

Indirect Sex Discrimination – The Justification Defence

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[Dobson v North Cumbria Integrated Care NHS Foundation Trust \[2026\] EAT 32](#)

1. In this case the Claimant claimed indirect sex discrimination and unfair dismissal. The EAT (Mr Justice Choudhury) decided that the PCP was justified and that the dismissal was not unfair. The Tribunal had not, when considering the proportionality of the PCP, focused too much on the disadvantage to the Claimant rather than to the affected group more widely, nor had it placed too much weight on the Claimant's intransigent position that she could not comply with the PCP.

The Key Facts

2. These were:
 - i. The Claimant had 3 children, 2 of whom were disabled;
 - ii. The Claimant had a fixed working pattern whereby, due to her caring responsibilities for her children, she would only work on Wednesday and Thursday each week;
 - iii. The Respondent introduced a PCP which required the Claimant to work flexibly, including at weekends;
 - iv. The Tribunal was required to take judicial notice of the "childcare disparity", which means that women bear the greater burden of childcare responsibilities than men; and
 - v. The Claimant said that she could not work during weekends and she was eventually dismissed.

The Legitimate Aim

3. The Respondent needed to provide care to patients in the community, 24 hours per day, 7 days a week and to balance workload amongst the team and reduce the cost of having to use more expensive band 6 and 7 registered nurses on a weekend.

The PCP

4. The Claimant was asked to work an occasional weekend no more than once a month. The PCP had advantages for the Respondent which included:
 - i. Providing flexibility in staff planning to match peaks and troughs in activity;
 - ii. Having a greater range of skills and experience available in the team; and
 - iii. Not losing existing staff who cannot continue to work full time.
5. In addition, a change to a more flexible working approach would eradicate emerging problems such as the existence of gaps in the service which meant that some patients were waiting in discomfort or pain before being seen to or being admitted to hospital unnecessarily.
6. A Staff Rostering Policy (“the SR Policy”) stated that “The Trust supports the principle regarding work life balance and flexible working. However, this should be set against the need to ensure a safe level of staffing to maximise the quality of patient care and reduce clinical and non-clinical risk...”, so that flexible working needed to be “fair and equitable to all staff”

The Claimant’s Response

7. The Claimant made it clear that she could not accept any change to her existing non-weekend working pattern. The Claimant wanted her current arrangement to stay in place “forever”.
8. The Claimant was adamant that neither her mother-in-law (who looked after the children on Wednesday and Thursday) nor her husband (who worked Monday to Friday) could step in to assist at weekends. At no stage did the Claimant put forward any other solution to the problem.

Effect of the Claimant's Inflexibility

9. The Claimant's inability to be flexible had resulted in unfairness to other staff in that the Claimant would work only 1 in 7 Christmas holidays where other staff worked 1 in 3. The Claimant's refusal to work any weekends had also resulted in cover having to be provided during weekends by more senior nursing staff which was considered no longer operationally or financially viable.

The Impact of the PCP

10. The following were the impacts on the group and on the Claimant respectively,

Group

- i. The PCP was applied to all community nurses (and indeed all employees at the Trust) who were required to work flexibly;
- ii. No other employee worked set days like the Claimant;
- iii. The Claimant's working pattern adversely affected the ability of others to take leave at e.g. Christmas and/or required more senior community nurses to work at weekends more often; and
- iv. No other community nurse in the Trust experienced the same difficulties as the Claimant to the point where they had to leave their employment.

Individual

- i. The Tribunal accepted that only the Claimant was unable to meet the requirements of the PCP.

Measuring the Extent of the Disadvantage

11. As to the extent of the disadvantage – this was working on an occasional weekend each year. It had to be weighed against the reasonable needs of an NHS Trust to deliver its care services in a manner which takes account of the requirements of both patients and other community nurses. The Tribunal assessed the disadvantage at the lower end of the scale.

The Tribunal's Decision

12. The Tribunal decided that:

- i. The Respondent had established the legitimate aim;
- ii. The PCP was rationally connected to that legitimate aim;
- iii. As to the question of proportionality, the Tribunal held as follows:
 - a. In conducting the balancing exercise, the Tribunal had in mind the fact that the Claimant was determined to retain her set days on Wednesdays and Thursdays for life and did not want her employer ever to reopen that question again. The Tribunal held that it was not necessary for the Respondent to show that it was impossible to accommodate the Claimant's insistence on being excluded from the PCP. The Tribunal further held that the Respondent had demonstrated that its actions were proportionate and in keeping with its legitimate aim; and
- iv. Overall and weighed against the Claimant's intractable position, the reasonable needs of the organisation justified the PCP.

13. The Tribunal found that the Claimant could meet the Respondent's requirement to work flexibly, including at some weekends, albeit with difficulty. That disadvantage needed to be balanced against the Respondent's business needs. The balancing exercise accounted for the Claimant having some difficulty or inconvenience in complying with the PCP (which did reflect the disadvantage she experienced as a working mother) but the degree of disadvantage when weighed up against the Respondent's aims and systems of work did not warrant a conclusion that the PCP was unjustifiably discriminatory.

14. The Respondent thus acted proportionately in its application of the PCP to the Claimant and it met the burden of establishing it was justified. The claim of indirect discrimination and the parasitic unfair dismissal claim both failed.

Other Points Discussed at the EAT

15. In addition to dismissing the Claimant's appeal, the EAT considered that there was some relevance in the Claimant's failure to suggest any alternative measures. When the Tribunal considers the seriousness of the discriminatory effect, this will almost inevitably involve some investigation of the difficulties caused and the extent of the inability to

comply with the PCP. That could include, as it did in this case, whether the Claimant's insistence on being unable to comply was reasonable in the circumstances.

16. The Tribunal is not bound simply to accept the Claimant's assertions as to the extent of the disadvantage, notwithstanding the starting point that the childcare disparity will mean that there is at least some such disadvantage, just as it was not bound to accept the employer's assertions as to business need. In order to assess the seriousness of the detriment - bearing in mind that no other employee in the group was unable to comply - and whether the PCP was reasonably necessary, the Tribunal was entitled to take account of the Claimant's stance and whether she was able to suggest any alternative.
17. The Respondent made extensive efforts to reach an accommodation with the Claimant, but she had remained "intransigent", notwithstanding evidence available to the Tribunal that the occasional weekend or bank holiday working "was in fact manageable" for the Claimant: Judgment at [235]. It was such evidence that led the Tribunal to find as an unchallenged fact that the Claimant "could meet the Respondent's requirement to work flexibly, including at some weekends, albeit with difficulty": Judgment at [241]. That was a finding that the Tribunal was entitled to make and which was pertinent to the balancing exercise that it was required to conduct.

Comment

18. Practitioners will find this case a useful guide for the considerations when litigating a claim of indirect discrimination. It provides a good example of how the Tribunal at first instance correctly dealt with determining whether the Respondent could establish the PCP as a fair and proportionate means of achieving a legitimate aim.
19. Whilst there is no requirement on Claimants to propose alternatives to the PCP, it is up to the Tribunal whether to give weight and, if so, how much to the alternatives (or lack of) that are suggested by the Claimant (see para 49 of the EAT decision). A Claimant who refuses to engage or whose response is unreasonable may find that a Tribunal considers this to be a material consideration when determining the justification defence.

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