



Nigel Harrison, Partner (left)

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 tennis, fly-fishing, the great outdoors, and spending time with his young family.

Bill Lamplugh, Solicitor (right)

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.



Employment Team Member

Nichola Gallen-Friend

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

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](#)

Welcome to the latest issue of our free employment law update. In this month's issue we look at:

AGE DISCRIMINATION ROUND-UP We provide a brief overview of recent case law developments because of age discrimination and flag up some of the changes being introduced by the Equality Act 2010. [[more...](#)]

TERM BY TERM Under equal pay law, a "term" of a contract must have "sufficient content" so that it can be compared with a similar provision in another contract. We look at an appeal tribunal decision which said that tribunals must compare each term separately. [[more...](#)]

SALARY SACRIFICE Some companies offer employees "salary sacrifice" schemes, the value of which is then deducted from their salary. We look at a case which said that companies must pay VAT on retail vouchers offered to employees. [[more...](#)]

IN BRIEF Many of the provisions in the Equality Act 2010, which updates and brings together nine separate pieces of discrimination legislation into one single Act, came into force on 1 October. [[more...](#)]

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

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- Family friendly rights
- Handling disciplinary matters fairly
- Discrimination
- Harassment and bullying
- Company takeovers and their effect on the employment relationship

AGE DISCRIMINATION ROUND-UP

The Employment Equality (Age) Regulations, introduced in October 2006, made it unlawful for employers to discriminate against workers, employees, job seekers and trainees because of their age.

We provide a brief overview of some recent case law developments because of age discrimination and flag up some of the changes being introduced by the Equal Act 2010.

Changes under the Equality Act

The introduction of large chunks of the Equality Act 2010 this month has ushered in some changes to the rules regarding age discrimination.

From now on, they not only cover treatment based on a perception of someone's age, but also protection against discrimination because the person "associated" with someone who possesses a "protected characteristic" (the new terminology of the Act).

Acas gives the example of June, a project manager who has been promised a promotion. However, after she tells her boss that her mother, who lives at home, has had a stroke, the promotion is withdrawn because the boss thinks that she will not have time to concentrate on her new job due to caring responsibilities looking after her mother. This is likely to be "associative" discrimination.

Under the Act, employees will also now be able to complain of behaviour that they find offensive even if it was not directed at them. The complainant does not have to possess the relevant characteristic (in this case, age) themselves. And they are protected from harassment because of "perception" and "association".

Acas also warns employers that, under the Equality Act, they are potentially liable for harassment because of age (among other things) of employees by people who are not employees of the company, such as customers or clients.

This only applies, though, if the harassment had already happened on at least two previous occasions, the employer knew it had happened and had not taken reasonable steps to prevent it from happening again.

What about the default retirement age?

The original age discrimination regulations introduced a national default retirement age (DRA) of 65, allowing compulsory retirement over the age of 65.

However, the government announced recently that the DRA will be abolished from October 2011 with a six-month transition period phasing it out from April 2011.

Therefore, as the law now stands, an employer can dismiss an employee on that person's 65th birthday if that is the contractual DRA, as long as they stick to the correct procedures which involve giving not less than 6 month's notice to the employee and considering any representations made by the employee to work beyond the DRA.

The consultation to look at how the government can help employers by removing the "administrative burden" of statutory retirement procedures closes on 21 October.



Some recent EAT decisions

Direct and indirect discrimination

Unlike other forms of direct discrimination, direct age discrimination can be justified by employers if they can show it is a proportionate means of achieving a legitimate aim.

In **Seldon v Clarkson, Wright and Jakes and anor**, the Court of Appeal said it was not unlawful to have a compulsory retirement age of 65 as long as it could be shown to be a proportionate means of achieving the firm's aims.

It is indirectly discriminatory for employers to apply a provision, criterion or practice (PCP) which seems to apply equally to everyone but which, in reality, puts people of a certain age group at a disadvantage.

However, in **Chief Constable of West Yorkshire Police v Homer**, the Court of Appeal said that it was not indirect age discrimination to require staff at a certain grade to have a degree, as the requirement applied to everyone at that grade, irrespective of their age.

Justification

Employers can justify both direct and indirect age discrimination if it is a proportionate means of achieving a legitimate aim.

In **Kraft Foods UK Ltd v Hastie**, the Employment Appeal Tribunal said that a cap on a contractual redundancy scheme could be justified if the aim was to stop employees from receiving a windfall.

Burden of proof

In discrimination claims, the burden of proof can pass from the claimant to the appellant in certain circumstances, requiring them to prove they did not discriminate against the claimant.

In **Canadian Imperial Bank of Commerce v Beck**, the Employment Appeal Tribunal said that the use of the word "younger" in a recruitment briefing document was enough to reverse the burden of proof, as the word had been retained despite advice from a human resources professional that it was inappropriate.

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TERM BY TERM

Section 1(2) of the 1970 Equal Pay Act defines a "term" of a contract as a provision with "sufficient content" that can be compared with a similar provision in another contract. In **Brownbill and ors v St Helens and Knowsley Hospital NHS Trust**, the Employment Appeal Tribunal (EAT) said that tribunals must compare each term separately, not lump them all together.

What happened?

Mrs Brownbill and her colleagues claimed that prior to a new pay structure called Agenda for Change being introduced in August 2004, terms relating to unsocial hours in their contracts were less favourable to similar terms in the contracts of their male comparators.

The women were paid time and one third for working their normal contractual hours on Saturday and time and two thirds for Sunday and bank holidays. The men were paid time and a half for Saturday and double time for Sundays and bank holidays.

The women brought equal pay claims. At a pre-hearing review, the tribunal agreed that each of the claimants and the comparators had a clause entitling them to an enhanced payment for unsocial hours during the standard working week.

It said these were terms with distinct provisions and sufficient content so "that the benefits that are conferred by the provision can be contrasted". The judge also accepted that the "uplift" in the two sets of terms and conditions was of a different percentage.

However, the judge then went on to say that, following the decision in **Degnan v Redcar and Cleveland Borough Council** (in which the Court of Appeal ruled that an attendance allowance was part of a term dealing with basic hourly pay), the unsocial hours payments in this case had to be calculated as part of the women's basic pay. As the women earned more overall than their male counterparts when the payments were included, the tribunal said they were not treated any less favourably than the men.

Overtaking the tribunal decision, the EAT said that the tribunal had adopted the wrong approach and that it was irrelevant whether Mrs Brownbill and her colleagues would be better off overall if they received a similar uplift to the men.

The Equal Pay Act was not a "fair wages statute", nor was it "concerned with whether the outcome in any particular case is fair and equitable". The only question was whether "any term" of the women's contract was "less favourable to the woman than a term of a similar kind" in her comparator's contract.

In **Hayward v Cammell Laird Shipbuilders Ltd** (confirmed by numerous European decisions), the House of Lords had said that the "natural meaning of the word 'term' in this context is a distinct provision or part of the contract which has sufficient content to make it possible to compare it from the point of view of the benefits it confers with similar provision or part in another contract ...".

The EAT distinguished **Degnan**, saying that it did not establish the general principle that contract terms should be compared as a whole, rather than individually. In this case the tribunal had made clear that the relevant terms in the claimants' contracts could be compared with those of the comparators but had failed to do so.

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SALARY SACRIFICE

Some companies offer employees "salary sacrifice" schemes under which the employee opts to take advantage of a benefit, the value of which is then deducted from their salary. In **Astra Zeneca UK Ltd v Commissioners for Her Majesty's Revenue and Customs**, the European Court of Justice (ECJ) said that companies must pay VAT on retail vouchers offered to employees which may, in turn, have implications for such schemes.

What happened?

Astra Zeneca offered its employees an overall remuneration package which included a fixed amount of cash, called the "Advantage Fund", and a choice of benefits. Employees were made aware that, for each benefit they chose, the company deducted a specific amount from their "fund" - a form of salary "sacrifice". The benefits included £10 retail vouchers that could be used in certain shops to buy either goods or services.

Astra Zeneca bought the vouchers at a discounted price, which it passed onto the employees so that the salary they sacrificed was significantly less than the face value of the vouchers. The company then claimed that Her Majesty's Revenue and Customs (HMRC) should reimburse the VAT it had to pay on the vouchers when it bought them.

HMRC, however, did not agree and ruled that the company was liable to pay VAT on them, as they were being supplied to employees as part of their overall remuneration package, as per article 2(1) of the VAT directive. This states that the "the supply of goods or services effected for consideration" is subject to VAT and applies to any "taxable person".

The ECJ said the provision of a voucher to employees constituted "a supply of services for consideration", even if the employees were contractually entitled to take part of their remuneration in the form of a voucher. As the retail vouchers allowed the employees to purchase goods or services in specific shops, that gave them "a future right to goods or services" which weren't specified at the time of buying them.

Consequently, as the vouchers did not give the employees the immediate right to the goods or services, their provision constituted, for VAT purposes, a "supply of services".

In terms of whether the services were supplied for "consideration" (in other words, some sort of quid pro quo), the ECJ said all that was needed was a direct link between the service provided and the consideration received. In this case there was - Astra Zeneca provided the retail vouchers to employees and the employees "paid" for them by virtue of the deduction made by the company from their salaries.

The ECJ concluded therefore that article 2(1) "must be interpreted as meaning that the provision of a retail voucher by a company, which acquired that voucher at a price including value added tax, to its employees in exchange for their giving up part of their cash remuneration constitutes a supply of services effected for consideration within the meaning of that provision".

Although this decision may affect some employees who are members of salary sacrifice schemes, it will not apply to all of them. For instance, schemes that cover services which are exempt or outside the scope of VAT (such as pension contributions and some childcare vouchers). However, it may effect the value of benefits such as "cycle to work" schemes under which employees can buy bikes at a discount.

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IN BRIEF

Most of the provisions in the Equality Act 2010, which updates and brings together nine separate pieces of discrimination legislation into one single Act, came into force on 1 October.

The following were implemented on that date:

- The basic framework of protection against direct and indirect discrimination, harassment and victimisation in services and public functions; premises; work; education; associations; transport
- Changing the definition of gender reassignment by removing the requirement for medical supervision
- Improving protection for people discriminated against because they are perceived to have, or are associated with someone who has, a protected characteristic
- Applying the European definition of indirect discrimination to all protected characteristics
 - Extending protection from indirect discrimination to disability
 - Introducing a new concept of "discrimination arising from disability"
- Making it more difficult for disabled people to be unfairly screened out when applying for jobs
 - Allowing hypothetical comparators for direct gender pay discrimination
 - Making pay secrecy clauses unenforceable
- Introducing new powers for employment tribunals to make recommendations which benefit the wider workforce
 - Harmonising provisions allowing voluntary positive action.

The government is still considering how to implement the following provisions:

- the socio-economic duty on public authorities
- dual discrimination
- gender pay gap information
- diversity reporting by political parties
- positive action in recruitment and promotion.

The government is also currently consulting about how best to implement the new public sector equality duty.

For more information, go to: http://www.equalities.gov.uk/equality_bill.aspx

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