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Challenging discrimination against working mothers

Harrison v Heritage Venues Limited 3301612/2023; November 20, 2023

Facts

Fiona Harrison (FH) was employed as a senior events and operations co-ordinator by Heritage Venues Ltd (HV Ltd), a boutique wedding planning business. FH worked in a team of three in the operations department.

In May 2022, FH returned from a period of maternity leave having arranged to work on a part-time basis. The purpose of the reduction in hours was to allow her to carry out childcare responsibilities. On her return to work, FH found that her line management responsibilities for her junior colleagues in the operations department had been removed and that a promotion opportunity had been offered to a colleague.

In September 2022, HV Ltd decided to make redundancies. FH was placed in a *'pool of one'* for the purposes of redundancy selection and was told that HV Ltd would carry out a consultation process. During the limited consultation process, FH suggested various alternatives to redundancy, including a job share. This was rejected by HV Ltd on the basis that a job share involving part-time working would not be feasible as it could cause delays in responding to the company's demanding clients. In the course of consultation meetings, the company told FH that it could not afford to lose a full-time member of staff and this was the reason she had been placed in a pool of one. At the conclusion of the consultation process, FH was dismissed.

FH appealed against her dismissal. During the appeal, HV Ltd carried out a redundancy selection matrix exercise to compare FH to her two junior colleagues within the operations team. During the litigation, HV Ltd disclosed two versions of the matrix, one of which gave FH low marks for her time keeping, performance and relevant skills. The matrix included a criterion relating to the employees' ability to take on 66 wedding events over the course of the year. In assessing this criterion, the company gave FH a lower score than her full-time colleagues. FH's appeal was dismissed.

Employment Tribunal

The ET upheld FH's claims for unfair dismissal, indirect sex discrimination, and part-time working detriment.

The ET was satisfied that the reason for FH's dismissal was redundancy [para 28]. It held that the material difference between the three roles in the operations department was that FH's role was part-time and that HV Ltd had made the decision to dismiss her on that basis before the consultation took place [para 30]. Further, the ET was troubled by the company's approach to the selection matrix exercise undertaken during the appeal, which it held was not objectively or fairly applied and was an ex post facto justification of the decision to dismiss [para 35]. Accordingly, the dismissal was unfair and the ET declined to apply a *Polkey* reduction.

In respect of the claim for indirect sex discrimination under s19 of the Equality Act 2010 (EA) the ET accepted that HV Ltd applied a provision, criterion or practice (PCP) which used part-time work status as a selection criterion in the redundancy exercise [para 48]. The ET took judicial notice of the childcare disparity between men and women (*Dobson v North Cumbria Integrated Care NHS Foundation Trust* [2021] ICR 1699) and the fact

that a higher proportion of women than men work part-time (*Home Office v Holmes* [1984] ICR 678); it concluded that the PCP put women at a particular disadvantage compared with men and FH experienced that disadvantage [para 49].

Further, the ET rejected the company's attempt to justify the discriminatory impact of using part-time work status as a selection criterion. The ET considered that the objections to the feasibility of a job share arrangement were '*a series of generic statements which in essence set out the sort of challenges that the respondent or any employer might have to address when setting out to employ people on a job share*' [para 52].

The use of part-time working as a selection criterion in a redundancy exercise... has a disproportionate impact on women, as women bear more responsibility for childcare than men and, relatedly, are more likely to work part-time.

The ET adopted similar reasoning in respect of the claim under regulation 5(1)(b) of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000. The ET rejected the distinction the company sought to draw between part-time working and FH's inability to handle the number of client's required by the business, holding that this was a distinction without a difference [paras 57-58]. It held that FH was selected for redundancy because she was part-time and HV Ltd had failed to justify the use of part-time worker status as a redundancy selection criterion [para 59].

Comment

The judgment provides useful practical guidance on how to challenge discriminatory redundancy selections of mothers with caring responsibilities. The use of part-time working as a selection criterion in a redundancy exercise is a PCP for the purposes of a claim under s19 EA and the use of this PCP has a disproportionate impact on women, as women bear more responsibility for childcare than men and, relatedly, are more likely to work part-time. The burden will then shift to the employer to justify the discriminatory impact. In these types of cases, a part-time working detriment claim can be run in conjunction with an indirect sex discrimination claim with each cause of action overlapping, to some extent, with the other.

Practitioners should consider carefully whether an employer is seeking to disguise the use of part-time working as a selection criterion by, for example, arguing that the business has a need for the employee to do a particular volume of work or deal with a particular number of clients. The use of such criteria in redundancy matrices has the effect of picking out part-time workers without explicitly using part-time status as a selection criterion.

Further, the judgment is a useful reminder to employers that the use of discriminatory selection criteria must be justified. The tribunals are unlikely to be persuaded that a generic objection to the practicability of part-time or job share working arrangements amounts to a lawful justification of discrimination.

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