



## Employment Law Newsletter - May 2019

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### Employment Law Update 2019

### Let's dress for summer

At some point this year we will enjoy a week of good weather that we will call 'summer'. It will start at 9am on a Monday and end whenever you take the barbecue out. You may wish to relax your normal dress code so that people are comfortable, but at the same time you don't want staff to appear as though they are auditioning for Love Island. Before summer arrives, remind people of your company's standards, for example, no beach wear, sheer clothing or flip flops. Applying one standard of dress for a diverse business can be difficult. Here are some common difficulties.

#### Can you ban jewellery?

Yes, but a ban may lead those who wish to manifest their religious beliefs to claim discrimination so you must have a legitimate reason for doing so. Good reasons would be a specific health and safety risk such as where employees are operating potentially dangerous machinery. It may be more difficult to justify a ban simply to project a certain corporate image, so you may need to be flexible.

#### How can you apply your dress code flexibly?

If an employee's religious belief requires them to wear an item of clothing that breaches your rules, consider whether you can modify your rules or apply them flexibly to avoid a claim of indirect religious discrimination. This is where your rule disadvantages those of a particular religion because they cannot comply with it. Anticipate those issues by, for example, accommodating Muslim women who wish to wear a head scarf as part of your uniform. You could also incorporate turbans into your company's uniform for male Sikh employees or allow Rastafarians to put their dreadlocks in a tam.

### What if an employee ignores your rules?

In the first instance, speak to the employee informally to find out why they've broken your rules. Offer two options:

go out and buy something more appropriate in their break

go home and get changed.

### What if they continue to refuse?

Subject to any religious objection that could be accommodated, and after your formal disciplinary procedure, a continued refusal to comply with your dress code could lead to a fair dismissal for misconduct or 'some other substantial reason'.

### Should you always meet before issuing an improvement notice?

Yes said the EAT in [Starling v Epsom & St Helier](#). Ms Starling, a nurse, was asked to switch on an incubator, but she became unwell and was taken to A and E before she could do so. She told a doctor about the incubator at the hospital the next day. The Trust issued an improvement notice, the equivalent of a first written warning, so she resigned. In upholding her claim of constructive unfair dismissal, the EAT criticised the Trust for not meeting Ms Starling and said, had they met her, she would have been fully informed, and the Trust could have decided on the full facts. So, how can you manage performance effectively while avoiding breaches of the implied term of trust and confidence?

### Follow your own policies

If an informal approach hasn't worked, check the requirements of your internal policies before starting any formal process and comply with them as far as is reasonably practicable. Keep your capability procedure non-contractual so that you can change it without consulting staff.

### Meet

It is a matter of good employee relations to meet your employee to discuss performance issues before acting. If you don't, you risk any action being viewed as unfair.

### Consider all the circumstances

Before issuing a penalty, consider your employee's previous performance, standard of work, length of service and any circumstance that mitigates their poor performance.

### What should the improvement note contain?

The note should identify the problem, explain what improvement is required and how quickly your employee must improve. Warn them about the next stage of the process if they fail to improve but describe the support that you will give them to help them reach the standard you require.

The emphasis should be on keeping them in the business not managing them out.

### If you enhance maternity pay must you enhance shared parental pay?

The Court of Appeal said no in the latest instalment of [Ali v Capita Customer Management Ltd; Chief Constable of Leicestershire Police v Hextall](#). When on paternity leave, Mr Ali was entitled to two weeks' full pay from Capita. Female employees could get 14 weeks' enhanced maternity pay. Mr Ali was eligible for shared parental leave, but he would only be paid at the statutory shared parental pay rate. Mr Ali claimed sex discrimination.

The Court of Appeal disagreed because 'the entire period of maternity leave following childbirth, and not just the first two weeks of maternity leave, is for more than just facilitating childcare'. It helps new mothers recover from the physical and psychological effects of pregnancy and giving birth. The proper comparator was a female employee on shared parental leave. That woman would be treated the same as Mr Ali.

### Does this close the issue?

Not quite. This decision reduces the risk of successful claims of sex discrimination or equal pay if you pay enhanced maternity pay but pay shared parental leave at the statutory minimum. However, this is the third decision so don't rule out the possibility of an appeal to the Supreme Court.

### Should you believe references?

Not without checking them. A recent survey into recruitment fraud audited the CVs of 5000 employees. Worryingly, 75% contained discrepancies, 20% had inflated job titles and 12% included false grades and qualifications. Some references were complete fiction.

### What should you do?

Don't accept pre-written references. Always obtain references from referees directly and verify all academic and professional qualifications. If possible, only accept written references and avoid taking references by telephone.

Decide what information you need and provide a description of the job, if appropriate. Ask specific, relevant questions. One of the referees should, with the candidate's consent, be their current or most recent employer and, ideally, their line manager.

Make job offers conditional on the provision of satisfactory references and don't let prospective employees start work before you have received and checked their references.

### What if the employer refuses?

Employers aren't obliged to give references although it is considered good practice to do so. It may simply be the policy of that business not to give references so this should not be fatal for your prospective employee. However, it may present a level of risk that you can mitigate with a probation period during which you can assess whether they can work to the required standard.

### Loose ends

Consider agreeing an appropriately worded reference for those leaving under a settlement agreement or when settling litigation to avoid later problems.

### Loose Lips

Remember that informal conversations can have a detrimental effect on a former employee's career, even if it has been several years since they worked for you. Those comments may be actionable in negligence, so take care.

## Employment Law Update 2019

Our free annual update on employment law takes place this week. As usual we will be in Manchester and London and we still (at the time of sending this) have a few spaces left at both venues. If you already have a place but are no longer able to attend then please let us know.

In an uncertain world, the role of HR continues to evolve. We will bring clarity to complying with the National Minimum Wage, establishing a dismissal for some other substantial reason and navigating the risks surrounding changing terms and conditions of employment. In addition to

these topics we will explain how to avoid treating your part-time workers unlawfully, discussing the developing area of gender identity and advising on the issues surrounding bonuses.

And of course, our annual update would not be complete without our look at recent case law and legislative changes along with advice on how to deal with the challenges they pose.

There is no charge to attend. Each day starts at 9.15am and finishes at around 3.45pm. Refreshments will be provided at registration (8.45am), at morning and afternoon breaks and in the form of a buffet at lunch.

And there will be an opportunity to learn about our wider work on HR matters.

All delegates will receive the new edition of our handbook *Employment law for line managers*.

To register, click [here](#) and fill in the form. We shall acknowledge your booking promptly and will send you more details on the event. If you have any questions, please contact us on: [+44 161 703 5611](tel:+441617035611).

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If you would like to discuss these or any other issues facing your organisation please speak to your usual contact at Watershed or Keith Morgan on [+44 161 703 5611](tel:+441617035611)

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