

# RadcliffesLeBasseur



## Employment Law News 2

March 2010

**In this edition of Employment Law News we look at holiday entitlement during sickness absence; religious and disability discrimination.**

### Case round-up

#### ***Right to carry holiday entitlement lost during sickness absence over to next leave year:***

##### ***Shah v First West Yorkshire Ltd***

In the first decision of its kind the Employment Tribunal has ruled that an employee should be allowed to carry over annual leave entitlement to a subsequent annual leave year in circumstances where his pre-booked annual leave was ruined by sickness absence.

Mr Shah had booked four weeks holiday from 22 February to 21 March 2009 but during this time broke his ankle. On his return to work in April 2009, Mr Shah attempted to reclaim his annual leave entitlement but was informed by his employer that this was “lost” as he had returned to work after the start of a new holiday year on 31 March.

The Employment Tribunal considered two European Court of Justice decisions which established last year that a worker on sick leave accrues the right to annual leave and further that if they are incapacitated during their annual leave, a worker should have the right to reschedule their annual leave to a later date.

The UK Working Time Regulations 1998 (WTR) contradict these decisions and in particular state that a worker may only take annual leave in the annual leave year in which it has been accrued. However irrespective of the WTR, the Employment Tribunal held that Mr Shah “lost” his annual leave entitlement as a result of his sickness absence and therefore should be allowed to take it during the following annual leave year.

This case highlights that whilst private sector employers are not obliged to allow employees to carry annual leave over to the next leave year, Employment Tribunals are willing to purposively add to and interpret the Working Time Regulations to give effect to ECJ decisions. This decision by the Employment Tribunal will not be binding on future Employment Tribunals however, if employers wish to play safe and follow best practice it is advisable for them to review and amend their policies to give effect to this decision and to consider strategies to guard against abuse of this decision by employees.



## ***Uniform Policy not indirect religious discrimination***

### ***Eweida v British Airways plc***

The Court of Appeal has upheld an EAT ruling that Ms Eweida, a Christian BA employee, did not suffer indirect discrimination on the grounds of her religion or belief in being requested by BA to conceal her cross which she wore on a visible necklace and which was deemed inappropriate in accordance with their uniform policy.

Indirect discrimination occurs under the Employment Equality (Religion or Belief) Regulations 2003 where a provision, criterion or practice is applied equally to all persons but which puts or would put persons of the same religion or belief at a particular disadvantage when compared to others.

During the course of the Tribunal hearing it had been established, in Ms Eweida's own evidence, that the wearing of a cross was an individual manifestation of her Christian belief and not a mandatory requirement of her faith. Leaders of the Christian Fellowship had stated "it is the way of the cross, not the wearing of it, that should determine our behaviour". Further, out of a uniformed workforce of some 30,000 employees, it was determined that Ms Eweida alone had suffered a detriment.

The Court of Appeal rejected Ms Eweida's argument that one individual person can be subject to indirect discrimination and confirmed that the Religion or Belief Regulations required that "some identifiable section of a workforce, quite possibly a small one, must be shown to suffer a particular disadvantage".

The decision is helpful to employers as it draws a distinction between the mandatory wearing of items in accordance with a particular religion or belief and those worn as a result of an individual's personal preference.

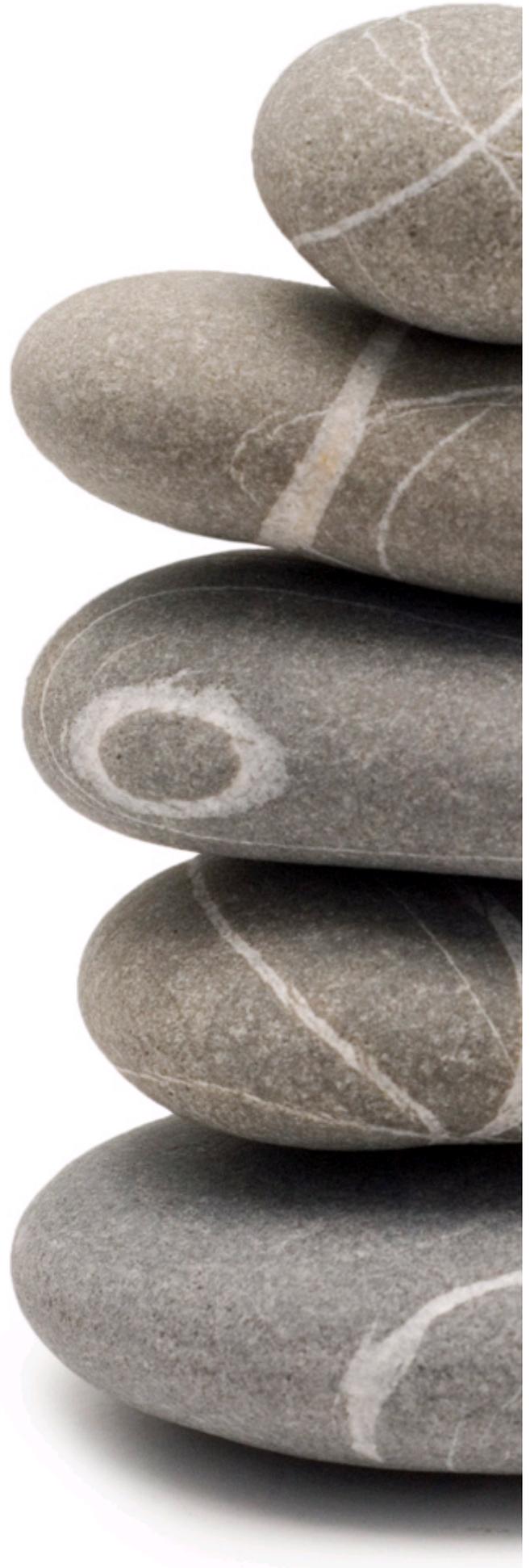
## ***Protection for genuine job applicants only***

### ***Keane v Investigo***

Only Claimant's applying for jobs in which they are genuinely interested in obtaining can subsequently bring a claim for discrimination if they discover they were unsuccessful in being appointed to the position for a discriminatory reason such as their age, race, sex or colour.

Ms Keane was a 50-year-old accountant who applied for over 20 positions advertised as being suitable for a newly qualified accountant. She subsequently brought 11 claims for age discrimination of which 6 settled and 5 were dismissed.

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Ms Keane appealed the dismissal of her claims however the Employment Appeal Tribunal dismissed her appeal and in doing set down as authority the proposition that a Claimant must have genuinely applied for a position in order to then suffer any form of detriment or less favourable treatment. An applicant who is not successful in being considered or offered a post in which they are not, in any event interested cannot be said to have suffered any disadvantage.

There have been reports in the media of other serial litigants who have tried to bring such claims and employers should be aware.



## ***Employer's rejection of disability – related defence not discriminatory***

### **The City of Edinburgh Council v Dickson**

Mr Dickson was dismissed from his job for gross misconduct, for looking at “seriously pornographic” images on the Internet at work. In his defence Mr Dickson, who suffers from diabetes, tried to argue that at the time he had been having a hypoglycaemic episode hence his uncharacteristic behaviour. His employer did not accept this as a defence and so Mr Dickson subsequently brought claims for unfair dismissal and disability discrimination.

In respect of his claim for unfair dismissal, the Employment Appeal Tribunal (EAT) held that his employer had failed to adequately investigate Mr Dickson's defence by not seeking professional medical advice on his condition. His dismissal was therefore unfair and an Order for reinstatement was made.

However, Mr Dickson was less successful in his claim for disability discrimination. The EAT considered whether Mr Dickson had been subject to direct disability discrimination and disability related discrimination – the two claims being inextricably linked.

The EAT identified the correct approach to take was to ask the “reason why” Mr Dickson had been dismissed and examined whether it was reasonable to conclude that the dismissing officer's mental processes in reaching his decision had included consideration of Mr Dickson's disability. The EAT found that it had not. The fact that Mr Dickson's disability was part of his defence did not mean that in not believing it, his employer had dismissed him as a result of his disability or for a reason related to it. If an employer treats an employee unfairly, even in a matter related to his disability, this does not mean that he does so because that person is disabled.

Employers should be wary to always investigate any medical conditions put forward by employees as extenuating circumstances to their behaviour or run the risk of having been found to have not followed a fair process.

## **In the news**

### ***Working towards Equality:***

In July 2009 the Women and Work Commission published an updated report looking at workplace gender equality issues. In response the Government has set out its strategy to continue to tackle the gender pay gap. With an increased demand for part-time and flexible working patterns research has found that such opportunities are only available in limited sectors and often at lower rates of remuneration. Whilst this affects men and women alike, the Government's report concludes it affects women the most. To tackle this, the Government has set out plans, including non-statutory measures, aimed at assisting businesses in offering flexible working. The Government's commitments include working with businesses to increase the number of women in senior positions and publishing new guidance to encourage employers to offer high quality part-time work.

### ***Employee engagement:***

ACAS published a new advisory booklet on 4 February 2010 encouraging employee engagement as a business priority in the workplace. It advises that this will boost morale in the working environment as employees who are committed to their work are much more likely to behave in a positive, cooperative way. The Chair of ACAS stated ***“The recession means that a lot of businesses have experienced a challenging period. Inevitably, this has had a knock-on effect on employees and morale. As we approach what might be the beginning of the end of the downturn, business leaders and managers have a responsibility to encourage an open business culture”***.

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**If you require any advice in relation to the contents of the Employment Law news then please contact**

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