EAT considers the correct pool for comparison in indirect discrimination cases

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Allen v Primark Stores Ltd [2022] EAT 57

Background facts

1. The claimant was employed as a department store manager at the Respondent's store in Bury. It was a contractual requirement that managers were required to guarantee their availability to work late shifts. In 2019 she took a period of maternity leave and was due to return to work on 1 November 2019. Prior to her return to work she had made an application for flexible working, given that she was a single parent with sole responsibility for childcare. In particular, she was concerned that she would not be able to guarantee her availability to work late shifts.

2. At the relevant time, there were 8 managers employed at the Bury store. The manager's contracts stipulated that they were required to work one of four shifts each day over a five-day period, which included a shift that ran from 10:30am to 8:30pm, which was referred to as the 'late shift'.

3. Responding to her flexible working application, the store manager, Mr Davis, explained:

   "Whilst on the majority of days your reasoning that there are other managers who could cover this late shift is true, on a Thursday we do not have sufficient flexibility in the management team to accommodate this request as only 2 of the 6 current managers are able to work this shift."

4. An alternative was proposed, but that still required the claimant to work the Thursday late shift on occasion. The claimant appealed the outcome, but her appeal was not upheld. She resigned then issued claims for constructive unfair dismissal and indirect sex discrimination.

5. In her claim before the ET, it was the claimant's case that "*the requirement for department managers to guarantee availability to work late shifts amounted to a provision, criterion or practice*"; and she argued that this:

> *"… put women (a) who were department managers at that workplace or (b) who were department managers in the wider workforce … at a particular disadvantage compared to men. The particular disadvantage was the difficulty or practical impossibility of working evenings while having childcare responsibilities."*

6. The Respondent accepted that it had applied such a PCP but denied that it placed women at a substantial disadvantage and argued that, in any event, such treatment was a proportionate means of achieving a legitimate aim.

7. At the outset of the full merits hearing, the claimant clarified that, given the accommodation that the respondent would have allowed, her complaint related to the more specific PCP of being required to guarantee her availability to work the Thursday late shift.

8. In his witness statement, Mr Davies (store manager) said as follows:

"55 Having looked into the Store structure and the management team's shift arrangements, it was clear that only [the claimant] and one other Department Manager, Adam … could do the Thursday late shift. …

56 Adam and Julie could continue doing the Thursday Late Shift but Adam was the only Department Manager that could do it. This meant that granting [the claimant's] request would leave the Store without cover whenever Adam could not work or wanted to go on holiday. …

59 … I considered various shift patterns and managed to come up with an alternative for [the claimant] which went as far as possible to give her what she wanted. In doing so, I was able to provide [the claimant] with the fixed shift times she wanted for all of her shifts apart from a Late Shift on Thursdays as I had no cover for Adam. In doing so, I planned for Adam to work the shifts and then [the claimant] to cover as and when needed. My proposed alternative did not require [the claimant] to work every Thursday Late Shift, only that she "would need to be

available to work" it if it was absolutely necessary and there was no alternative cover …"

9. In identifying the pool for comparison, the ET concluded that this should be comprised of the department managers and trainee managers "*who potentially have to work the Thursday [late] shifts, however convenient or inconvenient to them it was*". In defining that pool, the ET focused on the respondent's Bury store, where, in addition to the claimant, there were five other department managers: Piotr, Adam, Zee, Imran, and Julie (albeit that Julie was in fact a trainee manager). The ET excluded Piotr from the pool "*because he had his own flexible working arrangement which was appropriate to his specific circumstances*". It found, however, that the department managers "*who had historically worked on Thursdays*" were Adam, Zee, Imran, Julie and the claimant. They found that Adam and Julie had no issues working Thursdays. Zee and Imran had childcare issues- Imran took his son to football on Thursdays and therefore was rota'd in for only a few Thursdays, mainly in the school holidays, and he had worked four Thursdays over a period of 51 weeks. Similarly, Zee had childcare responsibilities because his wife worked in retail also, and he had worked 16 Thursday shifts over 51 weeks but complained that he was frustrated at doing to many. Whilst the arrangements with Zee and Imran generally not being required to work on a Thursday late shift was informal, the manager considered that the arrangement had become so entrenched that they had become implied terms.

10. Focusing on the pool for comparison, the ET concluded that it "*should consist of the group which the PCP affects (or would affect) either positively or negatively while excluding workers who were not affected by it, either positively or negatively*." The ET considered the pool should consist of only the managers at the Bury branch and excluded Piotr from the pool.

11. Looking at the pool it had thus identified (i.e. the department managers at the Bury store, other than Piotr), the ET found that, of the proportion of men and women in that pool who were disadvantaged by the requirement to work a late shift on a Thursday because they had childcare responsibilities, two were men (Zee and Imran) and one was a woman (the claimant); it therefore concluded that "*women were not at a particular disadvantage and therefore group disadvantage is not made out*."

12. The Claimant appealed the outcome, arguing that (1) the ET had not identified the correct pool and (2) had failed to adequately explain why a wider pool was rejected. It was argued

that it had been part of the claimant's case below that, as the requirement to be available to work late shifts (including Thursdays) was within the respondent's standard terms and conditions for department managers across the whole of the United Kingdom, the discriminatory impact was properly to be considered across that wider pool.

13. As for ground (1), it was the claimant's contention that the ET had wrongly included Zee and Imran in the pool for comparison given it had found as a fact that the claimant was *required* to work late Thursdays, whereas Zee and Imran only did so on a voluntary basis. The ET had defined the relevant pool as extending to those "*who potentially have to work the Thursday [late] shifts,*" but it had failed to have regard to this requirement in its analysis. It was not a contractual requirement imposed on the two men in question, as was apparent from the fact that the store manager understood their working pattern - not being required to work the late shift on Thursdays - amounted to an implied term. The position of Zee and Imran was further made clear by the respondent's position on the claimant's application for flexible working, treating them as in an analogous position to Piotr as department managers who "*would not be flexible to cover all late nights*".

14. In short, as the PCP relied upon was the requirement to guarantee availability to work Thursday late shifts, the pool for comparison thus ought to have been limited to those who were - or who the respondent considered were - contractually obliged to work the Thursday late shift

EAT judgment

15. The matter came before HHJ Eady (President), who considered the law as to the identification of the correct pool. Those who are in the pool should be those who are affected by the PCP and whose circumstances are not materially different. As explained in Essop v Home Office (UK Border Agency); Naem v Secretary of State for Justice [2017] UKSC 27:

"all the workers affected by the PCP in question should be considered. Then the comparison can be made between the impact of the PCP on the group with the relevant protected characteristic and its impact upon the group without it. This makes sense. It also matches the language of s.19(2)(b) which requires that "it" - ie the PCP in question - puts or would put persons with whom B shares the characteristic at a particular disadvantage compared with persons with whom B does not share it. There is no warrant for including

only some of the persons affected by the PCP for comparison purposes. In general, therefore, identifying the PCP will also identify the pool for comparison"

16. The pool chosen must suitably test the particular discrimination complained of [Grundy v British Airways plc [2007] EWCA Civ 1020]. The pool must be logically defensible, but this does not necessarily mean that only one pool is permissible. Indeed, there may be a range of logical options. as Cox J opined in Ministry of Defence v DeBique [2010] IRLR 471, EAT:

"In reaching their decision as to the appropriate pool in a particular case, a tribunal should undoubtedly consider the position in respect of different pools within the range of decisions open to them; but they are entitled to select from that range the pool which they consider will realistically and effectively test the particular allegation before them."

17. HHJ Eady opined that if the choice of pool had a logical basis - that is to say, it allowed the allegation of discrimination in issue to be tested - there was no requirement upon it to consider a different pool. Ground (2) of the appeal is thus contingent upon ground (1): if the store-specific pool suitably tested the particular discrimination of which the claimant complained, the ET would not have erred by failing to provide a more detailed account of why it did not adopt a broader, UK-wide, perspective.

18. It was found that the ET had been correct to exclude those who could have no interest in the advantage or disadvantage in issue, namely Piotr, who had been granted a flexible working arrangement that he never had to work the Thursday late shift. However the ET did not exclude Imran and Zee. This approach was criticised because it re-defined the complaint being made by the claimant; the PCP she had identified was not simply that she was "*being asked to work*" Thursday late shifts but that she was being required to guarantee her availability to work those shifts. The respondent argued that any requirement being made of the claimant was in the nature of a request, akin to that which was asked of Imran and Zee.

19. The ET was careful to explain that it had included within the pool for comparison those who were *"affected or potentially affected by the application of the PCP, and the context and circumstances in which it is sought to be applied".* The "*context and circumstances*" in this case, however, included the distinction that the respondent had itself drawn between Piotr, Zee and Imran and the other department managers. As had been made clear in the response to the claimant's request for flexible working arrangements, Piotr, Zee and Imran

were not treated as available to cover the Thursday late shift, something Mr Davis had seen as akin to a contractual variation for each of them. Whilst, therefore, Zee and Imran might have been prepared (however reluctantly) to work Thursday late shifts "*when asked, and when the store required*", it was not the respondent's position that they were required to guarantee their availability to do so. Indeed, to suggest that the claimant was being treated in the same way as Zee and Imran would be entirely contrary to the respondent's position in its response to her flexible working request and to the explanation provided by Mr Davis in his witness statement. The claimant would need to be available to work Thursday late shifts because there would otherwise be "*no cover for Adam*". That statement would make no sense if the same requirement of availability applied to Zee and Imran (that is to say, if they would suffer the same disadvantage as the claimant in this regard).

20. Thus HHJ Eady considered that there was a material difference between the position of the claimant on the one hand, and Zee and Imran on the other. The claimant was required to guarantee her availability to work some Thursday late shifts, whereas although Zee and Imran might work some of these shifts, they were not subject to the same requirement of availability. It was not sufficient for the ET to consider whether staff might be asked to work the Thursday late shift without going on to consider if there was an element of compulsion in making such a request. The ET therefore included people in the pool to whom the disadvantage to which the PCP gave rise did not apply.

21. It was concluded therefore that the choice of pool was unsafe. HHJ Eady did not form any view as to whether the ET was bound to adopt a broader, UK-wide pool and the matter was remitted for a re-hearing.

Commentary

22. A helpful reminder of the importance of carefully considering the relevant PCP when constructing the pool for comparison. The fact that other staff may be asked to work on a particular shift is distinguishable from a situation in which other staff are *required* to work on a particular shift, even if the practical consequences of this may be the same. It is incumbent on parties when suggesting a potential pool for comparison to ensure that such a pool suitably tests the discrimination which is being alleged, and that will require an examination as to whether or not the circumstances of the individuals within the pool are materially different, as was found to be the case here.

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