Respiratory Protective Equipment and Facial Hair in Light of COVID-19: Legal and Ethical Dilemmas

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Abstract
Facial hair inhibits the functionality of certain respiratory protective equipment, yet employers have a duty of care to provide protection for their employees against communicable respiratory diseases such as COVID-19. Could individuals be forced to remove their facial hair? How can staff with facial hair be protected from COVID-19? These issues present legal and ethical dilemmas for employers and employees alike regarding the provision and use of respiratory and personal protective equipment under health and safety considerations. This is a law review examining various UK statutory instruments and case law surrounding the use of facial hair and the use of respiratory protection. Facial hair is a hazard when considering respiratory protective equipment provision and use. Unless there is an absolute need requiring the removal of facial hair for any reason, individuals have the right to grow facial hair as they see fit. It is arguable though what an “absolute need” may be, as numerous proportional and reasonable adjustments can be made to accommodate facial hair that can mitigate the risks associated with respiratory diseases.

Keywords
facial hair, risk, respiratory protective equipment, COVID-19, informed choice

Introduction
The COVID-19 pandemic presented employers with ethical and legal challenges in terms of respiratory protection. Whilst the predominant proportion of nurses worldwide are represented by the female gender, male nurses also practice in various settings, increasingly more so in the UK. Male nurses typically may grow facial hair, which is a very specific gender characteristic. Facial hair presents with challenges, in particular within the healthcare setting, where protection from certain communicable respiratory diseases such as COVID-19 requires the use of respiratory protective equipment (RPE) along with other personal protective equipment (PPE).

Sandaradura et al. (2020) pointed out that facial hair significantly inhibits the fit of face masks, as in their study no bearded employees achieved a sufficient fit with their RPE. Only 47% of their clean shaven study participants achieved the required fit, highlighting the various problems around adequate fit, facial differences and the fitness of the equipment provided for employees. This also reinforces the notion that appropriate fit testing has to take place for a particular equipment to be functional, as has been the case with improper fit with over half of their clean shaven study participants.

Meadwell et al. (2019) demonstrated that it is extremely problematic in practice to achieve a proper fit against facial hair, whilst at the same time commercially available masks seem to be offering the best available technical solution protecting their wearers from airborne communicable diseases. Singh et al. (2020) have devised a technique that could be utilized to achieve an improved fit for commercially available RPE in conjunction with the existence of facial hair on their participants. Their technique relies on the application of an under-mask liner that covers facial hair, over which RPE is used. However, it has to be pointed out that even their own test results proved to provide full protection. Their study size was relatively small and was performed in a relatively well controlled environment. Ford (2020) has pointed out the utmost importance of the fit testing process as well as the need for the appropriate application of RPE as an everyday practical need. An incorrectly fitted RPE item will ultimately compromise the protection of the wearer.

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Facial hair shapes the self-image of a person, affecting their non-binary employees may also grow facial hair either for predominantly associated with the male gender, female and others choose to retain it in various forms. Whilst facial hair is and some may choose to intermittently remove it, whilst oth-manifestation of this is either wanted or unwanted facial hair, the growth of facial hair is determined by genetics and a hor-monal drive that is out of the control of the individual. The state apparatus does indeed overlook certain issues based on political agendas. This is especially true for healthcare settings in the UK as Cowper (2020) rightly pointed out.

COVID-19 has presented with a pressing and urgent issue for healthcare providers to provide PPE and RPE for their employees. Staff have the right to refuse certain interven-tions on the grounds of health and safety without appropriate PPE/RPE. Employers have options to provide safe working conditions for their employees with appropriate and suitable PPE and RPE based on risk assessments. For male employees with facial hair most RPE items may only be effective if the employee is readily willing to maintain a clean-shaven face. However, in the first instance there may be an obstacle in overcoming the removal of their facial hair. Facial hair is not only a personal preference for some, but may be a social, cultural or religious matter that shapes the identity of an individual. Regardless of the reason, facial hair has to be consid-ered as a hazard during the risk assessment process. This is not simply a legal issue, but also an ethical one. Could indi-viduals be forced to remove their facial hair? How can staff with facial hair be protected from COVID-19? This is a global issue that may be applicable worldwide, and similar reasoning can apply in each jurisdiction. However, the aim of this review is to establish an answer under UK law.

**Brief Review/Discussion of Topic**

**Statutory Instruments**

The UK is a diverse and multicultural society. Growing facial hair for a wide variety of reasons a choice an individ-ual may make any time. As a gender specific characteristic the growth of facial hair is determined by genetics and a hormonal drive that is out of the control of the individual. The manifestation of this is either wanted or unwanted facial hair, and some may choose to intermittently remove it, whilst others choose to retain it in various forms. Whilst facial hair is predominantly associated with the male gender, female and non-binary employees may also grow facial hair either for wanted or unwanted reasons in various shape and form. Facial hair shapes the self-image of a person, affecting their psychological wellbeing. Many personal beliefs and per-ceived needs may guide an individual the upkeep of facial hair, not only as a personal preference or an identity issue, but people can also claim the upkeep of facial hair on med-ical grounds, as they may suffer from various effects from the regular removal of facial hair as an activity that can inflict injuries, irritation or even allergic reactions. Some may grow beards to cover up scarring, dermatological damage or as an aesthetic need. Facial hair can also be a social issue, determin-ing the position of an individual, whilst there may also be a need for an individual to follow social trends and fashion as a gender specific expression of identity. Various religious and cultural aspects may also require an individual to grow facial hair unhindered, based on which individuals or groups can claim the upkeep of their facial hair under the protected characteristics of the Equality Act (2010). In accordance the 2010 Act certain protected characteristics give protection to people from discrimination at the workplace. These charac-teristics as listed by the Act are age, disability, gender reasignment, race, religion or belief, sex, sexual orientation, marriage, civil partnership, pregnancy, and maternity. No workplace policy can override the principles of the Equality Act (2010), as that would amount to discrimination at the workplace. Importantly, this allows for people of all back-ground to choose as they wish regarding the use of facial hair. This issue is comparable to pregnancy, maternity and even breast feeding, as these are all specific sex characteris-tic, which are clearly safeguarded under the Equality Act (2010). However, the growth and retention of facial hair is not yet highlighted or defined as a specific protected character-istic under the same Act, and is yet to be tested under the same provisions in the courts. Employees need to be aware of their rights, and they have to be informed of their options in order to make informed choices. This is particularly rele vant when RPE considerations depend on compliance and cooperation (Beauchamp & Childress, 2013). Likewise, employers also have to be aware of how the law affects them.

Employers have a duty under the Health and Safety at Work Act (HSW, 1974) to protect their staff from risks associated with a task with reasonably practical measures. As such, employers are duty bound to provide RPE appropriate PPE and RPE to protect their staff from diseases through environmental exposure at the workplace. The same legisla-tion also places obligations on the employees, with the appropriate use of the provided equipment. However, the appropriateness of RPE depends on risk assessments. Employers are bound to assess each activity with each indi-vidual or groups of people performing that task. This is where facial hair may become an obstacle, as it inhibits the forming of an appropriate seal between equipment and the end-user, as Meadwell et al. (2019) pointed out. The reasonably practical consideration under the 1974 Act is an impor-tant factor in determining what alternative arrangements might be made for employees with facial hair, who otherwise cannot wear certain RPE items safely and effectively.
Employers are bound to protect their employees from biological hazards through the Control of Substances Hazardous to Health Regulations (2002). Employers must risk assess hazards at the workplace. As such, facial hair may be considered a hazard (The Management of Health and Safety at Work Regulations [MHSWR], 1999).

Employers have to safeguard their employees’ health and wellbeing by risk assessing activities, hazards, and existing predisposing factors, and have to take reasonable and proportionate steps to mitigate these factors (MHSWR, 1999). Health and safety considerations have to be made under the HSW (1974) and the various enabling regulations enacted to create a safe working environment for all. Employees have an obligation to the use of the equipment provided. At the same time the PPE/RPE provided has to be suitable for the purpose under The Personal Protective Equipment Regulations (1992). Facial hair may inhibit the proper application of PPE/RPE items. Gentle persuasion can be fruitful toward changing employee attitudes and behaviors. In contrast, arguing with people based on health and safety grounds is more harmful than beneficial, especially when this would impact on their protected characteristics under the Equality Act (2010).

**Case Law**

Employer-employee relations are based on employment contracts. Employment contracts have to incorporate principles of statutory instruments and have to be in written format, based on which an employer may conduct their business. However, in the UK business can also be conducted not only via written contracts, but by customary principles, which are known as “implied terms on previous dealings.” In other words, previous dealings set the precedent for future actions (McCutchcheon v. MacBrayn, 1964). Under such established customs if a practice has been allowed for a certain period without any repercussions, then it would be expected that the same business can be conducted on the same grounds. Hence if facial hair has been allowed at the workplace previously for a substantial time, then it would be reasonable to continue that practice uninterrupted.

In *Achbita and another v. G4S Secure Solutions* (2017) the European Court of Justice have ruled that employees can be required to wear uniforms as part of an employer’s requirement at work, that is not in contravention of religious rights. The ruling only extends to uniform requirements only and does not cover PPE/RPE items. Hence the use of uniforms may be required legally by an employer, but the term used in defining “uniform” does not cover PPE/RPE items. This is important to note, as uniform does not mean PPE/RPE items.

In *Smith v. Safeway plc* (1996) it was found that an issue of appearance which extends beyond working hours affecting individual choices against their own will has been deemed detrimental to individuals. By this reasoning, it is fundamentally unfair on men to make a distinction as to their facial hair appearance. The removal of facial hair would be a permanent issue an employer cannot request their employees to perform, as the loss of facial hair would affect the individual long after their employment hours have ceased. This has been a most significant ruling, based on which it has been established that employers do not have the right to require the removal of their employee’s facial hair. Employees have the right to grow their facial hair as they see fit. It is the employer who has to make appropriate and reasonable adjustments to enable their employees to perform their task unaffected.

In *Biržietis v. Lithuania* (2016) the European Court of Human Rights considered that the decision on whether or not to grow a beard is related to the expression of an individual’s personality and individual identity, which is a protected characteristic under Article 8 of the European Convention on Human Rights (ECHR, 1950). Unless there is a justifiable absolute need to prohibit an individual from growing a beard, restricting the growth of a beard is a violation of Article 8 of ECHR (1950). Although apart from beards no other facial hair considerations have this ruling, it would presumably be similar that all facial hair can be interpreted as such.

To date, many aspects of this issue have not yet been tested in the court of law, such as what would constitute an “absolute need.” However, it can be argued that a “need” may arise on an “absolute” basis when there are no alternatives to a particular choice of activity or personnel. Following on from this argument, an employer can make alternative arrangements for an employee to wear various other types of PPE/RPE. Moreover, as long as there is a single employee without facial hair who can be utilized for a given activity, there is no absolute need validating a requirement to remove any facial hair an individual may chooses to display.

It is uncertain whether EU case law precedents may cease to apply post-Brexit. As Gordon and Moffatt (2016, p. 8) rightly pointed out: “...it seems unlikely that all EU law would be sought to be repealed. Much of it would be retained” and “Questions would be likely to arise and have to be legislated for or else decided by the courts as to the precedent value of European court case law and its status in areas where a particular area of EU law was sought to be preserved in a domestic context.”

**Practical Considerations**

Where staff are found to be at risk of a hazard that cannot be mitigated by elimination, employers have to resort to risk avoidance, which can be done through various means (Health and Safety Executive [HSE], 2013). Provision of RPE in the form of face masks or Filtering Face Pieces can be effectively provided with even short stubbles. Where this fails, employers can provide Powered Air Purifying Respirators [PAPR]. Where the provision of these is not possible, staff redeployment can be a suitable alternative. There are various cost implications of each of these considerations. However, health and safety considerations prevail over cost implications as the
HSE (1974) and case law demonstrates. In terms of provision and use of equipment, employers and employees have to engage in a constructive dialogue that may result in compromises from either party regarding equipment availability, provision and use. Employers have the option to redeploy staff to areas and roles either temporarily or permanently where stringent PPE/RPE requirements may not be necessary. No employee should have to choose between a job and a beard if their employer has other jobs that bearded employees can perform. Whilst there is no absolute method of protection that could completely guarantee safety from the exposure to diseases, employers are obliged to provide their employees with reasonably practical solutions based on risk assessments to minimize their employees from environmental exposure (MHSWR, 1999). We need to take a balanced approach and a feasible solution that works for everyone. To consider the opposite, whereby employees may be forced into actions that lead to problems with their wellness, health and safety as a result can lead to claims under the HSW (1974), discrimination under the Equality Act (2010), as well as claims under the tort of negligence.

**Regulatory Requirements**

In the UK, nursing as a profession is regulated by the Nursing and Midwifery Council (NMC). The code of conduct published by the NMC (2015) does not cover facial hair explicitly anywhere. As a regulatory body it cannot interfere with fundamental human rights and thus cannot impose terms on nurses that may contravene legislation or case law. As so far as the NMC (2015) Code of conduct is concerned with this matter, it discusses health and safety considerations and recommends that nurses have to reduce the potential harm associated with their practice. §19.3 requires that nurses “keep to and promote recommended practice in relation to controlling and preventing infection,” whilst §19.4. requires that nurses “take all reasonable personal precautions necessary to avoid any health risks to colleagues, people receiving care and the public,” both of which implies that should nurses grow a beard, they have to wear the appropriate PPE/RPE in line with infection control measures when appropriate, for which the practice guidelines are to be followed (HSE, 2013). Employers and employees alike have to follow the applicable regulatory requirements and common law principles set out in statutes and case law. Employees are obliged under HSE (1974) to wear the appropriate PPE/RPE for their intended purpose supplied by their employers. Employers must not abuse, neglect and exploit their employees, regardless of the situation.

**Conclusion**

**Importance to Nursing Profession**

A worker has a legally enforceable right to grow facial hair. The employer has to demonstrate that an “absolute need” exists to require the removal of facial hair of their employees and only if all other possibilities are exhausted. Facial hair as a hazard must be risk assessed, and appropriate protection methods have to be used considering the needs of the individual employee at the workplace in the UK. Various statutory instruments and case law supports the argument presented, although the extent to what “absolute need” means is debatable. A number of alternative methods exist to protect employees with the use of different RPE and PPE, as well as redeployment, before an employee could be requested to remove their facial hair. Although, at what point this becomes absolutely necessary is yet to be tested in the courts.

**Implications for Policy**

Current UK law provides inadequate protection for nurses if they do not wish to shave. The protection for retaining a beard lies within the highlighted case law. The majority of workers do not have sufficient insight into particular legal matters as such. Hence it should be the elected lawmakers’ responsibility to protect their constituents at the workplace through legislation. Specifically, legislation should place requirements on employers instead to respect the rights of employees and to protect them from abuse, neglect and exploitation. Unfortunately the Equality Act (2010) does not go far enough and fails to recognize facial hair as a gender specific protected characteristic. Whilst pregnancy and breastfeeding are both protected gender specific feminine characteristics protected by the Equality Act (2010), this statute should also recognize the need to safeguard other gender specific characteristics such as facial hair. The MHSWR (1999) should explicitly detail that an employer cannot request for an employee to make changes to their appearance that would last beyond their working hours.

**Implications for Practice**

It is the employer’s duty to prove whether an absolute need may exist for requiring their employees to remove facial hair, provided that they have exhausted all other means to avert risks associated with a particular activity. Employers have a duty of care toward their staff, and they have to meet the needs of the individual with the provision of PPE/RPE sufficient to the demands of an activity. Employers are also required to inform staff of their choices where actions are required following risk assessments under health and safety regulations. Where the risks remain following a risk assessment, the employer has to make reasonable and proportionate adjustments to keep their employees safe. Should there be no other possible alternative for an employer to avoid the risks associated with an activity, the employees can be requested to remove their facial hair. However, it is debatable whether that can be a valid legal requirement at any time. Hence it is at the individual’s discretion whether they choose to grow facial hair or not.
The findings within this paper imply that fit testing is not a mandatory requirement for employees, whereas the provision of appropriate RPE for employers is. This places the onus on employers to provide RPE whether or not the employee is either or not fit tested for any particular equipment. Employers rely on the goodwill of their employees to carry out tasks to run a business, and as such employers have to foster good employee relations. Existing law protects employees with facial hair from unjustifiable requirements, and as such there is no need for an employee with facial hair to remove theirs.

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