

UPDATE

Employers' obligations to breastfeeding mothers

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This issue hit the headlines recently when a UK employment tribunal found that EasyJet had discriminated against two flight attendants in relation to breastfeeding requests.

Under UK, Guernsey and Jersey legislation, it is unlawful for an employer to discriminate against an employee on the grounds of sex. Discrimination can either be direct where the employee is treated less favourably on the grounds of sex, or indirect where the employer introduces a practice, criterion or policy which adversely affects one sex more than the other. Direct sex discrimination is always unlawful, and indirect sex discrimination is unlawful unless it can be justified as a proportionate means of meeting a legitimate aim.

EasyJet operated a roster policy which sometimes required crew to work more than eight hours continuously. The claimants, who were breastfeeding mothers, made flexible working requests that they would not be rostered to work longer than eight hours in order that they could express milk at regular intervals as recommended by their doctors. EasyJet refused their request on health and safety grounds, claiming there could be unforeseen delays that could see the women working more than eight hours. As an alternative, EasyJet offered the women alternative ground duties limited to a fixed period of six months, after which point they suggested breastfeeding becomes a woman's 'choice'.

The employment tribunal ruled that EasyJet's refusal to offer shorter shifts beyond a six month period amounted to indirect sex discrimination. EasyJet attempted to objectively justify the policy on the grounds that they could not guarantee shorter shifts and that bespoke rosters could cause difficulties for colleagues. The tribunal held that EasyJet's policy was not objectively justified. In particular, EasyJet had failed to identify any actual examples of where granting bespoke rosters had caused the airline any difficulty. The tribunal also commented that it was not reasonable to ask the claimants how long they expected to continue breastfeeding.

Although the decision is not binding on future UK, Guernsey or Jersey employment tribunals, it serves as a salient reminder to employers that a failure to make adjustments for breastfeeding employees could result in a finding of sex discrimination. Furthermore, extremely robust evidence will be needed if an employer seeks to justify a policy which does indirectly discriminate.

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