

## Employment Update

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This month we look at a number of developments in employment law: the possible extension of the right to request flexible working, whether employees can insist on wearing a poppy to work; and the latest developments in the on-going saga of what happens to an employee's holiday if they are off on long term sick leave.

### Flexible working

As the law currently stands only employees with 26 weeks' service and, either with children under 17 (or 18 if the child is disabled), or who care for another adult can make a flexible working request. The Government had planned to extend this right to all employees with 26 weeks' service earlier this year, but held back given the current economic climate. A further period of consultation has followed during which a leaked Government report suggested that they were considering removing the right to request flexible working from all employees.

In the light of this report, the Chartered Institute of Personnel and Development (CIPD) made a Freedom of Information request, asking for figures relating to request for flexible working claims. The results show that in 2010/11 there were 277 tribunal claims concerning employers' alleged failure to comply with the flexible working legislation. Of these, only 48 reached a full hearing and 10 were successful.

In the light of the statistics, CIPD argues that fears expressed about the impact of extending the right to request flexible working to all employees who have accrued 26 weeks' continuous employment (regardless of their caring responsibilities) are exaggerated. In any event, many employers already allow all employees with 26 weeks' service the right to request flexible working. Mike Emmott of the CIPD comments that 'these figures are hardly calculated to keep employers awake at night. They demonstrate beyond any doubt that the fears expressed about the impact of extending the right to request flexible working are grossly exaggerated.' The Government are yet to confirm how they propose to proceed with this matter. In the meantime, if you would like us to review your flexible working policy, please contact one of the employment team.

### Can employees insist on wearing a poppy to work?

In a recent employment tribunal claim, Mr Lisk, an ex-serviceman, alleged that he was subjected to discrimination by his employer who refused to allow him to wear a poppy at work. The employment judge rejected Mr Lisk's claim, holding that his belief that wearing a poppy amounted to a philosophical belief was not protected under the Equality Act 2010. The employment judge held that it is not simply a question of whether somebody's choice to wear a poppy is serious and should be respected, but of whether there is a philosophical belief underpinning that choice. The employment judge went on to hold that, however admirable, the belief that one should wear a poppy to show respect seems to lack the characteristics of cogency, cohesion and importance.

This case is further illustration that it is extremely difficult for employers to know what beliefs are covered by the Equality Act 2010. The Employment Appeal Tribunal (EAT) gave guidance as to what amounts to a philosophical belief in the case of *Grainger plc v Nicholson*. In this case, the EAT held that the belief must be:

- genuinely held;
- a belief, not an opinion or viewpoint based on the present state of information available;
- a belief as to a weighty and substantial aspect of human life and behaviour;
- attain a certain level of cogency, seriousness, cohesion and importance; and
- worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others.

However, as we have seen with the cases, it is not always easy to predict which side of the line a tribunal decision will fall in philosophical belief discrimination claims.

### An employee on sick leave must request holiday

The Employment Appeal Tribunal (EAT) has held that an employee on long-term sick leave must request holiday in accordance with the Working Time Regulations 1998 (WTR) in order to be paid for it.

In the case of *Fraser v Southwest London St George's Mental Health Trust*, Ms Fraser, a nurse, injured her knee in an accident at work. She went off on long-term sick leave. Her entitlement to sick pay ceased in August 2006. Ms Fraser was certified fit to return to work in November 2007, but the Trust was unable to find a position for her and stopped paying her in March 2008, dismissing her later that year. Ms Fraser was paid in respect of the leave which accrued in the final holiday year of her employment (from April 2008) but nothing in respect of the previous two years. She claimed that she had accrued four weeks' leave in each of the years and should be paid in lieu of it on the termination of her employment.

There was no dispute that Ms Fraser had accrued leave in each of the two years, what was at issue was whether she should have requested the leave in the relevant holiday years. The WTR set out clearly what a worker needs to do in order to request leave. They also confirm that leave must be taken in the leave year in respect of which it is due and may not be replaced by a payment in lieu except on termination of employment. The EAT took the view that there was nothing in wording of the WTR which requires payment on termination in respect of previous years' accrued leave. They held that the 'use it or lose it' rule applies regardless of whether a worker is at work or on sick leave.

This is an important development in the on-going saga of what happens to an employee's holiday entitlement when they are on sick leave. I doubt that this is the end of the story, but it is good news for employers (for the time being). Employees wishing to preserve their right to annual leave must now ensure that they request any leave they are entitled to in the year that it falls. Failing to do so would mean that they lose the right to such leave and payment in lieu of it.

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