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Employment Newsletter

Discrimination Update

A load of poppycock?

It appears that wearing a poppy in remembrance of British soldiers was a source of controversy last year. The England football team had their quarrels with FIFA in gaining permission to wear a poppy on their shirts and it also caused issues in the workplace.

In the case of Lisk v Shield Guardian Co Ltd & Others, Mr Lisk, a former serviceman claimed direct discrimination and harassment on the protected ground of "philosophical belief" against his employer, Shield Guardian Co Ltd, in that he should be able to wear a poppy at work during remembrance week until Remembrance Sunday. Mr Lisk said that the wearing of the poppy was to respect those who have given their lives on the front line although his employer did not allow Mr Lisk to wear the poppy. The Tribunal needed to determine whether wearing a poppy amounted to a "belief" (either religious of philosophical) for the purposes of the Equality Act 2010.

Mr Lisk argued that he regarded the period from 2 November to 11 November each year as a period of mourning and that this period of mourning, for him, was equal to the seriousness in his Christian beliefs in observing Lent. Also, as a former serviceman himself, he considered it an obligation to show respect for the sacrifice of others and he had worn the poppy every year. He also argued that wearing the poppy is nationally recognised and does not conflict with anybody else's rights.

However, notwithstanding the arguments advanced by Mr Lisk, The Employment Tribunal dismissed his claim and concluded that there was no religious or philosophical belief underpinning his choice to wear a poppy. The Tribunal judge felt that it was an opinion (or viewpoint) rather than a belief as to "*a weighty and substantial aspect of human life and behaviour*".

Furthermore, the judge believed that the belief that Mr Lisk expressed support for the sacrifice of others is not narrow enough to be characterised as a philosophical belief.

The judge concluded by saying however admirable, the belief that one should wear a poppy to show respect that belief itself lacks the characteristics of "*cogency, cohesion and importance*" required to be capable of protection.

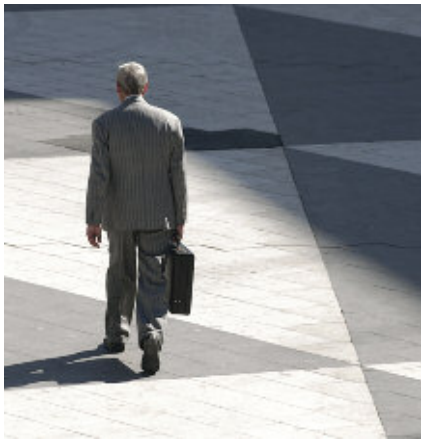
In summary, it is very difficult for employees and employers to determine what type of beliefs are covered by the legislation and which are not. In our view, this judgement is somewhat surprising given the previous wide interpretation of the legislation. For example, Tribunals have previously held that beliefs in climate change, anti-fox hunting and the higher purpose of public service broadcasting were all capable of protection under discrimination law. These previous cases have suggested that the definition of philosophical belief was being interpreted widely. However, the Employment Judge in Lisk felt that Mr Lisk's "belief" was not a philosophical belief capable of protection which shows the unpredictability of this type of claim. It should be noted that this case was heard in an Employment Tribunal and is not binding on the other cases determining philosophical beliefs and Mr Lisk could be in the process of appealing.

Ed Jenneson

Also in this issue

Employment Tribunal

Reform or restoration?



From 6 April 2012 the Government is increasing the length of service employees need to qualify for unfair dismissal rights from one year to two. Sound familiar?

That's because it is. Over the years the length of service required to qualify for unfair dismissal rights has varied. During the 80's the qualifying period was set at two years. There appears to be little evidence to suggest that setting the qualifying length of service to two years held any discernible benefit or that its reduction to one year in 1999 opened the floodgates to Employment Tribunal claims.

The Government has concluded that the reform is necessary and according to Employment Regulations Minster, Edward Davey "*By moving the period to two years it would actually give a change for that employer-employee relationship to develop and to cement, and we think that's good for jobs*".

Setting aside the obvious commentary on the repetition of previous regimes, what are the likely consequences of the reform?

The legislation has now been published in draft form by the Government. Subject to Parliamentary approval, the new two year qualifying period will only apply to employees whose employment begins on or after 6 April 2012. Those who commence employment or are already employed before that date will retain the current one year qualifying period for claiming unfair dismissal. As a result, the reform (and any beneficial effects) will not be immediately obvious.

It is misleading to suggest that all Employment Tribunal claims require a qualifying period of employment. Discrimination and breach of contract claims require no qualifying period of employment therefore the reform will have no discernible impact upon these types of claim.

Similarly, it is already the case that there is no qualifying period for certain types of dismissals. For example, claims where it is alleged that the dismissal is connected with whistleblowing, exercising rights under the Working Time Regulations, or trade union membership/participation to name but a few. It may be the case that the increase in the qualifying period sees an upturn in these types of dismissal complaint (however flimsy the claim) to circumnavigate the new qualifying period. Arguably, it is precisely the types of claim identified above which are potentially more costly for an employer to defend.

There has also been considerable concern raised over the possibility that the increase in the qualifying period is indirectly discriminatory against women (on the basis that women may have less traditional working arrangements and may take career breaks). Interestingly this challenge was raised during the previous regime. The Court concluded that whilst the two year qualification period was discriminatory, it pursued a legitimate social policy aim and was justified. It will be interesting to see whether the Courts would take the same approach now given the advent of family friendly working arrangements.

By the same token, the reform is likely to have a discriminatory effect on the young workforce who it may be argued are likely to be less able to accrue the requisite two years service given the current statistics relating to youth unemployment. It is envisaged that a challenge on this basis will be forthcoming so it will be interesting to see how the case law develops.

Lottie Pigg

Rollits Employment team

There is virtually no area of the workplace where employment law does not have an impact and the size of Rollits Employment Group reflects that.

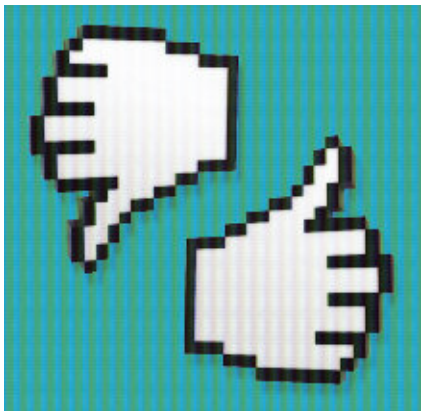
Partner Donna Ingleby, heads up the team of five employment specialists at Rollits.

She says: "*Interpreting and applying new employment legislation can be a real minefield for businesses.*

Our employment team has a great deal of experience and specialist knowledge which companies and organisations use on a wide range of issues. As with all things related to employment, prevention is better than cure, and the employment team at Rollits can provide a complete portfolio of advice to ensure clients are protected under the law. We also draw on expertise from other service areas, such as our pension specialist Craig Engleman and colleagues in the Regulatory and Commercial Groups to provide a comprehensive HR service."

Social media
A burden or a benefit?

We have seen a marked increase in enquiries in relation to employers' concerns in relation to things said by employees both in and out of working time on social networking sites.



Whilst the opinion of many employers is divided, many acknowledge the strategic importance of social media within their business and the many opportunities it can present. Others focus solely on the issues that it can create.

Whatever your view, the key is to ensure that any risks are identified and managed accordingly. The potential risks are many and could include discrimination issues, risks to the employer's reputation, the risks that confidential information could be leaked online, productivity and data protection issues.

The most frequent complaint from employers relates to things posted online by one employee about another and the risk of a discrimination claim where the comments could amount to harassment and where the employer could be held to be "vicariously liable".

Here, the employer's first line of defence is to say that it has taken all reasonably practicable steps to prevent the harassment. For this defence to succeed it will be necessary for the employer to identify a social media policy and/or disciplinary procedure, clearly setting out that online conduct, even outside of the workplace, should be of an acceptable standard.

Employment documentation should be reviewed to ensure relevance in relation to social media usage. This should include revised confidentiality provisions in the Terms and Conditions of Employment, up to date disciplinary rules and even a social media policy to impose guidelines in the workplace setting out restrictions on usage, monitoring by the employer and clear guidance in relation to the disclosure of confidential information and the use of unacceptable and possibly discriminatory comments about both colleagues and clients at home and at work.

Case highlight

In the case of Preece v J D Wetherspoons, an employee was deemed to have been fairly dismissed for making derogatory comments about customers on Facebook whilst at work. Here the employer had a clearly drafted policy which gave a clear warning that employees might be disciplined for making derogatory comments on Facebook about customers, staff or the organisation.

In the more recent case of Whitham v Club 24 Ltd T/A Ventura, Mrs Whitham employed by Club 24 (a Team Leader for Skoda, part of the Volkswagen Group) whilst at home and having had a difficult day at work, posted a comment on Facebook which her colleagues and Facebook friends brought to the attention of her line manager. They believed that the comments could have a detrimental effect on the relationship between the Company and Volkswagen.

Mrs Whitham was then dismissed for misconduct on the basis that her comments could have damaged the relationship between the Respondent and Volkswagen.

The Employment Tribunal concluded however, that Mrs Whitham had been unfairly dismissed. The Tribunal went on to explain that the sanction of dismissal, for what the manager who heard the appeal described as "*not too horrendous remark*", fell outside the range of reasonable responses.

Donna Ingleby

Can workers be forced to take annual leave during "down time"?

Can an employees annual leave entitlement be satisfied during periods where the employee is not required to work?

In the recent case of Russell and others v Transocean International Resources Limited and others, the Court of Session confirmed that it can.

In this case, the employees were employed on offshore installations. Employees worked two weeks offshore followed by two weeks onshore. Whilst offshore the employees worked 12 hours on and 12 hours off. Whilst onshore the employees were essentially free to do as they pleased.

The employees requested annual leave during their offshore time which was refused by the employer. The employees brought a claim that they were entitled to paid holiday during the offshore period arguing that the onshore periods were not part of their working time and could not be part of their annual leave entitlement. They also argued that the onshore periods did not have the quality required for them to be enjoyed as holiday.

The employers argued that onshore periods were rest periods from working time. They also stated that the onshore periods were far more generous than the minimum entitlement under the Working Time Regulations and as such there was no need for the employee to be entitled to any paid time off during the offshore periods.

The Court agreed with the employer and found that they were entitled to require the employees to take annual leave while onshore. Employees do not have the right to additional leave from scheduled working time.

This case is particularly relevant to industries where shift patterns include 'field breaks' or periods of 'down-time' between intense periods of work. It also has relevance to sectors where employees are required to take annual leave during prescribed periods, e.g. teachers. In these circumstances, employees cannot demand holiday leave during the intense periods of work provided they get adequate leave during the periods of inactivity.

Lottie Pigg

Accrual of holiday leave during absence

The law in relation to absence and accrual of holiday leave is constantly evolving and some recent decisions have left many employers feeling queasy. However, the latest Employment Appeal Tribunal ("EAT") decision in the case of *Fraser v Southwest London St George's Mental Health Trust* has provided a tonic for employers in what was becoming an increasingly claimant friendly area of employment law.

In this case, the individual was employed at the Trust as a nurse. In November 2005, she started a period of sickness absence due to a knee injury. She did not return to work and her employment was terminated in October 2008. She subsequently claimed disability discrimination, unfair dismissal and non-payment of holiday entitlement. Following consideration of her claim for non-payment of holiday entitlement, the original Employment Tribunal decided that she was required to give notice to her employer of her intention to take the annual leave, she hadn't and therefore her claim failed. The claimant appealed to the EAT.

The EAT found that the claimant had a legal entitlement to annual leave under the Working Time Regulations 1998 and that right continued when she was absent on sick leave. This finding was in accordance with the current law. However, the EAT further held that in order to exercise her right she must have requested to take the leave and if she had failed to do so, she lost her right to the leave within the year in question.

As holiday pay can only be claimed for leave actually taken, if the individual fails to request their right to the leave then they lose the right to it at the end of the leave year and thus payment in relation to it. A claim for failure to pay holiday pay can be brought in relation to any payments that should have been made in the previous six years. The decision will therefore come as a relief to any employers who have employees on long term sickness absence.

Employers should exercise caution as the decision does not entitle an employer to simply refuse an individual's right to the leave in order to avoid making a payment in respect of holiday pay. However, the individual is now bound to be proactive in relation to holiday leave and cannot simply accrue holiday leave and thus pay without taking action to claim it. In summary, they must attempt to use it or lose it.

Ed Heppel

Summary of changes…

1 February 2012

The maximum unfair dismissal compensatory award rose from £68,400 to £72,300

The maximum amount of a week's pay for the purpose of calculating a statutory redundancy payment increased from £400 to £430

6 April 2012

Statutory maternity, paternity and adoption pay increases from £128.73 to £135.45

Statutory sick pay increases from £81.60 to £85.85 per week

Other April 2012 changes

The maximum deposit Order an Employment Tribunal can make increases from £500 to £1,000

The maximum amount of a Costs Order an Employment Tribunal may award against a legally represented party increases from £10,000 to £20,000

Witness statements are to be taken as read unless the Employment Tribunal directs otherwise

Employment Judges are to hear unfair dismissal cases alone in the Employment Tribunal unless directed otherwise

Other changes with no confirmed date

Introduction of fees in the Employment Tribunal

Compulsory ACAS conciliation prior to submission of straightforward Employment Tribunal claims

Financial penalties for employers who breach employment rights

Information

If you have any queries on any issues raised in this newsletter, or any employment matters in general please contact Donna Ingleby on 01482 337314.

This newsletter is for the use of clients and will be supplied to others on request. It is for general guidance only. It provides useful information in a concise form. Action should not be taken without obtaining specific advice. We hope you have found this Newsletter useful. If, however, you do not wish to receive further mailings from us, please write to Pat Coyle, Rollits, Wilberforce Court, High Street, Hull, HU1 1YJ.

The law is stated as at 21 February 2012.

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