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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. 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:

FORTHCOMING LEGISLATION In general, the Department for Business, Innovation and Skills introduces legislative changes twice a year ? April and October. We provide an overview of the main changes effective for the next six months from October 2010. [[more...](#)]

PERCEPTION OF DISABILITY Disability discrimination law covers claimants who associate with someone who has a disability. We look at a court decision which said that the legislation did not cover someone with a "perceived disability". [[more...](#)]

IT'S A PRIVILEGE Courts can refuse a request for disclosure of documents by claimants in certain circumstances. We look at a case which said that even if the advice was given by non-lawyers it would still be covered by litigation privilege if given for the dominant purpose of litigation. [[more...](#)]

IN BRIEF The government has introduced a "one-in, one-out" system with regard to regulations affecting businesses and third sector organisations. [[more...](#)]

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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 2010.

We will publicise the changes that become effective in April 2011 in our March 2011 edition of HReSource.

October 2010

Single Equality Act

1 October 2010

The Equality Act 2010, which brings together nine existing pieces of legislation into one single Act, now refers to the different groups previously covered by discrimination legislation as people with “protected characteristics”.

It outlaws direct and indirect discrimination, harassment and victimisation as before and introduces associative and perceptive discrimination.

It makes a number of changes to strengthen disability law, including a new protection from discrimination arising from disability. Additionally indirect discrimination has been extended to cover disabled people.

The Act prohibits employers from asking candidates about their health before offering them a job and also from including “gagging clauses” in contracts.

National minimum wage increase

Effective from 1 October 2010

From 1 October 2010, the national minimum wage increases from £5.80 per hour to £5.93 for workers aged 21 and over, while the development rate for workers aged 18 to 20 increases from £4.83 per hour to £4.92. The rate for workers aged 16 to 17 years goes up from £3.57 to £3.64 per hour. As promised the government has extended the main, adult rate to 21-year-olds from October 2010.

The rate for apprentices of £2.50 per hour applies to apprentices who are under 19 or those 19 and over but in the first year of their apprenticeship.

The per day value of the accommodation offset increases from £4.51 to £4.61.

Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2010

Effective from 1 October 2010

These amendments introduce two main changes:

- tighten restrictions on the charging of upfront fees - usually made to offset the cost of producing publications for introducing artists to would-be clients - in the

entertainment and modelling sectors. The regulations ban agencies from charging fees from would-be models, but not other entertainers such as actors, musicians and extras

reduce regulatory burdens by eliminating unnecessary suitability checks that all agencies placing workers into permanent (as opposed to temporary) posts currently have to carry out. These include identity checks, training and qualifications. The only exception is if the person is applying for a job to work with the vulnerable in their own homes, in which case the checks must still be carried out

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PERCEPTION OF DISABILITY

The Disability Discrimination Act (DDA) requires claimants to have an actual disability, unless they have an association with someone who has a disability in which case they are also covered. In **Aitken v Commissioner of Police of the Metropolis**, the Employment Appeal Tribunal (EAT) rejected the argument that the definition should be extended still further to include discrimination on the basis of a “perceived” disability.

What happened?

Mr Aitken, a police constable, was diagnosed towards the end of 2005 as having obsessive compulsive disorder (OCD) and a tendency to binge drink. At a Christmas social that year, he admitted to fantasising about punching a female officer’s nose and wanting to beat his girlfriend’s head in. He was angry and aggressive intermittently.

He was put on special leave but in February 2006 was considered fit to return to an office-based role with no public contact. However there were further incidents of inappropriate and aggressive behaviour and in June, he was told that he might have to retire early.

He went on sick leave in October 2006 and although the Met accepted that he was disabled for the purposes of the DDA, it retired him on medical grounds in early 2008 because it could not find him a role that did not involve contact with the public either in person or on the phone.

Mr Aitken claimed direct disability discrimination, disability-related discrimination and failure to make reasonable adjustments. He argued that his behaviour was so closely connected to his disability that it should be considered part and parcel of it and that the reason he had been treated in the way he had was because of his employer’s “perception” that he had a dangerous mental illness, contrary to the decision of the European Court of Justice in *Coleman v Attridge Law*.

The tribunal disagreed, saying that the reason for his dismissal was not because of a perception that he had a dangerous mental illness, but on the “basis of how he appeared to others”; and that it was reasonable for the force to take into account that a police officer should not present a danger to colleagues or to members of the public.

The EAT upheld the decision of the tribunal, concluding that:

- The DDA requires an actual disability and although the decision in *Coleman* extended the application of the Act to include someone associated with the person

who has a disability, the DDA does not apply to less favourable treatment because of a "perception" that an employee is disabled

- Mr Aitken's behaviour should not be "stripped out" when assessing a comparator for his treatment. The approach tribunals must take is that "the disability is to be removed from the equation and the relevant circumstances of the comparator are to be the same as or not materially different from those of the disabled person". Here, the "relevant circumstances" included the bad behaviour which was connected with the disability but was not to be regarded as the disability

As for assessing the reasonableness of the adjustments, the EAT said that the tribunal "was entitled to have regard to the need that a police officer should not appear to present a danger to colleagues or the public".

This case was decided before the Equality Act 2010 (see Forthcoming Legislation) comes into force on 1 October 2010. Under this new Act it will become unlawful for an employer to treat an employee less favourably because it perceives that the employee is disabled: for example, the employer wrongly thinks that the employee is suffering from a disability (for example, depression) and dismisses them as a result.

However, it is doubtful that the EAT would have reached a different conclusion in this case even if the same set of circumstances were to have taken place after the 1 October as the EAT took the view that the tribunal had made a clear finding on the facts that the force's actions in dealing with the claimant (Mr Aitken) were not based on a perception that he was suffering from a dangerous mental illness but on the basis of how he had appeared to others.

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IT'S A PRIVILEGE

Although claimants can ask for disclosure of certain documents when bringing a claim, courts will refuse the request if the documents are protected by legal advice privilege (applicable only to lawyers) and/or litigation privilege. In **Scotthorne v Four Seasons Conservatories (UK) Ltd**, the Employment Appeal Tribunal (EAT) said that even if the advice was given by non-lawyers it would still be covered by litigation privilege if given for the dominant purpose of litigation.

What happened?

After being dismissed on 6 May 2009, Mr Scotthorne claimed unfair dismissal, arguing that his employer had wanted to get rid of him for financial reasons for some time, and had dreamt up the idea of gross misconduct (arising from an altercation on 21 April) to justify the decision.

He applied to the tribunal for an order requiring his former employer to disclose - and allow him to inspect - various files that might help to prove his case. The documents he sought contained advice from the company's non legal advisors, RBS Mentor.

The tribunal refused to order disclosure of the documents, saying that although they were relevant to the proceedings they were "protected by legal advice privilege, but not litigation privilege insofar [as] the documents that pre-date the disciplinary proceedings that led to the Claimant's dismissal are concerned."

Mr Scotthorne appealed that decision, on the basis that the documents could not attract legal advice privilege as the advisors were not lawyers.

The EAT said that the correct test when deciding whether documents should be disclosed is firstly to ask whether the documents are necessary, "although the starting point is relevance". On that basis, it held that material prior to 21 April 2009 was "neither relevant nor necessary". If the documents are necessary the question of whether litigation or legal privilege applies can then be considered.

In this case following the altercation on 21 April 2009, the company contacted RBS Mentor for advice as required by their insurance policy. The EAT said that at that point, there was legal litigation privilege but as only one member of the RBS Mentor team was a qualified lawyer, it accepted that it would be "fraught with difficulty" to claim "legal advice privilege".

Therefore, the EAT was satisfied that the real issue in this case was litigation privilege as that was the most likely reason for the company to consult RBS Mentor when it did or at least to find out how to handle matters which could well lead to litigation.

It concluded, therefore, that that as from 21 April 2009, litigation was the dominant purpose of the approach by the company to RBS Mentor. "The advice given by RBS Mentor to its insured would correspond to it both seeking to avoid litigation and assisting the [company] should litigation occur. In that case it does not matter that some of those giving advice were not legally qualified. It was given for the dominant purpose of litigation which could well ensue in the light of what the [company] told RBS Mentor about the altercation with [Mr Scotthorne]".

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IN BRIEF

On 1 September, the government introduced a "one-in, one-out" system with regard to regulations affecting businesses and third sector organisations.

This means that when ministers want to introduce new regulations that impose costs on a business or the third sector, they now have to first identify current regulations with an equivalent value that can be removed.

The idea is to capture the net cost to business of any given measure so that the "benefits to business will be offset against the costs to business".

The new rule will only apply initially to domestic legislation but the government says it intends to expand the system "in due course".

To further ensure that "the costs of red tape are being properly addressed", the government has also agreed a set of "principles of regulation" that departments must apply when considering new rules.

In addition, it has asked the independent Regulatory Policy Committee to act as an external scrutineer to look at the evidence and analysis supporting new regulatory proposals, prior to policy decisions being made. It will also analyse proposals for the

implementation of EU legislation.

On it, the government asks, among other things: "Which regulations do you think should be removed or changed to make running your business or organisation as simple as possible?"

The press release announcing these new measures adds that the government intends to adopt "a rigorous approach to tackling EU regulations and gold plating" so that when European rules are transposed into UK law, "it is done without putting British business at a competitive disadvantage to other European-based companies".

For more information, go to:

<http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=414871&NewsAreaID=2>

To access "Your Freedom" website, go to: [http://yourfreedom.hmg.gov.uk /](http://yourfreedom.hmg.gov.uk/)

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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.

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