Refusal of maternity returner’s request to work part-time to allow her to collect her child from nursery was discriminatory

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An employer’s refusal to allow an employee to make modest adjustments to her working hours following her return from maternity leave has been held to be indirect sex discrimination. An Employment Tribunal awarded the employee £185,000.

What happened in this case?

Ms Thompson was employed as a Sales Manager by Manors, an estate agency. Manors covered both sales and lettings, with many international clients. Ms Thompson was recognised for her good client relationships and it was acknowledged by the company that “down to you, the business is doing well.”

Ms Thompson took a period of maternity leave between October 2018 and October 2019. On her return from maternity leave, she made a flexible working request asking to work four days per week from 9am to 5pm (rather than the standard 6pm). She wanted to finish work at 5pm in order to pick up her daughter from nursery. The flexible working request also set out a number of suggestions to make the proposal work including that her maternity leave cover (who was about to revert back to her original position) could fill in for her on her day off and that she would be available on her mobile telephone for any urgent queries between 5pm and 6pm.

Manors refused the request, citing the following business reasons:

- the burden of additional costs;
- the detrimental effect on the ability to meet customer

demand;

- an inability to reorganise work among existing staff;
- an inability to recruit additional staff; and
- planned structural changes.

Ms Thompson appealed the decision on the basis that the grounds for refusal had not been explained. She referred to ACAS guidance on flexible working, highlighting that there had been no discussion of the request with her, rather it was a flat refusal. Further, she argued that the request would not result in the burden of additional costs, cause any detriment to meet client demand or require additional staff.

Ms Thompson resigned before the appeal was finalised. She went on to bring various claims, including a claim arguing that the working hours requirements was indirectly discriminatory on the grounds of sex.

What was decided?

The Employment Tribunal considered whether it was still the case that women are more likely to be the primary carers of children than men, noting that the situation is not as obvious now as it was a generation ago. Ms Thompson adduced evidence to confirm that this is still the case, which was accepted by the Employment Tribunal. It is worth noting here that this decision was handed down before a recent Employment Appeal Tribunal decision, where it was accepted that the "childcare disparity" is a matter that Tribunals must take into account if relevant, without the need for further evidence. In other words, although this employee was able to produce evidence to show that women were more likely to have primary child caring responsibilities, there was, in fact, no need for her to have gone to the trouble. The Employment Tribunal also agreed that the working hours requirement placed Ms Thompson at an individual disadvantage.

The Employment Tribunal then turned to consider whether the

working hours requirement could be justified. The Employment Tribunal understood the employer's concerns about meeting customer demand, coupled with caution about changing the team's roles during a time when Brexit had caused a period of uncertainty to the property market. However, it did not follow that the employer was unable to have made the adjustments sought. Although it would have caused them some difficulty, this did not outweigh the discriminatory impact that the working hours requirement had on Ms Thompson. As such, the requirement was not justified, and the indirect sex discrimination claim succeeded. Ms Thompson was awarded compensation of £185,000.

What does this mean for employers?

It is critical for employers to consider the rationale and justification for refusing a flexible working request with care. It is not enough to rely on the list of potential reasons for refusal set out in the law relating to requests for flexible working – a clear explanation is needed. It is, therefore, important for employers not simply to rely on a template refusal letter; time needs to be taken to tailor the response to the issues that the business is concerned about and explain why the proposal is not viable in that particular individual case.

The Employment Tribunal also mentioned that no consideration was given to the use of a trial period to see whether the feared impacts would transpire. Trial periods are a useful tool which are often overlooked when considering how to respond to a flexible working request. The pandemic has shown the viability of hybrid and/or flexible working for many roles and, as such, trial periods may be less relevant in some cases. However, where the request concerns a novel working pattern, consideration should be given to the use of a trial period.

If you would like to discuss any issues arising out of this

decision please contact, Emily Plosker (emilyplosker@bdbf.co.uk), Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

Thompson v Scancrown Ltd t/a Manors

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