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Born in the West Midlands, Nigel spent several years in industry working as a Mechanical Engineer before qualifying with Hatchers as a solicitor in 1998 specialising in employment law and personnel related matters.

In his spare time, Nigel's interests include the great outdoors, and spending time with his young family.



Bill Lamplugh,
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Since qualifying as a solicitor in 1973 Bill has worked in Shrewsbury dealing with a variety of legal work, including employment law, personal injury claims and civil litigation. After retiring as Managing Partner of another local firm of solicitors. Bill then joined Hatchers as a consultant solicitor working with the employment team, consolidating our expertise.

Bill is a keen scuba diver and enjoys walking in the countryside.

Welcome to the February issue of our employment law update.

Having survived a relatively mild winter this year it looks as though we may be in for some more severe weather.

It might be a good time to remind yourself and staff of your policy on dealing with absences due to severe weather and consequential school closures. If you would like any help with that drop me a line.

Regards

Nigel

In this month's issue we look at:

RELIGION OR BELIEF DISCRIMINATION OVERVIEW We provide a brief overview of the religion or belief discrimination provisions of the Equality Act 2010. [[more...](#)]

HOLIDAY TERMINATION We look at a case in which the court held that workers have to give notice to their employer if they want to carry annual leave over from one leave year to the next. [[more...](#)]

REST OR RELAXATION Although workers on sick leave are entitled to accumulate annual leave, the Court of Justice of the European Union has said they cannot do so indefinitely. [[more...](#)]

IN BRIEF A comprehensive survey of over 1,500 UK managers reveals that board directors feel more confident and secure in their jobs than other managers. [[more...](#)]

Meet our Employment Team
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Having grown up in Nottinghamshire and studied law at Aberystwyth, Nichola has now settled in Shropshire. Nichola started as a trainee at Hatchers in October 2008 and qualified as a solicitor with the firm in July 2010 working in the Commercial and Employment Team dealing with employment matters.

Nichola enjoys socialising, going to musical theatre and travelling

Our specialist employment team can provide you with practical advice upon how this complex and rapidly changing area of law affects you.

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- Drafting and reviewing contracts of employment
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- Handling disciplinary matters fairly
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- Harassment and bullying
- Company takeovers and their effect on the employment relationship



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RELIGION OR BELIEF DISCRIMINATION OVERVIEW

The Equality Act 2010 (which applies in England, Scotland and Wales) outlaws discrimination against workers because of the “protected characteristic” of religion or belief in employment (among other things).

What does the Act cover?

The Act covers believers of organised religions, as well as anyone who holds any religious or “philosophical belief” such as paganism or humanism. It also protects non-believers, but not people with political beliefs.

Case law has established that the belief should have a certain level of cogency, seriousness, cohesion and importance which is worthy of respect in a democratic society.

All forms of discrimination in the workplace are covered, including recruitment, terms and conditions, promotions, transfers, dismissals and training or any other detrimental treatment because of the person’s religion or philosophical belief.

Who is protected and who is liable?

Apprentices, those working under a contract of employment and the self employed working under a contract personally to do the work are all protected. Ex-employees can also make a claim against a former employer, if they are complaining about something that was closely connected to their employment.

The employer is generally liable for acts of discrimination, harassment and victimisation in the workplace but individual employees may also be found liable.

What does the Act outlaw?

The Act outlaws direct discrimination which occurs when an employer treats one person less favourably than another (or instructs someone to directly discriminate against them), because of their religion or belief.

But these cases have so far not been easy for employees to prove. Take the Court of Appeal decision in **Ladele v London Borough of Islington** as a good example. It held that Ms Ladele had not been discriminated against when she was required to carry out her civil partnership ceremonies which, she claimed, were contrary to her religious beliefs. The Court of appeal accepted that the Council had no alternative but to require her to perform civil partnership duties as it would otherwise have been in breach of its own legal obligations. She had been treated no differently from all other employees.

The direct discrimination provisions also cover anyone discriminated against because they are perceived to be of a particular religion or belief or because they are associated with someone of a particular religion or belief.

The Act also outlaws indirect discrimination which arises when an employer applies a provision, criterion or practice which puts people of one religion or belief at a particular disadvantage compared to those of another and which the employer cannot justify.

This provision has so far been narrowly enforced by the courts. For instance, in **Eweida v BA**, the Court of Appeal ruled that it was not indirectly discriminatory to impose a staff dress code forbidding visible neck adornment, even though Ms Eweida, a committed Christian, could not, as a result, wear a small, visible cross with her uniform.

Harassment

This occurs when one person subjects someone else to unwanted conduct related to religion or belief that has the purpose or effect of violating a person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

Employers may also be liable for harassment by third parties such as clients or customers, provided the employer knows the worker has been subject to harassment on two previous occasions and has not taken any reasonably practicable steps to prevent the harassment.

Victimisation

The Act says it is unlawful for an employer to victimise an individual because, in good faith, they:

- brought proceedings under the Act or previous discrimination legislation
- gave evidence or provided information in connection with proceedings that someone else brought

Are there any exclusions?

There are two main exceptions to the principle that people should not be discriminated against because of their religion or belief:

- The occupational requirement (OR)
- The religious organisations' OR

What is an OR?

An OR applies when the employment is for the purposes of organised religion and requires compliance with the doctrines of that religion to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.

The Act does not apply when the employer can show that there is an occupational requirement to do with the nature or context of the work which means they need to recruit someone of a certain religion or belief, as long as they can show it is a proportionate means of achieving a legitimate aim.

It applies only to direct discrimination in recruitment, promotion, transfer and training and not to the way in which an employer affords access to benefits, facilities or services.

What is the religious organisations' OR?

Organisations that are founded on an ethos based on religion or belief can rely on the OR

exception, as long as they can demonstrate that it relates to that ethos.

The requirement to be of a particular religion or belief applies if the employer can show that it is a proportionate means of achieving a legitimate aim and the person concerned does not meet the requirement (or the employer has reasonable grounds for believing that they don't).

What is the public sector equality duty?

Public bodies such as the NHS and those carrying out public functions are under a duty to consider equality when making day to day decisions both in terms of service delivery and employment. This consists of a general duty and specific duties.

What is positive action?

The Act allows employers to treat someone with a protected characteristic more favourably during the process of recruitment and promotion if they are "as qualified" as the other candidate, and they don't have a policy of treating people of the underrepresented group more favourably.

Can employers impose a dress code?

In general they can, although they have to be careful that it does not give rise to claims of unlawful indirect discrimination. Employers cannot, however, impose a code if it seems to discriminate against someone on the grounds of their religion or belief, unless they can justify the requirement.

Take the case of **Azmi v Kirklees Metropolitan Borough Council** as a good example of justification. Mrs Azmi claimed indirect discrimination when she was not allowed to wear a veil in class. The appeal tribunal said the school was justified in its refusal because the children needed to see her facial expressions as part of the learning process.

Do employers have to observe religious holidays?

If a worker wants to take a day off in observance of a religious holiday or festival, employers should try to accommodate this when it does not interfere with their business. Otherwise, a refusal may amount to unjustified indirect discrimination.

Do employers have to provide prayer facilities?

There is no explicit requirement under the Act to provide facilities, such as a prayer room, for workers who want to practise their religion.

However, if employees ask for a quiet place to pray and the premises can accommodate the request without adversely impacting on the business or other staff, then it may be difficult to justify a refusal.

[\[Back to contents \]](#)

HOLIDAY TERMINATION

Recent European decisions have established that workers who are off sick can accrue their annual leave entitlement. In **Fraser v Southwest London St George's Mental Health Trust**, however, the Employment Appeal Tribunal (EAT) said that workers have to give notice if they want to carry annual leave over to another leave year.

What happened?

Mrs Fraser went on long term sick leave in November 2005 after injuring her knee in an accident at work. Her sick pay entitlement ended in August 2006 and she returned to work in November 2007. However, as the Trust could not find any work for her it stopped paying her again in March 2008 and dismissed her in October of that year.

The Trust's leave year ran from April to March. Mrs Fraser made a number of tribunal claims including one for four weeks' unpaid statutory holiday for 2006/07 and 2007/08. The Trust argued that her claim could not succeed because she had not given notice of her intention to take annual leave as required by regulation 15 of the Working Time Regulations (WTR).

Given the decision in **Stringer v HM Revenue and Customs Commissioners**, it was clear that Mrs Fraser was entitled to the annual leave for 2006 and 2007 even though she had been absent on sick leave.

However, the tribunal said there was nothing in **Stringer** to suggest that regulation 15 should not apply to workers off sick. As Mrs Fraser had not submitted any evidence that she was unable to take her leave during the relevant periods, it said that regulation 13(9) which requires leave to be taken in the leave year in which it is due, continued to apply.

As she did not take her leave during the relevant leave years, she was not entitled to carry it over or receive a payment in lieu of it on termination of her employment.

And the EAT agreed. It said that Mrs Fraser was only entitled to statutory holiday pay if she had actually taken the leave in accordance with regulation 15 of the WTR.

It also dismissed her argument that the Trust had an obligation to tell her that she had to notify them if she wanted to exercise her right to annual leave, as a result of the decision in **Scally and others v Southern Health and Social Services Board**.

However, the EAT distinguished this case on the basis that it involved a contract that had been negotiated collectively, under which employees had acquired rights which were contingent on them taking a particular step. It concluded there was no general duty on employers to inform their employees of their rights.

[\[Back to contents \]](#)



REST OR RELAXATION

Workers have the right to accumulate annual leave under the working time directive when they are off sick, but for how long? In **KHS AG v Schulte**, the Court of Justice of the European Union (CJEU) said that workers on sick leave cannot endlessly accumulate entitlement, as the leave would cease to be a period of rest in those circumstances and instead become a period of "relaxation and leisure".

What happened?

Mr Schulte, who had worked for the company for many years, was entitled under the terms of a collective agreement to 30 days' paid annual leave. The leave entitlement, however, lapsed three months after the end of the calendar year unless the worker could not take it because of illness, in which case it lapsed after 12 months.

In January 2002, Mr Schulte had a heart attack and was declared unfit for work. He received a pension from October 2003 until the end of August 2008 on the ground of total invalidity, when the company terminated his employment. He then brought a claim in a German labour court for payment in lieu of the annual leave he had not taken during 2006, 2007 and 2008.

He appealed, but the higher court said that, under national legislation and the collective agreement, his entitlement to paid annual leave for 2007 and 2008 still existed when his contract of employment ended. However, he lost his entitlement for 2006 because the carry over period of 15 months had expired.

It asked the CJEU to decide whether article 7(1) which requires member states to provide paid annual leave of at least four weeks, allowed for entitlement to holiday leave to lapse at the end of the leave year and/or at the end of a carry over period. If so, whether the period for the leave that could be carried over should be for at least 18 months.

The CJEU said that in the case of a worker who is off sick, national legislation cannot provide that their right to paid annual leave will lapse without actually having had an opportunity to take that holiday.

Any carry-over period must take into account the specific circumstances of a worker who is unfit for work for several periods and so should be "staggered, planned in advance and available in the longer term. Any carry-over period must be substantially longer than the reference period in respect of which it is granted".

However, that right must be qualified for workers who are off sick as they cannot continue to accumulate unlimited holiday entitlement, not least because "it ceases to have its positive effect for the worker as a rest period and is merely a period of relaxation and leisure", which is not the point of article 7.

In this case, it held that a carry-over period of 15 months was not contrary to the purpose of the right to paid annual leave, as it ensured that the leave period retained its positive effect as a rest period.

[[Back to contents](#)]



IN BRIEF

The annual Management Agenda report, a comprehensive survey of over 1,500 managers in the UK by leadership institute Roffey Park published in January, has found a big difference between how directors view their skills, compared to less senior managers.

The main findings include:

- 79 percent of board directors believe they are well respected, but only 50 percent of all other managers take the same view
- 87 percent of board directors feel their leadership is good or excellent, as opposed to 68 percent of managers
- 54 percent of board directors say they feel secure in their job, compared to only 42 percent of other managers
- 82 percent of board directors are happy/very happy at work, compared to 65 percent of other managers
- When rating key leadership behaviours such as providing clear strategic direction and communicating directly with employees, women managers were less positive than men in every instance
- 61 percent of directors compared to 32 percent of other managers believe redundancies in their organisation have been handled well
- 62 percent of board directors report their organisation is very supportive of learning and development, compared to 44 percent of managers.

For more information, go to:

<http://www.roffeypark.com/press/Pages/ManagementAgenda2012.aspx>

[[Back to contents](#)]

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