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*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.*



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*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.*

We trust you enjoyed your festive break and are now looking forward to the challenges of the new year.

One of your business new year resolutions might be to update and check compliance with your HR policies and procedures. If so please give me a call on 01743 237698. We'd be happy to help, Regards

*Nigel*

### In this month's issue we look at:

**OVERVIEW OF FLEXIBLE WORKING** We provide a brief overview of the right of certain employees to request flexible working. [[more...](#)]

**RELEVANT CONTEXT** The appeal tribunal has said that although the cost of making a reasonable adjustment for disabled employees in the workplace is not necessarily decisive as to whether it is reasonable, that does not mean it is not relevant. [[more...](#)]

**FACTUAL REFERENCES** It is well established in law that references must be true, accurate and fair. We look at a case in which the court clarified that factual accuracy is a central requirement of the reference, whereas fairness relates to the nuances or innuendo which might be drawn from the facts. [[more...](#)]

**IN BRIEF** We provide a brief summary of a recent review into health and safety legislation. [[more...](#)]

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*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*

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## OVERVIEW OF FLEXIBLE WORKING

Anyone can ask their employer for a flexible work arrangement, but some employees have the right under the law to request a flexible working pattern.

### Who has the right to request to work flexibly?

The person must:

- be an employee (excluding agency workers or members of the armed forces)
- have worked for their employer for 26 weeks continuously before applying
- not have made another application to work flexibly during the previous 12 months
- have or expect to have parental responsibility of a child aged under 17
- have or expect to have parental responsibility of a disabled child under 18 who receives Disability Living Allowance (DLA)
- are the parent/guardian/special guardian/foster parent/private foster carer or as the holder of a residence order or the spouse, partner or civil partner of one of these and are applying to care for the child
- are a carer who cares, or expects to be caring, for an adult who is a spouse, partner, civil partner or relative; or someone who lives at the same address

### What process must employees follow?

There is a specific process that employees have to follow if they want to make an application. It must be:

- be in writing (whether on paper or electronically)
- be dated
- state that the application is made under the statutory right to request a flexible working pattern
- give details of the flexible working pattern they are applying for, including the date from which they want it to start
- explain what effect they believe the new working pattern would have on their employer, and how any effects might be dealt with
- state whether they have made a previous application and, if so, when

### What should happen next?

If the employer agrees to the application, they must confirm this in writing and specify the date from which the proposed change will apply.

If the employer does not agree, they have to call a meeting within 28 days of the date of the application to discuss it. If the employee is off sick or on holiday, then the time limit can be extended to 28 days of their return to work. The employee has the right to bring a companion to this meeting, and although the companion can discuss issues with the employer they cannot answer questions on the employee's behalf.

After the meeting, the employer has to notify the employee of the decision within 14 days of that meeting, either agreeing to it or setting out the grounds for refusal in writing. The employer has to give a proper explanation for the refusal – a simple rejection by reference to one of the prescribed headings (see below) is not good enough.

The employee has the right of appeal by giving notice within 14 days of the date of the refusal. That hearing must be held within 14 days of the date on which the notice of appeal is lodged. The employer must notify the employee of their decision within 14 days of the date of the appeal hearing. Any of the time limits can be extended by mutual agreement, but the details of the change must be put in writing.

### **What are the grounds on which an employer can reject the application?**

Employers can rely on one of the following reasons to reject the application:

- the burden of additional costs
- a detrimental impact on their ability to meet customer demand
- an inability to reorganise the work amongst existing staff, or recruit additional staff
- a detrimental impact on quality or performance
- insufficient work during the hours when the employee intends to work
- planned structural changes.

### **Are the changes temporary or permanent?**

Any changes to the employee's working pattern will normally be permanent, unless the employer and employee agree otherwise.

### **How have employers responded to the right?**

Very positively on the whole. Recent figures obtained by the Chartered Institute of Personnel and Development show that out of a total of 218,100 employment tribunal complaints in 2010/11, just 277 claimed that employers had failed to observe the flexible working regulations.

The majority (229) of those claims were successfully conciliated by ACAS or settled out of court. Of the 48 that went to tribunal, only 10 were successful.

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## RELEVANT CONTEXT

The law requires employers to make reasonable adjustments for disabled employees in the workplace. In **Cordell v Foreign and Commonwealth Office** (FCO), the Employment Appeal Tribunal (EAT) said that although the cost of an adjustment was not necessarily decisive as to whether it was reasonable, that did not mean it was not relevant.

### What happened?

Ms Cordell, who was profoundly deaf and required the support of lipspeakers, started work for the FCO in 2001. She was posted to Warsaw in 2006, where she was supported by professional lipspeakers who commuted on a fortnightly basis from the UK and were accommodated in an embassy flat at an average annual cost of about £146,000.

In 2009 she accepted the offer of a posting to Kazakhstan. The FCO decided that, as the cost of providing lipspeaker support and other adjustments over three years would come to just over £1 million, this was not reasonable. Ms Cordell raised a grievance, arguing that there was little difference between the cost of the adjustments she required and the FCO policy of meeting the school fees of children of employees posted abroad. Her grievance was not upheld and she claimed direct disability discrimination and a failure to make reasonable adjustments.

The tribunal disagreed, saying there was a “material difference” between the situation of employees with children and hers, which would be “artificial” to ignore. In addition, the costs of making the adjustments were disproportionate as they came to five times her own salary and almost amounted to the total salary costs of all the diplomatic staff at the embassy in Astana. On any objective test, the cost of the adjustments was unreasonable.

The EAT agreed with the tribunal that the reason for withdrawing the offer was the cost of making the necessary adjustments, not Ms Cordell’s disability. And that she could not compare herself with a parent who benefitted from the payment of school fees as their circumstances were materially different to hers. In terms of making a reasonable adjustment, the EAT said that tribunals have to make a decision on the basis of what they consider “right and just”. This involved taking the following factors into account:

- the size of the budget for reasonable adjustments
- what the employer has spent in comparable situations
- what other employers are prepared to spend
- any collective agreement or other indication of what level of expenditure is regarded as appropriate by representative organisations.

Although the size of the budget was not decisive, that did not mean it was not relevant. The tribunal was therefore perfectly entitled to take the size of the FCO’s budget for reasonable adjustments into account when putting the claim into context.

The relative cost of the FCO’s allowances for paying school fees was also relevant in this context, but the EAT took the view that “what an employer is prepared to expend on other objects can never be more than of suggestive or indicative value when it comes to the question whether it was reasonable to expect it to meet the cost of a given adjustment”.

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## FACTUAL REFERENCES

Employers owe ex-employees a duty of care when providing references, so they must be true, accurate and fair. In **Jackson v Liverpool City Council**, the Court of Appeal said that factual accuracy was a central requirement of the reference, whereas fairness related to the nuances or innuendo which might be drawn from the facts.

### What happened?

Mr Jackson, a social worker with Liverpool City Council for 12 years, left in September 2007 to work for Sefton Council. He received a satisfactory reference from his then manager. A year later he applied for another job with Sefton that also required references.

This time, a different manager provided the Liverpool Council reference, which raised some concerns about his record keeping. She said these only came to light after he left Liverpool Council and would (if proven) have resulted in a formal improvement plan, had he stayed on. She also said, in a telephone call to Sefton, that she could not answer the other questions they had asked about him as part of the reference "in either a positive or negative manner" as the allegations had not been investigated formally.

Mr Jackson did not get the job and remained unemployed for about a year before finding another post with similar earnings. He brought a claim for damages against Liverpool.

The county court judge held that although the reference was true and accurate, it was not fair because "it carried with it an unanswered, uninvestigated, unparticularised, unspecified allegation implying he was unsatisfactory for employment". Mr Jackson was not given the opportunity to refute or answer the concerns raised, although they were serious enough to result in the job offer being withdrawn.

The Court of Appeal, however, allowed the appeal, saying that the central requirement of the reference, according to the decision of the Supreme Court in **Spring v Guardian Assurance plc and ors**, was factual accuracy. Fairness, on the other hand, according to the decision in **Bartholomew v London Borough of Hackney**, "related to the nuances or innuendo which might be drawn from the factual assertions".

The county court judge had been wrong, therefore, to consider fairness as a "form of some procedural mechanism which might permit the ex-employee to challenge an adverse opinion". The reference provided by Liverpool was both accurate and fair and the Court could not see how the council could have answered the questions posed by the reference without identifying the concerns that it had. It concluded that Liverpool could not be criticised for providing a reference which included a cautionary remark based on allegations made about Mr Jackson's record keeping. Liverpool had made clear to Sefton that it could not say whether the allegations were true as they had not been investigated.

Taken together, the reference and the subsequent telephone conversation were careful and "by no stretch of the argument unfair". The council should not be criticised for providing a reference, because a refusal would have been likely to cause Sefton to draw even more serious adverse inferences and withdraw the offer of employment.

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## IN BRIEF

The government recently published a review into health and safety legislation which has found that existing health and safety requirements are "broadly right".

The review, led by Professor Ragnar Lofstedt entitled "Reclaiming health and safety for all: an independent review of health and safety legislation" contains a number of proposals and recommendations which include:

- That the self-employed "whose work activities pose no potential risk of harm to others" be exempt from health and safety law
- That the Health and Safety Executive (HSE) should review all its Approved Codes of Practice by June 2012 so businesses have certainty about what is planned and when changes can be anticipated
- That HSE undertakes a programme of sector-specific consolidations to be completed by April 2015
- That legislation is changed to give HSE the authority to direct all local authority health and safety inspection and enforcement activity, in order to ensure that it is consistent and targeted towards the most risky workplaces
- That the original intention of the pre-action protocol standard disclosure list is clarified and restated and that regulatory provisions that impose strict liability should be reviewed by June 2013 and either qualified with 'reasonably practicable' where strict liability is not absolutely necessary or amended to prevent civil liability from attaching to a breach of those provisions.

The Department for Work and Pensions has said that it will now develop an implementation plan with HSE and other government departments and agree milestones for action.

To read the review, go to: <http://www.dwp.gov.uk/docs/lofstedt-report.pdf>

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