Employment & Business Brief

July 2018

Dress codes and sex discrimination a guide for employers

The Government has published new guidance (May 2018) for employers who set dress codes in the workplace and job applicants who may have to abide by them.

The guidance has been published following a recommendation from the Parliamentary Women and Equalities Select Committee and the Petitions Committee. It sets out how the law might apply in cases of sex discrimination where an employer requires female staff to wear for example high heels, make-up, hair of a particular length or style or revealing clothing.

It will remain the responsibility of the courts to decide whether a practice is unlawful.

When setting a dress code, the employer has the responsibility to ensure that the dress code is a legitimate part of their terms and conditions. They should not discriminate between men and women but should uphold equal standards. Any less favourable treatment because of sex could be discrimination.

Dress codes should not lead to harassment by colleagues or customers, so any requirements for women to dress in a provocative manner are likely to be unlawful on those grounds.

A good starting point when considering a dress code is the reason behind it. Therefore, consulting with employees, staff organisations and trade unions is advisable to ensure the code is acceptable to both the organisation and staff. Health and safety should also be considered, especially if specifying a particular item for a dress code rather than personal protective purposes makes staff more prone to injury. Once it has been agreed it should be communicated to all staff.

Where someone meets the definition of a disabled person in the Act, employers are required to make reasonable adjustments to any element of the job which place a disabled person at a substantial disadvantage compared to a non-disabled person.

Transgender employees should be allowed to follow the organisation's dress code in a way which they feel matches their gender identity and if there is a staff uniform they should be supplied with an option which suits them.

Employers should be flexible and not set dress codes which prohibit religious symbols that do not interfere with an employee's work.

Examples of where an employer may fall foul of the guidance include:

- Requiring female employees to wear high heels as part of a dress code but places no footwear requirements on men or merely requires them to look smart. This is likely to constitute direct discrimination on the grounds of sex as there is not an equivalent standard set on male staff. It may also indirectly discriminate against employees with a disability, where heels could exacerbate any difficulties with mobility or place them at risk of falling.
- A clothes shop which expects staff – both male and female to dress in a provocative or revealing fashion. Whilst this might not amount to direct discrimination, it could contribute to an environment where employees are vulnerable to unwanted sexual attention or harassment.

Employees cannot be dismissed for making a complaint solely about a sexist dress code, as The Equality Act 2010 provides protection from victimisation.

If an employer needs further assistance on work wear or jewellery which an employee may ask to wear for religious reasons, the Equality and Human Rights Commission publishes guidance.

Disputes amongst directors

The high-profile departure of Sir Martin Sorrell earlier this year from WPP, the advertising agency he started surprised many people and it is unfortunately common that at some point there will be a serious disagreement or issue to deal with at board level for most businesses.

If directors no longer agree how to run the business, what are the options available?

Hindsight is always wonderful and planning ahead for such a situation is vital, but still one which is often overlooked.

The starting point is to consider whether there is a director's agreement or a shareholder agreement in place which will help to resolve the issue.

Without an agreement it would be necessary to try to resolve the dispute using the Articles of Association, employment legislation and shareholder protection rights under company law.

It is worth noting that when setting up a company it is always better to avoid a 50/50 shareholding to avoid a deadlock situation where the director and shareholder's vote are equally split. This can be especially hard to resolve without further legal action.

The company can dismiss a director according to their employment contract or director's service agreement. In the absence of these documents then statutory notice provisions apply. Where a dispute is about a performance or other disciplinary issue, the company should make sure it follows the correct steps set out in the contract of employment or risk a claim for unfair dismissal. However, this only deals with the end of employment and will not remove the director as a director / shareholder. The Articles and company law should be consulted as to how to achieve this.

Court action would be expensive and could result in the shareholders being held personally liable for the costs. A shareholder agreement or detailed provisions in the Articles are needed to provide for the automatic transfer of shares on the shareholder stopping their employment or directorship.

It is important to have the procedure in place at the outset, no matter how amicable the business relationship starts, as people and relationships can change over time.

News in brief

Bereavement Leave

Consultation closed in June on the Parental Bereavement (Pay and Leave) Bill. It's intention is to give employees who lose a child below the age of 18 (including a still birth after 24 weeks) certain statutory rights the key ones being the right to:

- At least two weeks' leave (irrespective of their length of service).
- At least two weeks' statutory bereavement pay.
- Protection from detriment, redundancy and dismissal as a result of them taking bereavement leave.

The Bill provides for a minimum of two weeks' bereavement leave (pro-rated for part time) to be taken within a period of 56 days (8 weeks), beginning with the date of the child's death.

The Government notes that it will be important to strike the right balance between flexibility needed to enable bereaved parents to grieve, and the need for employers to have a degree of certainty over when and how their employees can take such leave and pay. Key issues being consulted on are how the leave might be taken and notified and what relationships should benefit from the leave.

At present there is no statutory right to time off when a family member dies although many employers have informal policies.

Employment status

The issue of employment status rumbles on. After the Uber case, the GMB union has launched a legal claim on behalf of drivers who work for three delivery firms used by Amazon, arguing that they are employees (as opposed to independent contractors) and should therefore be entitled to employment rights including paid annual leave, holiday pay and sick pay. The union claim that as the drivers were required to attend scheduled shifts they did not have the flexibility, which is commonly associated with a self-employed worker. The union will also pursue whistleblowing claims against Amazon after two couriers were allegedly dismissed after they raised concerns about working practices (such as excessive working hours).

Minimum Wage and the difficulties of "On Call" workers

Further to last quarter's article on calculating the right wages to pay to avoid being named and shamed for failure to pay minimum wage we deal below with the thorny issue of how to deal with what is working time when the workers are "on call".

Time spent on call has been the subject of debate since cases in 2000. In those cases, the ECJ held that all "on-call" time constitutes working time if the employee is required to be in the workplace rather than at home, even if the worker is asleep (at the workplace) for some or all of that time. The fact that the workers were required to be in the workplace and ready for work indicated, in the ECJ's view, that they were to be regarded as carrying out their duties.

This was contrary to a case involving wardens working for sheltered housing schemes, living at or near the sites for which they were responsible in accommodation provided by the employer. A decision made here determined that the workers were not engaged in "working time" while on call (apart from time actually spent working) since they were able to remain at home.

Cases have tinkered around the different sets of circumstances these type of workers find themselves. In one case the claimant was a warden living in tied accommodation within a sheltered housing complex. She was required to be available on site to answer calls 24 hours a day for four days a week. She could sleep, receive visitors and undertake other recreational activities during that time, provided that she remained within a three-minute radius of the site. The EAT held that she was engaged in working time 24 hours a day for four days a week. It stated that the precise nature of the accommodation supplied to workers when they were on call (that is, whether or not it was their "home") was not significant: the relevant question was whether they were required to be present and remain available at a place determined by the employer.

The Scottish EAT held that relief paramedics who were contractually required to stay within a three-mile radius of the ambulance station and to respond within three minutes were working during such on-call periods. The case makes it clear that the question of whether a worker is required to be "at a place determined by the employer" is not confined to one specific location. The EAT also provided guidance on determining whether time spent on call is working time or a rest period.

More recent guidance has cautioned against regarding the requirement to be present at the place determined by the employer and to provide services immediately in case of need as the "decisive factor" in defining working time in this context. Commentary stated the quality of the time spent on stand-by duty is of overriding importance, not the precise degree of required proximity to the place of work.

The EAT rejected an argument, that resident on-call time was not to be viewed as working time where the risk of call-out was "so insignificant as to be trifling". In that case, the claimant was a hotel manager required to sleep at the hotel purely in case of an emergency that the night porter could not tackle alone. He was disciplined for leaving the hotel for half an hour one night. The case was brought purely to establish whether, for the purposes of his contract, he was working and therefore entitled to be paid, but the EAT considered the WTR 1998 as an aid to construction and held that he was.

Currently the European Working Time Directive (EWTD) and the Working Time Regulations 1998 only distinguish between working time and rest time. In practice, many workers are often required to spend periods of time when they are not free to pursue their own activities and are not working, such as being on call.

In June 2008, EU ministers proposed that the EWTD should be revised so that on-call time should be split into active and inactive on-call time, with active on-call time necessarily counting as working time. However, the European Parliament and the European Council of Ministers failed to reach agreement.

Heating Engineer wins employment status claim against Pimlico Plumbers

A much-anticipated ruling in the Supreme Court, (13 June 2018), could have major significance to other freelance workers and the businesses that employ them.

Gary Smith worked solely for Pimlico Plumbers for six years and despite being VAT registered and paying self-employed tax, the court has ruled that the Employment Tribunal was 'entitled to conclude' that Pimlico Plumbers cannot be regarded as a client or customer of Mr Smith and he is a worker and therefore entitled to workers' rights such as holiday and sick pay. The contractual documentation also referred to "wages" and terms used in employment relationships such as "dismissal" and "gross misconduct".

Pimlico argued that as he was free to reject assignments and work for others he could not be considered an integral part of their business. The Court however looked at the fact Mr Smith was required to wear a branded uniform and drive a branded van, as well as obey a strong set of instructions.

This ruling could have implications for other cases and businesses that operate in the 'Gig' economy, although Pimlico Plumbers have indicated they may consider an appeal to the European Court of Human Rights in Strasbourg.

Whilst the full impact of this ruling will no doubt continue to be discussed, it hasn't made it fully clear to other businesses in the Gig economy facing legal challenges, such as Uber, as the business models they operate are different. Critics however argue that it is a way of businesses denying staff their basic employment rights and the Government should now step in and legislate on the different ways that workers are being categorised.

Any business which employs freelance workers would now be well advised to review the arrangements they have in place, to see if any self-employed workers are actually workers whose employment status should be updated to reflect this.

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Quick reference section

Statutory minimum notice periods:
An employer must give at least:

- One week's notice to an employee who has been employed for one month or more, but less than two years.
- One week's notice for each **complete** year of service for those employed for more than two years.
- Once an employee has more than 12 year's service, the notice period does not extend beyond 12 weeks.

National Minimum Wage

	April 2017	April 2018
Apprentices	£3.50	£3.70
16-17	£4.05	£4.20
18-20	£5.60	£5.90
21-24	£7.05	£7.38
25+	£7.50	£7.83

Statutory Sick Pay (from April 2018)
Per week £92.05

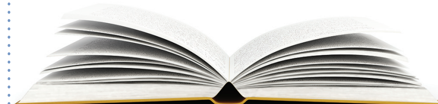
Statutory Shared Parental/Maternity/Paternity/Adoption Pay
(basic rate) (from April 2018) £145.18

Statutory Holiday
5.6 weeks for a full time employee.
This can include bank and public holidays.

Redundancy Calculation

- 0.5 week's pay for each full year of service when age is less than 22.
- 1 week's pay for each full year of service where age during year is 22 or above, but less than 41.
- 1.5 week's pay for each full year of service where age during year is 41 and over.

Calculation is capped at 20 years. Maximum week's pay is capped under the Statutory Scheme for dismissals after 6th April 2017 at £489.00; for dismissal after 6th April 2018 at £508.00



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