



## All Inclusive

August 2011

### Breaking the glass ceiling

In a joint letter to FTSE 350 companies, Theresa May, Home Secretary, and Business Secretary Vince Cable have set out a strong business case for increasing representation of women in senior positions to at least 25% by 2015.

The letter highlights recent figures which show that companies with more women on their boards were found to out-perform their rivals with a 42% higher return in sales, 66% higher return on invested capital and 53% higher return on equity. This follows Lord Davies' review, suggesting that companies should set targets to achieve 25% female representation at board level.

The Government's position is that it will continue to encourage companies to set their own targets to ensure talented women can access top jobs. Recently, the CBI urged the Financial Reporting Council to get on with making changes to the UK's Corporate Governance Code to boost the number of women on boards, calling for the Code to be revised to require listed companies to report on diversity on a "comply or explain" basis.

### Research on attitudes to LGB&T employees

The Home Office has published details of a new study into employment barriers faced by LGB&T people, that identifies the obstacles preventing employers from taking action to make their workplace more LGB&T-friendly.

The report, [Barriers to employers in developing lesbian, gay, bisexual and transgender friendly workplaces](#) concludes that inertia, lack of understanding that it is a workplace matter and nervousness about the area, together with uncertainty about how to address issues, were key barriers to employers taking action to make their workplace more LGB-friendly. In general, there is also substantial ignorance about transgender and hostility towards transgender people. In recognition that both legal information and advice and assistance on how to handle the situation can be difficult to find, Section 9 of the report contains a number of useful recommendations for employers introducing or reviewing their equality policies relating to LGB&T employees.

### Low success rates in discrimination claims

An analysis of the latest tribunals statistics for 2010/11 conducted by Equal Opportunities Review shows that discrimination claims are the least successful when compared with other jurisdictions.

Equal Opportunities Review (Issue No 215, Michael Rubenstein Publishing) contains an analysis of discrimination claims following the publication of the annual tribunals statistics for 2010/11. The key findings are: (i) the rate of success in discrimination cases, varying from 1% to 3%, falls below redundancy pay claims (23%) and is less than the next "least successful" jurisdiction - unfair dismissal, with a success rate of 8%; (ii) the proportion of successful religious belief claims has increased slightly, to 3% from 2%, but the proportion of successful sexual orientation claims decreased from 5% to 3%; (iii) the average rate of withdrawn claims in non-discrimination jurisdictions is 26%, whereas it is 38% for discrimination claims; (iv) the highest proportion of cases that were unsuccessful following a hearing was in race discrimination claims at 16% followed by religion or belief at 15%.

## **Intervention sought in religion cases**

The EHRC has made an application to intervene in four cases at the European Court of Human Rights involving religious discrimination, arguing that judges have interpreted the law too narrowly.

The Commission has sought [permission to intervene](#) in the cases of Nadia Eweida & Shirley Chaplin against the United Kingdom and Lillian Ladele and Gary McFarlane against the United Kingdom. If allowed to intervene, the Commission will argue that the way existing human rights and equality law has been interpreted by judges is insufficient to protect freedom of religion or belief.

The Commission is concerned that UK and EU courts have created a body of confusing and contradictory case law. For example, some Christians wanting to display religious symbols in the workplace have lost their legal claim, so are not allowed to wear a cross, while others have been allowed to, after reaching a compromise with their employer. As a result, it is difficult for employers to know what they should be doing. The Commission will propose the idea of 'reasonable accommodations' to help employers manage how they allow people to manifest their religion or belief.

## **Wide-ranging recommendations permitted**

In *Lycée Français Charles De Gaulle v Delambre* the EAT has held that an employment tribunal was entitled to impose a wide range of recommendations on a school which it found had committed age discrimination.

Ms Delambre, 34, succeeded in her claim that the school's refusal to promote her was an unlawful act of age discrimination. She was awarded £48,000 in compensation and the tribunal, as it is permitted to do, made recommendations that the employer takes specified steps for the purpose of avoiding or reducing the adverse effect of the unlawful discrimination within a set time period. These were that the school should: (i) circulate the tribunal's judgments to each member of its governing board and senior management team; (ii) engage a qualified HR professional to conduct a review of its existing equality-related policies and procedures to ensure they are legally compliant; and (iii) undertake a programme of formal equality and diversity training, beginning with the governors and then cascading down through the entire school. The school appealed, arguing that these recommendations were burdensome and impractical.

The EAT rejected the appeal. Tribunals have an extremely wide discretion to make recommendations. The tribunal's recommendations in this case, given the circumstances, were entirely justified, as they were just and equitable, and practicable in terms of the effect on both Ms Delambre and the school in attempting to eliminate discrimination.

## **Compulsory retirement at 65 justified**

In *Fuchs and another v Land Hessen* the European Court of Justice held that German legislation requiring civil servants to retire at 65 was an appropriate and necessary means of encouraging the recruitment and promotion of young people and avoiding performance disputes with older workers.

Two German civil servants complained that German law requiring them to retire at 65 was discriminatory. Upon referral to the ECJ, the Court ruled that there was no breach of the EU Equal Treatment Framework Directive if, as the German Government had argued, the rule was an appropriate and necessary means of achieving the legitimate aims of efficient HR planning, encouraging the recruitment and promotion of young people and avoiding disputes relating to employees' ability to perform their duties beyond the age of 65.

The ECJ's acceptance that a wish not to go through, what can be, the uncomfortable process of evaluating employees' fitness to work on a case-by-case basis could, in itself, provide justification for a fixed retirement age for everyone, is surprising. This seems to run counter to the whole ethos of anti-discrimination legislation, which is to ensure that judgments are made about employees as individuals and not based on stereotypical assumptions that performance decreases at a fixed age. However, to pass the test of 'proportionality' it is still up to the employer to demonstrate that there are reasonable grounds that show that the policy actually does actually avoid disputes about performance at age 65 and over.