

# ByteSize

## Employment Law News



Welcome to the January issue of Actons' employment law update  
- keeping you all up to date in Employment Law issues.

We welcome your feedback - please let us know if you have any suggestions for improvements or alternative topics

### £500,000 for Data Protection breaches

The Ministry of Justice has announced plans to give the Information Commissioner the power to impose penalties of up to £500,000 on data controllers who seriously breach the Data Protection Act 1998. The ICO would have power to issue a monetary penalty notice if a serious contravention occurs. A 'serious contravention' is one that:

- (a) would be likely to cause substantial damage or distress; and
- (b) is either deliberate or reckless (i.e. the data controller knew or ought to have known of a risk of a serious breach but failed to take steps to prevent it.)

The Information Commissioner has simultaneously produced draft guidance setting out how this potential new power would be exercised, stating that a monetary penalty notice would only be used as a punishment where there had been a deliberate or reckless handling of personal data. When deciding the extent of the penalty, the Information Commissioner will take into account the data controller's size, the financial resources available to the data controller and the sector in which the data controller operates.

At present, the Information Commissioner has limited powers to "punish" offenders of the Data Protection Act.

The Information Commissioner can issue enforcement notices for breaches of the data protection principles. However, as enforcement notices merely require a data controller to change its practice, the Government believes that enforcement notices alone are not appropriate sanctions for serious breaches of the Data Protection Act.

The Information Commissioner can bring criminal proceedings for some data protection offences,

including non compliance with enforcement notices, failure to notify as a data controller and unlawfully obtaining personal data.

The new penalty would allow the Information Commissioner to directly punish serious offenders of data protection law. Although not a criminal sanction, the power to impose a "fine" of up to £500,000 should deter businesses from breaching the data protection principles and encourage compliance with the Data Protection Act.

### Compensation falls

For the first time ever the government has decided to reduce the maximum level of compensatory award for unfair dismissal. The reduction follows the drop in the retail prices index for 8 months from March to October 2009. The level of compensation from 1 February 2010 will drop from £66,200 to £65,300. One week's pay for redundancy and basic award purposes will remain at £380.

### Statutory payments to rise

The Statutory adoption, maternity and paternity pay and maternity allowance will rise from £123.06 to £124.88 from April 2010. Statutory sick pay will remain at £79.15 per week.

### Pregnant workers pay finding

The Advocate General has given an opinion that where pregnant workers are transferred on health and safety grounds to lower paid jobs they only need to be paid at the rate other workers receive for doing the same job, not the previous salary from their substantive job. Although not binding, the opinion is usually followed by the European Court of Justice. We will bring you the final outcome in a later edition.

For further information, please contact Claire Bell on  
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Claire Bell

### Dismissal not religious

In the case of *McFarlane v Relate Avon Ltd* the EAT has found that the dismissal of a counsellor who was described as a committed Christian for refusing to work with gay couples is not direct religious discrimination.

The dismissal was based on the employee's refusal to comply with the employer's equal opportunities policy rather than his Christian beliefs. The dismissal was also found not to amount to indirect discrimination since it was a proportionate means of achieving the legitimate aim of serving the community in a non discriminatory manner. In so doing the EAT was following its previous finding in the case of *Ladele*, a finding which was subsequently upheld by the Court of Appeal.

### Consultation on default retirement

The government has begun consulting on the default retirement age. Responses should be made by 1 February 2010 on the following points:

- the operation of the default retirement age in practice;
- the reasons that businesses use mandatory retirement ages;
- the impact on businesses, individuals and the economy of raising or removing the default retirement age;
- the experience of businesses operating without a default retirement age;
- how any costs of raising or removing the default retirement age could be mitigated and benefits realised.

Submissions are requested by 1 February 2010 and should be emailed to:

[draevidence@bis.gsi.gov.uk](mailto:draevidence@bis.gsi.gov.uk) and/or posted to

**DRA Evidence, Department for Business, Innovation and Skills, V497, 1 Victoria Street, London SW1H 0ET.**

### Insolvency Practitioners urged to consult

Ian Lucas, minister for Business and Regulatory Reform, has recently circulated advice to insolvency practitioners reminding them of the duty to consult employees facing redundancy. He stated that redundancy must be carried out sensitively and with due regard to the interests and legal rights of employees. He also indicated that his officials would monitor cases where protective awards were made as a result of the failure to comply with collective consultation obligations.

Reference is also made in his letter to the fact that where 20 or more redundancies are to be made the Secretary of State must be notified on the appropriate form. Failure to do so is a criminal offence and can attract a maximum fine of £5,000.

When in doubt, insolvency practitioners are urged to take advice in advance of making redundancies.

### Paid leave to care for sick relatives?

The government has sparked controversy with a suggestion that carers might be entitled to paid time off to look after dependents, and that temporary workers might qualify for the same rights. The Equalities Office insists nothing concrete has been decided, but employers representatives reacted negatively to the suggestion. Other countries do provide such paid leave. In the Netherlands employees can have up to 10 days paid leave to care for a sick partner or parent, part of the cost of which is payable by the state, whilst in Australia all employees receive paid emergency leave.

### Belief in climate change can constitute a 'philosophical belief'

In a recent case the EAT held that an employee's belief in climate change could amount to a philosophical belief for the purposes of the Religion or Belief Regulations. In *Grainger plc v Nicholson* the claimant claimed he had been dismissed for his climate change beliefs. His philosophical belief affected most aspects of his life. The tribunal took note of an earlier decision where it had been held that for a belief to qualify for protection, it must have cogency, seriousness,

cohesion and importance and be worthy of respect in a civilised society. The tribunal found that the claimant's beliefs fulfilled the requirements of the regulations. On appeal, the EAT set out a series of guidelines for determining a philosophical belief:

- The belief must be genuinely held.
- It must be a belief and not, as in *McClintock*, an opinion or viewpoint based on information currently available.
- It must be a belief as to a weighty and substantial aspect of human life and behaviour.
- It must attain 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.
- Although the word 'similar' was removed from the Regulations by the Equality Act 2006, it is still necessary for the belief to have a similar status or cogency to a religious belief in order to be protected.
- As the EAT's decision in *Eweida v British Airways plc* shows, a belief is not required to be shared by others in order to come within the protection of the Regulations.
- A philosophical belief does not need to 'allude to a fully-fledged system of thought' that governs the entirety of a person's life, provided it satisfies the criteria above. Thus, one-off beliefs such as pacifism or vegetarianism can be protected.

### Vento guidelines increased

The EAT has held that the Vento guidelines, used to assess compensation for injury to feelings in discrimination cases, should be increased to take account of inflation. Accordingly, the top of the lower band rises from GBP 5,000 to GBP 6,000; the middle band rises from GBP 15,000 rises to GBP 18,000; and the upper limit rises from GBP 25,000 to GBP 30,000.

This update is provided free of charge and is a summary of the legal position at January 2010.

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