

# Working parents – the changing legal landscape

The workplace has seen a lot of changes since Covid, but fundamentally it still runs along traditional lines. An office working day of 9am to 5pm (and beyond) is more or less incompatible with the routine of children going to school or nursery. Organising pick-ups, drop-offs and inevitable childhood sicknesses between two working parents can become something resembling a military operation.

Combined with the cost of childcare, this often results in parents (predominantly mothers) taking career breaks or lower-paid jobs and sacrificing long-term earning potential.

While the legal protections around pregnancy and maternity are well-known and operate to protect women at the start of the parenting journey, having children is a lifelong commitment for both female and male employees. It is often not the early stages of having a child, but the long-term juggle of work and family responsibilities which forces mothers to leave employment. This leads to a lack of women at senior levels in businesses, which, in turn, is a significant driver of the gender pay gap.

The law itself recognises that this is a problem that disproportionately affects women. In *Dobson v North Cumbria NHS Trust*, the EAT held that notwithstanding changing social attitudes it remains a fact, of which Tribunals should take judicial notice, that there is a 'childcare disparity' between men and women, with the burden falling more heavily upon

women.

The statutory rules on flexible working were amended in April 2024 to allow greater scope for employees to make a flexible working request. It is now a 'day one' right and the employer must consult with the employee before making any decision to refuse the request. However, the range of permitted reasons for refusing a request is very wide, making it relatively simple for employers to comply with the legislation. The compensation for any breaches of the legislation is also so limited that for many employees it is not worth pursuing. The Labour Government has promised to legislate to make flexible working the default – but exactly what this will mean in practice and when it will happen is yet to be seen.

The better avenue for working mothers (as it was in *Dobson*) is to claim indirect sex discrimination against their employer. They can argue that the employer's practice (for example, of mandating full-time office working) will disadvantage those with childcare responsibilities and thus disproportionately affect women. If the employer cannot successfully argue that their policy is a legitimate requirement for their business, and they have acted proportionately in enforcing it, the employer will be liable for indirect sex discrimination. In *Dobson*, it was held that the employer had acted in a proportionate way and worked with Mrs Dobson to find a reasonable compromise, and her claim failed. However, in *Thompson v Scancrown* the employer refused to budge on their policy of a 6pm finish, and Mrs Thompson's claim succeeded. She was awarded compensation equivalent to over a year's salary plus damages of £13,500 for injury to feelings.

While working mothers have a long and weary history of trying to have and do 'it all', working fathers in the 2020s are far

more likely to see parenting as something that should be genuinely 50:50. The new generation of fathers might feel justifiably put out that the law does not count them as being discriminated against by policies which disadvantage parents.

The January 2024 changes to the Equality Act could change this. The new concept of 'indirect discrimination: same disadvantage' in s19A of the Equality Act means that if:

- an employer imposes a policy on male and female employees;
- the policy disproportionately disadvantages women due to their childcare responsibilities;
- the policy would also put a man with childcare responsibilities at substantively the same disadvantage; and
- the employer cannot show the policy to be a proportionate means of achieving a legitimate business aim,

then the man in question could make an indirect sex discrimination (same disadvantage) claim.

This is welcome news for working fathers in demanding roles, who often face more pushback from employers when trying to

carve out time for their family life.

The search for a flexible working arrangement that both employer and employee can work within can be a long and sometimes frustrating one. However, with millennial parents becoming increasingly senior within their organisations, the possibility of discrimination claims in this area is something that employers are having to take more seriously. Working fathers in the City are using their networks to benchmark family-friendly offerings when looking for a new role, and this trend is only going to increase over the next ten years as millennials move towards the most senior positions. Trust between the employer and employee is paramount, and employees do better work when they feel valued and trusted to do the work within the time available to them, even if sometimes that does not fit standard office hours or means some working from home.

Employers can start to address this cultural shift, and retain and attract talent, by considering their own workplace policies. There is a growing trend for instigating gender-neutral leave policies for the first year after a child's birth, and this sets a great precedent and often helps to retain talented employees in a key transition in their lives. However, policies addressing the ongoing responsibility of raising a family would be as attractive to employees – for example, pay enhancements to the under-utilised unpaid statutory parental leave entitlement of 18 weeks per child.

Policies like flexible start and finish times, hybrid office and home-working and enhancements to the statutory right to emergency time off for dependants could also be beneficial to not only working parents but any employees with caring responsibilities – for example, those caring for elderly

parents or a disabled partner. These individuals may also benefit from the indirect discrimination: same disadvantage provisions of the Equality Act.

Culture change takes time, but the upcoming generation of business leaders envisage a very different workplace to the one in which their parents operated.

**BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact Connie Berry ([ConnieBerry@bdbf.co.uk](mailto:ConnieBerry@bdbf.co.uk)) or your usual BDBF contact.**