Failure to provide adequate breastfeeding facilities was harassment related to sex

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An Employment Tribunal has held that a woman suffered harassment related to sex when her employer failed to provide a private room for her to express breastmilk while at work. The employee was forced to express milk in the toilets or her car, which had the effect of creating an unwanted, degrading or humiliating environment for her.

What happened in this case?

Ms Mellor was a school-teacher at MFG Academies Trust. While she was pregnant, she told the school that when she returned to work after maternity leave, she would need somewhere to express breast milk. She raised this again while on maternity leave and again on her return to work in September 2020. However, the School failed to provide her with an appropriate room.

This meant that she was forced to express milk in either the school toilets or her car during her lunch break. She was given 25 minutes for lunch, 20 minutes of which was needed to express milk, meaning she was forced to eat her lunch at the same time.

Having chosen to continue breastfeeding, it was a necessity for Ms Mellor to express, as not doing so would cause her to experience embarrassing leakages and she could develop mastitis (and had done so in the past).

Ms Mellor brought claims of direct and indirect discrimination and harassment related to sex against the school.

What was decided?

<u>Direct discrimination</u>

Ms Mellor compared herself to the hypothetical comparator of a

male teacher injecting himself with insulin. The school confirmed that they would have provided such a male teacher with appropriate space if asked. Nevertheless, the Tribunal decided this claim failed because Ms Mellor was unable to show that the treatment she received was because of her sex. They found that the treatment was because of the incompetence of the school, rather than because she was a woman.

Indirect discrimination

The Tribunal held that the school's practice of not providing suitable facilities to express milk did not put women at a particular disadvantage in comparison to men because "biological men have no interest in the provision of facilities for expressing breastmilk".

Essentially the Tribunal said they were bound by a previous case, which stated that indirect discrimination cannot be shown without meaningfully applying the practice to both men and women. Therefore, as needing a space to express breastmilk was solely a biological female function this claim had to fail.

Harassment

The Tribunal found that Ms Mellor genuinely and reasonably had no choice but to express breast milk in either the toilets or her car. It also found that forcing her to express milk while eating her lunch, and potentially being seen by pupils, was unwanted conduct and had the effect of creating a degrading or humiliating environment for her.

They also held it was related to Ms Mellor's sex, as the need for privacy to express milk came from the intimate nature of the activity, because she is a woman.

What does this mean for employers?

Although there is no statutory right to the provision of

facilities at work to express milk, there is guidance from the Health and Safety Executive which recommends that employers should provide facilities such as a private, clean environment (other than toilets) and a fridge to store the expressed milk. Employers should give careful consideration to any request for a space from a worker who is expressing milk since there is a risk of harassment depending on the particular circumstances.

Mellor v MFG Academies Trust

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Associate Hannah Lynn (hannahlynn@bdbf.co.uk), Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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