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Indirect discrimination on grounds of sex

Glover v Lacoste UK Ltd ♦ [2023] EAT 4; February 2, 2023

Facts

Ms M Glover (MG) was an assistant store manager at Lacoste UK Ltd's (LUL) store in Nottingham. She was a full-time employee, working five flexible days per week before commencing her maternity leave on March 3, 2020.

During her maternity leave, on November 9, 2020 MG made a flexible working request to return to work three days a week. After meeting with LUL's HR Director her request was rejected by letter dated March 10, 2021, albeit with a right of appeal. On March 11, 2021 she appealed the decision.

In a letter dated April 7, 2021, LUL upheld the decision in part, offering MG the option to return on a part-time basis working four days a week across any days. The letter stated that the decision was final and that MG had no further right of appeal.

On April 14, 2021, MG's solicitors sent a letter before action to LUL asking the company to reconsider MG's request and informing it that, should the request not be granted, MG might be forced to resign and claim constructive dismissal. On April 23, 2021, LUL granted MG's initial flexible working request of working three days a week.

Although MG's maternity leave ended on March 21, 2021, due to the Covid-19 pandemic she was placed on furlough and did not actually return to work until April 25, 2021 – after LUL had granted her flexible working application. This meant that MG never worked under the four-day flexible working arrangement which had been granted following her appeal.

Despite the fact that MG was granted her request to work three days a week, on May 4, 2021 she lodged an indirect sex discrimination claim against LUL. This was on the basis that the requirement to work four flexible days per week was a provision, criterion or practice (PCP) which had been applied to her and put women such as her at a disadvantage due to childcare implications, which she claimed could not be justified.

Employment Tribunal

The ET rejected the claim of indirect sex discrimination on the basis that a PCP had not been applied to MG. The ET held that because LUL overturned its decision and granted MG's initial request to work three days a week on April 23, 2021 (before she had returned to work), the PCP of working a four-day arrangement was never actually applied to her. In reaching its decision, the ET relied predominantly on the EAT judgment in *Little v Richmond Pharmacology* Ltd [2014] ICR 85.

The ET did, however, find that if the PCP had been applied it would have put women at a disadvantage because of consequential difficulties in arranging childcare, and that this would have been unjustified.

Employment Appeal Tribunal

MG appealed to the EAT.

The issue for the EAT to decide was whether the PCP was applied when MG began working under the new arrangement (April 25, 2021) or at the point when the flexible working application was determined. If the latter, there was the further issue of when

♦ [2023] IRLR 457

the application was considered to have been determined, namely was this the date of her appeal outcome (April 7, 2021) or when the employer overturned its refusal further to MG's letter before action (April 23, 2021)?

The EAT found that the ET had erred in its interpretation of *Little*. In contrast to the ET, the EAT held that *Little* established that a flexible working PCP was applied when an application was determined and not when an employee attempts to return to work under the discriminatory arrangement. However, based on the specific facts in *Little*, the PCP was not found to have been applied to the employee because the original decision to reject her request was subject to appeal and therefore provisional. The claimant in *Little* had exercised that right of appeal and the decision was overturned with her initial request being granted.

... employers should carefully consider flexible working requests from the outset, particularly where the applicant is not afforded, or has exhausted, any right of appeal.

This was to be distinguished in this case as the decision to grant MG's request came only after a letter before action had been sent, after the appeal stage had concluded and was expressly stated to be final. LUL's eventual decision to grant MG's initial request on April 23, 2021 was therefore not the final step in deciding whether to apply the PCP, but a reversal of its previous decision to apply it.

Finding in favour of MG, the EAT held that the PCP was applied to her upon the outcome of her appeal on April 7, 2021. The EAT held that the ET erred in law and remitted the case to the ET to determine whether the PCP subjected MG to a disadvantage.

While the EAT did not make a finding on whether there was a disadvantage or detriment, it noted that it would be difficult to find that there was no detriment when MG had felt the need to consider resigning as a result of LUL's refusal of her flexible working application.

Implications for practitioners

This case illustrates that an employee who has had their flexible working request rejected could bring a successful claim of indirect sex discrimination, even if the request is subsequently granted, provided that the initial decision was not objectively justified. This could apply not just to indirect discrimination on the basis of sex, but also other protected characteristics such as age, disability or religion or belief.

Although it may be rare for these claims to be brought where the request is ultimately granted, employers should carefully consider flexible working requests from the outset, particularly where the applicant is not afforded, or has exhausted, any right of appeal.

If an employee is able to return to work under the arrangement they initially requested (as MG did in this case), it may be difficult to show any financial loss and so compensation would likely be restricted to an award for injury to feelings.

Sophie Etherton
Paralegal, Leigh Day

Lara Kennedy
Solicitor, Leigh Day