Lacoste Flexible Working Ruling Acts As Alert To Employers

By **Amanda Steadman** (March 13, 2023)

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In Glover v. Lacoste U.K. Ltd. last month, the U.K. Employment Appeal Tribunal said that the rejection of a flexible working request on appeal resulted in the application of a potentially discriminatory working pattern on the employee.[1]

This was the case even though the employer later changed its mind and the employee had never had to work under the unwanted working pattern.

What Happened in This Case?

Melissa 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, 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.

Glover felt that the requirement to work on any day of the week would be impossible given her child care commitments. Her solicitor wrote to Lacoste asking for the original request to be reconsidered, failing which 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, Glover had been 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.

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 Glover in practice because Lacoste had reversed the decision before she had 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 Glover then it would have been discriminatory and could not have been justified.

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

What Was Decided?

The employment appeal tribunal allowed the appeal. In particular, it noted that the tribunal had misinterpreted previous case authority when deciding whether Lacoste's discriminatory requirement had been applied to Glover.

In the case of Little v. Richmond Pharmacology Ltd. in 2011, the employer had rejected Little's flexible working request and required her to work full time.[2]

The decision was said to be provisional, and she was offered a right of appeal. However, Little resigned and did not return to work under the full-time arrangement. In Glover's case, the tribunal had concluded that the requirement had not been applied to Little because she had never worked under that arrangement. They applied the same logic to Glover's case.

However, the appeal tribunal said that this interpretation was wrong. In fact, the real reason the full-time working requirement did not apply to Little was because the employer's decision was expressed to be provisional and subject to appeal. In other words, their 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 Glover upon the determination of her appeal. It did not matter that Glover never actually worked under that arrangement, nor did it matter that Lacoste later changed its mind

However, the question of whether Glover suffered any disadvantage was remitted to a fresh employment tribunal to consider. On the one hand, it could be said that the decision was eventually reversed, and so she did not have to constructively dismiss herself.

However, the appeal tribunal 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 and had left 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 does 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. Therefore, the fact that the employee is absent from work at the relevant time will not help an employer avoid liability for discrimination.

However, 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 favor, 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.

Yet, 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.

Looking forward, it should be noted that the Employment Relations (Flexible Working) Bill 2022-2023, currently on its passage through Parliament, will give employees the right to make two flexible working requests per year, rather than just one. Each request will be a standalone request, however, meaning that if an employer decides to impose a discriminatory requirement at the conclusion of the first request, it will not avoid liability for a discrimination by changing its mind and agreeing to the request made on the second attempt.

In addition, the bill will:

- Remove the requirement for employees to explain in their request what effect they think it will have on their employer;

- Require employers to consult with the employee before refusing a request; and

- Reduce the deadline for an employer's decision on a flexible working request from three months to two months.

Furthermore, the U.K. government has committed to making the right to request flexible working a "day 1" employment right. As a result, managing flexible working requests will become slightly more onerous for employers, plus there will be more of them to deal with and less time available to complete the process.

Employers would be well advised to review their flexible working procedures in light of this decision and the forthcoming changes. Care should be taken to ensure that all of those handling flexible working requests receive training on both the process and the risk of indirect discrimination.

Where a flexible working request is feasible, but a manager has reservations about it, the prudent approach would be to permit it on a trial basis. If it ultimately proves not to be workable, the employer will be able to point to evidence underlining why the arrangement cannot be permitted on a permanent basis and it will be in a stronger position to defend any discrimination claim that follows.

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[1] Glover v. Lacoste U.K. Ltd. and Mr R Harmon: Case No: EA-2022-000534-AT.

[2] Little v. Richmond Pharmacology Ltd UKEAT/0490/12/LA.