



**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.

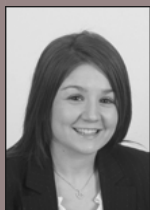
In his spare time, Nigel's interests include tennis, fly-fishing, the great outdoors, and spending time with his young family.

**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.

**Latest recruit for growing employment team**



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.*

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

**UPDATE ON THE EQUALITY ACT** We provide a brief overview of the main changes to discrimination law following the government's announcement that the Equality Act will be implemented in October this year. [[more...](#)]

**CLOAK OF PREJUDICE** When negotiations are conducted "without prejudice" nothing mentioned can be subsequently used in evidence. We look at a case that said the only exception to the rule was when it might "act as a cloak" for perjury, blackmail or some other "unambiguous impropriety". [[more...](#)]

**FULL TIME HOLIDAY RIGHTS** The law says that part timers and fixed-term workers cannot be treated less favourably than full time or permanent employees. We look at a case in which the European court said that member states cannot rely on a law which reduced the holiday entitlement of a part-timer that had been accrued (but not taken) when they were working full time. [[more...](#)]

**NEWS IN BRIEF** The Government has announced that the default retirement age (65) will be consigned to the history books in October 2011. The proposals (currently in the consultation stage) provide that no forced retirement notices can be issued from 6 April 2011. We look at the effect that this would have on businesses. [[more...](#)]

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## **UPDATE ON THE EQUALITY ACT**

The coalition government confirmed recently that the first wave of implementation of the Equality Act will go ahead as planned in October this year, following the publication of the first commencement order in Parliament in early July.

The following is a brief overview of the main changes that will be ushered in by the new legislation.

### **What does the Act do?**

The Act brings together nine existing pieces of legislation into one single Act. Although there are some changes to the law, these are not extensive.

The Act also covers the same groups that are currently protected by existing equality legislation, but now calls them protected characteristics.

These are - age, disability, gender reassignment, race, religion or belief, sexual orientation, marriage and civil partnership, pregnancy and maternity.

### **What are the different types of discrimination?**

These remain much the same as before - direct (treating someone less favourably because of a protected characteristic); indirect (a condition or rule that seems to apply to everyone but disadvantages people with a certain protected characteristic more); harassment and victimisation.

In addition the Act explicitly refers to another two forms of discrimination - associative (direct discrimination against someone because they associated with someone who has a protected characteristic); and perceptive discrimination (direct discrimination against someone because others think they have a particular protected characteristic).

### **What are the main changes that employers should be aware of?**

The Act mainly extends protection to people with protected characteristics relating to disability and gender reassignment.

The changes to disability law include the introduction of a new protection from discrimination arising from disability. This states that it is discriminatory to treat a disabled person unfavourably because of something connected with their disability (for instance, a tendency to make spelling mistakes because of dyslexia).

Additionally, indirect discrimination has been extended to cover disabled people. This means that a job applicant or employee could claim that a particular rule or requirement that the employer has in place disadvantages people with the same disability. Unless the employer can justify this, it would be unlawful.

The Act also includes a new provision which makes it unlawful, except in certain circumstances, for employers to ask about a candidate's health before offering them work. Essentially employers should only ask about someone's health when it is:

- To make a reasonable adjustment to the selection process
- To decide whether an applicant can carry out a function that is essential to the job

- To monitor diversity among applicants
- To take positive action to help the disabled
- To ensure that the candidate actually has the disability if the job genuinely requires the jobholder to have a particular disability.

Although transsexuals were already protected under the previous legislation, the Equality Act now says they no longer have to be under medical supervision to be protected.

### **Can employers take positive action?**

As with previous equality legislation, the Equality Act allows employers to take positive action when they think that employees or, crucially, job applicants who share a particular protected characteristic are disadvantaged because of that characteristic.

### **What about equal pay?**

The big change in the Equality Act is that a person bringing an equal pay claim can rely on a hypothetical comparator. So if the claimant can provide evidence showing that they would have been paid more if they were of a different sex, they can still bring their claim, even if there is no-one of the opposite sex doing equal work in the organisation.

### **Can employers enforce pay secrecy?**

Employers cannot now stop their employees from having a discussion about whether there are differences in their pay related to protected characteristics. The Act also outlaws "gagging clauses" in people's contracts.

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## **CLOAK OF PREJUDICE**

It is quite common for negotiations to be conducted "without prejudice" so that nothing mentioned during those discussions can be used in evidence against either party at subsequent proceedings. In **Woodward v Santander**, the Employment Appeal Tribunal (EAT) said that the only exception to the rule was when it might "act as a cloak" for perjury, blackmail or some other "unambiguous impropriety".

### **What happened?**

Mrs Woodward brought claims of unfair dismissal and sex discrimination against Santander in 1994. The company settled with her in 1996 but refused to provide her with a reference.

In the years following the settlement, she struggled to find and keep other work. In October 2002 she wrote to Santander complaining that the company's refusal to provide her with a reference was scuppering her efforts to get another job.

She then brought more claims alleging victimisation, direct sex discrimination, and detrimental treatment for whistleblowing in early 2003.

The tribunal initially dismissed all her claims but after a series of successful appeals (some

of which went as far as the Court of Appeal), her claims were re-heard at a fresh hearing on 19 January 2009.

However, after exchanging witness statements on 15 January, Santander said it wanted to exclude information in Mrs Woodward's statement alleging that, in the course of the 1996 negotiations, it had refused to provide her with a reference on the ground that the information was "without prejudice".

She argued that, following the decision in the case of **BNP Paribas v Mezzotero**, she could rely on an exception to the rule of "unambiguous impropriety".

However, the tribunal disagreed. It concluded that just because she had asked Santander for a reference which it had refused to provide, was not something it considered to be "improper" in and of itself.

And the EAT agreed. It said that the existing exception of impropriety applied only in the very clearest of cases and should not be expanded just because someone alleged discrimination. To do so "would have a substantial inhibiting effect on the ability of parties to speak freely in conducting negotiations".

In this case, the impropriety was not clear and Ms Woodward could not therefore claim an exception to comb through the correspondence and/or discussions she had had with Santander to point to words or actions in support of "an inference of discrimination"

The EAT said that the exception had been applied successfully in the **Mezzotero** case because the impropriety was so clear. It had not created a new rule about discrimination cases or expanded the exception further.

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## FULL TIME HOLIDAY RIGHTS

EU legislation says that part timers and fixed-term workers cannot be treated less favourably than full time or permanent employees. The European Court of Justice (ECJ) said in **Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol** that the Austrian government could not rely on a legislative provision which reduced the holiday entitlement of a part-timer that had been accrued (but not taken) when they were working full time.

### What happened?

Paragraph 55(5) says that if the employee's working hours change, any annual leave not taken must be adjusted "proportionally to the number of hours in the new contract".

Paragraph 60 states that the right to annual leave expires at the end of the leave year. This can be extended if the employee has taken parental leave of ten months or more but only by the length of time the leave exceeded those ten months.

The organisation representing hospital employees in Tyrol said these provisions were contrary to EU directives on part-time and fixed-term work and parental leave.

And the ECJ agreed. It said that the provisions of paragraph 55(5) - whereby full-time employees could lose the right to paid annual leave they had accumulated but had not been able to take before they started working part time - was incompatible with EU law. Likewise if employees could only take their leave on a reduced level of holiday pay.

The ECJ also said that although the part-time workers directive allowed for leave to be reduced pro rata for part timers and to be lost at the end of a leave year, that did not mean member states could apply a provision to reduce the holiday entitlement of a part-timer that had been accrued when they were still a full-time worker.

As for the provisions of paragraph 1(2)(m), the ECJ said that, according to clause 4 of the fixed-term workers directive, members must be able to objectively justify treating fixed-term workers differently to comparable permanent staff. The need to implement "rigorous personnel management" put forward by the Austrian government could not constitute "objective grounds" as it was a budgetary consideration and could not therefore justify discrimination.

Nor did the court accept the argument that it would be difficult administratively to create permanent posts in excess of requirements by agreeing contracts with workers who were only ever intended to be short term. Employees on a casual contract or on one of six months or less could not therefore be excluded from the right to annual leave (as well as comparable pay and overtime rates etc).

Finally, the ECJ decided that it was also contrary to EU law for workers (who were mainly women) to lose the right to paid annual leave accumulated during the year before their child was born, just because they had exercised the right to take parental leave of two years.

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## **NEWS IN BRIEF**

The Government has announced that the default retirement age (DRA) will be consigned to the history books in October 2011 under proposals published last month.

The current position is that employers have the right to terminate employment for reason of retirement at the age of 65 (or the company's normal retirement age, whichever is the later). However, the employer must follow a specified procedure which includes consultation with the employee in relation to their continued employment, which the employee has the right to request (although the employer is not obliged to accept a request that an employee continues working).

The new plans allow for a six month transition from the existing regulations, following the announcement in the budget that the DRA would be phased out from April 2011. Currently employers can make staff retire at 65. These proposals provide that no forced retirement notices can be issued after 6 April 2011

This measure is one of the steps the Government says it is taking to help and encourage people to work for longer against the backdrop of demographic change.

Others include reviewing when the state pension age should increase to 66 and re-establishing the link between earnings and the basic state pension.

The consultation also proposes to "help" employers by removing the "administrative

burden" of statutory retirement procedures. With the DRA removed, the Government claims there is no reason to keep employees' 'right to request' to work beyond retirement or for employers to give them a minimum of six months notice of retirement.

Although the Government is proposing to remove the DRA, it will still be possible for individual employers to operate a compulsory retirement age, provided that they can objectively justify it as a proportionate means to a legitimate aim. Medical and aptitude tests might become more commonplace – and not just in industries like aviation where they are already used.

A legitimate aim is a nebulous concept and doubtless there will be litigation over it. All employers will have to rethink their retirement policies and decide whether to set their own retirement age – and if so how it can be justified. Employment contracts must clearly state what the retirement policy is. There should also be clear guidelines about any flexibility.

The consultation asks whether the Government could provide additional support for individuals and employers in managing without the DRA or statutory retirement procedure.

This includes the possibility of future guidance or a more formal code of practice on handling retirement discussions.

Views are also being sought on whether removal of the DRA could have unintended consequences for insured benefits and employee share plans.

The consultation closes on 21 October 2010.

The document can be accessed at: <http://www.bis.gov.uk/retirement-age>

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