

Flexible working, childcare and indirect sex discrimination – important reminder

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The courts have long recognised that, on a societal level, women bear a greater burden of childcare responsibilities than men which can make it more difficult for women to comply with employer requirements for flexible working (known as the ‘childcare disparity’). This recognition has historically assisted women who make claims for indirect sex discrimination on the basis of a requirement to work flexibly applied to both men and women which has a particular disadvantageous effect on women due to the childcare disparity.

The Employment Appeal Tribunal confirmed last week in [Dobson v North Cumbria Integrated Care NHS Foundation Trust](#) that the childcare disparity still persists in 2021 despite advances being made to address the inequality in recent years. It does not necessarily follow that in all cases where the childcare disparity applies, there will be a group disadvantage. It also does not necessarily follow that if in a particular case a woman can establish that a requirement to work flexibly puts her to a disadvantage due to childcare responsibilities, the employment tribunal should assume that it also puts women as a group to a disadvantage due to the childcare disparity. However, in some cases, such an inference may be appropriate, requiring the employer to objectively justify the flexible working requirement to avoid a finding of indirect sex discrimination.

Although the Employment Appeal Tribunal recognised that this assumption may become inappropriate in the future as further progress is made on sharing the childcare burden more equally, it noted that the position is still far from equal.

Whilst this case represents a re-statement of the current law and is perhaps not as landmark as reported in the media, it is an important reminder to employers that care must be taken in reaching decisions on working patterns in relation to employees with childcare responsibilities. Employers should take care to ensure that any decisions that could put a working parent to a disadvantage go no further than is necessary, are justified and are properly recorded. If employers are in any doubt, they should seek professional advice.

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