



Nigel Harrison,
Partner

Direct Dial:
01743 237698

Born in the West Midlands, Nigel spent several years in industry working as a Mechanical Engineer before qualifying with Hatchers as a solicitor in 1998 specialising in employment law and personnel related matters.

In his spare time, Nigel's interests include the great outdoors, and spending time with his young family.



Bill Lamplugh,
Employment
Solicitor

Direct Dial:
01743 237697

Since qualifying as a solicitor in 1973 Bill has worked in Shrewsbury dealing with a variety of legal work, including employment law, personal injury claims and civil litigation. After retiring as Managing Partner of another local firm of solicitors. Bill then joined Hatchers as a consultant solicitor working with the employment team, consolidating our expertise.

Bill is a keen scuba diver and enjoys walking in the countryside.

Welcome to the latest issue of your free employment law update.

Christmas is approaching and many of you will be preparing company parties. While I'm sure you will have a wonderful time please remember that at a staff event you, the employer remain liable for the actions of employees. Might be worth reminding staff of the company policy. If you would like any help with that or any refreshment of policies and procedures please give me a call on 01743 237698.

The partners and staff of Hatchers would like to wish you a very Happy Christmas and New Year.

Regards

Nigel

In this month's issue we look at:

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IN BRIEF We provide an overview of the changes announced by the government last month in a "radical reform" of the employment law system. [[more...](#)]

Meet our Employment Team

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Nichola Gallen-Friend,
Employment
Solicitor

Direct Dial:
01743 237720

Having grown up in Nottinghamshire and studied law at Aberystwyth, Nichola has now settled in Shropshire. Nichola started as a trainee at Hatchers in October 2008 and qualified as a solicitor with the firm in July 2010 working in the Commercial and Employment Team dealing with employment matters.

Nichola enjoys socialising, going to musical theatre and travelling

Our specialist employment team can provide you with practical advice upon how this complex and rapidly changing area of law affects you.

- Recruiting staff
- Disciplinary and grievance procedures
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- Unfair dismissal
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- Equal pay
- Employment policies and handbooks
- Drafting and reviewing contracts of employment
- Family friendly rights
- Handling disciplinary matters fairly
- Discrimination
- Harassment and bullying
- Company takeovers and their effect on the employment relationship

Office address:

Park House (Park Plaza)
Battlefield
Shrewsbury
SY1 3AF

T: 01743 452852

F: 01743 452853

Email : n.harrison@hatchers.co.uk

Website : [click here](#)



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UPDATE ON DISABILITY DISCRIMINATION

The Equality Act 2010 (which applies in England, Scotland and Wales) outlaws discrimination against workers because of the "protected characteristic" of disability in employment (among other things).

What does the Act cover?

The Act covers all forms of discrimination in the workplace and applies to apprentices, those working under a contract of employment and the self employed working under a contract personally to do the work.

Ex-employees can also make a claim against a former employer, if they are complaining about something that was closely connected to their employment.

The employer is generally liable for acts of discrimination, harassment and victimisation in the workplace but individual employees may also be found liable.

Who is disabled under the Act?

To be protected, workers have to show that they have a "physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities".

People are still protected even if they can control or correct their disability - for example with medical treatment (although this excludes the use of aids such as glasses or contact lenses).

People who have had a disability in the past are covered, as are people with progressive conditions. People with HIV, cancer or multiple sclerosis are protected by the Act from the point of diagnosis.

What does the Act outlaw?

Direct discrimination is when someone is treated less favourably because of disability.

The comparison is with someone who does not have that disability but whose abilities and circumstances are the same or not materially different.

The definition is wide enough to cover workers who are also discriminated against because they are perceived to have a disability or because they are associated with someone who has a disability.

Unlike other discrimination legislation, however, it is not unlawful direct discrimination to treat a disabled person more favourably than a non-disabled person.

Indirect discrimination arises when an employer applies a provision, criterion or practice (PCP) which puts workers who share a disability at a particular disadvantage compared to those who do not share it, and which the employer cannot justify unless they can show that it was "a proportionate means of achieving a legitimate aim".

Discrimination arising from disability occurs when an employer treats a disabled person unfavourably "because of something arising in consequence of" the disabled person's disability. Employers can justify the treatment if it can be shown to be a proportionate means of achieving a legitimate aim. And they can defend a claim on the ground that they did not know or could not be reasonably expected to know, that the person has a disability.

The **duty to make adjustments** arises when a PCP or physical feature of the employer's premises places a disabled person at a substantial disadvantage in comparison to those who are not disabled.

The employer is required to take such steps as it is reasonable to have to take to avoid the disadvantage. What is reasonable may depend on whether the step would remove the disadvantage, the cost of taking it and whether there was any financial assistance available to help them take it.

Employers cannot argue that they were justified in not making the reasonable adjustment when the duty arises.

Harassment

This occurs when one person subjects someone else to unwanted conduct related to disability that has the purpose or effect of violating a person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

The definition of harassment also applies to those subjected to unwanted conduct because of another person's disability. So, for example, an employee who is subjected to offensive comments about their disabled daughter will be protected under the Act.

Employers may also be liable for harassment by third parties such as clients or customers, provided the employer knows the worker has been subject to harassment on two previous occasions and has not taken any reasonably practicable steps to prevent the harassment.

Victimisation

The Act says it is unlawful for an employer to victimise an individual because, in good faith, they:

- brought proceedings under the Act or previous discrimination legislation
- gave evidence or provided information in connection with proceedings that someone else brought

The person complaining of victimisation does not need to show they have a disability in order to bring a claim.

What health-related enquiries can employers make?

In general, employer must not ask about a job applicant's health or whether they have a disability until they have either been offered a job or been included in a pool of successful

applicants.

However, they can ask questions about or whether a person has a disability before offering the person a job if it will help them to :

- make a reasonable adjustment to the selection process
- decide whether an applicant can carry out a function that is essential to the job
- monitor diversity among applicants
- take positive action to help the disabled
- ensure that the candidate actually has the disability if the job genuinely requires the jobholder to have a particular disability.

What is the public sector equality duty?

Public bodies such as the NHS and those carrying out public functions are under a duty to consider equality when making day to day decisions both in terms of service delivery and employment. This consists of a general duty and specific duties.

What is positive action?

The Act allows employers to treat someone with a protected characteristic more favourably during the process of recruitment and promotion if they are "as qualified" as the other candidate, and they don't have a policy of treating people of the underrepresented group more favourably.

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REASONABLE ADJUSTMENTS

Employers are required, under the disability discrimination law, to make "reasonable adjustments" in certain circumstances. In **Leeds Teaching Hospital NHS Trust v Foster**, the Employment Appeal Tribunal (EAT) said that the adjustment just has to offer "a prospect" of alleviating the disadvantage, not a "real prospect" of doing so.

What happened?

Mr Foster had worked in the Trust's security department for many years but in October 2006 he went off sick with stress. He subsequently lodged a grievance of bullying and harassment against his manager, but this was dismissed in September 2007.

In January 2008 he agreed to return to work because he thought (wrongly, as it turned out) that he was to be redeployed to another department. He was then placed on the redeployment register for three months in June, but was unable to take up the only suitable job offered to him.

In September 2008, his manager left and it was decided he could return to the security department in October but this didn't happen because of continuing concerns about the impact on his health. He was deemed unfit for work in November and was dismissed in

February 2009. He claimed disability discrimination, among other things.

The tribunal said that the requirement for Mr Foster to work within the security department placed him at a substantial disadvantage. The cause of his disability (stress) was directly related to his work and he could not be expected to return until that had been resolved. As the Trust had never thought it necessary to find out what had caused it, there was never any chance of that happening.

It also ruled that the Trust should have made a reasonable adjustment by placing Mr Foster on the redeployment register in January 2008 when he was ready to return to work.

Had it done so, there was a "real prospect" that he would have returned to work with appropriate support.

The Trust appealed, arguing that putting him onto the register earlier was not a "reasonable" adjustment because there was no evidence from which the tribunal could conclude there was a "real prospect" that he would have been redeployed.

The EAT said that, following the decision in **Cumbria Probation Board v Collingwood**, there did not have to be a "real prospect" of Mr Foster returning to work by placing him on the register earlier; there just had to be "a prospect" of that happening.

As the Trust was a large employer with about 15,000 employees, 5,000 or so of whom worked at the location where Mr Foster was based, it was open to the tribunal to conclude that there was a good prospect that it might have found a suitable post for him in the first six months of 2008.

The burden of proving that that was unlikely to happen was down to the employer and in this case, the Trust failed to do so as it didn't produce any evidence to the contrary.

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LIGHT DUTIES

Employers must make reasonable adjustments for disabled employees if a provision, criterion or practice (PCP) puts them at a disadvantage in comparison to those who are not disabled. In **Salford NHS Primary Care Trust v Smith**, the Employment Appeal Tribunal (EAT) said that it was not a reasonable adjustment to expect the Trust to find some form of light work for a former employee or to allow her to take a career break.

What happened?

Ms Smith went off sick in March 2007 with a chest infection. She was diagnosed in September with chronic fatigue syndrome. While she was off work her job effectively ceased to exist and she had a series of meetings with her manager over the next year to decide what she might do when she returned to work.

She asked for a career break which the Trust refused. It asked her to consider a number

of other posts, but she said none were suitable. It also offered her IT training so that she could do administrative work, but she was unwilling to do this. Towards the end of May 2008, she wrote to complain that no progress was being made to facilitate her return.

She then failed to attend two meetings in May and June 2008 to discuss her future. The Trust wrote again towards the end of June inviting her to another meeting and making clear that termination of her employment was on the cards. She wrote back on 23 June saying that she had resigned. She claimed constructive unfair dismissal and disability discrimination, on the ground that the Trust had failed to make reasonable adjustments to allow her to return to work.

The tribunal concluded that the PCP in this case was the Trust's expectation that Ms Smith would do her full role within her contracted hours. This placed her at a substantial disadvantage because she was unable to multi-task, deal with clients or set up emotional barriers. She would, effectively, have to climb a "mountain" if she were to do her job.

Given the size of the Trust and the resources available to it, the tribunal said that it should have found alternative light work for Ms Smith to help her get back to work, as the Trust's own occupational health doctor had recommended. By not doing so, it had failed in its duty under the reasonable adjustment provisions of the disability discrimination legislation and had therefore discriminated against her.

The EAT disagreed. It said that it was not a reasonable adjustment to expect the Trust to find some form of light work for her or allow her to take a career break, for the simple reason that neither adjustment would have prevented the disadvantage caused by the PCP and would not have helped her to return to work.

As "reasonable adjustments are primarily concerned with enabling the disabled person to remain in or return to work with the employer", these proposals did not satisfy the requirements under the law. It concluded that: "Adjustments that do not have the effect of alleviating the disabled person's substantial disadvantage ... are not reasonable adjustments within the meaning of the Act".

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IN BRIEF

Towards the end of November, the government announced what it called the "most radical reform to the employment law system for decades".

The changes emerged from a consultation earlier in the year on resolving workplace disputes and the government's Red Tape Challenge review of employment law.

The changes include:

- A call for evidence on reducing the 90-day minimum period for collective redundancy consultations and the effectiveness of the 2006 TUPE regulations
- A consultation on introducing fees for anyone wanting to take a tribunal claim
- Requiring all employment disputes to go to the Advisory, Conciliation and

- Arbitration Service to be offered pre-claim conciliation before going to a tribunal
- From April 2012 increasing the qualification period for unfair dismissal from one to two years
- Publishing a consultation in the new year on 'protected conversations' to allow employers to discuss issues like retirement or poor performance in an open manner with staff, without this being used in any subsequent tribunal claims
- Initiating an independent review of the existing rules of procedure governing employment tribunals to address concerns that they have become too complex
- Consulting on measures to simplify compromise agreements, which will be renamed 'settlement agreements'
- Closing a whistleblowing case law loophole which allows employees to blow the whistle about their own personal work contract
- Merging 17 National Minimum Wage regulations into one set
- Consulting in the spring on streamlining the current regulatory regime for the recruitment sector
- Creating a universally portable Criminal Records Bureau check that can be viewed by employers instantly online, from early 2013

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