

Employment Law News

June 2008

Here is our latest Employment Law newsletter . We hope you will also visit our web site at <http://www.oxford-employment-law.co.uk/> which now includes a comprehensive and regularly updated free employment law section available for you to use whenever and as often as you like to find answers to basic employment law questions. We will, of course, be pleased to assist you with individual advice when that is required.

Clickable "what's new" index

- 1. Deal on agency workers - but problems remain.**
- 2. Flexible working to help 4.5 million more parents - but businesses ask how will employers cope?**
- 3. Sex (discrimination) and the City**
- 4. EC red card for FIFA's plans for professional footballers.**
- 5. Working with children and vulnerable adults**
- 6. Dispute Resolution - new Code of Practice and Government response to consultation.**
- 7. Age discrimination**
- 8. New cases, statutes and regulations**

1. Deal on agency workers - but problems remain.

First came a [draft EU Directive on "Working Conditions for Temporary Workers"](#) put forward in 2002 but "stalled" ever since. Then, in 2007, came Andrew Miller MP's private members bill, Temporary and Agency Workers (Equal Treatment) Bill, which gained considerable parliamentary support and prompted a government review. Now the question of rights for Agency Workers appears finally to be making headway.

On 20th May the Government agreed a "Deal" with the TUC and the CBI, as announced by a [BERR Press Release on 20 May 2008](#). Mr Miller's [Bill was withdrawn](#) the very next day.

The main points of the "Deal" are as follows:-

- After 12 weeks in a job the Agency worker would be entitled to "equal treatment".
- "Equal treatment" means "basic working and employment conditions" (pay, holiday etc) that would apply had the workers been directly and permanently recruited, but not occupational social security schemes (pensions etc).

- The Government will consult further about implementing the [draft Directive](#), on matters such as dispute resolution and anti-avoidance measures.

An important point specifically covered by Mr Miller's Bill but so far as we can see not mentioned in "the Deal" concerns the rights of agency workers who have been working for the same end-user for more than a year. If a person in that position is **unfairly dismissed** should he or she sue the end-user or the agency, or might they even be legally self-employed and so not able to sue either? Both the Court of Appeal and the EAT have recently called for legislation to clarify the position. Mr Miller's Bill certainly tried to do that, albeit in a bulldozer like fashion - it contained a clause which provided that the worker would be deemed to be an employee of both the end-user and the supplying agency which would both be jointly and severally liable for any award of unfair dismissal compensation. On the face of it the 20th May deal looks as though it may make the position on this important point more confusing than it is already, rather than less. Until the small print is available, we cannot be sure.

Even apart from that, the arguments are far from over. The TUC welcomed the deal calling it a "victory for union campaigning " but the CBI was less enthusiastic, describing it as "the least worst option". At least they had their chance to have a say - the [Financial Times of 27 May 2008](#) reported that British Chambers of Commerce and The Federation of Small Business (FSB) feel that the Deal was reached "behind closed doors" and are rather upset. FSB Chairman Alan Tyrell clearly sees the agency worker issue as linked with proposals for an extension of the right to request flexible working time (*see below*) and that employers, especially small employers, can only lose out. The FT quotes him as saying "*You can't have an extension of flexible working and at the same time clamp down on the means by which many small businesses cope with it, which is often through temporary workers.*"

Things may even get worse for employers. The "Deal" will only become law once the EU Directive is agreed and that calls for equal rights after only six weeks. The British government has so far resisted that call but is clearly now wanting to get agreement on the Directive - so agency workers, agencies and end-users should keep a careful eye on what develops.

- For further information click here on [Employment Agencies / a general note](#) to go to notes on our website.

[\(return to top\)](#)

2. Flexible working to help 4.5 million more parents - but businesses ask how will employers cope?

Since 2003 many employees have had a statutory right to request flexible working - not a right to flexible working arrangements but a right to request them. An employer is not obliged to agree a request by a qualifying employee if he considers that one of a number of grounds (listed in the Employment Rights Act 1996) applies. The sanction against a defaulting employer is that an employment tribunal has power to order reconsideration of the application and to award compensation of up to (currently) £2,640. The right has been steadily opened up to an ever-increasing number of employees. From April 2003 it was available to parents of children under 6 (or disabled children up to 18). From April 2007 the right has been extended to those with responsibility for caring for spouses and adult relatives. Now, in its [Draft Legislative Programme for 2008/9](#), published on 15 May 2008, Gordon Brown's government is proposing that all employees with children up to age 16 will have the right to request flexible working. As [David Cameron is on record](#) as saying less than a year ago that he wants all parents with children under 18 to have the right to request flexible working arrangements it seems likely that this, at least, is a proposal which the Government will be able to get through Parliament without difficulty. But where should the balance between the needs of family and the needs of business lie? Might this be a step too far? Certainly many employers clearly do not share the politicians' enthusiasm for the proposals. For example the [Financial Times 19 May 2008](#) quotes FSB Chairman Alan Tyrell as saying *"The current flexible working regime seems to be working but the government should be cautious about extending it too far which could be damaging to small businesses and, as a result, the millions of people they employ."*

- For further information click here on [Flexible Working / 2003 rules](#) to go to notes on our website.

[\(return to top\)](#)

3. Sex (discrimination) and the City

In September 2007 a lady named Gillian Switalski, later described by the Employment Appeal Tribunal as a "high-flying city lawyer", resigned from her job as Director and Head of Legal at F&C Asset Management. F&C is an

important fund management company which had merged with another fund manager in 2004, giving the combined organisation over £100 billion of assets under management.

Ms Switalski claimed she had resigned in response to sex discrimination, harassment and victimisation which had occurred after the merger and that her resignation amounted to constructive dismissal. She won before an employment tribunal. The employer appealed to the EAT, which heard the case on 17th and 18th April 2008.

On 23rd May the EAT issued its judgment. It pointed out that its function was to consider points of law, not fact, and that its role was "*.... not to say whether we agree or disagree with the Tribunal's conclusions. It is to determine whether or not the findings under appeal are legally permissible or flawed*". On that basis the EAT dismissed FC's appeal meaning that, unless F&C appeals on to the Court of Appeal, the matter will now go back to the employment tribunal to assess compensation.

This is where what otherwise might have been a sad but not particularly noteworthy case gets interesting. Newspaper reports suggest that Ms Switalski is claiming - wait for it - £13.4m compensation (for psychiatric problems, loss of pension benefits and diminished career prospects - [Financial Times, 12th March 2008](#)) or perhaps even £19m ([the Times, 18th April 2008](#)). Quite apart from the obvious reaction of most normal employees (and employers), it is worth pondering whether it is appropriate that employment tribunals should be given the job of assessing proper compensation when amounts like this are in dispute - after all, until quite recently the maximum award a tribunal could make was £12,000 and even full time employment judges have salaries of less than £100,000.

- For further information click here on [Appeals / fact or law?](#) and/or [Maximum and minimum tribunal awards / general considerations](#) to go to notes on our website.

[\(return to top\)](#)

4. EC red card for FIFA's plans for professional footballers.

Professional football has a problem - football clubs' are in danger of losing any national identity.

In Europe, it was established back in 1995 that any limits or quotas on player numbers by reference to nationality are unlawful if they affect nationals of EU member states, and also that transfer fees for out-of-contract players who

are switching from a club in one EU Member State to a club in another Member State are illegal (the [Bosman case](#), ECJ no C-415/93). In May 2008 FIFA, the world governing body, voted in favour of a rule which would limit every team to only five foreign players in their starting XI. However in the EU, this would be unlawful as direct discrimination. UEFA, the European governing body supports the philosophy and objectives of the FIFA proposals but as they are considered illegal in the EU, cannot do much other than continue with its own proposals from the 1990's. Under the UEFA proposals a club would have to field a minimum number of "home grown players" to be eligible for UEFA competitions, but "home grown" players could be any nationality. This would be indirectly (rather than directly) discriminatory but as such it would be lawful if justifiable as a "proportionate means to achieve a legitimate aim". Indications from the European Commission suggest it would not argue against this ([message from EC Commissioner Vladimír Spidla, 28th May 2008](#)). However the UEFA plan is opposed by the footballers themselves and would probably be seen by many as less satisfactory than the FIFA proposal. However in the past the ECJ has recognised that a distinction can be drawn between matters of purely sporting interest and those which are of economic relevance - and the Treaty of Lisbon (2007) acknowledges the "specificity of sport". So there may be scope for some movement. We will keep readers informed.

- For further information click here on [Freedom of movement of workers / footballers](#) and/or [Racial discrimination / direct and indirect discrimination](#) to go to notes on our website.

[\(return to top\)](#)

5. Working with children and vulnerable adults

After the Soham murders in 2002 and the 2004 [Bichard report](#) which followed from it there was uproar when it was disclosed in late 2005 that the government (Department for Education) had cleared a man to work as a PE teacher in Norwich notwithstanding that his name was on a sex offenders' register. The government then disclosed that it had cleared 88 other sex offenders to work in schools and promised speedy action to tighten existing law.

Legislatively, the result was the [Safeguarding Vulnerable Groups Act 2006](#). This establishes an Independent Safeguarding Authority "ISA"), removing direct responsibility from the government. The ISA will set up and

maintain two new lists of names called the "Children's Barred List" and the "Adult's Barred List" which will replace the current List 99, the Protection of Children Act List ("POCA") and the Protection of Vulnerable Adults list ("POVA"). "Regulated Activity Providers" will commit an offence if they employ a person without making checks with the ISA and persons on the lists will commit an offence if they engage or seek to engage in "regulated activity".

When the new system is in operation it will not always be necessary to do a CRB (Criminal Records Bureau) check as well as an ISA check. However the ISA does not replace the CRB and a CRB check will still be needed where required by law, for example by education staffing regulations and for care workers under the Care Standards Act. Anyone concerned about their legal position would be well advised to take expert advice.

The government announced in April 2008 that new system would start sometime in October 2009. At the end of May this was followed up by a 54 page document with further details of how the new scheme will work and confirmation of the start date as 12th October 2009. This document also says that the ISA application fee for those in paid employment will be £64. It is worth noting that entirely separately from any of the above a highly controversial private initiative known as the [National Staff Dismissal Register](#) is being set up in spring/summer 2008 as a collaborative "Web2" application with the intention of making available to qualifying applicants details of individuals who have been dismissed or left a Company whilst under suspicion of certain types of criminal activity (essentially theft or fraud).

- For further information click here on [Acts of Parliament etc / Safeguarding Vulnerable Groups Act 2006](#) to go to notes on our website.

[\(return to top\)](#)

6. Dispute Resolution - new Code of Practice and Government response to consultation.

The [Gibbons Review](#) recommended in March 2007 that the statutory disciplinary and grievance procedures, introduced less than three years earlier as a compulsory preliminary to employment tribunal hearings, should be scrapped and replaced with something simpler. The [Employment Bill](#) currently before Parliament will do the job. Probably with effect from April 2009, there will be new and less prescriptive rules designed to ensure that disputes between employee and employers are settled "out of court" wherever possible.

An [ACAS Code of Practice](#), recently issued in draft for consultation (which will run until 25 July 2008) is a cornerstone of the new proposals. Employment tribunals are to be given power to increase awards of compensation to employees by up to 25% if an employer has unreasonably failed to comply with the Code in his dealings with a disaffected employee.

On 21 May 2008 the Government issued its [formal response](#) to the consultation it conducted into the Gibbons Review recommendations. It explains the reasons for abolishing the existing procedures and also clarifies plans for a "fast-track" system to deal with some types of claim made to employment tribunals. There will apparently be further consultation - on the fast track system, on proposals to widen tribunal powers to make recommendations regarding discriminatory practices, and a new tribunal application form (ET1). One area that is not up for debate, however, is that of time-limits and extensions to them.

Few tears will be shed at the passing of the current statutory disciplinary and grievance procedures rules. As a judge recently noted in a Scottish EAT case of they have provoked "*a sea of negative comment of Pacific rather than Caspian proportions*" ([Clyde Valley Housing Association Ltd v MacAuley](#) EAT on 3rd April 2008).

- For further information click here on [Employment Bill](#) and/or on [Dispute Resolution / 2004 new regulations](#) to go to notes on our website.

[\(return to top\)](#)

7. Age discrimination

There is a legal argument to the effect that the UK Age discrimination regulations are contrary to EU law in so far as they allow enforced retirement at age 65. If that argument is correct the 2006 Age regulations will have to be amended.

The question was referred to the European Court of Justice in December 2006 following an application by the HeyDay organisation (part of Age Concern). At last, the news is that the ECJ's Attorney General is likely to be considering the case in July 2008. His opinion will then be considered by the full European Court and hopefully the result will be known before the end of the year or in early 2009.

It seems unlikely that the Heyday challenge will be successful as the ECJ has already ruled that a similar provision in Spanish law was justified as being a proportionate means to achieve a legitimate aim and was therefore compatible with EC rules ([Palacios de la Villa v Cortefiel Servicios SA](#) [2007] IRLR 989, ECJ case C-411/05) – but that was Spain. It is at least possible that the ECJ will rule that what is justified in Spain is not justifiable in the UK.

- For further information click here on [Age discrimination / retirement](#) to go to notes on our website.

(return to top)

8. New cases, statutes and regulations

You can find on our website summaries of all employment law cases reported in the most recent editions of the IRLR and ICR Law Reports (the two leading series of law reports covering employment law cases), of recent employment law related Acts of Parliament and employment law related Bills currently before Parliament and notes on significant new employment law related secondary legislation (statutory instruments, orders and regulations).

- *For further information click here on [List of Cases](#) and/or [Acts of Parliament etc](#) and/or [Bills before Parliament](#) to go to notes on our website.*

(return to top)

prepared 1st June 2008.
FINISH>