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## employment briefing - equal pay

**Businesses in the leisure sector rarely operate on a 9-5 basis. Pubs, bars and restaurants usually operate very long hours and tend to be at their busiest during the evenings and at weekends. With the need for extensive cover at unsociable hours, employers sometimes offer increased rates of pay or other incentives to their staff in order to encourage them to work the least popular hours.**

It is widely acknowledged that employers risk claims of indirect sex discrimination where a practice disadvantages those with childcare responsibilities. However, what happens when the practice relates to pay and those with childcare responsibilities are unable to work the hours which attract the greater rates of pay due to their responsibilities?

The West Midlands Police are required to provide cover 24/7 and devised a system of three shifts covering each 24-hour period. Extra pay was awarded to those employees who contributed to night cover. Two female police officers were excused the night shift because of their childcare responsibilities but this meant they were not entitled to extra pay. They brought claims in an employment tribunal (ET) against their employer, alleging that they were receiving less pay than their male colleagues.

The ET accepted that female officers were employed in similar work to their male colleagues and this gave them the right to equal pay. It was held that the payment system for the shifts had an unequal effect on more women than men as a result of their childcare responsibilities. However, this was subject to a possible defence for the employer, if it

could show that the measures it adopted reflected a real need and were appropriate and necessary to achieve the objective of 24/7 cover. The Tribunal found that the reward to achieve the aim was legitimate but it nevertheless decided that it would cause little expense to achieve the same aim in a less discriminatory way by paying the women as if they were doing the same shifts. This decision was appealed.

On appeal, the Employment Appeal Tribunal (EAT) rejected the Tribunal's finding and held that it was not necessary for employers to pay women for work which they had not done. Nor did it require compensation for the economic disadvantages suffered by those with childcare responsibilities. The argument that it cost little to pay them for shifts they had not worked was not deemed applicable. Taken to its logical conclusion, this could mean that an employer would be required to pay a part-time employee the same as a full-time one because the part-time employee had childcare responsibilities.

This is a sensible decision and will be a relief to those businesses which offer incentives to encourage staff to work the less desirable hours required of the leisure industry.

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