



## XpertHR Podcast

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- Ellie Gelder: Hi and welcome to this week's XpertHR podcast with me, Ellie Gelder. Now it's a topic that's sparked a flurry of headlines last year – women having to wear high heels in the workplace. It followed the case of Nicola Thorp who was sent home from work without pay because of her failure to comply with a policy that required women to wear high heels and the case prompted a government inquiry. As part of the inquiry the Women and Equalities Commission recently published a report on high heels and dress codes and just this week MPs have been debating the issue of dress codes, in particular those that are sexist.
- I'm joined now by principal employment law editor Stephen Simpson, who is going to discuss some of the dangers of having an overly prescriptive dress code. And we'll also have a look at how the courts and tribunals have dealt with dress codes over the years. But first things first, Stephen, there are no specific UK laws on dress codes, are there? [0:01:01.7]
- Stephen Simpson: That's right. So there are no specific laws or enforceable statutory codes of practice on dress codes in the workplace. I think that's one of the things that makes dress codes a difficult area for employers.
- Ellie Gelder: Okay. So just remind us which laws are applicable then when it comes to dress codes? [0:01:15.2]
- Stephen Simpson: So the main legislation is of course the Equality Act 2010, where the direct discrimination provisions and even more so the indirect discrimination provisions come into play. There are nine protected characteristics under the Act, one of which of course is sex.
- Ellie Gelder: And the key concept for direct discrimination is less favourable treatment isn't it? [0:01:32.5]
- Stephen Simpson: Yes. So that's where the individual is less favourably treated because of a protected characteristic such as sex. Direct discrimination cannot be justified and while there is a defence if the employer can show that there is a genuine occupational requirement for dress and appearance rule, that defence is notoriously narrow and it will hardly ever allow for a blanket rule on appearance.
- Ellie Gelder: But the more dangerous claim for employers is indirect discrimination, isn't it? [0:01:54.7]
- Stephen Simpson: Absolutely. So I am sure listeners will all be familiar with the concept of indirect discrimination, but just a reminder that this is where a rule

is applied across the board that puts people with a protected characteristic, such as sex, at a particular disadvantage, compared with others who don't share the characteristic.

- Ellie Gelder: But importantly there is a justification defence for indirect discrimination. [0:02:14.3]
- Stephen Simpson: Yes. Again this is a concept that listeners will be familiar with, but it's always worth repeating. The dress rule can be justified if it's a proportionate means of achieving a legitimate aim.
- Ellie Gelder: And there is clearly the potential for sex discrimination in dress code rules. So can you just give us some examples? [0:02:28.8]
- Stephen Simpson: So the examples that came up most commonly in the government's recent report and inquiry are requiring women to wear make-up or high heels or the requirement for a woman to wear a skirt.
- Ellie Gelder: So what are the key cases here? [0:02:40.6]
- Stephen Simpson: So a key historical case is *Schmidt v Austicks Bookshops Ltd* which is a 1977 case in which a female bookshop worker was required to wear a skirt and banned from wearing trousers whilst serving the public. She was dismissed as she refused to wear a skirt.
- Ellie Gelder: And did that requirement constitute sex discrimination? [0:02:58.4]
- Stephen Simpson: The judgment seems very surprising to us 40 years on, but the employment appeal tribunal found that the bookshop did not commit direct sex discrimination.
- Ellie Gelder: So why was that? [0:03:07.6]
- Stephen Simpson: The rationale was that it's okay for employers to have a gender specific rule as long as there are comparable rules of conventional dress for both sexes. For example in this case there were also rules for men who weren't allowed to wear T-shirts. So the EAT accepted there were similar rules for both sexes.
- Ellie Gelder: So that's quite an old case. Is that still good law? [0:03:26.4]
- Stephen Simpson: Incredibly, yes. It was affirmed in a 1996 Court of Appeal decision – *Smith v Safeway* – and there hasn't been a decision at a higher level since.
- Ellie Gelder: Okay. So what was the issue in *Smith v Safeway*? [0:03:37.4]
- Stephen Simpson: In that case the issue was hair length. A male delicatessen worker with long hair brought a sex discrimination claim after he was dismissed because his pony tail grew too long to be kept under his hat.
- Ellie Gelder: And what were Safeway's rules on hair length then? [0:03:50.8]
- Stephen Simpson: The rule for male staff was, 'Tidy hair not below shirt collar length. No unconventional hair styles or colouring.' The rule for female staff was, 'Tidy hair. Shoulder length hair must be clipped back. No unconventional hair styles or colouring.'

Ellie Gelder: And the Court of Appeal found that those rules were comparable and therefore not discriminatory. [0:04:10.8]

Stephen Simpson: Exactly. So the Court of Appeal found that it wasn't discriminatory for employers to require a conventional appearance, even if the rules are slightly different for men and women.

Ellie Gelder: But what if there are rules for women, but no comparable rules for men. Have we got any examples from case law on that? [0:04:25.0]

Stephen Simpson: The best one I could find was *Stoke-on-Trent Community Transport v Cresswell* which is a 1994 case that went to the EAT.

Ellie Gelder: And what happened in that case? [0:04:34.1]

Stephen Simpson: There a female charity worker began going to work wearing trousers, but she was told by her manager that this was frowned upon. She continued to go to work wearing trousers and was eventually dismissed, despite her protest that she needed to because of a medical condition and that she couldn't afford to buy skirts for the office.

Ellie Gelder: And was she found to have been discriminated against? [0:04:52.3]

Stephen Simpson: Yes. So in that case the claimant won. That was because the employer didn't have any comparable rules for men. There was evidence that men who worked for the charity were allowed to adapt their dress for their comfort. So that was clearly an example of direct sex discrimination.

Ellie Gelder: So a warning there then to employers that they must have comparable rules for men and women. But all of the cases we've mentioned are obviously quite old now. So the question many employers are going to be asking is can any of these cases still be relied on? [0:05:18.3]

Stephen Simpson: Although they are technically still good law, there are reasons why I would be very cautious as an employer about relying on these cases. Judges will consider cases on the basis of the social norms of the time and employers shouldn't just assume that because a judge found in 1977 that women could be prevented from wearing trousers and be required to wear a skirt, a judge in 2017 will come to the same conclusion. And the same goes, I think, for men having long hair.

Ellie Gelder: And are there any other limits to these old cases? [0:05:44.1]

Stephen Simpson: Yes. The claims all revolved around direct sex discrimination and the cases did not deal with the issue of indirect sex discrimination.

Ellie Gelder: So let's move on then to indirect sex discrimination. What's the most likely justification for a rule that potentially indirectly discriminates against one sex? [0:06:00.1]

Stephen Simpson: The most likely justification is normally health and safety. But it's hard to see any health and safety justification that a tribunal would take seriously in relation to any of the gender specific rules that we've mentioned, such as women wearing make-up, high heels or a skirt.

Ellie Gelder: Yes. I can't imagine there would be. But what about other possible justifications. So maybe a company wants to project a particular image? [0:06:22.0]

Stephen Simpson: I think employers are getting into murky territory here. While there is nothing to stop an employer from putting in its dress code that employees must project, say, a positive and professional image, the problems can occur when the dress code is overly prescriptive.

Ellie Gelder: So just give us an example then of a case where an employer has attempted to use projecting a particular image as a justification for a dress rule. [0:06:42.2]

Stephen Simpson: The best example I can think of was the high profile case *Eweida & Others v United Kingdom*.

Ellie Gelder: So why is that case important, because wasn't that a big religious discrimination claim? [0:06:51.9]

Stephen Simpson: Yes it was religious discrimination, but I think this case is important to mention because of the justification related to the corporate image put forward by British Airways.

Ellie Gelder: Okay. Just remind us what happened in *Eweida*. [0:07:02.2]

Stephen Simpson: There a Christian employee of British Airways was sent home after she came to work displaying a cross on her necklace. The airline's uniform policy banned the wearing of visible items of jewellery. While she lost her religious discrimination case in the UK Court of Appeal, she succeeded when the case with the European Court of Human Rights.

Ellie Gelder: And what did the European Court say? [0:07:20.4]

Stephen Simpson: The European Court said that the UK Court of Appeal had not struck a fair balance between the employee's desire to manifest her religious beliefs and the employer's wish to project a certain corporate image.

Ellie Gelder: Why did the European Court come to that conclusion then? [0:07:33.2]

Stephen Simpson: It wasn't really impressed with British Airways' failure to provide previous examples of staff wearing authorised religious clothing, such as turbans, having any negative impact on the company's brand or image. It also took into account the discreet nature of the item, which it didn't think detracted from the employee's professional appearance.

Ellie Gelder: So that's a good example of the need to project a certain corporate image not being a sufficient justification for a discriminatory rule. Are there any other strong arguments for a claimant bringing a sex discrimination claim over a make-up, high heels or skirt requirement? [0:08:05.3]

Stephen Simpson: I think a claimant could play up two aspects. Firstly these requirements can't clearly place women at a particular disadvantage. For example high heels have been linked to health problems such as muscular skeletal disorders and secondly there is a strong argument

that make-up, high heels and skirt requirements sexualise the presentation of female staff and are demeaning to female staff as well.

Ellie Gelder: And do you have any real life examples of that? [0:08:26.7]

Stephen Simpson: Yes. The recent Women and Equalities Committee report included some pretty compelling testimony that female staff required to conform to that type of appearance are at increased risk of harassment from customers. So I think that's a good example from real life.

Ellie Gelder: So just give us a flavour then of that testimony. [0:08:41.6]

Stephen Simpson: One individual who worked in retail and as a receptionist explained that her retail employer encouraged her and female colleagues to wear shorter skirts at Christmas time when a higher proportion of male shoppers was anticipated. Just a quote from her evidence, briefly, she said, 'I certainly did get a lot of unwanted attention. I was asked out on dates by customers and they wanted to know when I finished my shift. That was uncomfortable.'

Ellie Gelder: Given that expectations as to the way women dress at work can clearly cause problems like this, why haven't there been more recent cases on dress codes? [0:09:12.5]

Stephen Simpson: Unfortunately all areas of employment law, not just sex discrimination, now have the same problem of tribunal fees putting off claimants who could potentially bring test claims. Quite often the amount of likely compensation just won't justify the paying of £1,200 for a case to go all the way to a tribunal.

Ellie Gelder: So fees are simply making it unfeasible for most workers to bring dress code claims? [0:09:33.2]

Stephen Simpson: Exactly. Even if an individual is brave enough to embark on a long and costly tribunal claim, the chances of an employer being forced to change its dress code are slim. Tribunal powers for making recommendations to employers are very weak and rarely invoked.

Ellie Gelder: Does the report contain any recommendations to remedy that? [0:09:47.7]

Stephen Simpson: There are some interesting recommendations in the report, including giving tribunals the power to use injunctions in employment cases.

Ellie Gelder: So in the context of dress codes, a tribunal could grant an interim injunction to prevent the employer from enforcing a particular rule on its staff? [0:10:02.4]

Stephen Simpson: Yes. The report highlights that the average length of time for sex discrimination cases to be decided is 28 weeks and at the moment employers can continue to enforce the rule while the case is ongoing.

Ellie Gelder: So do you think the use of interim injunctions would work? [0:10:16.3]

Stephen Simpson: It's a good idea on paper, but there would be some major problems I think, not least employees and unions using the threat of an injunction tactically, for example as a way to disrupt the employer's business.

Ellie Gelder: And did the report contain any other recommendations? [0:10:29.1]

Stephen Simpson: The other really interesting suggestion is changing the Equality Act to define exactly what legitimate aims can be.

Ellie Gelder: So what are the suggested legitimate aims? [0:10:37.8]

Stephen Simpson: The report proposes four – firstly health and safety; secondly to establish a truly necessary public image; thirdly to project a smart and uniform image and fourthly to restrict dress or insignia that may cause offence.

Ellie Gelder: So do you think that could work, by changing the law? [0:10:54.6]

Stephen Simpson: Well I think it would provide some certainty for employers. The biggest danger is that employers could use the list as a tick box exercise and assume that one or more of the aims applies in their case, without really thinking it through. So, realistically, a change to make the legitimate aims more prescriptive is simply not going to happen.

Ellie Gelder: So just to conclude, what can an employer do if they're concerned that their dress code policy is leaving them open, potentially, to a sex discrimination claim? [0:11:18.6]

Stephen Simpson: A good starting point is to take their dress code policy and highlight any specific rules, considering whether or not each rule is really necessary and if the rule places one gender at a particular disadvantage. Perhaps the most helpful practical part for employers of the Women and Equalities Committee report is the detail of Portico's dress code both before and after the code was reviewed and after Nicola Thorp received widespread publicity.

Ellie Gelder: So well worth employers reading that part of the report then? [0:11:43.8]

Stephen Simpson: Yes. I wouldn't normally recommend that employers read such a lengthy parliamentary report, but the case study and how Portico amended its policy is well worth reading. The report contains the full text of Portico's policy both before and after it was reviewed and the company scrapped its very detailed gender specific policy covering everything from shade of nail varnish to height of heels and moved to a more general adaptable policy that's suitable for 2017.

Ellie Gelder: Thanks, Stephen. So certainly some essential reading for those of you who are wondering whether or not you should be adapting your dress code policy. For more information on dress codes have a look at our task on establishing a work place dress code where you can see all our relevant content in one place. That brings us to the end of this week's XpertHR podcast which you've been listening to with me Ellie Gelder. We'll be back next Friday, but until then it's goodbye from us.