there was indirect sex discrimination, that flexible working arrangements put women at a particular disadvantage compared to men on the basis that women were more likely to be primary child carers. The tribunal rejected the claim on the basis that there were no evidence deduced showing that there had been any particular disadvantage compared to men. Although the tribunal sympathized with the Appellant on the fact that she is a parent of disabled children, nevertheless this was not a protected characteristic that she could rely on in an indirect discrimination claim.

Hence, the Appellant filed an appeal with the EAT.

[1] – Dobson v North Cumbria Integrated Care NHS Foundation Trust [2021] IRLR 729

ISSUES

The issues on appeal were:

(i) Whether the Respondent had erred in determining the pool for comparison in that it considered group disadvantage by reference only to the small number working in the claimant's team instead of across the Trust.

The Appellant argued that the tribunal erred in only considering group disadvantage in the context of the Team rather than across the Trust more widely. Limiting the pool to the Team alone was not an adequate or effective test of the Appellant's allegation of indirect discrimination, particularly in circumstances where the Appellant had expressly indicated that comparing her position to that of her colleagues in the Team would be unfair and not comparing like with like. The Respondent on the other hand argued that the tribunal identified the pool in accordance with the case put to it by the Claimant, which was focused on the Team. Further, counsel for the Respondent argued that the burden of proof in identifying an appropriate pool did rest with the Claimant. That burden was not discharged, not least because no evidence was adduced in relation to a wider pool. The Claimant's pleaded case was focused on the Team and the tribunal cannot be criticised for approaching the question of the pool on that basis.

(ii) Whether the tribunal erred in finding that the claimant was required to adduce evidence to demonstrate the 'childcare disparity', i.e. the fact that women bore the greater burden of childcare responsibilities than men and that this could limit their ability to work certain hours.

The Appellant argued that it was an error to require the Claimant to adduce evidence of such disadvantage and that this was a case where the tribunal ought to have taken judicial notice of the disadvantage to women. The Respondent in reply submitted that the argument put forth by counsels for the Appellant were problematic and potentially unfair in that there ought to be, at the very least, a requirement that a party identifies the matter in respect of which judicial notice is to be taken and that it was not done in this case.

DECISION OF THE EAT

On the first issue, the EAT agreed with the Appellant that since the new rule applied to all community nurses, the logical pool for determining group disadvantage was all the community nurses working for the Respondent. It was wrong to look only at the Appellant's team. This produced a potentially unrepresentative pool in terms of childcare responsibilities. Such a pool would not realistically or effectively have tested the allegation being made. Accordingly, the tribunal erred by limiting the comparison to those in the team. As a matter of logic, that pool was all community nurses.

In respect to the second issue, the EAT came to the conclusion that the tribunal had erred in not taking judicial notice of the childcare disparity in considering group disadvantage. It was apparent that the 'flexibility' expected was that community nurses would work on other days as and when required by the Respondent. This was not, therefore, an arrangement whereby the nurses had any flexibility to choose working hours or days within certain parameters.

The reason the Appellant was dismissed was for her inability to comply with the new policy. This was inseparably linked to the revised working arrangements giving rise to the alleged indirect discrimination. Therefore, since the EAT had come to the conclusion that the tribunal had erred on the indirect discrimination claim, hence a different conclusion should be reached in respect of the unfair dismissal claim.

CONCLUSION The decision by the EAT ought to be celebrated as it brings to light the harsh reality that many working women with families face a greater burden of childcare responsibilities at home. The court determined that when the "childcare burden" is significant, it must be given judicial notice. Having been given judicial notice status, now many women in the UK with indirect discrimination claims connected to family and work schedule can breathe a little easier. It remains to be seen whether working women in Malaysia may be accorded such rights in choosing flexible work arrangements due to childcare responsibilities at home.

Click HERE to see the full judgement of the case.

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