



**All Inclusive**

**December 2009**

**Contact us**

**Content**

**Makbool Javaid**  
Partner  
Head of Employment Law



Tel: 020 3206 2745  
Mob: 07817 805315

[makbool.javaid@smab.co.uk](mailto:makbool.javaid@smab.co.uk)

**Ewan Keen**  
Partner



Tel: 020 3206 2724  
Mob: 07870 942622

[ewan.keen@smab.co.uk](mailto:ewan.keen@smab.co.uk)

**Simons Muirhead & Burton**

8-9 Frith Street  
London  
W1D 3JB

Tel:+44 (0) 20 3206 2700  
Fax:+44 (0) 20 3206 2800

- The proportion of older workers planning to work beyond the state pension age has increased dramatically in the last two years, suggesting that the recession has shrunk pension pots, savings, investments and house values. This is the main finding from a survey by the Chartered Institute of Personnel and Development.
- EU ministers have approved an amended Parental Leave Directive following the adoption of the Framework Agreement on improved parental leave rights, signed by the European social partners earlier this year, providing a range of increased entitlements, including a minimum of four months' leave as opposed to the current three months.
- The European Commission has published its third Eurobarometer survey which aims to track perceptions of people in Europe towards different forms of discrimination and diversity. The latest survey reveals that discrimination on ethnic grounds (61%) is considered the most widespread form of discrimination in the EU, followed by discrimination based on age (58%) and disability (53%).
- Two Reasoned Opinions have been sent by the European Commission to the Government which state that the UK have failed to implement the EC Equal Treatment Framework Directive and the EC Equal Treatment Directive correctly. The UK now has two months to respond.
- An employment tribunal has found that Alan Power, a former police employee, was not dismissed because he is a spiritualist who believes that messages from the dead help in criminal investigations. Therefore Mr Power had not been discriminated against on grounds of a genuinely held belief, in breach of the Employment Equality (Religion and Belief) Regulations.
- In *Da'Bell v NSPCC*, the EAT ruled that the Vento guidelines, issued in 2003, which are used to assess compensation for injury to feelings in discrimination cases, should be uplifted to take account of inflation. Accordingly, the top of the: lower band rises to £6,000; the middle band rises to £18,000; and the highest band rises to £30,000.
- In *McFarlane v Relate Avon Ltd*, the EAT ruled that the dismissal of an employee for refusing to provide counselling to same-sex couples was neither direct religious discrimination, as the dismissal was caused by the employee's refusal to comply with the employer's equal opportunities policy, nor indirect discrimination, since the provision was a proportionate means of achieving a legitimate aim.
- In *Chagger v Abbey National plc and anor*, the Court of Appeal ruled that employees who suffer a stigma when searching for a new job, as a result of a discriminatory dismissal can be compensated for that loss when it comes to assessing compensation.



## Number of older workers planning to work beyond retirement age nearly doubles

The proportion of older workers planning to work beyond the state pension age has increased dramatically in the last two years, suggesting that the recession has shrunk pension pots, savings, investments and house values. This is the main finding from a survey by the Chartered Institute of Personnel and Development (CIPD).

The [Employee Outlook Survey](#) of 2,000 working people shows the proportion of people aged 55 and above planning to work beyond the state pension age has jumped to 71%, compared to 40% in a CIPD survey two years ago. Financial factors are the main reason employees of all ages plan to work longer, with 71% of those aged 55 and over saying this is the case.

The research also shows that the older people get, the more likely they are to be planning to work beyond state retirement age, suggesting that reality bites as they get closer to drawing their pension. Just 30% of people aged between 18 to 24 plan to work beyond the state retirement age, however 52% of this age group said they did not know and 18% said no. The survey revealed the following:

- Under half of employees (46%) said they had a pension with their current employer, with men (52%) more likely than women (39%) to say this is the case.
- Worryingly just 23% of people aged 18 to 24 have a pension provision with their current employer.
- There is a stark split between those working in the public, non profit and private sectors. 90% of public sector workers have a pension with their current employer, compared to 53% of workers in the non-profit sector and just 36% in the private sector.

## Longer parental leave agreed by EU ministers

EU ministers have approved an amended Parental Leave Directive following the adoption of the Framework Agreement on improved parental leave rights, signed by the European social partners earlier this year which will provide a range of increased entitlements, including a minimum of four months' leave as opposed to the current three months.

Following the adoption of a Framework Agreement on parental leave by the European social partners (BUSINESSEUROPE, ETUC, CEEP and UEAPME) in June this year, EU ministers have approved the Amended Parental Leave Directive which contains all the improved rights agreed by the Social Partners. The main changes in the new, amended Directive are:

- Each parent will be able to take four months off per child (previously three months). The extra month cannot be transferred from one parent to the other, thereby encouraging fathers to take their leave.
- An employee applying for or taking parental leave will be protected from any less favourable treatment for doing so.
- Employees returning from parental leave will have the right to request changes to their working hours for a limited period.

The new Directive will be formally adopted in the coming months. Member States will then have two years to transpose the new rights into national law.

The improved right to 4 months' leave will require an amendment to UK legislation since leave for a parent of a child who is not disabled is 13 weeks (those with a child entitled to receive disability living allowance are entitled to 18 weeks).





## European Commission publishes survey of discrimination and diversity in Europe

The European Commission has published its third Eurobarometer survey which aims to track perceptions of people in Europe towards different forms of discrimination and diversity. The survey reveals that discrimination on ethnic grounds (61%) is considered the most widespread form of discrimination in the EU, followed by discrimination based on age (58%) and disability (53%).

The [Eurobarometer survey](#) is the third in its kind and was carried out in May and June this year, with a sample of 26,756 people interviewed in 30 countries, i.e. the member States plus the three Candidate Countries: Croatia, the Former Yugoslav Republic of Macedonia and Turkey. Summary findings were as follows:

- Discrimination on ethnic grounds (61%) is considered the most widespread form of discrimination in the EU, followed by discrimination based on age (58%) and disability (53%).
- While perceptions of ethnic discrimination remain stable, there has been a significant increase in the number of people who consider the most widespread to be discrimination based on age (+16% points since 2008) and disability (+8% points since 2008).
- The rise in perception of age discrimination is clearly linked with the economic downturn. The survey also indicates that nearly two thirds of the EU population (64%) expects the current economic situation to lead to more age-based discrimination in the job market.
- In addition to age discrimination, a majority of Europeans also expect the economic situation to lead to higher levels of discrimination on the grounds of disability (56%) and ethnic origin (57%) in the job market.
- There is also an expectation that economic problems are likely to have a generally negative effect on action to tackle discrimination in terms of political and financial priority given by government.



## Commission contend that UK has failed to implement equality Directives properly

The European Commission has sent two Reasoned Opinions to the Government which allege that the UK have failed to implement the EC Equal Treatment Framework Directive and the EC Equal Treatment Directive correctly. The UK now has two months to respond to the Commission.

The Reasoned Opinion on the Framework Directive, which prohibits discrimination in employment and occupation based on religion or belief, disability, age or sexual orientation, states:

- there is no clear ban on 'instruction to discriminate' in national law and no clear appeals procedure in the case of disabled people; and
- exceptions to the principle of non-discrimination on the basis of sexual orientation for religious employers are too broad.

The Reasoned Opinion on the Equal Treatment Directive, which aims to establish equal treatment between men and women in employment, states:

- the indirect discrimination definition does not cover potential discrimination;
- the exceptions to the principle of non-discrimination on the basis of sex for certain jobs are too wide; and
- the right of associations to support victims is not clearly established.

If the Commission is not satisfied with the reply, it can refer the matter to the ECJ and if found to be in breach of EU law, the UK will be required to take all the necessary measures to end its infringement or else be fined.





### **Dismissal was not due to a genuinely held belief in spiritualism**

An employment tribunal has found that Alan Power, a former police employee, was not dismissed because he is a spiritualist who believes that messages from the dead help in criminal investigations. Therefore he had not been discriminated against on grounds of a genuinely held belief, in breach of the Employment Equality (Religion and Belief) Regulations.

In last month's All Inclusive we reported the case of Grainger Plc v Nicholson, where the EAT set out the test to be followed to determine whether a 'belief', comes within the scope of the protection afforded by the Employment Equality (Religion and Belief) Regulations. Using that test, the EAT held that a belief in man-made climate change, and an accompanying moral duty to live in a way that avoids any damaging effects, did come within the scope of the Regulations.

Alan Power, a former police trainer, claimed that had been dismissed because he is a spiritualist who believes that messages from the dead help in criminal investigations. At a pre-hearing review, using the test set out in the Grainger case an employment judge held that Mr Power's beliefs were worthy of respect in a democratic society, and had sufficient cohesion and cogency to be a philosophical belief under the Regulations. The EAT upheld the tribunal's decision and the case was remitted for a full hearing.

At the full hearing, the tribunal found that Mr Power had not been dismissed because of his belief in spiritualism. His dismissal was because of inappropriate behaviour which came to light shortly after he joined Greater Manchester Police. This included allegedly becoming sexually aroused when being searched when playing the part of an arrested shoplifter during a session at a police training college and distributing inappropriate research materials to Merseyside officers featuring the World Trade Centre attacks.

This case demonstrates that the definition of a belief is capable of being given a wide interpretation, even though the EAT in Grainger set out a number of specific tests which have to be applied.

### **Injury to feelings guidelines amended to take account of inflation**

In Da'Bell v National Society for the Prevention of Cruelty to Children, the EAT ruled that the Vento guidelines, used to assess compensation for injury to feelings in discrimination cases, should be uplifted to take account of inflation. Accordingly, the top of: the lower band rises to £6,000; the middle band rises to £18,000; and the upper limit rises to £30,000.

Ms Da'Bell claimed that the NSPCC failed to make reasonable adjustments after she suffered a heart attack, and that she had been constructively dismissed when she resigned due to the treatment she received. The tribunal dismissed her unfair dismissal claim but did uphold her disability claim in that reasonable adjustments had not been made. In arriving at the award for injury to feelings the tribunal decided that the midpoint of the middle band of injury to feelings awards set out by the Court of Appeal in Vento v Chief Constable of West Yorkshire Police was appropriate but then uplifted that figure to account for inflation, since the Vento guidelines were set in 2003.

The EAT upheld the tribunal's decision confirming that the Vento guidelines needed to be uplifted in line with the Retail Prices Index, with immediate effect, meaning that the top of the bottom band would rise from £5,000 to £6,000, the middle band from £15,000 to £18,000 and the upper limit from £25,000 to £30,000.





### **Tribunal right to dismiss claims of direct and indirect religious discrimination**

In *McFarlane v Relate Avon Ltd*, the EAT ruled that the dismissal of an employee for refusing to provide counselling to same-sex couples was neither direct religious discrimination, as the dismissal was caused by the employee's refusal to comply with the employer's equal opportunities policy, nor indirect discrimination, since the provision was a proportionate means of achieving a legitimate aim.

The Relate Federation provides relationship counselling services to same-sex couples in precisely the same way as to heterosexual couples. The Code of Ethics requires that therapists should not impose their beliefs on clients and must not discriminate when providing services.

Mr McFarlane is a Christian and believes that it follows from Biblical teaching that same-sex sexual activity is sinful and that he should do nothing which endorses such activity. He was dismissed when Relate took the view that he had no intention of providing counselling to same sex couples, in breach of the Code.

The EAT held that the express finding by the tribunal that the reason why Mr McFarlane was treated as he was, was not because of his Christian faith, but because of his perceived unwillingness to provide relationship counselling to same-sex couples, meant there was no direct discrimination. He was treated in the same way as any non-Christian who had stated such an unwillingness.

As to indirect discrimination, the provision, criteria or practice (PCP) of providing the service equally to all users, did give rise to indirect discrimination, in that the PCP put persons of the same religion or belief as Mr McFarlane at a particular disadvantage. However, the PCP was justified since Relate had a legitimate aim of providing services equally to all users and it was a proportionate, since there was no practical alternative.

### **Employees can recover stigma loss for having brought a discrimination claim**

In *Chagger v Abbey National plc and anor*, the Court of Appeal ruled that employees who suffer a stigma when searching for a new job as a result of a discriminatory dismissal can be compensated for that loss when it comes to assessing compensation.

A tribunal held that Mr Chagger's dismissal for redundancy was unfair and an act of race discrimination. The tribunal awarded him £2,794,962, which included future loss based on his inability to work in the financial services industry ever again. Abbey National appealed.

The EAT rejected the liability appeal but upheld Abbey's appeal on remedy, holding that: (i) any stigma loss was the result of third party conduct for which Abbey was not liable; and (ii) the tribunal should have applied the Polkey principle and considered making a reduction to reflect the chance that Mr Chagger would have been dismissed in any event, discounting the discriminatory conduct. Mr Chagger appealed.

The Court of Appeal held that the EAT had been right to apply the Polkey principle and therefore, to remit to the tribunal an assessment of the likelihood of Mr Chagger being dismissed even if there had been no discrimination, and if he would have been dismissed, to adjust compensation accordingly. As to stigma loss, the Court disagreed with the EAT. In discriminatory dismissal cases, an employer should be held liable for financial loss suffered by the employee due to the stigma attached to a discriminatory dismissal. It will not normally need to be considered as a separate head of loss, but was simply one of the factors which impact on how long it will take the employee to find a new job.

