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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 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.

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

**DISCIPLINARIES AND GRIEVANCES** Following a record rise of tribunal claims last year, the government has announced new plans for resolving workplace disputes. [[more...](#)]

**COST OF DISCRIMINATION** Up until recently, tribunals have said that consideration of costs alone cannot justify discrimination. We look at a case which says there is no reason why they can't constitute justification. [[more...](#)]

**CANDYMAN** Although the terms of a contract may seem crystal clear at the time of signing it, we look at a case in which the court said the claimant was not entitled to a contractual bonus because he had to be "employed" by the company to receive it. [[more...](#)]

**IN BRIEF** The government has provided more information about its plans for a new system of flexible parental leave. [[more...](#)]

**Meet our Employment Team**  
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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.

- Recruiting staff
- Disciplinary and grievance procedures
- Employment tribunals
- Unfair dismissal
- Redundancy
- Compromise agreements
- 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

## DISCIPLINARIES AND GRIEVANCES

Last year, the number of employment tribunal claims rose to 236,000, a 56 per cent rise on 2009 and a record figure.

With businesses spending on average £4,000 to defend a claim, it's perhaps no surprise that the government last month announced new plans for resolving workplace disputes which emphasise the importance of early resolution.

The key proposals set out in its consultation document (consultation closes on 20<sup>th</sup> April 2011) include:

- increasing the qualifying period for employees to bring a claim for unfair dismissal from one to two years
- requiring the payment of a fee in order to lodge a tribunal claim
- encouraging parties to resolve disputes between themselves as early as possible by requiring all claims to be submitted to Acas before a tribunal to allow Acas a period of up to a month to offer pre-claim conciliation
- tackling weak and vexatious claims – providing tribunals with a range of more flexible case management powers so that weaker cases can be dealt with in a way that does not mean disproportionate costs for employers.
- And controversially introducing automatic financial penalties for employers found to have breached employment rights, on top of ordinary compensation already payable

Acas (the conciliation service) has welcomed the emphasis that the government has placed on early resolution, stressing the amount of time and money that employers can save by not ending up in a tribunal.

The government will have to invest in Acas by recruiting additional conciliators to deal with this proposed pre-hearing conciliation as the service is already under pressure to deliver.

Its codes of practice recommend how employers should handle disciplinaries and grievances, should they arise and ideally, employers should incorporate these points into their own policies.

### **What does the Acas code of practice state?**

With regard to disciplinaries, the code states that:

- Employers should carry out an investigation without delay to establish the facts, with different people undertaking the investigation and hearing the disciplinary (if possible)
- Employers should inform employees in writing of the basis of any alleged misconduct, giving them enough information to allow them to answer the case at a hearing
- Employers should give employees the chance to put their side of the story before making any decisions. When giving written notification of the time and venue of

the hearing, employers should include copies of any written evidence and inform the employee of their right to be accompanied at the hearing

- At the meeting the employer should explain the complaint and go through the evidence. The employee should be allowed to set out their case, answer any allegations that have been made and have a reasonable opportunity to ask questions, present evidence and call relevant witnesses
- After the meeting the employer must decide what disciplinary action is appropriate and inform the employee accordingly in writing. They should then allow employees to appeal the decision
- If an employee is persistently unable or unwilling to attend a disciplinary meeting without good cause the employer can make a decision in their absence, on the evidence available to them

With regard to grievances, the code states that:

- Employees should set out a potential grievance in writing, having tried to resolve it informally
- Employers should then arrange for a formal meeting to be held as soon as possible and then decide what action to take
- They should set out their decision, in writing, and, where appropriate, make clear what action they intend to take to resolve the grievance
- The employee should be told that they can appeal if they are not happy with the decision
- The appeal should be heard as soon as possible, at a time and in a place that the employee has been told in advance. It should be dealt with impartially and wherever possible by a manager not previously involved in the case.

The code recommends in general that:

- Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions

Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting. [Note that a tribunal can award up to 2 weeks' pay to an employee who complains to it that his employer has failed to comply with his reasonable request to be accompanied at a meeting]

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## COST OF DISCRIMINATION

Although it is well-established that consideration of costs alone cannot justify discrimination, the Employment Appeal Tribunal (EAT) has cast doubt on that orthodoxy in **Woodcock v Cumbria Primary Care Trust, (2010)** saying there was no reason why consideration of costs in and of themselves could not constitute justification.

Mr Woodcock was the chief executive of the North Cumbria Primary Care Trusts (PCTs), but in 2005 it was decided to reduce the number of PCTs in the area and Mr Woodcock's post disappeared. He was seconded in February 2006 to the Cumbria and Lancashire Special Health Authority (SHA) to a temporary role until 1 October, when his employment was transferred to the new Cumbria PCT. He was not, however, appointed to one of the new chief executive posts and continued in a number of temporary roles. In March 2007, his new employer asked him to attend a meeting to discuss his "employment status" on 6 June.

At some point before the meeting, the Trust realised that if it did not give Mr Woodcock 12 months notice of dismissal before 17 June, he would still be in employment on his 50th birthday (17 June 2008), allowing him to claim early retirement on enhanced terms. This could have cost the Trust anything between £500,000 and £1,000,000.

It therefore wrote to him on 23 May giving 12 months' notice of dismissal. The meeting went ahead on 6 June but Mr Woodcock said that consultation was meaningless when he had already been given notice. He asked the Trust to withdraw the notice but it refused and Mr Woodcock claimed age discrimination among other things. The tribunal agreed that he had suffered direct discrimination in that he was dismissed without "proper consultation" because of his "impending forty ninth birthday". However, it said the discrimination was objectively justified because the Trust's aim was to avoid the additional cost it would incur if he reached age 50 before the end of his notice period.

It then dealt with the decision in **Cross v British Airways (2005)** which said that cost alone cannot be a legitimate aim for justifying discrimination but it can be put into the "balance". The tribunal concluded that as the discriminatory act in this case was the failure to have a consultation meeting and as that would not have made any difference as to whether he was dismissed or not, the discriminatory act was proportionate in the circumstances.

And the EAT agreed, saying the tribunal had correctly applied the "costs plus" test in **Cross**. Although the Trust was motivated by the potential costs consequences of allowing Mr Woodcock to remain in employment until his 50<sup>th</sup> birthday, "it would be artificial to regard that factor in isolation" as the only reason for his dismissal.

As a matter of principle and common sense the EAT then went on to say that "considerations of cost must be admissible in considering whether a provision criterion or practice which has a discriminatory impact may nevertheless be justified."

It could not see any principled basis for a rule that considerations of cost could never by themselves constitute sufficient justification. Having such a rule, it said, just tended to involve both the parties and tribunals in "artificial game-playing" which was likely to produce arbitrary and complicated reasoning, not least because deciding where "cost" stopped and other factors started was far from straightforward. [[Back to contents](#) ]

## CANDYMAN

Although the terms of a contract may seem crystal clear at the time of signing it, the decision in **Locke v Candy and Candy Limited** (2010) shows they may be anything but. The Court of Appeal held that after being summarily dismissed, Mr Locke was not entitled to a contractual bonus because of a clause which stipulated that he had to be "employed" by the company to receive it.

Mr Locke started work on 17 September 2007 as the project director for Candy & Candy overseeing a major property development on behalf of the Qatari government on an annual salary of £200,000.

He was entitled to a bonus of £160,000 after 12 months in the job, but only if he was still "employed by the company" (clause 4.2). Under clause 7.1, the company could terminate his employment with six months notice; under 7.5 it had the right to make a payment in lieu of notice (PILON); and under clause 7.6 it had the right to put him on "garden leave" during "any period of notice".

The company then tried to make changes to his contract which Mr Locke rejected. It terminated his contract on 7 September, giving him six months salary in lieu of notice but withheld the bonus on the basis that he had not been employed for 12 months.

Mr Locke claimed that he was entitled to the bonus because had he been asked to work his notice or had he been put on "garden leave", he would have notched up a year's employment.

However, the High Court disagreed. It pointed to the "detailed provision" for garden leave in the contract as well as the provision for payment in lieu of notice, giving the company the right to terminate his contract with immediate effect.

It reasoned that if Mr Locke was right and the company was obliged to pay six months' salary and the bonus, then the company had voluntarily accepted " a most onerous obligation from which it derived no advantage". It concluded that "this interpretation is strained, unnecessary and inconsistent with the clauses 4.2 and 7 of the agreement."

And a majority of the Court of Appeal agreed. It pointed out that as the PILON clause did not stipulate how much should be paid in lieu of notice, "the amount had to be found somewhere else in the contract". That meant the court had to look at the rest of the contract and interpret it "holistically".

Reading the contract "in its entirety" and giving the words in clause 4.2 their natural meaning, it concluded that "provided the employer makes the right payment in lieu of notice, the employment of the employee with the employer comes to an end".

Clause 4.2 must therefore apply to a situation in which the company had exercised its rights under clause 7.5 to make a payment in lieu of notice.

The unfortunate result was that Mr Locke was thereby "deprived of a bonus to which he would have been entitled had he completed one year's service, which he almost had, but that ... was the consequence of what the parties had agreed." [[Back to contents](#) ]

## IN BRIEF

The government has recently provided more information about its plans for a new system of flexible parental leave to help parents balance their work and family commitments.

It also announced last month that the Department for Business will launch a consultation in the near future to explore proposals for a more flexible system of parental leave.

In addition, the consultation will consider how best to extend the right to request flexible working to all employees.

In the meantime, the government has said that the changes should embody the following principles:

- Any new arrangements must maintain women's guaranteed right to time off in the first months after birth, paid as it is now
- Any new arrangements must protect the rights of lone mothers
- The reforms must transform the opportunities for fathers to take time off to care for their children
- Mothers and fathers must be able to share part of their leave, splitting it between them, in whatever way suits them best
- The new system must take into account the needs of employers and it must be simple to administer.

Currently, employed mothers are entitled to 26 weeks' Ordinary Maternity Leave and 26 weeks' Additional Maternity Leave, a combined total of 52 weeks maternity leave, 39 of them paid (the first six at 90 per cent of earnings and the rest at a fixed rate which is currently £124.88 per week, rising to £128.73 from April 2011). Employed fathers are currently entitled to two weeks' leave paid at the same fixed rate.

The government says that although 'this system is inflexible and does not support shared parenting', it has decided to retain the Additional Paternity Leave regulations agreed by the last government for the time being.

These cover parents of a baby due on or after 3 April 2011 and give employed fathers a right of up to six months extra leave which can be taken once the child's mother has returned to work after 20 weeks. Some of the leave may be paid if taken during the mother's maternity pay period.

An employee/father must give eight weeks' written notice before taking paternity leave.

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