

SMOKING, HEALTH & SOCIAL CARE (SCOTLAND) ACT 2005

The Smoking, Health & Social Care (Scotland) Act 2005 came in to force on 26 March and bans smoking in no-smoking premises (“NSPs”). The Act does this by creating a number of offences:-

- Permitting others to smoke in NSPs;
- Smoking in NSPs;
- Failing to display warning notices in NSPs; and
- Failing without reasonable cause to give your name and address on request by an Enforcement Officer (an Environmental Health Officer).

This all seems fine but is there room for manoeuvre when looking at what comprises “premises”? Premises include :-

- any building/part of a building, structure/part of a structure, installation on land or offshore;
- any tent, marquee or stall, any vehicle, psychiatric hospital, pub including Inn, Ale House or other premises at which alcoholic drink is sold by retail for consumption either on or off the premises;
- public transportation facilities which includes train stations, bus stations, bus shelters, waiting rooms, ticket offices and terminal buildings provided in connection with any public transportation vehicle;
- sports centres, state hospitals, taxis and telephone boxes.

But then we need to look at whether the premises falls within the definition of a no-smoking one. To answer that question we need to look at whether the premises is “wholly or substantially enclosed”. If it is wholly or substantially enclosed, then it is a no smoking premises and you cannot smoke there. As you can imagine, wholly enclosed means premises with a ceiling or roof and is wholly enclosed (except for doors, windows or passageways). Substantially enclosed covers premises which has a roof and walls on a least 50% of its perimeter.

Again, all straightforward - but I would ask whether it is realistic to try to stop a smoker having a cigarette whilst waiting on a bus at a bus shelter which happens to have 3 sides but is, on one argument, so clearly not “enclosed” in any real sense of the word. Are the Enforcement Officers to come out with their measuring tapes to sort out the 50% question (by which time the smoker has taken say 2 steps away from the bus stop and now no longer finds himself “inside” it)? And what about the company car being driven by a smoker with smoker passengers? Are they to be prosecuted if they all smoke in the car? Obviously the employer will have a responsibility to in those circumstances but what if there is a humanitarian plea by all the people to be in the vehicle? Will the Enforcers be so strict?

There are of course a few exemptions, mainly made on humanitarian grounds. They include exemptions for residential accommodation, designated rooms in adult care homes, adults’ hospices, designated hotel bedrooms, police detention or interview rooms, certain laboratory rooms, submarines and refuelling vessels. One can of course smoke in their own private vehicle.

So what is going to happen by way of enforcement? If you are a person in control of a no smoking premises then you could be liable to a £200 fine if you do not take reasonable action to prevent someone smoking on your premises or if you do not provide adequate no-smoking signs (see below). Individuals are liable to a £50 fine although the idea is that they will not be “on the spot fines” but rather something that will be followed up. Refusal to pay or failure to pay may result in prosecution and a fine of up to £2,500.

Signage may also involve Enforcement Officers getting out their measuring tape; the signs require to be a minimum size of 230mm by 160mm. They must also state that the premises is a no smoking one, and that it is an offence to smoke there or to knowingly permit someone to smoke there. It must display the international “No Smoking” symbol which must be a minimum of 85mm in diameter. Finally, it must display the name of the individual to whom complaints can be made by anyone who observes someone smoking. It is up to the manager or person in control of the premises to decide if more than one sign is required but they require to be seen and read by persons in and approaching the premises; and they require to be obviously displayed and protected from tampering, damage, removal or concealment.

It will in my view be a case of waiting to see how failure to comply with the regulations will actually be dealt with. It is however arguably an issue strongly in the hearts of many smokers (and even some nonsmokers) and continues to be debated - currently there are legal challenges to the smoking ban. Edinburgh City Council Football Club wants the ban to be declared unlawful and has taken its case to the Court of Session along with a pub and a hotel chain as well as an individual smoker. The case seeks a judicial review in a bid to have the new laws declared out with the devolved competence of the Scottish Parliament.

Watch this space – the fuming smokers may prove successful if human rights arguments are to hold any water.

If you require any further information, please contact Claire O’Neill
www.cmo@mitchells-roberton.co.uk