

GUIDANCE NOTE

Dress Codes in the Modern Workplace

June 2016

Background

Dress codes have hit the headlines recently when a woman was reportedly sent home from her job as a receptionist for refusing to comply with a dress code requiring her to wear two to four inch heels. She responded by setting up an online petition on the government and Parliament website calling for a change to the law to make it illegal for a company to require women to wear high heels at work and calling current formal work dress codes "out-dated and sexist".

The petition has attracted over 100,000 signatures and will be considered for a Parliamentary debate. This has caused much attention in the press and, ultimately, it was reported that the company that engaged her has changed its dress code to allow employees to wear flat shoes. The publicity in this matter highlights one of the dangers for employers operating a dress code that might be seen as outdated or discriminatory, but what is the legal position?

Dress codes and sex discrimination

Employers frequently require employees to comply with dress codes or appearance requirements. Often this is because of the professional image that they want to present or because of health and safety requirements. However, although the courts have recognised this to be a legitimate aim, it can give rise to claims of unlawful discrimination on grounds including sex, religion, disability and gender reassignment.

Some comment in the media in relation to a requirement to wear high heels has focused on an allegation that a requirement to wear high heels is sex discrimination because a man would not be required to wear high heels. Treating a woman less favourably than a man in the same circumstances amounts to direct sex discrimination. However, in *Smith v Safeway Plc* the Court of Appeal held that having different requirements for men and women in a dress code will not amount to sex discrimination, where the dress code applies a conventional standard of appearance and taken as a whole, rather than item by item, neither gender is treated less favourably in enforcing that principle. This means that the dress code should not be more onerous for one gender, and comfort and health issues may be relevant here, and should be enforced consistently on men and women.

In *Safeway*, a requirement for men to have hair "not below shirt-collar length" which did not apply to a woman was held to be lawful, in the context of the dress code as a whole. Similarly, the Employment Appeal Tribunal has held that a dress code which required a man to wear a shirt and tie but women only to dress appropriately and to a similar standard will not necessarily be unlawful discrimination where an even-handed approach is adopted in the context of the dress code overall (*Department for Work and Pensions v Thompson*).

In contrast, and unsurprisingly, a woman who was dismissed from her job as a waitress for refusing to wear a low-cut top succeeded in claiming sex discrimination in an employment tribunal; a man would not have been required to wear an equivalent uniform (*Smith v Rees*).

Other areas of discrimination

It is not only in the area of sex discrimination that issues can arise out of dress codes. If a transsexual person is prevented from wearing a skirt, where other women would be permitted to, this could amount to direct discrimination because of gender reassignment.

Dress code requirements can also be indirectly discriminatory where they restrict employees' rights to wear an item of clothing or jewellery which is associated with their religious beliefs, such as a veil or a cross. These cases often depend on whether the requirement of the dress code can be objectively justified as a proportionate means of achieving a legitimate aim, balancing the importance of the employer's aims in having a dress code, against the impact on the employee (*Azmi v Kirklees Metropolitan Council*).

Employers also need to bear in mind the risk of disability discrimination. If a requirement of a dress code puts employees with a disability at a particular disadvantage compared to a non-disabled person, the employer will have a duty to make reasonable adjustments to seek to remove the disadvantage. Again, this involves a balancing act between the interests of the employer in enforcing the particular feature of the dress code and the disadvantage that it causes for the employee.

Consider requirements carefully

Overall, employers should think carefully about the contents of any dress code and identify the reason why they consider the dress code to be important. Both Acas and the Equality and Human Rights Commission have provided guidance on dress codes which recommend that best practice is to consult with employees, although this is not a legal requirement. Employers should ensure that dress codes are applied even-handedly between men and women.

Generally, the more flexibility that an employer can allow while still achieving its objectives, the less likely it is that there will be a problem. Employers should be ready to consider exceptions to the dress code where it is requested by employees who feel disadvantaged because of a protected characteristic, such as sex, disability or religious belief. The employer will not necessarily be acting unlawfully if it refuses a request, but it should carefully balance the reason why it has the dress code with the disadvantage to the employee and consider whether its objectives can be achieved in a way which accommodates the employee's request.

The comments in this Guidance Note are of a general nature only. Full advice should be sought on any specific problems or issues.

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