



E-Cigarettes and the Workplace

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Despite smoking being banned in enclosed workplaces for some time within England and Scotland, employers are now facing a fresh challenge in the form of the use of e-cigarettes within the workplace.

The Legal position

Action on smoking and health (ash.org.uk) reports that an estimated 2.1 million adults in Great Britain use electronic cigarettes; a trend that has increased exponentially in recent years. In 2010, 8.2 per cent of smokers had tried electronic cigarettes. By 2014 this had risen to 50.6 per cent.

As things stand e-cigarettes do not fall under the current smoking laws as they contain nicotine as opposed to tobacco. This leaves an employer free to decide whether to permit the use of e-cigarettes in their workplace.

However, there can be indirect consequences for employers and employees in relation to the use of e-cigarettes in the workplace, as the below employment tribunal case illustrates.

Employment Tribunal claim

The case of (*Insley v Accent Catering* 2014) involved a school catering assistant who brought a claim for constructive unfair dismissal after she was suspended by her employer for smoking an e-cigarette on the grounds of the school in full view of its pupils.

Insley resigned from her post before her disciplinary hearing and claimed that the school had not issued a policy against smoking e-cigarettes and had therefore breached the implied duty of mutual trust and confidence owed to her.

The Employment Tribunal did not feel that the implied duty had been breached or that it was reasonable for her to have resigned from the role as a result and the claim was struck out. However it was noted that the school's prohibited use of e-cigarettes had not been made clear and if a dismissal had instead taken place, this could well have been deemed as unfair.

This case is a message for employers who look to discipline employees over their use of e-cigarettes that unless the employer's policy on e-cigarettes is clear there may be a risk of a finding of unfair dismissal against an employer.

What can employers do?

If a Smoking Policy is already in place then it should be amended to include the use of e-cigarettes and clearly state the employer's approach to these. It should be clear as to whether e-cigarettes are to be banned outright in the workplace or simply in certain locations.

Key issues that an employer needs to include in a Smoking Policy are:

- Why the policy is being implemented (ie to promote a healthy working environment)
- Links that employees can access if they wish to give up smoking.
- The employer's approach to any smoking breaks
- The locations of any non-enclosed work areas where smokers are free to smoke (if this is the case).
- The consequences of any break of the policy including when disciplinary action will be taken and on what level. This is to limit the scope of any possible claims by employees who do not adhere to the provisions of the policy.

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