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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.*

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

As we head into Autumn it can be a time when we face increased sickness absence. How do you manage these tricky staffing issues? Can we help? Give us a call on 01743 248545

Regards

*Nigel*

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

**FORTHCOMING LEGISLATION** In general, the government introduces legislative changes twice a year. We provide an overview of the main changes effective for the next six months from October 2011. [\[more...\]](#)

**COST OF RELIGION** Indirect discrimination is potentially justifiable by employers. We look at a case in which the Employment Appeal Tribunal said that employers can rely on cost to justify an otherwise indirectly discriminatory policy. [\[more...\]](#)

**JOB CAPABILITY** The Employment Appeal Tribunal has confirmed that the decision to dismiss someone is ultimately a managerial, not a medical one, and that employers have to make their own assessment of the risks involved in a return to work. [\[more...\]](#)

**IN BRIEF** A report published last month has found that the work-life balance of many workers in the UK has deteriorated as a consequence of the recession. [\[more...\]](#)

**Meet our Employment Team**  
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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*

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
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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.

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Call Andrew Holland on 01743 248545

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## FORTHCOMING LEGISLATION

In general, the Department for Business, Innovation and Skills introduces legislative changes twice a year – April and October. The idea is to make it easier for employers (and employees) to keep abreast of the changes. The following are effective from October 2011.

We will publicise the changes that become effective in April 2012 in our March edition of HReSource.

### **Equal treatment for agency workers**

Effective from 1 October 2011

The Agency Workers Regulations 2010 give agency workers the right to “facilities” and amenities and information about job vacancies in the organisation from day one on the job.

After twelve weeks’ work on the same job, they are entitled to the same “basic working and employment conditions” as other directly recruited staff, including basic pay, holiday and overtime payments.

### **National minimum wage**

Effective from 1 October 2011

The main rate of the national minimum wage will increase from £5.93 to £6.08 per hour; the development rate from £4.92 to £4.98 per hour; the rate for workers aged 16 to 17 from £3.64 to £3.68 per hour; and the apprentice rate from £2.50 to £2.60 per hour.

### **Retirement date**

Effective from 4 January 2012

January 4 2012 is the last date on which an employee can make a statutory request not to retire on the intended date of retirement under the statutory retirement procedure.

### **Specific public sector equality duties**

Date to be confirmed

In addition to the general equality duty, section 153 of the Equality Act 2010 gives the government a power to impose specific duties on certain public bodies to help them perform the equality duty more effectively.

The aim of the regulations is to promote the “better performance of the equality duty” by

requiring those public authorities to publish:

- equality objectives, at least every four years
- information to demonstrate their compliance with the equality duty, at least annually

The latter will need to include, in particular, information relating to their employees (for authorities with 150 or more staff) and others affected by their policies and practices, such as service users.

The draft Equality Act 2010 (Specific Duties) Regulations 2011 were laid before Parliament in June 2011 and debated in the House of Commons in July. The debate in the House of Lords is expected to take place in September 2011 and the specific duties will come into force following parliamentary approval.

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## COST OF RELIGION

Indirect discrimination is potentially justifiable by employers. This is when an employer can show that a provision, criterion or practice (PCP) which puts some workers at a disadvantage if it is a proportionate means of achieving a legitimate aim. In **Cherfi v G4S Security Services Ltd**, the Employment Appeal Tribunal (EAT) said that employers can rely on cost to justify what would otherwise be an indirectly discriminatory policy.

### What happened?

Mr Cherfi worked as a security guard for G4S on a site in Euston for several years which he left every Friday lunchtime to attend prayers at the local mosque, with the agreement of G4S. He then moved to a site in Highgate which he was also allowed to leave.

However a new contract between G4S and the site owner meant that the company had to ensure a minimum number of guards on site during operating hours. Mr Cherfi's absences meant it could not fulfill its contractual obligation and were in danger of losing the contract, involving financial penalties.

G4S withdrew its permission, but Mr Cherfi continued to leave on Friday lunchtimes to go to the mosque and was suspended for an allegedly unauthorised absence. In October 2008, he raised a grievance which included the fact that he had been refused permission to attend the mosque.

The company explored various options to resolve the problem, including changing his shift pattern so that he worked one day at the weekend instead of Fridays. It also suggested that he use a prayer room which was available on site.

Mr Cherfi turned down the proposals but began unofficially not to appear for work on

Fridays by taking holiday, sickness absence, or unauthorised unpaid leave on these days. When G4S told Mr Cherfi that this could not continue, he raised an indirect religious discrimination claim arguing that G4S's policy placed Muslims at a particular disadvantage.

The tribunal disagreed, holding that the requirement to be on site was a proportionate means of achieving the legitimate aim of meeting the employer's operational needs. Otherwise G4S would suffer financial penalties. It pointed to the fact that the company had offered an alternative work pattern to Mr Chelfi and provided a prayer room on site.

The EAT agreed with the tribunal that G4S had applied a PCP to Mr Cherfi which put him, as a practising Muslim, at a disadvantage because he could not attend prayers "in congregation". However, it concluded that requiring Mr Cherfi to remain on site was a proportionate means of achieving the company's legitimate aim to comply with the contract, given the "substantial" financial penalties that the company would face.

It rejected Mr Cherfi's argument that economic considerations on their own could not justify a discriminatory policy, holding instead that financial implications were sufficient to make the discriminatory policy reasonable and proportionate. Although this was not a case in which costs alone were used to justify the PCP, the EAT said that, given the overall position and the alternatives open to the company, the tribunal would have been entitled to come to the conclusion that it did, even if cost had been the only consideration.

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## JOB CAPABILITY

To avoid a finding of unfair dismissal on the ground of capability, employers have to show they have a reasonable belief that the person is unable to return to work. In **DB Schenker Rail (UK) Ltd v Doolan**, the Employment Appeal Tribunal (EAT), said that the decision to dismiss was ultimately a managerial, not a medical one, and that employers have to make their own assessment (informed by experts) of the risks involved in a return to work.

### What happened?

Mr Doolan worked in a job that was considered to be 'safety critical'. Towards the end of 2004, he was treated for stress/depression. He returned to work in June 2005 but was signed off again in August 2007, a few months after taking on the more responsible post of production manager.

His GP said he was fit to return in February 2008, but the company referred him to an occupational health (OH) doctor, who also said he was fit to return. It then instructed an occupational psychologist who concluded that he was likely to succumb to further periods of stress-related absence in his current role.

At a meeting on 12 May, Mr Doolan said it was highly unlikely that he would go off sick

because of stress again, but that if he did, the company could start disciplinary proceedings immediately. The company then decided that it did not think he could return to his role of production manager and, after having considered whether there were alternative positions available, dismissed him on 18 June on capability grounds.

Although the tribunal accepted that the reason for dismissing Mr Doolan was capability, it held that he had been unfairly dismissed because the company did not have reasonable grounds for its belief that he could not return to work as a production manager.

It said it was outside the bands of reasonable responses to reject Mr Doolan's offer to return to work, given the undertaking he had made. Likewise the decision to dismiss him, as this contradicted what his own GP and the OH doctor had said. And it was unreasonable because the psychologist had not said that he could not return to his post.

The EAT said that the tribunal had to consider whether the company genuinely believed in the reason that it gave; whether it was a reason reached after a reasonable investigation; and whether they had reasonable grounds on which to come to that conclusion. Although employers must ascertain the "true medical position" for a dismissal to be fair, this did not mean they had to carry out more of an investigation into a medical, as opposed to a misconduct, case.

On that basis, the issue for the tribunal to decide was whether a reasonable organisation could find, from the material before them, that Mr Dooley was not capable of returning to his role of production manager. It also had to bear in mind that the decision to dismiss is a managerial, not a medical one.

Although medical reports can help employers to make an informed decision, ultimately it's for them to decide whether to allow someone to return or dismiss them on the grounds of capability. They have to make their own assessment (informed by experts) of the risks involved in a return to work.

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## IN BRIEF

A report published last month has found that the work-life balance of many workers in the UK has deteriorated as a consequence of the recession.

The Balancing Act report, commissioned by the Cornwall Development Company, examined the views of 3,000 workers from across the UK. One-in-three (35%) said they were spending more time at work and less time at home since the start of the downturn.

A third of people (29%) questioned in the study blamed additional responsibilities; while around a fifth (21%) cited understaffing; and a similar number (18%) held the rising cost of living responsible for longer hours. One-in-five (19%) said they were scared of losing their job.

On average staff work 30 days a year of unpaid overtime, with family and friends bearing the brunt of workers' poor work-life balance. One in ten even said their sex life had suffered.

Those working in larger businesses, with over 250 employees, are the most likely to support the effects of a good work-life balance on their firm's bottom line, with almost nine-out-of-ten (86%) believing it has a positive effect on productivity.

The report also highlights the steps employers can take to improve the work-life balance of their employees. A third of people (28%) believe flexible working hours would most improve their work-life balance. More support from colleagues and an improved working environment were also cited as steps they could take.

External factors also have a role to play, with 40 per cent of people looking towards a lower cost of living for a better work-life balance. Two-thirds of people (63%) would change their job to achieve a better work-life balance, and a similar number (59%) would move somewhere else, reinforcing the value they put on a good work-life balance.

To download a copy of the report, go to:

<http://www.investincornwall.com/uploads/files/theBalancingAct.pdf>

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