

**In This Edition**

- An employment tribunal finds that a nurse was fairly dismissed for discussing religion with patients in an inappropriate manner during pre-surgery assessments, having been warned not to do so.
- ECJ AG Sharpston gives an opinion that generic risk assessments of jobs where breast feeding workers are involved are not compatible with EU law as each worker's personal circumstances have to be considered.
- An employment tribunal awarded an accountant £182,000 for age discrimination and unfair dismissal after he was pushed out of his job because the employer wanted him to retire at 65.
- A Work and Pensions Committee report has called on the Government to close loopholes that are allowing "bogus" self-employment practices which burden the welfare state and reduce tax contributions.

**Dismissal fair for discussing religion with patients in an inappropriate manner**

In [Kuteh v Dartford & Gravesham NHS Trust](#), Kuteh (K) is a committed Christian. She was employed as a nurse responsible for carrying out assessments of patients who were due to undergo surgery. Patients had complained that when K was carrying out assessments she had raised matters of religion with them, including one patient, about to undergo major bowel surgery for cancer, who was told that if he prayed to God he would have a better chance of survival. K was told that such discussions were inappropriate and should cease.

Further complaints were received, including a patient describing an encounter with K as “very bizarre” and “like a Monty Python skit” during which K had told him the only way he could get to the Lord was through Jesus and asking him to sing Psalm 23. Following an investigation and a disciplinary hearing, K was summarily dismissed for inappropriate behaviour/conduct that involved unwanted discussions on the topic of religion which resulted in verbal complaints from the patients.

An ET rejected K's claims of unfair dismissal and breach of her Article 9 Rights: Freedom of thought, belief and religion. K had been dismissed for a reason relating to her conduct. She had admitted that she had continued to have inappropriate discussions after being told they should stop, had gone too far and had breached her duty. K's conduct had caused a breakdown in trust and confidence and dismissal fell fairly and squarely within the band of reasonable responses. Furthermore, as K was prevented from inappropriately proselytising her beliefs, as opposed to being prevented from manifesting them, then Article 9 had no application to the facts of the case.

**Risk assessment for breast feeding workers must take individual circumstances into account**

Advocate General Sharpston gives an opinion that generic risk assessments of jobs where breast feeding workers are involved are not compatible with EU law as each worker's personal circumstances have to be considered. In [Ramos v Servicio Galego de Saúde and Instituto Nacional de la Seguridad Social](#) the ECJ was asked whether, if a job performed by the worker is included in a list of risk-free jobs drawn up by the employer after consulting the workers' representatives without further information regarding how those conclusions were reached, does this: (i) meet the requirement to conduct a risk assessment for a breast feeding worker? and (ii) if not, does it constitute direct sex discrimination?

AG Sharpston answered “no” to (i) and “yes” to (ii). The AG was clear that where a risk assessment is carried out there must be an examination of the individual situation of the worker who is breastfeeding to establish whether her safety and health or the safety and health of her child is at risk. Should the ECJ follow this opinion, which is normally the case, then it means that generic risk assessments of a particular job where workers are pregnant, have given birth in the last 6 months or are breastfeeding, are not compatible with EU law; the particular circumstances of each worker have to be assessed.

### **£182,000 for age discrimination after being forced to retire**

An employment tribunal awarded an accountant £182,000 for age discrimination and unfair dismissal after he was pushed out of his job because the employer wanted him to retire at 65. CIPD People Management [report](#) that John Peters successfully argued that his former employer, Rock Oil, had unfairly dismissed and discriminated against him in a bid to get the now 69-year-old to retire. The tribunal found that when Peters indicated that he did not intend to retire the management trumped up charges against him in a threatening manner. The tribunal also heard that the company refused to provide Peters with the information he needed to refute the allegations made against him and found that Rock Oil singled him out in that the allegations would not have been brought against a hypothetical company accountant who had not reached retirement age.

### **"Gig economy" companies free-riding on the welfare state**

A Work and Pensions Committee [report](#) has called on the Government to close loopholes that are allowing "bogus" self-employment practices which burden the welfare state and reduce the tax contributions. The Committee heard from "gig economy" companies like Uber, Amazon, Hermes and Deliveroo, and from drivers who work with them. The Committee say that the apparent freedom companies enjoy to deny workers the rights that come with "employee" or "worker" status fails to protect workers from exploitation and poor working conditions; it also leads to substantial tax losses to the public purse, and potentially increases the strain on the welfare state. The Committee take the view that an assumption of the employment status of "worker" by default, rather than "self-employed" by default, would protect both those workers and the public purse.

#### Content

*This update provides summary information and comment on the subject areas covered. Where employment tribunal and appellate court cases are reported, the information does not set out all of the facts, the legal arguments presented and the judgments made in every aspect of the case. Click on the links to access full details. If no link is provided, contact us for more information. Employment law is subject to constant change either by statute or by interpretation by the courts. While every care has been taken in compiling this information, SM&B cannot be held responsible for any errors or omissions. Specialist legal advice must be taken on any legal issues that may arise before embarking upon any formal course of action.*