

# Workplace Newsletter

Keeping you up to date with all things Employment Law, HR & Work-Based

January 2020



## Don't discriminate against me, I'm vegan

In a landmark ruling on 3 January 2020, Employment Judge Robin Postle made history by ruling that ethical vegans are protected under the Equality Act against unlawful discrimination.

EJ Postle's timing couldn't have been better: it's Veganuary (a movement launched to encourage the vegan way of life, which takes place every January), supermarkets and eateries are falling over themselves to release vegan products and the focus on what we can do to save our flooding, burning planet has many people re-evaluating food production and diet and turning to veganism as a result.

### Philosophical belief

You may be asking yourself how veganism falls under the remit of the Equality Act. Well, the protected characteristic of 'religion or belief' is where we find ourselves. 'Belief' extends not only to the religious, but also to the philosophical.

[Read more p2>](#)

Philosophical belief isn't further defined in the Equality Act, but case law has established the following guidance:

The belief must be genuinely held.

It must be more than an opinion or viewpoint.

It must be a belief as to a weighty and substantial aspect of human life and behaviour.

It must reach a certain level of cogency, seriousness, cohesion and importance.

It must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others.

It must "have a similar status or cogency to a religious belief", but it doesn't need to go as far as being an "-ism".

It does not need to be a belief that is shared by others.

Supporting a particular political party is not a philosophical belief, however a belief in a political philosophy or doctrine, e.g. Socialism, Marxism or free-market Capitalism, might qualify.

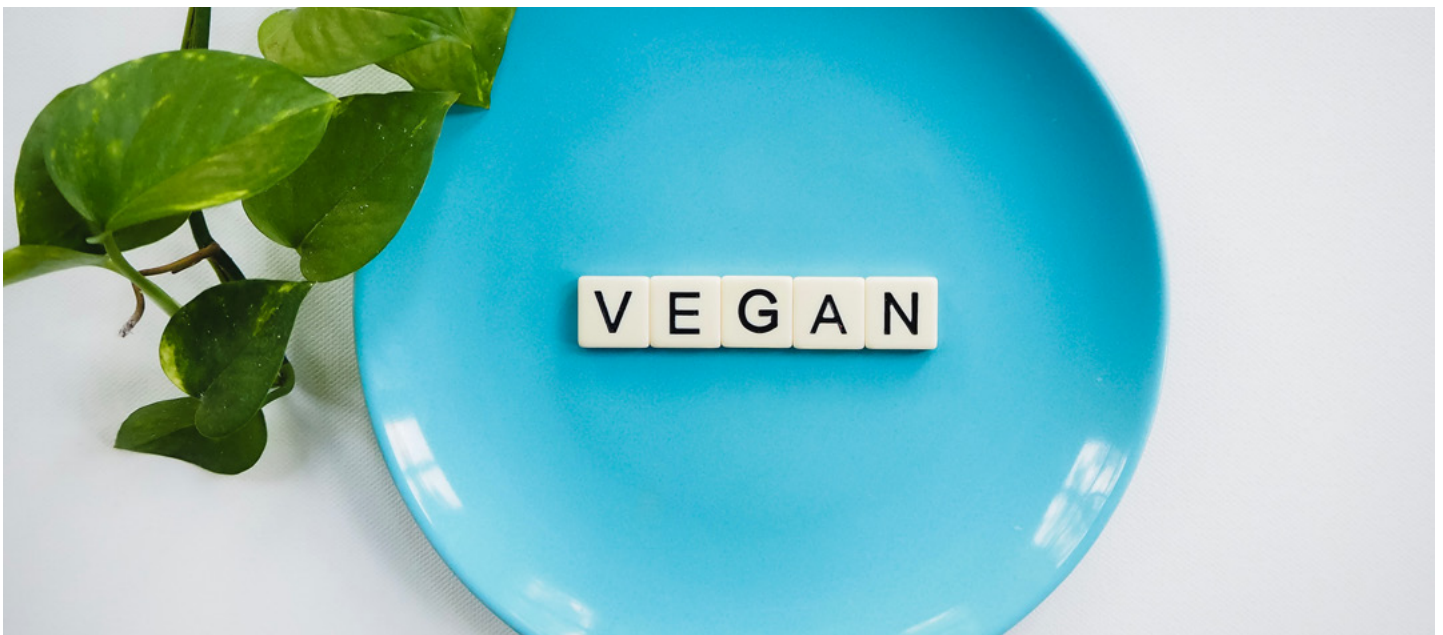
A philosophical belief may be based on science.

## Welcome

## Happy New Year!

We hope you had a wonderful break and are raring to go. We're looking forward to keeping you up to date this year with key and interesting workplace updates.

Wishing you a very happy, healthy and prosperous 2020 from all at Outset.



**outset.**

De-mystifying holiday entitlement and the right to 'carry over' [p3>](#)

April Legislative changes [p5>](#)

Recent case decisions [p5>](#)

**What is Veganism?**

Some people may think that being vegan is a strict dietary choice, and the dictionary definition is “a person who does not eat or use animal products”. However, certainly for ethical vegans, the Vegan Society provides a more accurate explanation:

**“Veganism is a way of living which seeks to exclude, as far as is possible and practicable, all forms of exploitation of, and cruelty to, animals for food, clothing or any other purpose.”**

There are many ways to embrace vegan living. Yet one thing all vegans have in common is a plant-based diet avoiding all animal foods such as meat (including fish, shellfish and insects), dairy, eggs and honey - as well as avoiding animal-derived materials, products tested on animals and places that use animals for entertainment.”

**What does this mean for employers?**

It means ensuring any vegans in the workplace aren't the butt of others jokes and aren't made to feel harassed or excluded at work. This could mean expanding your thought process and considering the following:

- 1 Does the work event an employee is attending cater sufficiently for vegans?
- 2 Most workplaces provide tea, coffee, milk etc free of charge for staff – don't forget to provide plant based alternatives where required.
- 3 Do you give chocolates, wine, etc as gifts to employees? Make sure you consider any vegans, some wines can be unsuitable for them!
- 4 Do you need to consider alternative seating for vegan staff which avoids leather?
- 5 Be aware of conversations taking place which could be offensive or distressing for vegans, particularly if these are happening deliberately to offend (“banter” can be bullying!)
- 6 Include veganism in your equality policies and training in order to raise awareness - employers can be held vicariously liable for discriminatory acts their employees commit against others

**The road to protection for vegans**

**2009**

The draft Equality and Human Rights Commission Code released in 2009 contained the following example: “A person who is a vegan chooses not to use or consume animal products of any kind. That person eschews the exploitation of animals for food, clothing, accessories or any other purpose and does so out of an ethical commitment to animal welfare. This person is likely to hold a belief which is covered by the Act.”

However, a spokesperson for the Government Equality Office at the time stated that the government did not share the view that climate change or veganism were beliefs, but added that interpretation was a matter for the courts. The final EHRC Code was published without the above wording

**March 2011**

A tribunal held that a belief in the sanctity of life, extending to a fervent anti-fox hunting and anti-hare coursing belief, constituted a philosophical belief. That decision was upheld by the Appeals Tribunal.

**Sept 2019**

A Claimant lost his argument that being vegetarian was protected under the Equality Act. Interestingly, in delivering judgment the Tribunal commented that it could be contrasted to veganism, where there is a “clear cogency and cohesion in vegan belief”.

**3 Jan 2020**

An employment tribunal in Norwich has determined that veganism is a protected, philosophical belief. The Tribunal were given over 1,000 pages of evidence to review to support the Claimant's arguments and after a day of considering these, and witness evidence including a vegan legal expert and an Oxford University professor of moral philosophy, EJ Postle stated: “I am satisfied overwhelmingly that ethical veganism does constitute a philosophical belief”, going on to comment that veganism is “important” and “worthy of respect in a democratic society”.

**New team member in group services**

If you haven't already spoken to her then you are bound to in the coming months. Emily Woolway joined our Group Services team so if you call our main number you may well speak to her. She did a great job helping to organise our Christmas do so we're very pleased to have her on board!



**Welcome Back Claire**

Many of you will know Claire McIntosh, an HR professional from our Employment Advisory Team. She has been away on maternity leave but is now back with us which we're all very pleased about – as well as being highly experienced she is a much loved colleague.



**De-mystifying holiday entitlement and the right to 'carry over'**

The right to paid annual leave is set out in the Working Time Regulations 1998 ('WTR'), which derive from the EU Working Time Directive ('WTD').

Workers are currently entitled to at least 5.6 weeks' paid holiday a year (which can include bank and public holidays). This is made up of 4 weeks' minimum leave under the WTD and an additional 1.6 weeks' under the WTR.

The rules around holiday entitlement can be complex, especially with the myriad of case law on the topic. With the holiday years of many businesses re-starting in January, we take a look at holiday and what employees are entitled to carry over to the next year.

Scenario	Allowed to carry over WTD 4 weeks?	Allowed to carry over WTR 1.6 weeks?
Worker was able to take their holiday, but has not taken some/all of it and none of 2 - 4 below apply.	No	No, unless a “relevant agreement” allows it.
No holiday entitlement has been taken because worker was told by employer that it would be unpaid, for example, if employer believes (wrongly) that the worker is an independent contractor.	Yes - Holiday will continue to carry over from one leave year to the next until such time as the employment terminates at which point a payment in lieu of accrued untaken holiday will be payable by employer.	No
Any/all of holiday entitlement not taken as a result of sickness absence during leave year.	Yes – the worker must be permitted to carry it forward. Any carried forward holiday entitlement should be taken within 18 months of the end of the leave year in which it accrued or it will be lost.	No, unless a “relevant agreement” allows it.
Any/all of holiday entitlement not taken as a result of a period of family leave.	Yes - Holiday will carry over into the following leave year.	Yes - Holiday will carry over into the following leave year.

Read more [p2>](#)



## Family leave



When it comes to family related leave, it's safest to err on the side of caution. The European Court of Justice (ECJ) has held that employees should be able to take holiday during a period other than their maternity leave. The ECJ did not directly address the issue of carrying over leave from one leave year to the next.

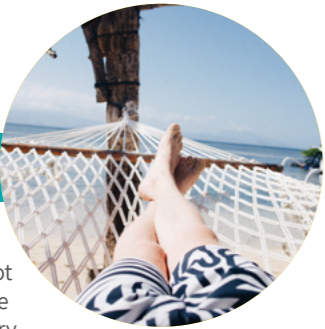
In the absence of a clear judgment, the safest course of action is to allow carry-over of the full 5.6 weeks' statutory holiday when a worker is unable to take it due to absence on maternity leave. It follows that the same stance should be taken for any period of paternity, adoption, parental or shared parental leave that spans two leave years.



## Pay in lieu

What a business should not do, is replace the minimum WTD statutory leave entitlement with a payment in lieu, except on termination of the relationship, as this is specifically prohibited by Article 7.

Contractual leave in excess of the WTD 4 weeks minimum can be paid in lieu during employment if the employment contract provides for this, or if the parties otherwise agree.



## Summary

The rights set out in the table do not extend to holiday which you choose to give workers above their statutory minimum entitlement.

Your documents can potentially restrict or enhance the right for contractual holiday to be carried over or paid in lieu on termination. If more generous provisions regarding carry-over are contained within a worker's contract then these should be adhered to in order to avoid a breach of contract claim.

The very basic line is that unless prevented by illness or family related leave, workers should not be permitted to carry forward their 4 weeks of leave under EU legislation, even with the agreement of the employer. Neither should they be paid in lieu of that leave unless their employment is ending.

The purpose of holiday is for workers to take a break and rest from work, and the 4 weeks is the absolute minimum any worker and their employer should ensure they take.



## Believe it or not...

We all know that the world of employment can throw us some surprises from time to time, but do you realise just how strange it can be...

**You can get paid to sleep in Finland**, by a hotel which employed a professional sleeper to test out its beds and pen reviews for guests. Sounds like a dream job!

**How do you fancy watching paint dry? Genuinely.** North Wales resident Keith Jackson has spent more than 30 years testing the drying time of paint, by painting sheets and then watching for colour changes, and maybe dabbing his finger on it from time to time.

**Encourage anguish from funeral goers in Asia where professional funeral criers are hired to mourn as loudly as possible.** It is thought that a dramatic send-off helps the deceased pass into the afterlife, and also allows family members to concentrate on other tasks whilst maintaining their composure.



## Recent Case Decisions

Self-employed or not: did IR35 apply?

### RALC Consulting Ltd v HMRC

HMRC determined that IR35 applied to the arrangements RALC Consulting had in place for supplying services i.e. employee income tax and NI should be deducted against the fees received by RALC for the IT consultant's (A's) services. RALC appealed. The Tribunal disagreed with HMRC and held there was not sufficient mutuality of obligation between the parties.

RALC provided A's services to two clients over a 5 year period on a series of short contracts. The Tribunal's decision centred on the fact there was no contractual obligation to provide A with a minimum amount of work or complete a project or outcome. This (along with other factors) pointed to self-employment. Therefore A was not a deemed employee of either end user client and was not subject to IR35.

This decision which will come as welcome guidance ahead of the IR35 changes which will affect the private sector in April 2020.

Lump sum awards for future loss of earnings

### Irani v Duchon

Mr Irani suffered serious injuries following an RTA in 2013. He eventually returned to work but was made redundant in 2015. The court found that his injuries contributed to his redundancy and therefore he was entitled to an award for his future loss of earnings. Although he found a new role, the break in employment meant Mr Irani was not able to renew his visa on its expiry.

Mr Irani argued that in India his earnings would reduce to a fraction of his UK earnings, but was unable to provide suitable evidence to the court of such. As a result, a calculation of future loss of earnings could not be made and instead Mr Irani was awarded a lump sum much lower than that claimed.

This case demonstrates that where claimants are unable to provide sufficient evidence to enable the courts to calculate future loss of earnings, their ability to recover compensation is likely to be significantly reduced.

Substitution clause not guarantee of self-employment

### Stuart Delivery Ltd v Augustine

Stuart Delivery engaged courier drivers on a self-employed arrangement. Drivers used an app to pick up delivery slots. Once a delivery slot was assigned to a driver, they could release the slot back into the pool of drivers, however they had no control over who picked up the slot and, if it wasn't picked up, they were required to complete it themselves.

Mr Augustine was engaged on one of these contracts and the Employment Appeals Tribunal confirmed that the right of substitution was not sufficient. As a result, Mr Augustine was found to be a worker.

Many businesses are well advised to include a substitution clause in contracts with their self-employed contractors. However, this case highlights that the right of substitution must be as unfettered as possible otherwise there is the risk that the Tribunal will find that individual has deemed worker (or even employment) status.

## April Legislative changes

### 6 April 2020



Holiday pay calculation reference period increases from 12 to 52 weeks



Removal of the "Swedish Derogation" from the Agency Worker Regulations



Agency workers must be provided with "Key Information" document



All workers entitled to a written statement of terms & conditions from day one



The threshold to request an ICE agreement reduced from 10% to 2% of employees



IR35 rules will be extended to medium and large businesses in the private sector

### April 2020



2 weeks of parental bereavement leave will be introduced, although the exact date is still TBC it is expected to be April



Rates including National Minimum Wage, maximum weekly pay and statutory maternity leave are increased each April, the expected increases for 2020 have been published but are not yet confirmed.