

29 May 2008

## **THE AGENCY WORKERS DIRECTIVE & THE CBI-TUC AGREEMENT**

### **BACKGROUND BRIEFING**

#### **Summary**

For several years the EU has been trying to pass a Directive giving temporary agency workers the same employment rights as permanent staff.

The UK has always opposed the Directive because of concerns that businesses (particularly small businesses) would be much more reluctant to hire temps to accommodate their changing needs. The ability to take on temps has been identified as a vital tool for businesses in dealing with peaks and troughs in demand, and in competing with countries with access to cheaper labour. For this reason the CBI has estimated that the Directive would cost up to 250,000 jobs.

The Directive can be passed by a qualified majority vote. So the UK has been reliant on the help of other Member States to block the Directive ever since it was first proposed in 2002. But after the change of Government in Poland last year, the UK no longer had enough support from other Member States to block the Directive.

Because the Directive was likely to be controversial, it was agreed at the Employment Council last December to put off the decision until after the Lisbon Treaty had passed through the Commons. It will now come up for discussion again at the Employment Council on 9 June, and the UK no longer has the support needed to block it.

The UK Government is attempting to persuade Member States to slightly water down the Directive by effectively proposing its own version of the legislation, based on a political agreement between the CBI and TUC. It hopes that by showing willing in this way, the other Member States can be persuaded not to outvote the UK and force it to accept the original version of the Directive.

John Cridland, CBI Deputy Director-General, argues that the Government's proposal represents "the least worst outcome available for British business". In particular, he says that excluding occupational benefits from the Directive and extend the qualification period would make it less damaging. He also argues that the Directive is a price worth paying, if it leads to a "permanent" opt-out from the EU's 48-hours working week.

The Government's handling of the issue raises two questions. Firstly, it is not at all clear that the tripartite agreement between the Government, the TUC and the CBI will in fact deter other EU members from passing the Directive in a more stringent form. Secondly,

this seeming return to 1970s-style corporatism raises wider questions – what right does the CBI have to reach agreement on behalf of all other business in the country? With smaller businesses likely to be hardest hit, surely they should have a right to be heard too?

Even in slightly watered down form, the Directive is a big step backwards. Even the CBI's president Martin Broughton has acknowledged that: "It's not a good solution. It's the least worst solution. But it will still inhibit the labour flexibility that gives Britain its competitive edge." There is no clear reason why this backwards step should be imposed at the European level. Despite endless rhetoric about "reform" in the EU, the Directive suggests that some Member States are still more interested in raising their European rivals' costs, than in making Europe as a whole more competitive.

### **What would the Directive mean? Why is it particularly significant for Britain?**

The EU's proposed Temporary Agency Workers' Directive would hit Britain harder than other Member States. Britain accounts for a third of all temporary employees across the EU – around 1.4 million. Around five percent of the UK's labour force is thought to be in temporary jobs.

There are currently around 17,000 British recruitment agencies – quite a contrast with Italy, where until recently the operation of an employment agency was deemed illegal.

Flexible temp rules have contributed to low unemployment rates in Britain. The CBI has estimated that the new Directive could cost up to 250,000 British jobs. This would hurt groups such as students, immigrants and mothers returning to work, who are helped by flexible rules when attempting to get on – or back on – the job ladder. It has been noted that many people also value the possibility to choose flexible working hours. A poll showed that over 80 percent of temps are satisfied with their assignment.

The proposal comes at a time when the British economy and other EU economies are slowing down. The EU is a long way off the targets for employment it set itself in the Lisbon Agenda – overall EU countries are 17 million jobs away from hitting their target.

On their part, British business fear loss of flexibility and competitiveness, as the process of placing temp workers would become much more complex. Particularly small businesses would be more reluctant to hire temps to accommodate changing needs. The possibility to take on temps has been identified as a vital tool for businesses in dealing with highs and lows in demand, and in competing with countries with access to cheaper labour.

### **What is under negotiation?**

A draft proposal of the EU's Temporary Agency Workers Directive was first tabled in 2002 by the European Commission. It stated that temporary agency workers across the EU must have the same basic working conditions as permanent members of staff doing a 'comparable' job in the same company. The proposal is based on the EU's "social chapter", which the Conservatives have said they would opt out of if elected.

Discussion over the Directive has focussed on two main things: firstly how long temps should work before they get the right to equivalent treatment, and secondly which rights they should have equal treatment in regard of.

The UK, backed by some other Member States such as Ireland and Germany, repeatedly blocked the proposal between 2002 and 2007. The UK has consistently argued that 6-12 months (not 6-12 weeks) should be the minimum qualifying period for temp workers to be granted the same conditions as permanent staff.

The original 'equal' employment conditions included: pay, working time, rest periods, holidays and holiday pay, maternity, paternity and action taken to combat discrimination.

The original proposal said that the rules need not apply where temporary agency workers would have met the following conditions:

- The assignment is less than 6 weeks.
- The temp worker is paid between assignments (never the case in the UK).
- The temp worker is covered by a collective agreement (very rare in the UK – inserted to accommodate the Scandinavian labour market model of voluntary collective agreements).
- There is no worker to use as point of comparison.

These 'opt-outs' are likely to reappear in the revised proposal of the Directive.

### **What is the agreement between the CBI and the TUC about?**

The temp workers Directive will again be up for discussion at the EU Council meeting on 9 June.

The UK no longer has enough allies to block the Directive in the Council. Unlike in previous negotiations, the new Government in Poland has said it will support the proposal. Also Germany has signalled it may throw its weight behind a deal. In face of a likely defeat, the UK Government has been forced to take steps to 'pre-empt' the implementation of the Directive, by outlining its own proposal, which it hopes other Member States will then accept, rather than outvote the UK.

For this purpose, the Government last week summoned the CBI and the TUC to agree a set of rules for temporary workers that is acceptable to both employers and employees. The deal is now effectively the Government's proposal, which envisions British agency workers receiving equal treatment in terms of pay, overtime arrangements and holiday as permanent workers - after 12 weeks of employment in the same company.

However, unlike the proposed EU Directive, the agreement stated that "occupational social security schemes", such as entitlement on maternity leave, paternity leave and pension benefits and sick pay, are to be excluded from the 'equal treatment' rules. The British Government also hopes to insert a derogation into the revised Directive that will allow Member States to extend the qualification period to 12 weeks, if there is an agreement between the 'social partners' to that effect (in the absence of collective agreements in the

UK). The Government hopes that the deal it brokered between the CBI and the TUC will count as such an agreement.

According to the CBI, the Government will be seeking to re-insert an older version of the text back into the Directive that excludes the “occupational benefits” mentioned above.

### **Why has the CBI accepted this?**

John Cridland, CBI Deputy Director-General, argues that the Government’s proposal represents “the least worst outcome available for British business”. He says that excluding occupational benefits from the proposal will make the proposal less damaging.

In addition, following horse-trading logic, the UK Government and the CBI hope that in return for signing up to the Temporary Agency Workers Directive, other Member States – notably France - will not challenge the British opt-out from the EU’s maximum 48-hour working week in future.

### **Uncertainties and issues**

**Will other Member States accept the UK’s proposal?** Negotiations are almost certainly already underway in the Council’s closed-door sub-committee, COREPER, and according to the CBI, Member States are likely to acquiesce to the UK’s demands in order to get a Directive. Several Member States still want both a shorter qualification period and more extensive benefits, however. It is also unclear as to whether the Government will manage to insert a derogation allowing for an extension of the qualification period in the UK to 12 weeks.

**UK’s opt-out from the 48-hour working week?** If the UK no longer has enough allies to block the Temporary Agency Workers Directive, what exactly is it “trading” in return for the opt-out from the working week? And what are the guarantees that there will be no new challenges – ever - to the British opt-out? This seems far-fetched.

**What are the exact ramifications of the proposal?** What, for example, will be the procedure for reviewing the new arrangement in light of experience? Will there be another corporatist-style gathering between the CBI and TUC? Furthermore, how will the Directive be legally enforced? If, for example, a temp worker is paid more than a comparable worker, will the latter be legally entitled to an increase? And, what happens if a British case is taken to the ECJ, given the corporatist reading embedded in the Directive?

### **Other business groups are highly critical of the deal**

Other business groups have strongly criticised the “tripartite” deal for being exclusive and “corporatist”.

John Wright, Chairman of the Federation of Small Businesses, said that,

*"It is sad that we appear to have gone back to the days of beer and sandwiches at Number 10 with an exclusive trio of Government, bosses and workers hammering*

*out private deals that affect a much wider range of interests. What is most galling about it is that the Government will no doubt be saying from now on that they've got 'business agreement' for this deal. That is simply not the case. In fact, what they've got is the grudging acceptance of a tiny percentage of businesses. Small and medium-sized businesses make up over 99 per cent of businesses in the UK and they are the ones that will be hit hardest by the loss of flexibility and the extra administration that will come with these changes."*

David Frost, Director-General of the British Chambers of Commerce, has warned of a return to the "corporatism of the 1970s", saying:

*"Does this mean the start of a European model of social dialogue and collective bargaining? It represents a fundamental shift in the way decisions on employment policy are made, and crucially, this appears to have taken place without any consultation. Whereas many issues on the continent are decided at an industry-wide or sector level, in the UK such decisions are made by individual firms."*

Miles Templeman of the Institute of Directors said that

*"We remain opposed to any changes that will damage the flexibility of the UK's labour market. However any qualification period must be counted in months rather than weeks and the IOD believes that anything less than 6 months would be an immensely counter-productive move."*

The Engineering Employers Federation commented that:

*"At a time when business needs all the tools at its disposal to work flexibly and be quick on its feet, it is very unhelpful to add further constraints on the use of agency workers."*

Phil Orford, the chief executive of the Forum of Private Businesses said:

*"Yet again, it is the law-abiding small-business-owner who will suffer from additional regulation."*

A leader in the *FT* argued,

*"With the economic slowdown yet to bite, and unemployment starting to rise, this is the worst moment to introduce burdensome new employment law. Mr. Brown should rethink before he makes another mistake."*

## **Wider issues**

More fundamentally, quite apart from questions about whether the Government's attempt to pre-empt more stringent legislation will work, or questions about the way the CBI-TUC deal has been agreed, the big question is really about the effect even the supposedly watered down agreement will have on the economy.

Even the CBI's president Martin Broughton has acknowledged that: "It's not a good solution. It's the least worst solution. But it will still inhibit the labour flexibility that gives Britain its competitive edge."

Despite a decade of rhetoric about the need for market reforms in the EU, (and the further decline in Member States' competitiveness in the world over the same period), the Agency Workers Directive is set to make the labour market significantly less flexible, with a clear impact on both jobs and the growth of the economy.

The determination of the Commission and other Member States to push through the Directive suggests that rhetoric about economic reform in the EU is nothing more than that. It seems that some Member States are still more interested in raising their rivals' costs than in making Europe as a whole more competitive.