



Nigel Harrison,
Partner

Direct Dial:
01743 452871

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,
Solicitor

Direct Dial:
01743 452876

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.

The talk of further recession is hardly encouraging for business and for many it's survival of the fittest. With that in mind we would strongly suggest you give your HR policies and processes a work out. If you'd like a little help with that....please give us a call on 01743 452852

Regards

Nigel

In this month's issue we look at:

AGENCY WORKER REGULATIONS We take a look at the Agency Worker Regulations 2010 which came into force on 1 October 2011. [[more...](#)]

TRUE TERMS It is not always easy to decide who is an employee and who is a worker. We look at a case in which the Supreme Court said that tribunals can disregard the written terms of a contract when they don't reflect the true agreement between the parties. [[more...](#)]

REASONABLY ADJUSTED Although the law requires employers to sometimes make "reasonable adjustments" for disabled employees, the appeal tribunal has said that does not include replacing subjective redundancy criteria with objective ones. [[more...](#)]

IN BRIEF The government has issued guidance for businesses who offer work experience, placements and internships on when to pay the National Minimum Wage. [[more...](#)]

Meet our Employment Team
[Click Here](#)



**Nichola
Gallen-Friend,**
Employment
Team Member

Direct Dial:
01743 452102

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
- 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

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](#)



Follow us on Twitter

Employment Law Tweets

General Firm Tweets

Commercial Litigation Tweets

In case now or in the future you need legal advice on a motoring issue:

Did you know that Hatchers also have specialist motoring defence lawyers who provide a unique nationwide service to private individuals, industry and commerce? We focus on strategies to prevent or reduce motoring offences occurring and give advice and legal representation on all motoring matters.

Our motto is Prevent and Protect but whenever necessary we are dedicated to React and Retain both your liberty and your driving licence.

Business owners need to ensure that they have a policy and procedure in place to avoid (or reduce) the Company's exposure to a prosecution.

We can advise you on your liability and ensure that you have a comprehensive Road Safety policy in place which has additional benefit of reducing your carbon footprint.

Call Andrew Holland on 01743 248545



AGENCY WORKER REGULATIONS

A new set of regulations covering the employment of agency workers - the Agency Worker Regulations 2010 - came into force on 1 October 2011.

They apply to:

- agency workers - individuals supplied by a temporary work agency to work temporarily for a hirer
- temporary work agencies involved in the supply of temporary agency workers, either directly or indirectly, to work temporarily for and under the direction and supervision of a hirer
- and hirers (private, public and third sector)

The regulations do not apply to the self-employed, in-house temporary staffing banks and individuals working under a managed service contract (when a company provides a specific service to a customer, such as catering or cleaning).

What rights do agency workers have?

From their first day on the job, agency workers are now entitled to access "facilities" and amenities and to be given notification about "relevant " job vacancies in the organisation.

"Facilities" include: canteens or other similar facilities; workplace crèches; transport services (such as transport between sites, but not company car allowances or season ticket loans); toilets/shower facilities; staff common room; waiting room; mother and baby room; prayer room; food and drinks machines.

What rights do agency workers have after 12 weeks?

After twelve weeks on the job, agency staff are entitled to the same "basic working and employment conditions" as other directly recruited staff.

These rights are limited to pay (basic pay, including any fee, bonus or commission related to the work done by the agency worker, holiday pay and vouchers or stamps which have monetary value); duration of working time (e.g. if working is limited to a maximum of 48 hours a week); night work; rest periods; rest breaks; annual leave.

Pregnant agency workers who have completed the 12 week qualifying period are entitled to paid time off for ante natal appointments.

What counts as a week?

The 12 week qualifying period is triggered when an agency worker works in the same job with the same hirer for 12 calendar weeks (any period of seven days starting with the first day of an assignment).

Workers can include weeks when they only work for a few hours a week in the same assignment.



When does the clock stop and start?

As the working patterns of agency workers can be irregular, the regulations set out a number of circumstances in which they still clock up time, even though they have had a break from work. The government guidance compares this to a clock, which can be paused and resumed or set to zero, as follows.

Reset to zero

Reasons for the qualifying clock to reset to zero will usually be because the agency worker begins a new assignment with a new hirer; stays with the same hirer but not in the same role; has a break between assignments with the same hirer of more than six weeks (which is not one which 'pauses' the clock or during which it continues to 'tick').

Paused

Types of break that will cause the qualifying clock to 'pause' and then resume include a break for any reason if it is no more than six calendar weeks and the agency worker returns to the same role with the same hirer; a break of up to 28 weeks because the agency worker is incapable of work because of sickness or injury; any break to take leave to which the worker is entitled; to perform jury service; a break caused by a regular and planned shutdown of the workplace by the hirer (for example at Christmas); a break caused by a strike, lock out or other industrial action at the hirer's establishment.

Ticking

Breaks where the clock continues to tick include breaks due to pregnancy, childbirth or maternity which take place during pregnancy and up to 26 weeks after childbirth; any breaks due to the worker taking maternity leave, adoption leave or paternity leave.

In each of these cases the clock will continue to tick for the originally intended duration of the assignment, or the likely duration of the assignment (whichever is longer).

Can employers terminate the contract before the 12 weeks are up?

Yes, there is nothing in the regulations to prevent hirers from releasing an agency worker after, say, 11 weeks.

However, the regulations do also include some anti avoidance provisions. These apply where an agency worker is prevented from completing the 12 week qualifying period because of the way the work assignments have been structured. In that case, a tribunal may decide that this is done with the intention of depriving the agency worker of equal treatment. If so, the agency worker will be deemed to have completed the 12-week qualifying period and entitled to the right to equal treatment.

This could result in a tribunal making an additional award to the agency worker of up to £5,000

[\[Back to contents \]](#)

TRUE TERMS

Although the law defines who is an employee and who is a worker, it can often be hard for tribunals to decide their status in reality. In **Autoclenz Ltd v Belcher and ors**, the Supreme Court said that tribunals can disregard the written terms of a contract when they don't reflect the true agreement between the parties.

What happened?

Mr Belcher and his colleagues, car valeters for Autoclenz, worked under contracts that described them as self-employed contractors. They were paid on a piecework basis and paid their own tax and National Insurance. They also paid for their own insurance and gave the company five per cent of their weekly pay for cleaning equipment.

In 2007 Autoclenz introduced revised terms of contract with two new clauses - one stating that they did not have to carry out the work personally (substitution clause); the other stating that there was no obligation on Autoclenz to provide work nor on the valeters to accept it (non-mutuality of obligation clause).

In November 2007 Mr Belcher and a number of his colleagues claimed that they were employees, alternatively workers, and that they were, consequently, entitled to the minimum wage and to paid holiday.

Relying on the decision of the EAT in **Consistent Group Limited v Kalwak**, the tribunal judge decided that the valeters were employees because the substitution clause and the right to refuse work were "unrealistic possibilities". He concluded that the degree of control exercised by Autoclenz in the way the "contracts were performed placed them in the category of contracts of employment".

The EAT, however, disagreed, holding that before a tribunal can decide that a term of a contract was a sham, it had to be shown that both parties intended to mislead somebody. As there was no intention on the part of the valeters to mislead anyone in this case, the written term could not be a sham. There was therefore no mutuality of obligation and the valeters could not be employees.

The Court of Appeal, however, overturned that decision, saying that it was essential for a tribunal to "consider whether or not the words of the written contract represent the true intentions or expectations of the parties (and therefore their implied agreement and contractual obligations), not only at the inception of the contract but at any later stage where the evidence shows that the parties have expressly or impliedly varied the agreement between them". And the Supreme Court has now agreed with that. It ruled that clauses in the contracts of the valeters which were designed to suggest that they were self-employed and not employees, should be disregarded.

The tribunal had been entitled to hold that the valeters' contracts did not reflect the true agreement between the parties. These were that they would perform the services defined in the contract; that they would be paid for that work; that they were obliged to carry out work offered to them and Autoclenz to offer it; and that the valeters must personally do the work and could not provide a substitute to do so.

[\[Back to contents \]](#)



REASONABLY ADJUSTED

The 1995 Disability Discrimination Act (now the Equality Act) requires employers to make “reasonable adjustments” for disabled employees in certain circumstances. In **Lancaster v TBWA Manchester**, the Employment Appeal Tribunal (EAT) said that it was not a reasonable adjustment to require the employer to replace subjective redundancy criteria with objective ones.

What happened?

Mr Lancaster had been a senior art director at the company since 2003, but was told in 2009 that, as a result of the financial crisis, he might be made redundant. He was placed in a pool of three with two other senior art directors for selection for redundancy and scored against 16 selection criteria. He scored the lowest and was dismissed in June 2009.

It was accepted that he was a disabled person within the meaning of the Disability Act because of a panic and social anxiety disorder. He claimed disability discrimination (among other things) arguing that the company had failed to make reasonable adjustments and should have:

- removed three of the 16 criteria altogether (ability as team player; attitude to others; and participating in company activities) because these put him at a disadvantage, or
- replaced all the redundancy selection criteria with more objective criteria, such as attendance, disciplinary or absence record

The tribunal dismissed Mr Lancaster’s disability discrimination claim, holding that although the three criteria placed him at a substantial disadvantage in comparison with someone who was not disabled, removing them would not be a reasonable adjustment as he would still have ended up with the lowest score.

As for replacing the criteria as a whole with more “objective” measurements, the tribunal said that it had no evidence to suggest that would have saved him from being made redundant.

And the EAT agreed, saying that removing the three criteria was not a reasonable adjustment as tribunals are bound by section 18B(1)(a) of the Disability Act to have regard in particular to factors which include “the extent to which taking the step would prevent the effect in relation to which the duty is imposed.”

As for removing all the original selection criteria and replacing them with more objective ones, the EAT said that the position of senior art director was a creative position at a senior level and, therefore, purely objective criteria might not have been appropriate.

In any event, it was for the tribunal to decide, on the evidence before it, whether it would have made any difference to the end result. This tribunal had decided it would not.

[\[Back to contents \]](#)



IN BRIEF

The government last month issued guidance for businesses who offer work experience, placements and internships, which makes clear when someone is entitled to be paid the National Minimum Wage (NMW).

It also includes a new worker checklist for employers and examples of case studies, which aims to make sure that those who are entitled to the NMW receive it.

Irrespective of job title, the guidance states that workers are entitled to be paid the minimum wage if the arrangement that an employer has with them makes them a worker for NMW purposes.

The term "intern" has no legal status under NMW law, so entitlement is not dependent on on what someone is called, the type of work they do, how the work is described (eg 'unpaid' or 'expenses only') or the profession or sector they work in.

Although some forms of work experience, including placements and internships, may be referred to as 'unpaid work' or 'expenses only' (where an individual gives their services free of charge in order to develop or maintain their skills), organisations must check if the individual is a volunteer for NMW purposes or if an exemption applies.

To download the government's guidance, go to: www.businesslink.gov.uk/nmw

[[Back to contents](#)]

Disclaimer:

This newsletter is a summary of legal issues not intended to provide specific legal advice nor intended to be comprehensive. If advice is required please contact your solicitor. This transmission is intended solely for the addressee (s) and is confidential. If you are not the named addressee, or if the message has been addressed to you in error, you must not read, disclose, reproduce, distribute or use this transmission. Delivery of this message to any person other than the named addressee is not intended in any way to waive confidentiality. If you received this transmission in error please contact the sender or delete the message.

List Maintenance

To unsubscribe from this e-mail update please e-mail unsubscribe@hatchers.co.uk