SIMONS MUIRHEAD & BURTON

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Keeping Up Appearances

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Over the years tribunals and the appellate courts have had to deal with a number of disputes between employers and employees where it has been alleged that the employer's dress standards policy is discriminatory. The disputes have been mainly on the grounds of sex, marital status, religion and sexual orientation and have involved issue surrounding the wearing of long hair, pony tails, earrings, trousers, ties, wedding rings, turbans, beards, hijabs, burqas and in one case a badge saying: "Lesbians Ignite"

Following the Court of Appeal's ruling in Smith v Safeway the law as far is sex discrimination is concerned is well established in that a code which applies different conventional standards to men and women may not be discriminatory if it uses an even-handed approach when looked at as a whole. Even if an apparently neutral provision is indirectly discriminatory, on whatever ground, it can be objectively justified.

But, just as we thought that 'who can wear what' disputes may have disappeared, two cases come along to dispel that view. In Dansie v the Metroploitan Police (Page 4), the EAT held that an 'all hair above the collar' rule did not discriminate against a male cadet who had to cut his hair, since a female would have been treated in exactly the same way. In Eweida v British Airways (Page 4) the Court of Appeal ruled that a Christian had not been discriminated again when permission to wear a cross was refused since Christians as a group were not placed at a disadvantage; only Mrs Eweida felt disadvantaged by BA's policy.

This may not be the last we hear, however, with news that ambulance service workers in the North West have been banned from wearing 'joke' socks. To do so is a disciplinary offence. What would Hyacinth Bucket say? ... "Richard!"

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Additional paternity leave and pay regulations published

The Government has published six sets of draft regulations to enable the introduction of additional paternity leave and pay. The regulations will apply to parents of babies due on or after 3 April 2011 and for adoptive parents who are notified of having been matched with a child on or after that date.

The Work and Families Act 2006 allows for the introduction of statutory rights to additional paternity leave and pay. The Additional Paternity Leave and Pay scheme will come into force on 6 April 2010 and will apply to parents of children due on or after 3 April 2011, or to adoptive parents who are notified of having been matched with a child on or after 3 April 2011.

Additional paternity leave and pay will provide eligible employees with the right to up to six months' leave to care for a child, if the child's mother or, in the case of adoptions, the primary adopter returns to work without exercising their full entitlement to maternity or adoption leave. Some of that leave may be paid if it is taken during the mother's maternity pay period or, for adopted children, during the primary adopter's adoption pay period. Guidance on the new rights will be put in place before 3 April 2011 to ensure that employers and employees are aware of the changes and have sufficient information about them.

IBM tops Stonewall's list of 2010 gay-friendly employers

Stonewall

Stonewall's Top 100 Employers 2010, showcasing Britain's best employers for lesbian, gay and bisexual people, named IBM as the best place to work in 2010. Hampshire Constabulary came second and Ernst & Young third. The index was compiled using the largest ever survey of lesbian, gay and bisexual employees, with over 7,000 participants

In compiling the Top 100 Employers 2010, Stonewall used an index of key indicators in the largest ever survey of lesbian, gay and bisexual (LGB) employees, with over 7,000 participants. This consistently revealed that staff satisfaction levels were highest at the top ranking organisations in the Index. Gay staff working at the top 25 workplaces reported a satisfaction level almost 10% higher than workplaces outside the Top 100. Staff were also more likely to disclose their sexual orientation in monitoring exercises at the highest ranking organisations.

The Index revealed IBM as the best place to work in 2010 for LGB people. This is the second time in four years that IBM has been named the most gay-friendly employer. Their success reflects the effectiveness of continual improvement as the minimum score to win a place on the 2010 Top 100 was 10% higher. Second place went to Hampshire Constabulary and Ernst & Young came third. Ernst & Young won the award for Employee Network Group of the Year and Nottinghamshire Healthcare NHS Trust was named Most Improved Employer.

Ben Summerskill, Stonewall Chief Executive said: "Gay people are far more likely to buy goods or services from companies they know are gay-friendly. The Index is used by Britain's 1.7 million gay employees and 150,000 gay university students to decide where to take their talent and skills."

Acas encourages employers to prepare for employee engagement

Acas is encouraging UK businesses to prepare for the potential economic up-turn by focusing on employee engagement. In a new discussion paper, Acas highlights the simple procedures that can increase employee engagement in the workplace, to improve staff retention, increase morale and encourage greater productivity.

Acas has launched a new discussion paper Building Employee engagement. It indicates that there is a good case for focusing on employee engagement as a business priority, which includes creating and maintaining a culture of diversity by giving employees a 'voice', showing respect and safeguarding integrity. Employees who are committed to their work are much more likely to behave in a positive, cooperative way - a benefit to both employees and the business.

There are four broad enablers. One focuses on leadership. The other three are directly linked to diversity, i.e. (i) managers must treat their people as individuals with fairness and respect; (ii) employees' views should be sought out, listened to and employees made to feel that their opinions count; and (iii) integrity - if an employee sees the values of the business ingrained in the management team, a sense of trust is more likely to be developed.

SM&B are running a free breakfast briefing on Employee Engagement on 16 March at Frith Street, presented by Andrea Cartwright, who is Head of Employee Engagement at Nationwide. Book a place by emailing eva.squibb@smab.co.uk

Rejection of disability-related explanation was not discriminatory

In Edinburgh Council v Dickson, the EAT held that although a diabetic employee's dismissal for gross misconduct was unfair, the employer's rejection of the employee's explanation that his disability was the cause of his behaviour was not an act of disability discrimination.

Mr Dickson, suffers from insulin-dependent diabetes. He was seen looking at hard-core pornographic images on a Council computer. He claimed he could not recall the incident and that his behaviour must have resulted from a hypoglycaemic episode. The Council did not accept his explanation, believing that Mr Dickson's conduct was conscious and deliberate, and he was dismissed. The EAT upheld the tribunal's finding that Mr Dickson's dismissal was unfair because the Council had refused to properly investigate Mr Dickson's explanation that his behaviour resulted from a hypoglycaemic episode, but the EAT overturned the tribunal's findings on disability discrimination.

The fundamental questions were: (i) what was the reason why the claimant was treated in the manner complained of? (ii) what was influencing the mind of the decision-taker? and (iii) did disability form part of the reason for the treatment? In this case there was no evidence that Mr Dickson's diabetic condition influenced the Council's thinking at all. The Council had formed a genuine belief that Mr Dickson's behaviour was conscious and deliberate. It had nothing to do with his disability. It followed that the rejection of the explanation was not because he was disabled or for a reason related to his disability.

Even-handed dress code was not discriminatory

In Dansie v Commissioner of Police for the Metropolis the EAT held that a male cadet had not been discriminated again on grounds of his sex when he was told that, in accordance with a dress code which applied to both sexes, he could not work with his shoulder-length hair tied in a bun and must have it cut. A female comparator would have been treated in exactly the same way.

The Police Dress Code states: “Hair must be neat, not allowed to cover the ears and … worn above the collar. For safety reasons, ponytails are not permitted and long hair must be neatly and securely fastened up and worn relatively close to the head.” Before starting his training as a police officer, Mr Dansie asked whether his hair would meet dress-code requirements and was told that it would. He arrived for training with his shoulder length hair tied in a bun: he was told to have it cut, which he did to avoid disciplinary action. He claimed sex discrimination, arguing that a female in the same circumstances would not have been required to have her hair cut.

The EAT upheld the tribunal's finding that Mr Dansie had not been discriminated against on the grounds of his sex. The guidelines issued to managers on the dress code applied equally to both men and women. The tribunal was fully entitled to conclude that a female comparator who failed to comply with a gender neutral dress/appearance code necessary for this disciplined service, particularly when on basic training, would have been treated in exactly the same way as Mr Dansie.

BA's 'no visible jewellery' policy not discriminatory

In Eweida v British Airways Plc, the Court of Appeal held that BA’s policy requiring employees to wear jewellery under their uniforms did not indirectly discriminate against a Christian who refused to conceal a silver cross, as it did not place Christians as group at a disadvantage, and the policy was objectively justified.

BA's uniform policy permitted employees to wear any jewellery they wished provided it was not visible. After refusing to conceal a silver cross worn on a necklace, Mrs Eweida, a devout Christian, was sent home without pay. She claimed indirect religious discrimination. The EAT upheld the tribunal’s decision that Mrs Eweida had not suffered indirect discrimination. To satisfy the first ‘hurdle’, she would have to show that BA’s policy would put persons of the same religion as her, Christians, at a particular disadvantage when compared to non-Christians, i.e. there must be evidence of group disadvantage. Given that no Christians at BA, or indeed anyone else, other than Mrs Eweida felt disadvantaged by BA's policy, her claim must fail. However, the EAT agreed with the tribunal that if this had not been the case, BA’s policy could not be justified as a proportionate means of meeting a legitimate aim.

The Court of Appeal agreed with the EAT’s ruling on indirect discrimination: the claim could not succeed. However, it disagreed that BA’s policy could not be justified. The disadvantage stemming from the policy affected just one person arising out of her wish to manifest her faith in a particular way and given that the policy had operated without objection for a number of years it was a proportionate means of achieving a legitimate aim.