



## EMPLOYMENT LAW UPDATE OCTOBER 2016

### **Breastfeeding flight attendants win indirect sex discrimination claim**

In McFarlane and Ambacher v easyJet an Employment Tribunal has held that easyJet's refusal to allow certain flexible working arrangements for breastfeeding flight attendants amounted to indirect sex discrimination.

Although there is no statutory right to time off for breastfeeding, breastfeeding employees have the right:

- Not to suffer indirect discrimination because of sex;
- To be offered temporary suitable work; and
- To paid suspension

An employer can justify potential indirect sex discrimination where it imposes a "provision, criterion or practice" which creates a particular disadvantage for women, if the alleged discriminatory practice is a "proportionate means of achieving a legitimate aim".

The Claimants were crew members employed by easyJet. They were still breastfeeding their children. EasyJet operated a roster system for its crew. There was no restriction on the length of a working day and crew members could be required to work for more than 8 hours continuously.

The Claimants lodged flexible working requests. They asked not to be rostered to work longer than 8 hours to enable them to express milk before and after their shifts. EasyJet rejected the Claimants' requests citing various legitimate aims, such as ensuring that the airline could deliver its flying schedule and avoiding flight delays and cancellations. The Claimants were eventually given temporary ground duties, however this did not take effect immediately and they had periods of sickness absence and unpaid leave first.

The Claimants brought indirect sex discrimination claims and presented medical evidence which suggested that delays in breastfeeding or expressing milk would lead to an increased risk of mastitis. The Tribunal held that the practice of requiring staff to work for shifts of longer than 8 hours indirectly discriminated against women and awarded compensation for financial loss and injury to feelings. EasyJet could not justify its roster system, as it was unable to present any convincing evidence to substantiate its claim that allowing some employees to have bespoke rosters would cause serious operational difficulties. The blanket ban on bespoke rosters was unnecessary on the facts.

A flexible working request (whether formal or otherwise) which is linked to pregnancy, breastfeeding or childcare must be given careful consideration and should only be rejected if the employer is satisfied that it has very good grounds for doing so. Employers should be aware that if they reject such a request, this could give rise to an indirect sex discrimination claim under the Equality Act 2010, even if the requirements of the Flexible Working Regulations 2014 are satisfied.

### **Asda store workers win right to pursue equal pay claim worth over £100 million**

An Employment Tribunal has held in Brierley v Asda Stores Limited that a group of Asda store workers can compare themselves to distribution depot workers for the purposes of an equal pay claim. The ruling means that 7,000 claims can proceed, the value of which has been estimated at over £100 million.

A group of (mainly) female employees of Asda, who work in its retail stores primarily as checkout staff and shelf stackers, sought to bring equal pay claims. They argue that they are entitled to equal pay with Asda's distribution depot employees, who are mainly men working in the warehouse. The Claimants claim that their work had historically been seen as "women's work", thought to be worth less than the work done by the men in the depot.

Under the Equality Act 2010 an equal pay comparison can only be made if the Claimant and the comparator are both employed by the same employer and work at the same establishment, or if they are employed by the same employer and work at different establishments but “common terms apply at the establishments”. The difference in pay must be down to a “single source” i.e. a single body must be responsible for the inequality and be capable of rectifying it.

The Tribunal rejected Asda’s argument that the division of its corporate structure into Retail and Distribution operations meant that pay-setting powers had been delegated to separate bodies. It took the view that the “single source” test was satisfied on the facts, as Asda’s executive board exercised budgetary control and oversight over both Retail and Distribution and so had the power to introduce pay equality. The Tribunal also accepted that the Claimants’ terms were broadly similar to those of the depot employees - they were hourly paid and the structure of the terms in the respective handbooks was broadly the same.

There will now be a further Tribunal hearing to consider whether the jobs are of equal value. If the claims succeed it will have wide reaching implications both for the retail sector and beyond.

### **Holiday pay update**

The Court of Appeal in British Gas v Lock has upheld the Employment Appeal Tribunal’s decision that results-based commission should be included when calculating holiday pay for the purposes of the Working Time Regulations 1998.

Mr Lock worked for British Gas as a salesman. He earned a basic salary with variable commission, which was based on sales achieved. Mr Lock could not earn commission whilst on holiday and therefore would lose income by taking it. Mr Lock brought a claim for “lost” holiday pay.

The case was referred to the European Court of Justice, which held that when calculating holiday pay, Member States must ensure that a worker taking holiday is paid by reference to commission payments that the worker would have earned if he had been at work. The EAT subsequently held that when calculating holiday pay, workers are entitled to be paid an amount which reflects the commission they would have earned if they had not been on holiday. The EAT’s decision was upheld by the CA.

Unfortunately for employers, neither the ECJ, the EAT or the CA have addressed the question of how holiday pay should be calculated in circumstances where a commission element needs to be taken into account. It is likely that British Gas will appeal to the Supreme Court, which may take the opportunity to provide some guidance for employers on this tricky issue.

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