

The COVID-19 pandemic and staff wearing beards

(what are the legal issues for employers and employees?)

In light of the COVID-19 pandemic, there have been reports that some primary care staff are being asked by employers to remove their beards; indeed, this has formed the subject of numerous calls to the MDDUS advice line in recent days and weeks. I am no medical or virus expert – commentators suggest that facial hair may allow water particles to escape protective masks which require a clean seal between mask and face (“FFP3 respirators”). If particles escape they could infect patients and other healthcare providers, and if particles enter then that jeopardises the health of the worker himself.

Many doctors, dentists and other professionals may well now choose to shave off their beard voluntarily or will follow an instruction by employers to be clean shaven to protect themselves and also patients. Many will look to source appropriate protection – to protect themselves and their patients.

Matters will require further consideration if employers are unable to source appropriate protection for staff with beards and those staff refuse to shave off their beard and state that that is because of personal or religious reasons.

Here are some of the issues to be considered by employers and employees.

Is the employer’s request lawful and reasonable?

On the face of it (before considering personal / religious objections to being clean shaven) such a request from an employer – to shave off the beard if suitable protective masks cannot be sourced for example - is likely to be considered lawful in the current circumstances. In the current climate, given the risk of COVID-19, it also likely to be considered as a reasonable instruction.

Should employers take steps to accommodate staff who refuse?

Where an employee states that they have a personal preference, “sartorial” reasons or cultural or religious reasons for their refusal to remove their beard, an employer should discuss that with the employee and consider whether an alternative course of action is possible. This could include sourcing alternative protective equipment with a full head covering where possible (for example some suggest a “powered air purifying respirator”) or considering redeployment of the employee to carry out no patient contact work where available. Alternative work may not be available

Does it make any difference if a refusal by an employee to shave off a beard is on religious grounds?

If an employee wears a beard because of a religious duty (e.g. Sikh or Muslim), a requirement by employers for staff to be clean shaven may amount to indirect discrimination. Employers then have to grapple with the interaction and potential for conflict between health and safety obligations and equality rights.

In an indirect discrimination claim, Tribunal would be required to address issues including:

- Did the employer apply a rule (to be clean shaven) to the employee of a particular religion as well as employees who do not share that characteristic?
- Did the rule put or would it put the employee and persons of that particular religion at a particular disadvantage compared to others? and
- Can the employer show the rule to be a proportionate means of achieving a legitimate aim and that all other reasonable options and alternatives had been attempted?

The circumstances arising from the COVID-19 outbreak have not yet been tested by the Employment Tribunal and each case would ultimately turn on its own facts. In the pandemic situation in which we are currently operating, patient and staff safety is paramount. Employers will want to consider whether or not they will have a stateable defence to a discrimination claim if they seek to issue and impose such a rule and that will involve consideration of issues such as:

- Controlling risks to staff and patient safety during a pandemic - that I would think could be argued to be a legitimate aim in these unprecedented times.
- In the absence of any reasonable, available alternative such as different equipment or redeployment - is requesting that staff are clean shaven a proportionate means of achieving that aim? I would think that could be argued to be a proportionate means of achieving that aim but full details of each case would require to be considered to give a definitive view.

Employers should engage with any staff member who raises this issue and deal with it in a sensitive fashion. If policies and practice needs to be updated in these unprecedented times, employers will be expected to behave reasonably towards their staff.

We would hope that regulatory bodies including the General Medical Council and General Dental Council will produce guidance on this issue to assist employers and employees at this difficult time.



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