



Transcript of Smokefree podcast Recorded and produced by Podlab

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Simon: Hello and welcome to the smokefree podcast, brought to you by Podlab, the London podcasting agency.

From 6 am on the 1st of July 2007, all enclosed public spaces and workplaces in England must become smoke free. This follows the introduction of smoking bans in Scotland last year, and in Wales and Northern Ireland earlier this year.

In this podcast we look at the rules relating to the introduction of smoke free environments and some of the practical and legal challenges that organisations face. We will be speaking to Brendan Dick, BT Scotland's National Manager, Jason Collins, TFL's Group Station Manager and Steve Gibbons will give us an employment lawyer's viewpoint.

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Simon: The smoking ban itself is a result of Section 1 of the Health Act of 2006, that specifies that premises are to be smoke free if they are enclosed (or substantially enclosed) and are either: open to the public; used as a place of work by more than one person; or a place that members of the public might go to, for example, to receive goods or services from people working there. It is also important to note that 'work' in this context also includes voluntary or charity work.

Regulations made under the Act define 'substantially enclosed' as covering premises which have a roof or ceiling, and which are at least 50% surrounded by walls. So that definitely spells the end of the smoking room! As a potential replacement for smoking rooms, many companies have opted to install external smoking shelters to help to protect their staff and clients from the worst of the elements. We met Steve Gibbons earlier today in a non-smoking coffee shop, and asked him to tell us a bit more about these shelters.

Steve: A number of employers have decided to actually install smoking shelters, which look a little bit like bus shelters outside their offices or on their industrial sites. Now, the intention here is to concentrate smokers in a particular area outside, and give them somewhere to indulge in smoking. Now, these will be lawful, but only if they don't have more than 50% of walls around them. So essentially, you are going to see either a one, or possibly a one and a bit sided shelter – anything more than that will actually be unlawful to smoke in there.

Simon: So can employees smoke on the way to the shelter, or, for example, could they smoke in their own cars in the staff car park?

Steve: There's nothing actually within the rules which will say that this is unlawful, because those employees will be smoking outdoors, presumably as part of a smoking break or as part of a meal break. Now some employers have actually instructed their employees only to smoke within smoking shelters. Now, that's really a decision for the employers and could be questionable.

Simon: So Brendan, obviously the Scottish smoking ban came in during 2006, so you've had some experience with this. But I gather that BT banned smoking throughout the whole UK, why was that?

Brendan: Well, it was largely driven by the legislation that was coming in in Scotland, because as you know we had to comply with the legislation in Scotland... and BT is putting a lot of effort internally into promoting healthy living and healthy lifestyles amongst its employees as many organisations are, and it was seen as an opportunity to do the right thing early, because we had to do it in Scotland, and secondly, as with any organisation it is probably easier to do things once than have to do things twice in different parts of the UK!

Simon: And what warning did you give? I mean, how did you brief the staff, because obviously for the rest of the UK this didn't coincide with a nationwide ban?

Brendan: By the nature of our organisation we use electronic communication significantly to brief people and we had been doing it for months and months in advance and critically also through briefings and line management briefings. Lots of briefings went on, so that by the time it happened people had total visibility, and of course on top of all that, within the buildings that we have – and within vehicles and so on – there was badging up, signs up and notices up about what was happening. In parallel we took out rooms internally that had been used as smoking rooms; so they went so it was quite obvious to smokers that smoking in the buildings was coming to an end.

Simon: Thanks Brendan... Now this obviously brings us to the next problem – which is perhaps one of the most worrying aspects of the ban for an employer. How can you enforce it amongst your staff? What rights does an employer have, and what rights do your staff have, to smoke? We spoke to Steve to find out more.

Steve: Now as far as smoking at the workplace... Firstly, quite clearly any smoking within a defined no smoking or smokefree area will be unlawful. Further, some employees in the past faced with a smoking ban by their employer have said that they have got a contractual right to smoke – they have always done so smoking 30 or 40 or 50 cigarettes a day. Now the courts are very clear on this, that this kind of term isn't appropriate for incorporation into a contract, so no employee could claim they have a contractual right to continue smoking at work.

Simon: And, how will that affect smoking breaks? Can an employee claim that a smoking break, therefore, is a right?

Steve: The only right to breaks that employees have is a mere 20 minutes for every 6 hours that they work, and this comes from the working time regulations. Now as far as smoking breaks, in a lot of office environments there's sort of a tradition that smokers can go out to take breaks from time to time. Now, this isn't a right as such, but is sort of considered to be a right by a number of employees. In the light of the smoking ban a number of employers are deciding to actually clamp down on this, and the particular problem is non-smokers, who will see their smoking colleagues going out to smoke for upwards of an hour a day in some cases. Now, the response of some employers has been either to say that you can only smoke on your meal breaks or coffee breaks, or – and I've seen this on a number of occasions – that employers will say "Fine. Go and smoke, but you will actually be making up the time that you've spent smoking at the end of the day..."

Simon: So Brendan, on the subject of employees, have you had any cases of staff that have flouted the ban by smoking in an enclosed area and how have you dealt with it?

Brendan: Not to my knowledge... I'm not aware of anyone that has carried on smoking within buildings, but if that had happened it would have been a matter for line-management to, let's call it, 'educate them' in a constructive way, and critically, as part of all that encourage them to start using the tools that we're promoting internally to help people stop smoking and register online for support and help a lot of which is available via the internet or intranet as I see.

Now clearly, behind all that, given it is corporate policy that you do not, if that early education doesn't work it's a disciplinary offence, although I'm personally not aware of any case where that has been necessary.

Simon: Steve – perhaps you could tell us more about what level of scope an employer actually has when disciplining staff that disobey the ban?

Steve: Now the first thing is here is how the employer actually categorises the offence of smoking. Now in some workplaces – for example in food manufacturing, or, I've seen this in the context of a factory that makes air fresheners – they say that smoking is inherently dangerous, so if you smoke in a smokefree area it will be gross misconduct and you will be dismissed. And, depending on the procedure that an employer takes, as long as they follow the right procedure, then that dismissal will be fair and lawful. Now in an office environment for example, it might not be right to consider smoking in the workplace as a dismissable first offence. However, certainly it will be considered to be misconduct and the employee may face a warning for the first time and a dismissal for any subsequent violation.

Simon: Obviously, employers will want to avoid the situation where they are forced to discipline staff, and reminding staff that smoking is prohibited is certainly key in this. In reality, one of the key obligations under the Act is the prominent display of signage. Any person who occupies or is concerned with the management of smoke-free premises is obliged to ensure that no-smoking signs are displayed in a prominent position at, at least each entrance to the premises. These signs should be no smaller than an A5 piece of paper, display the no-smoking symbol, and display the words 'No smoking. It is against the law to smoke in these premises.'

In addition to business premises, the smoking ban also applies to two categories of vehicle: work vehicles that are used by more than one person, and vehicles used by members of the public. Again, vehicle signage forms a key obligation for employers, with each passenger compartment requiring a non-smoking sign.

All of the signs required for both vehicles and premises can be purchased online, from companies such as smokefreesigns.co.uk. When we spoke to them they were happy to advise us on placement and stocked an extensive range of signs for companies and budgets of all sizes.

The other aspect of the upcoming legislation that will affect employers, is what happens if your clients, or the general public, smoke on your premises. Firstly, let's clarify exactly what the penalties are for the general public. An offence of smoking in a smoke-free place is committed by anyone who lights a cigarette, cigar or pipe in a place designated as smoke free. The fixed penalty for this is £50, which can be issued on the spot by an authorised local authority official. The maximum fine on conviction in the magistrates' court is £1,000.

For employers and others controlling premises, the key duty is contained in Chapter 1 Section 8 of the Act, which details that 'it is the duty of any person who controls or is concerned with the management of smoke-free premises to cause a person smoking there to stop smoking'. A failure to comply with this duty is an offence and carries a maximum fine of £2,500.

However, there is a defence for such a person if they can show that they took reasonable steps to cause the person in question to stop smoking; that they did not know, or could not reasonably be expected to know, that the person in question was smoking, or that on other grounds it was reasonable not to comply with the duty.

We spoke to Jason Collins at TFL earlier about the banning of smoking on the tube and asked him what steps his staff are briefed to undertake if they encounter someone smoking in a smokefree location. Here's what he had to say.

Jason: Well, we actually banned it first of all on London Underground back in 1984. This was following an incident at Oxford Circus station, but thereafter, although we did implement a ban – and it was a general education program that we put across to the public – not everyone heeded it and unfortunately we had the sad events at Kings Cross back in 1987. Following on from that we had an inquiry by Lord Justice Fennel, and part of the recommendations and actions arising out of that was the sub-surface railway regulations of 1989, which made it law that you couldn't smoke on any sub-surface station right across London Underground. Initially the public were, in areas, reluctant to react to it – primarily at the weekends and late evenings, so we actually enforced it quite a lot.

We also developed a staff education program, just in terms of when we do our customer service training how staff should actually approach customers if they see them smoking, politely and professionally. If they pose a major safety risk, obviously a little bit more sternly – still being polite and professional – and if needed give them the option of putting the cigarette out there and then or actually leaving the premises. The majority of people actually were very very good. A couple of people, inebriated, might be a little bit reluctant, but as soon as our police constables would come along they would duly decide to put out the cigarette.

Simon: So finally, this begs the question of how exactly an employer – or manager – can safeguard against these fines? What exactly are 'reasonable steps', and how is this interpreted? We posed this question to Steve earlier.

Steve: There are in fact 3 possible defences open to an employer. The first is, as you said, that he took - or she took - reasonable steps to cause the person in question to stop smoking. But also, if an employer can show that he or she did not know, or could not reasonably be expected to know that the person in question was smoking. Or, that there are other grounds on which it was reasonable for him or her not to comply with the duty, then there will be a defence.

Now the key thing about determining this defence, will be the interpretation that the courts or other bodies give to the meaning of 'reasonable'. In this respect, any steps that an employer has taken to alert staff to the ban, or to persuade them to comply with the ban will be really of some weight. And further, any clear policies which have defined sanctions attached to them will help any employer in actually showing that they have taken reasonable steps to stop people smoking. On the other hand to this, if it can be shown that employers were indifferent and allowed employees to smoke generally, then it would be unlikely that they can actually benefit themselves from any defence under the legislation.

Simon: So that brings the smokefree podcast to a close. We hope that this has been informative, and remember, if you are looking for any additional information on this legislation, please be sure to check out the resources section smokefreepodcast.co.uk

Thanks for listening.