

DRESS CODES AND SEX DISCRIMINATION

Introduction

The Government Equalities Office (GEO) has issued a guidance document for employers, employees and job applicants that sets out how the law might apply in cases of sex discrimination where an employer requires female staff to wear, for instance, high heels, make-up, hair of a particular length or style, or revealing clothing.

While the guide lists several industrial sectors where uniforms are commonly found, including in offices and retail, it does not – surprisingly for us - specifically identify the transport sector. Having said that, the list is stated as not being exhaustive and the subject of the guidance is clearly relevant for TSSA reps since uniforms are a common requirement for many of our members.

The Law

The Equality Act 2010 (EQA) does not set out specific examples of practices that are unlawful, nor does it provide definitions of behaviours that are “sexist”, “racist” or “homophobic.”

Rather, it sets out the legal framework, including identifying sex discrimination and harassment as unlawful acts that can be challenged in the judicial system. For employment matters that

means through an employment tribunal (ET).

Types of sex discrimination

There are four main types of sex discrimination under the EQA:

- Direct discrimination
- Indirect discrimination
- Harassment
- Victimisation.

Direct discriminationⁱ

This says you must not be discriminated against because:

- you are (or are not) a particular sex
- someone thinks you are the opposite sex (this is known as discrimination by perception)
- you are connected to someone of a particular sex (this is known as discrimination by association)

Indirect discrimination

Can occur where a workplace rule, practice or procedure is applied to all employees, but disadvantages those of a particular sex.

For example, a requirement that job applicants must be six feet tall could be met by significantly fewer women than men.

An employee or job applicant claiming indirect discrimination must show how they have been personally

disadvantaged, as well as how the discrimination has or would disadvantage other employees of the same sex.

In some limited circumstances, indirect discrimination may be justified in law (known as “objective justification”) if it is necessary for the business to work. However, employers should note this can be a difficult process.

Harassment

This breaks down into three different types:

- 'unwanted conduct' related to a person's sex causing a distressing, humiliating or offensive environment for them
- 'unwanted conduct' of a sexual nature - this is sexual harassment
- less favourable treatment of an employee because they have rejected sexual harassment or been the victim of it.

Victimisation

Treating an employee unfairly who has either made or supported a complaint about sex discrimination.

Note: In the Equality Act, sex can mean either male or female, or a group of people like men or boys, or women or girls.

Setting a workplace dress code

Dress codes can be a legitimate part of an employer's terms and conditions of service and there can be different ways of achieving a professional “look” among employees.

However, it is important that a dress code does not discriminate, for example, by allowing both men and

women to wear trousers in the workplace.

Whilst dress policies for men and women do not have to be identical, the standards or rules imposed should be equivalent for both female and male employees. Any less favourable treatment because of sex could be direct discrimination.

Dress codes must not lead to harassment by colleagues or customers which means that any requirement for women to dress in a provocative manner are likely to be unlawful on those grounds.

The GEO's advice is to avoid gender specific prescriptive requirements. For example, unless men were required to wear the same, it is unlikely to be lawful that only women should be expected to wear make-up, have manicured nails, wear hair in certain styles or dress in specific types of hosiery or skirts.

Further, the guidance also warns of the risk of requiring male and female employees to dress in a provocative or revealing fashion. Although this will not be direct sex discrimination (as the requirements on men and women are equal) it may increase the risk of an employee being vulnerable to sexual harassment.ⁱⁱ

Alternatively, a dress code that requires all employees to dress smartly would be lawful if the definition of smart is “reasonable,” perhaps by requiring a two-piece suit in a similar colour for both men and women, with low-heeled shoes for both sexes.

The GEO's advice to employers is that when setting or revising a dress code they should:

- consider the reasoning behind it;
- consult with employees and trade unions to ensure that the code is acceptable to both the company and the staff;
- once agreed, communicate with all employees.

What other factors should be considered?

There are a number of additional factors that should be considered when setting or revising a dress code:

- Health and safety: are there any implications in this area – eg, the requirement to wear particular shoes as part of a dress code rather than personal protective equipment (PPE) when the job role could lead to foot injuries from slips, trips and falls;
- Reasonable adjustments for disabled employees: when someone fulfils the criteria of a disabled person under EQA, the employer is required to make reasonable adjustments to any element of the job which may place a disabled person at a substantial disadvantage when compared to non-disabled employee
- Transgender staff: should be allowed to follow the organisation's dress code in a way which they feel matches their gender identity. If there is a staff uniform, they should be supplied with an option which suits them.

Taking action

This Reps Bulletin has concentrated on dress codes and sex discrimination. A member who believes she (or he) has been the victim of sex

discrimination, harassment or victimisation either because of the dress code – or for any other reason – should be supported to raise a grievance about the issues or behaviours that are causing distress.

If the grievance does not achieve the objective of amending the behaviour, advice should be taken from the TSSA full time officer or Employment Rights Adviser about the potential for making a claim in an employment tribunal (ET).

Reps action

This Bulletin seeks to build on the advice contained in an earlier Bulletin (Sexual Harassment - EQA/029/March 2018).

Reps should:

- familiarise themselves with the contents of both documents and be aware of the potential link that exists between dress codes, sex discrimination and sexual harassment;
- acquaint themselves with company policies in each of these areas, including whether there are any potentially discriminatory elements (which are less favourable either to women or men) in the standards forming the dress code;
- speak to colleagues who are obliged to comply with the dress code and find out their views and explain your concerns. Members may not feel the same way as you do because they have more information of what happens in practice. Alternatively, they may have been denied an opportunity to express their

concerns since when they kept quiet;

- if your discussions reveal an issue, raise the problem at the appropriate level of the collective bargaining process (normally at Company Council level when dealing with company policies). If you are a local rep, this will mean contacting the company council rep or your TSSA organiser to discuss your concerns;
- where non TSSA members are involved, recruit them into the union to prepare for any potential collective grievance that may be necessary to resolve the matter (non-members can join on line at: <http://www.tssa.org.uk/join>

Ten reasons why your colleagues should join can found at:

<http://bit.ly/TSSA10Reasons>

Acknowledgments and further information

This Bulletin was compiled from sources that appear in the end notes as well as:

The Government Equalities Office's "Dress codes and sex discrimination – what you need to know" (May 2018) available from:

<https://assets.publishing.service.gov.uk>

ⁱ Details taken from ACAS Website: <http://www.acas.org.uk/index.aspx?articleid=1814> and HMRC Website: <https://www.equalityhumanrights.com/en/advice-and-guidance/sex-discrimination>

[k/government/uploads/system/uploads/attachment_data/file/709535/dress-code-guidance-may2018-2.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/709535/dress-code-guidance-may2018-2.pdf)

TSSA affiliates nationally to both the TUC and LRD (Labour Research Department). TSSA Branches are therefore entitled to affiliate to LRD themselves and purchase their wide range of booklets on behalf of reps. Once they affiliate to the booklet service they can then extend the affiliation to include the online service which will provide access to the range of publications to all reps and branch officers. NOTE: LRD's latest edition of the "Law at Work 2018" book has a chapter on Dress Codes.

Branches are also able to purchase the TUC booklets through their website at: <https://www.tuc.org.uk/publications>

More information on this and other legal matters is available from:

- Val Stansfield, Employment Rights Adviser at stansfieldv@tssa.org.uk or 020 7529 8046
- TSSA Helpdesk – 0800 328 2673

The information given here is for general guidance only and should not be regarded as a complete or authoritative statement of the law.

ⁱⁱ Amaya Hobby, Veale Wasbrough Vizards LLP: <https://www.vwv.co.uk/news-and-events/blog/employment-law-brief/dress-codes-sex-discrimination-guidance>