



**FULL MEETING
THURSDAY 11TH NOVEMBER 2010**

**MEMBERS BRIEFING NOTE
(Agenda Item 8)**

1. Update on the coalition Government's views on new legislation

We reported in the Members' Briefing Note of 16 September 2010 that the coalition Government was planning to review several new pieces of legislation that had been introduced or planned by the previous Labour Government. In this section we consider these pieces of legislation and provide an update on the current Government's thinking.

- **Agency Workers' Regulations**

The Government has decided not to make any changes to the Agency Workers' Regulations, which come into force next year, despite "considerable sympathy" (especially from employers) for arguments against the new rules. Instead, the Government has said it will use the next 12 months to develop the "best possible" guidance to help employers comply with their obligations.

Coming into force in October 2011, the Agency Workers Regulations 2010 were conceived after the CBI and TUC, together with the previous Government, brokered a deal whereby agency workers will qualify for "equal treatment" as directly-employed staff after 12 weeks in their post. The European Agency Workers Directive intended this principle to apply from the first day of employment but did allow member states some flexibility on implementation, including the length of the qualifying period.

The decision to proceed with the provisions of the Regulations may disappoint some employers, but it is worth pointing out that, had changes been made, this could have put at risk the vitally important 12 week qualifying period before equal treatment has to apply.

The Government obviously considered that this was too serious a risk to take as retaining this key element of the Regulations will help to ensure that agency working remains a key part of the UK's flexible labour market.

Employers need to make preparations now in respect of implementing the Regulations. There will inevitably be cost implications, but these need to be weighed against the potential increase in the use of agency workers that authorities are likely to adopt in the current climate. These Regulations should not be viewed in isolation. Issues to bear in mind when using agency workers will include the potential accrual of employment rights, the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, etc.

- **Additional Paternity Leave**

The Government had planned to review these Regulations to consider whether or not they were the best way forward, leading to fears that they might be scrapped. We can now report that the Government has confirmed that these Regulations, implemented earlier this year by the previous Government, will remain in force as an interim measure for encouraging shared parenting from the earliest stages of pregnancy.

Additional paternity leave will affect parents of children due on or after 3 April 2011 and will give employed fathers the right to take up to six months' extra leave when the mother returns to work. Note also that the same provisions are available to the partner of a person adopting a child.

The announcement was made as part of the plans to extend the right to request flexible working to parents of children under 18 years of age (see below).

Local authorities will need to ensure that policies are revised or put in place to reflect the new arrangements. Practical issues to be considered include those relating to office cover, the additional administrative burden of monitoring take-up, the effect of potential redundancy situations, etc.

Further information on Additional Paternity Leave can be found on our website at: http://www.seemp.co.uk/index/hrhs/whatsnew/elp/paternity_leave/additional_paternity_leave.htm

- **Right to Request Flexible Working**

The Government has announced plans to extend the right to request flexible working, a move that it claims will benefit up to 300,000 people.

The extension will mean that parents of children aged under 18 will be able to request flexible working. Currently, the right is available to parents of children under 17 years of age, as well as parents of disabled children under 18 and carers of certain adults.

The extension will come into force from April 2011. The Government has also announced it will launch a consultation later this year which will look at how to extend the right to request flexible working to all employees, and examine a new system of flexible parental leave.

This immediate change will give parents of all children, regardless of age, the same right to request flexible working. It should also make it simpler for employers and employees to identify whether or not they are eligible to make a request.

It is not anticipated that these changes will have any major implications for local authorities as you will probably already have policies in place where you consider flexible working requests from most staff. Where this is not already the case, you will need to review existing policies to make sure that those who will come under the scope of the Regulations are included.

- **Vetting and Barring Scheme**

The Vetting and Barring Scheme for those working with children and vulnerable adults is to undergo a radical re-examination, the Home Office has confirmed. The review will

examine whether the Scheme is the best way to protect children and vulnerable adults and, if so, how many roles it should cover.

An independent review of the Scheme took place after critics complained that volunteers were being discouraged because the registration net was too wide. As a result, the previous Government agreed to vet adults only if they saw the same group of children or vulnerable people once a week or more, rather than once a month as originally proposed. However, the present Government suspended the Scheme in June 2010.

The review will consider the fundamental principles and objectives behind the Scheme, including:

- evaluating the scope of the Scheme
- assessing the most appropriate function, role and structures of any relevant safeguarding bodies and appropriate governance arrangements
- recommending what, if any, Scheme is needed now
- taking into account how to raise awareness and understanding of risk, and responsibility for safeguarding in society more generally.

About 9.5m people in England, Wales and Northern Ireland, were expected to have been required to register with the Independent Safeguarding Authority under the old Scheme.

The final recommendations for the Scheme will be announced early in 2011.

It is difficult to say at this stage what the implications of the revised Scheme will be for local authorities as, obviously, we do not have any details. In the meantime, you should continue with your current arrangements. You must also be aware that vetting and barring is only one element of safer recruitment practices so it remains essential that all the other elements of safe and fair recruitment processes, that local authorities will already have in place, are followed correctly, and that all relevant staff are trained in the correct techniques.

2. Equality Act 2010

The Equality and Human Rights Commission (EHRC) have published Codes of Practice on the Equality Act 2010.

The Codes, which are available on the EHRC website (see below), cover employment, services, public functions and associations, and equal pay. Please note that they have been labelled as 'draft', as technically they have not yet been approved by parliament.

The Codes should help to ensure that the law is applied consistently by lower courts and tribunals. They should also help to make the law accessible to a wider audience, both to those who have obligations and to those who have rights - or their representatives.

The Codes aim to set out clearly and precisely what the legislation means. They draw on precedent and case law and explain the implications of every clause in technical terms. These statutory Codes will provide an invaluable source of advice, for lawyers and human

resources experts in particular, who require a detailed analysis of the details of the legislation.

The Codes have been prepared in consultation with stakeholders and were laid before Parliament on 12 October 2010. The Codes remain in draft form until such time as they have laid before Parliament for 40 days without objection and the Government makes the Order bringing them into force.

The Code of Practice on Equal Pay can be downloaded at:

http://www.equalityhumanrights.com/uploaded_files/EqualityAct/equal_pay_code_05.10.10.pdf

The Code of Practice on Employment can be downloaded at:

http://www.equalityhumanrights.com/uploaded_files/EqualityAct/employment_code_05.10.10.pdf

The Code of Practice on Services, Public Functions and Associations can be downloaded at: [http://www.equalityhumanrights.com/uploaded_files/EqualityAct/services_code - 06.10.10.pdf](http://www.equalityhumanrights.com/uploaded_files/EqualityAct/services_code_-_06.10.10.pdf)

The implications for local authorities of the new Equality Act should not be as onerous or widespread as first feared as the Act's main purpose is one of consolidating all the previous equality legislation, and authorities are already compliant with the large majority of those provisions. The single public sector duty will involve some work mostly in the form of reviewing and amending current policies to include all the 'protected characteristics' that are now covered by the duty. Potentially, the main problem for local authorities is the issue of pre-employment questionnaires which will now be unlawful except in certain limited circumstances. SEE is currently in the process of producing some guidance on this which we will publish on our website in due course.

Further information on the key changes in the Equality Act 2010 can be found on our website at: http://www.seemp.co.uk/index/hrhs/whatsnew/ele/equality_act.htm

3. Advice and litigation privilege

Case: Scotthorne v Four Seasons Conservatories (UK) Ltd EAT 0178/10/1405

This case considers the status of employment advice provided to an employer by an external service when the employer receives a Data Subject Assess request, under Data Protection laws (or as in this case a request for disclosure for the purposes of a Tribunal Claim).

Mr Scotthorne (S) was dismissed on 6 May 2009 by Four Seasons Conservatories (FS) following a disciplinary procedure for gross misconduct. The event that led to the disciplinary hearing was an 'altercation' between S and Mr Foulger (F), the employer that occurred on 21 April 2009.

S submitted a Tribunal Claim for unfair dismissal and in the paperwork claimed that F had been seeking to remove him from FS for some time. To support this, S claimed that FS was in possession of documents in the form of advice sought by FS from its non legal

advisers, Mentor (M). One member of M's advisory team was legally qualified. However, the rest were not.

FS had an insurance policy with M, which required FS to seek advice regarding any and all employment matters before taking action. FS did so following the altercation before undertaking the disciplinary procedure.

The EAT concluded that to apply 'legal advice privilege' would be 'fraught with difficulty' as the majority of the advisory team were not legally qualified. However, in its view, any advice sought by FS with regard to an incident which might lead to dismissal could be said to attract litigation privilege. Therefore, any advice/documentation received from 21 April 2009 onwards relating to this case was protected from inspection by S under litigation privilege. This view was based on the fact that the advice was sought initially to attempt to avoid the need to move to litigation. Then once litigation had been initiated by S, further advice was sought regarding how to best manage the situation and respond. In order to attract litigation privilege the advisor does not need to be legally qualified, but merely needs to be providing advice with regards to the avoidance and/or management of litigation.

Regarding any advice provided by M to FS prior to 21 April 2009, the EAT deemed it not relevant to the claim of unfair dismissal, as the dismissal had been established as being by reason of gross misconduct (through evidence) and the claim of conspiring to remove S from FS's employment did not actually form part of the claim submitted by S. However, indications are that were there any conversations/advice prior to 21 April 2009 regarding S these would not be protected by litigation privilege.

The implications of this decision for councils is that where you seek employment advice from an external non-legally qualified advisor for the purposes of litigation avoidance or for assisting the employer should litigation occur, this advice is likely to be covered by litigation privilege. You may choose to disclose that you have sought and received advice but you do not need to allow inspection of such advice by the other party.

There are already protections in place for advice provided by internal advisers during the management of a case, but these do not prevent disclosure and inspection at a Tribunal.

Implications for SEE Employment Team:

It is not clear from the facts of this case as to whether SEE and its clients could rely on litigation privilege. Through our HR advice line we often provide advice from a very early stage of case management where dismissal/litigation is not an immediate consideration. Councils are also not required to contact us before taking any action in contemplation of dismissal which could lead to litigation. Therefore, in our day-to-day work litigation privilege is unlikely to apply and we should continue to include our full disclaimer on all written communications and on our website.

However, where we are commissioned to undertake consultancy work to support a council with the 'exit' of an employee, this may be a situation where our advice would be protected from inspection under litigation privilege.

Given the uncertainty it is best to assume that no work undertaken by SEE's Employment Team would attract litigation privilege and expect that all correspondence from SEE would be discoverable at Tribunal or under a Data Subject Access Request.

4. Scope of religion or belief discrimination

Case: Greater Manchester Police Authority v Power (UKEAT/0434/09)

Greater Manchester Police Authority employed Power as a trainer. He was dismissed after three weeks on the following two grounds: his work with neighbouring police forces, and his work in the psychic field. Power claimed discrimination on the grounds of his beliefs.

A pre-hearing review was held to determine whether a belief in spiritualism and life after death was capable of amounting to a religion or belief under what was then the Employment Equality (Religion or Belief) Regulations 2003 – now the Equality Act 2010.

Power was a member of the Spiritualist Church. This had been established in 1853 and spiritualism was listed as the eighth largest faith group in Britain with 32,404 adherents in the 2001 census. The tribunal considered this fulfilled the test for a religious or philosophical belief in that it had “sufficient cogency, seriousness, cohesion and importance, and was worthy of respect in a democratic society” and so referred the case to a full hearing.

Following the employer’s appeal, the EAT agreed with the tribunal’s finding that spiritualism was capable of amounting to a religion or belief.

Although the claimant managed to bring himself within the ambit of the discrimination regulations, he was not successful at the full hearing. The tribunal found he was dismissed for other reasons. He has appealed this decision, and the case is now due to be heard by the EAT.

This case seems to indicate that categories of belief that are capable of discrimination protection are fairly broad. However, employers can take comfort from the fact that it is often tricky and difficult to establish that these beliefs are the cause of the unfavourable treatment in question.

5. Effective date of dismissal is when dismissal letter is read by employee

Case: Gisda Cyf v Barratt [2010] UKSC 41

The Supreme Court has handed down its judgment in *Gisda Cyf v Barratt*, upholding the decision of the Court of Appeal, that a dismissal is not effective until it is communicated to the employee. When an employee is dismissed in writing, this means that, so long as the employee has not deliberately avoided reading the letter, dismissal is not effective until the employee has read the letter.

This above case centered on the strict three month time limit for filing an unfair dismissal claim with the Tribunal.

Gisda Cyf had dismissed *Barratt* in a letter which they sent by recorded delivery and which was signed for by her boyfriend’s son, on 30 November 2006. *Barratt* was away from home visiting her sister who was due to give birth and so did not open the letter and learn about the decision to dismiss her until her return on 4 December.

Barratt presented an unfair dismissal claim on 2 March. If the effective date of termination was 30 November, which Gisda Cyf argued was the case, then the unfair dismissal claim was out of time. If it was 4 December, when Barratt read the letter, her claim was presented within time.

The Supreme Court held that the effective date of termination was 4 December. As Barratt was unaware of her dismissal until 4 December and had not deliberately failed to open the letter or gone away to avoid reading it, then the effective date of termination would be the date she actually learned of the decision to dismiss her.

This case is a useful illustration of the uncertainty that can be caused when dismissing by post, so local authorities, as employers, are advised that, wherever possible, they should communicate a dismissal to staff face-to-face. However, where the communication is by post, there is room for ambiguity as to the effective date of termination, and it will generally be the employer who bears the risk of this, rather than the employee. The courts have taken the view that it would be unreasonable for an employee to be dismissed, and hence starting the time running on the three month limit for bringing a claim, without him or her actually knowing about it.

Of course, the employer could also say it needs certainty as to the effective date of termination, so that it knows when to stop pay, benefits, etc. This point was made by the Supreme Court in a dissenting judgment.

The effective date of termination can also be of crucial importance if, for example, the employee is close to attaining the one-year's service required to bring an unfair dismissal claim – a few days' delay could make the difference between having and not having the right.

The practical answer is, therefore, for employers to ensure that, where possible, dismissals are communicated in a manner that does not leave room for doubt as to the effective date of termination. The obvious way to achieve this is for the dismissal to be carried out face-to-face. It is then best practice (and recommended by the Guidance to the Acas Code on Discipline and Grievances at Work) to confirm in writing in any event.