Requirement to work a potentially discriminatory working pattern applied to the employee once flexible working appeal was rejected

In Glover v Lacoste UK Ltd the EAT said the rejection of a flexible working request on appeal resulted in the "application" of a potentially discriminatory working pattern on the employee. This was the case even though the employer later changed its mind and the employee never had to work under the unwanted working pattern.

What happened in this case?

Ms Glover worked for Lacoste as an assistant store manager. She worked five days out of seven per week, with the working days set out in a rota provided to her every four weeks. She went on maternity leave in March 2020 and her store closed during the Covid -19 pandemic.

In November 2020, Ms Glover made a flexible working request asking to work three days per week. Lacoste rejected her request at the initial stage and also on appeal, although it offered a compromise of four days per week to be worked on a fully flexible basis (i.e. on any day of the week, including weekends). No further right of appeal was offered.

Ms Glover felt that the requirement to work on any day of the week would be impossible given her childcare commitments. Her solicitor wrote to Lacoste asking for the original request to be reconsidered, failing which Ms Glover would constructively dismiss herself.

In April 2021, Lacoste relented and agreed to the original request to work three days per week. At the time, Ms Glover was absent on furlough and so had never had to work under the four-day week working pattern proposed by Lacoste. After Lacoste reversed its position, she returned to work.

Ms Glover went on to present a claim for indirect sex discrimination. She said that Lacoste's requirement to work fully flexibly across the week was discriminatory because it put women at a disadvantage compared to men (due to the fact that women still have primary responsibility for childcare), and it also put her at a disadvantage individually.

The Employment Tribunal rejected the claim on the basis that the requirement had never, in fact, "applied" to Ms Glover in practice because Lacoste had reversed the decision before she returned to work. This meant that she had not suffered any individual disadvantage. However, the Tribunal went on to say that had the requirement been applied to Ms Glover then it would have been discriminatory and could not have been justified.

With funding from the Equality and Human Rights Commission, Ms Glover appealed the decision.

What was decided?

The EAT allowed the appeal. In particular, the EAT noted that the Tribunal had misinterpreted previous case authority when deciding whether Lacoste's discriminatory requirement had been "applied" to Ms Glover.

In the case of Little v Richmond Pharmacology Ltd, the employer had rejected Ms Little's flexible working request and required her to work full-time. Their decision was said to be provisional, and she was offered a right of appeal. However, Ms Little resigned and did not return to work under the full-time arrangement. In Ms Glover's case, the Tribunal had concluded that the requirement had not been "applied" to Ms Little because she had never worked under that arrangement. They applied the same logic to Ms Glover's case.

However, this interpretation was wrong. In fact, the real reason the full-time working requirement did not apply to Ms Little was because the employer's decision was expressed to be provisional and subject to appeal. In other words, the internal process was not over.

Properly understood, Little was authority for the rule that a final determination of a flexible working request amounts to the "application" of the requirement in question, even if the employee never actually works under the arrangement. Therefore, in this case, the discriminatory requirement to work four days per week on a fully flexible basis "applied" to Ms Glover upon the determination of her appeal. It did not matter that Ms Glover never actually worked under that arrangement, nor did it matter that Lacoste later changed its mind

However, the question of whether Ms Glover suffered any

disadvantage was remitted to a fresh Employment Tribunal to consider. On one hand, it could be said that the decision was eventually reversed and so she did not have to constructively dismiss herself. However, the EAT Judge said it was hard to see how it could be said that she suffered no disadvantage at all when the request was rejected twice leaving her with no option but to consider resigning.

What are the learning points for employers?

This decision clarifies that reversing a final decision to impose a discriminatory requirement will not extinguish liability for discrimination. The problematic requirement or practice will be deemed to have applied to the employee from the point of the final decision, regardless of what actually happens in practice.

The extent to which the employee has suffered as a result of the decision will be a question of fact. If matters are ultimately resolved in the employee's favour, and he or she returns to work, there will be no loss of earnings. In such circumstances, the employee's remedy will probably be limited to an injury to feelings award only. However, as Lacoste no doubt found out, such claims carry with them the risk of unwanted publicity alongside the considerable time commitment and legal costs associated with defending discrimination claims.

Where a flexible working request is feasible, but you have reservations about it (as Lacoste clearly did) the better option might be to permit it on a trial basis. If it proves not to be workable, you will be able to point to evidence underlining why the arrangement cannot be permitted on a

permanent basis and you will also be in a much better position to defend any claims that follow.

Glover v Lacoste UK Ltd

BDBF is a leading law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.