



Weightmans

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Firefighter Fitness

Legal Considerations from an Employment and Health and Safety Perspective

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Key contact:

Chris Green

Partner

DDI: 0121 200 8125

Chris.green@weightmans.com

Kim Abbott

Associate

DDI: 0116 242 8918

Kim.abbott@weightmans.com



The Equality Act 2010

- The Equality Act 2010 s.60 prohibits employers from asking prospective candidates questions about their health or fitness or any disability.
- Section 60(6)(b) provides an exemption where there is a function that is intrinsic to the work concerned.

Firefighters Required Fitness Levels

- Nova Scotia – 4.8 kilometre walk with 20 kilo vest in 45 minutes
- Western Australia – 4 hour physical assessment inc. min. 9.6 on shuttle run
- U.S. – 8 events inc. stair climb, hose drag, forcible entry, search maze

Ogilvie v Grampian FRS 2008 (unreported)

- Kevin Ogilvie was dismissed because he was unfit and overweight (20 stone) after 22 years service.
- He subsequently brought a claim of unfair dismissal, which was settled with the assistance of ACAS.
- The remedy was his reinstatement, a precondition of which was that he was required to complete a three month probation period in which he had to reach the required fitness levels in order to secure permanent reinstatement.

Oglivie v Grampian FRS 2008 (unreported)

- Mr Oglivie did not meet the fitness criteria after 3 months, and so his probationary period was extended to a period of six months.
- Mr Oglivie still failed to meet the fitness criteria, and so his dismissal was reconfirmed, because of the risks to his own health and safety, that of his colleagues, and that of the public as he was not able to effectively perform his job.
- Mr Oglivie chose not to pursue an Employment Tribunal claim.

Bamber v Greater Manchester Police [ET April 2011]

- Ms Bamber, a public order officer, aged 51 could not complete the 'shield run' of 500 metres in less than 2 mins 45 seconds, wearing protective equipment.
- Indirect discrimination: where A applies to B an apparently neutral provision, criterion or practice that A would apply equally to others, but which puts or would put those who share B's characteristics at a particular disadvantage.
- There will be no discrimination if the provision, criterion or practice is objectively justified.

Bamber v Greater Manchester Police [ET April 2011]

- The force said that its aim was to maintain a level of fitness of its public order officers and its proportionate means was the shield run.
- Ms B won her claims for indirect sex and age discrimination.
- The employment tribunal said:

“The test would have to properly relate to the demands of the job. In respect of the time within which the test has to be performed, we are not satisfied this is the case.”

The Employment Perspective

- Does the fitness test relate directly to the requirements of the job?
- Is there a direct correlation between the objective of the tests and the duties that fire fighters are required to undertake?
- If the answer to either of those questions is ‘no,’ the tests could be indirectly discriminatory.

Failing to Manage a Capability Issue – The Health and Safety Perspective

- Employer's Liability –
 - Corporate Manslaughter and Corporate Homicide Act 2007
 - s2/3 Health and Safety at Work Act 1974
 - Management of Health and Safety at Work Regulations 1999

Failing to Manage Capability Issues – The Health and Safety Perspective

- Individual Liability
 - Gross Negligence Manslaughter
 - s7 Health and Safety at Work Act 1974
 - s36 & 37 Health and Safety at Work Act 1974
 - NB – no personal liability under Corporate Manslaughter and Corporate Homicide Act 2007

Corporate Manslaughter

s1 (1):

“An organisation...is guilty of an offence if the way in which its activities are managed or organised–

(a) causes a person’s death, and

(b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased”

s1 (3)

“An organisation is guilty of an offence...only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach...”

What Constitutes a Gross Breach

- How far you failed to ensure safety
- Risk gap analysis of possible fatality
- **Health and Safety Culture encourages breaches**
- **Or produces tolerance of it**
- **Health and Safety Guidance (IOD for leadership)**
- Attitudes, policies, procedures, systems or accepted practices

Health and Safety at Work Act 1974

- S2 – general duty to employees
- S3 – general duty to other concerned with undertaking
- “*reasonably practicable*”
- *R v Associated Octel Co Ltd [1996] 1 WLR 1543*
- *R v Charget Limited and Others [2008] UKHL 73*

The Management of Health and Safety at Work Regulations

Regulation 3

- Suitable and sufficient assessment of:–
 - (a) the risks to the health and safety of his employees; and
 - (b) the risks to the health and safety of others
- Level of fitness / capabilities – does this give rise to “material” or “significant” risks”?

Individual Liability

- Gross negligence manslaughter
- S7 Health and Safety at Work Act 1974

“reasonable care for the health and safety of himself and others who may be affected by his acts or omissions”.

“co-operate with their employer so far as is necessary to enable any duty or requirement under any relevant statutory provision to be performed or complied with”.

Individual Liability

- S7 Health and Safety at Work Act 1974
 - Potential applicability –
 - The “unfit” employee on operational duties
 - His health and safety
 - Health and safety of fellow colleagues
 - Health and safety of members of the public

Individual Liability

- S7 Health and Safety at Work Act 1974
 - Failure to co-operate
 - Would a refusal to complete a fitness test amount to a breach of s7 Health and Safety at Work Act 1974?

S36 & 37 Health and Safety at Work Act 1974

- Potential Liability for Managers within the Organisation
 - Act
 - Default

 - Consent
 - Connivance
 - Neglect

Health and Safety Codes of Practice

- HSE Guidance: Striking the balance between operational and health and safety duties in the fire and rescue service
- Management of Health and Safety at Work Regulations Approved Code of Practice

Competing Interests: Employment Rights v Health and Safety Legislation

- Fire-fighter fitness is a fundamental and essential capability requirement.
- Whilst questions to employees about health and fitness are strictly prohibited, employers may have a defence of objective justification in that asking questions and implementing fitness testing are a proportionate means of a legitimate aim.
- Both the HSWA 1974 and the MHSWR 1999 highlight the importance of health and safety duties that are owed to employees and the public.

Competing Interests: Employment Rights v Health and Safety Legislation

- Both pieces of legislation require that all risks are minimised so far as is reasonably practicable.
- Ensuring fire-fighter fitness is clearly a reasonably practicable step to minimise risk given the high stakes that are involved
- Health and safety should always prevail: *Dugmore v Swansea NHS Trust* (2003)



Weightmans

MIDLANDS REGULATORY TEAM
St Philips Point, City Plaza, 47 Cannon Street,
Birmingham B2 5EF
Fax No : 0121 632 5410
www.weightmans.com

Chris Green
Partner
Direct Dial: 0121 200 8125
Email: chris.green@weightmans.com
Mobile: 07894 462112



Hazel Padmore
Associate
Direct Dial: 0121 200 8138
Email: hazel.padmore@weightmans.com
Mobile: 07595 963308



Zoe Harris
Trainee Solicitor
Direct Dial: 0121 200 8131
Email: zoe.harris@weightmans.com

