

# The Perils of Penalising Part-timers?

Imagine there is a company at which a much higher proportion of women work part-time than men. (It is easy if you try as this is statistically true of most employers.) Imagine also that many of the women part-timers at this company have childcare responsibilities and are not able to work full-time due to these responsibilities. Finally, imagine that at this company no part-time employees are entitled to a particular employment benefit - an annual bonus, for instance. Instead only full-time workers are allowed the bonus with part-timers not even receiving a amount proportionate to their reduced hours.

Some of you might be thinking: can this be fair to the part-timers? Is that legal? Others of you might now be muttering with a sharp intake of breath: what's wrong with that - if you want the rewards, do the hours!

But let's go back to that statistic. Why is it true that more women than men do work part-time around the world? In Bermuda, the 2000 census reveals that 11.7% of the female workforce work less than 30 hours a week in their main job as opposed to only 4.6% of the male workforce. Can this discrepancy be linked to being female? The traditional onus upon women of childcare responsibilities? If it is, then by imposing a requirement to work full-time before receiving a work benefit, isn't our imaginary employer indirectly discriminating against their female employees as fewer of them can work full-time than men?

Such a situation as this is potentially covered by the 'indirect discrimination' provisions under the Human Rights Act 1981. These provide that if an employer applies a condition (i.e. working full-time) which is such that the proportion of people of the same sex who can comply with it (i.e. women) is considerably smaller than the proportion of people not of that description who can (i.e. men) then this can amount to indirect discrimination.

Two further tests need, however, to be applied before indirect discrimination can be said to have been committed by an employer. First, can the employer objectively justify the condition it is imposing? To decide this involves looking at whether the requirement meets a genuine organisational need rather than just mere convenience. In our example, the condition that to receive an annual bonus as an employee you must be full-time would be difficult to justify. This is because it would be administratively easy to offer part-timers a bonus proportionate to their hours worked.

The second test is that the person has to be put at a disadvantage by not being able to comply with the condition. In our example, it is again easy to show the disadvantage or 'detriment' suffered by the employee - she does not get the bonus if she does not work full-time. Is it the case though that she cannot comply with the full-time requirement? To satisfy this, the female employee has also to demonstrate that she is unable to work full-time due to family/child-care responsibilities.

Many countries now have specific legislation protecting the rights of part-time workers. Throughout the European Union, part-time employees have the right not to be treated less favourably than full-time employees. This has further assisted part-time workers to gain access to proportionate employment benefits across the board. Prior to this similar indirect sex discrimination provisions to those in Bermuda had to be used as a way to develop all part-time worker's employment rights. Although the individual cases always had to be taken on behalf of female part-timers, all part-time workers came to benefit as indirectly discriminatory conditions imposed by employers were slowly outlawed.

In other countries, the indirect discrimination provisions have also had the effect that any request by a female employee with childcare responsibilities to work part-time has to be considered by an employer very carefully. If the request were refused, good business reasons had to be provided explaining why working part-time was not possible. In fact, in one UK case a judge commented that part-time working should be considered possible for almost all types of job but for the air hostess on a longhaul flight! Employers using shift systems also had to ensure that they allowed sufficient flexibility in their system so as to enable mothers to continue to be able to work.

Can these same indirect discrimination provisions be used to benefit part-time workers generally in Bermuda? Certainly, if an employer looks around at their workforce and notices that there is much higher number of female part-time workers than male part-time workers, then it would be wise to re-examine the employment benefits given to those working part-time to ensure they are proportionate. Any requests made by young mothers for a switch from full-time to part-time work should also be considered carefully. Even if the workforce of the employer does not reveal a male/female part-time imbalance, care should also be taken as Bermuda's census figures are always available for a female part-time employee to rely upon in attempting to argue a claim for indirect sex discrimination.

However, an employer might be able to be less careful when dealing with part-time workers who work less than 15 hours a week with them. This is because there is a tension between the potential effect of the indirect discrimination provisions and the

Employment Act 2000. The Employment Act 2000 specifically excludes part-time workers who work less than 15 hours a week from the right to claim a proportionate entitlement to many benefits, including vacation, sick leave, maternity leave, a minimum notice period or a severance allowance. Hence, the hour in Bermuda is perhaps yet to come for all part-time workers and their employment rights.

This article contains information of a general nature and should not be relied upon as a substitute for professional legal advice given with respect to a particular factual situation.

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