

Travellers' Checks

The Civil Aviation Bill

In April 2006, the Civil Aviation Authority ("CAA") launched a consultation on proposals to replenish the Air Travel Trust Fund ("ATTF") and reform Air Travel Organisers' Licensing ("ATOL") bonding through the introduction of a Consumer Protection Charge ("CPC"). The Civil Aviation Bill, anticipated to become law this summer, contains clauses that will, subject to secondary implementing legislation, enable the CAA to require contributions to be made by licence holders to replenish the ATTF.

Background

ATOL is managed by the CAA and gives comprehensive protection from losing money or being stranded abroad to 28 million people in the UK who buy air holidays and flights from tour operators each year. It is by far the largest travel protection scheme in the UK and the only one for flights and air holidays sold by tour operators. Over the past 19 years, ATOL has managed over 300 tour operator failures, rescuing over 200,000 people from being stranded and giving refunds to more than a million others at a total cost of £175 million. All tour operators selling flights and air holidays must hold a licence from the CAA.

The ATTF, which is managed by the CAA, is currently used to meet claims when the bond provided by a failed ATOL holder proves insufficient to meet the refund and repatriation costs. The ATTF has been in deficit since 1997, following a series of tour operator collapses during the 1990s and because the CAA's power to require contributions lapsed in the 1980s.

Why the consultation?

Last autumn the UK Government announced its decision not to proceed with the CAA's recommendation to extend financial protection to all air travellers departing the UK. This was received badly by the travel industry and many tour operators expressed concern that as a result they would continue to bear greater regulatory costs than their airline competitors. Consequently, the Government asked the CAA to consider whether the current system of bonding might be replaced with a less burdensome way of meeting tour operators' obligations to consumers. In particular, the CAA was asked to consider whether a per-passenger charge, whose original purpose was simply to replenish the ATTF, might be extended to enable a reform of ATOL bonding and establish a less onerous means of meeting

Welcome to the Summer Edition

The focus is on UK developments in aviation and financial protection. We comment on the Civil Aviation Authority's consultation on proposals to collect a £1 consumer protection charge. We also analyse the clash between the CAA and Association of British Travel Agents in relation to the definition of "Package".

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licence holders' financial protection obligations to air travellers. Terms of Reference for this work were agreed between the CAA and Government last November.

The CAA sets out in the consultation document its views on the potential reduction in regulatory burden that would arise from a reform of bonding. It also outlines the principal issues associated with such a reform and its preliminary views on how these might be tackled. The emphasis of the consultation is on simplification: the current system based around bonds is complex and the CAA considers that a reform of bonding will bring significant de-regulatory benefits to tour operators.

Proposed changes

The ATTF is currently in deficit by £15.5m and is incurring annual interest

costs of more than £0.7m. Licence holder failure costs have, therefore, been met through a borrowing facility guaranteed by Government. The CAA thinks that a CPC to replenish the ATTF needs to be introduced as a priority to place it on a firmer footing, irrespective of whether or not bonding is reformed through a CPC on passengers.

The CAA proposes in its consultation that ATOL holders would collect a £1 CPC from each passenger when they book and that the funds collected would be used to build up a fund of up to £250m to enable bonding to be removed. The CAA's view is that the contribution should be set at as low a level as possible, given the continuing market distortion that leads to licence holders bearing greater regulatory costs than their airline competitors.

A transparent £1 CPC would replace the hidden bonding charge which the consumer currently pays. At the same time the consumer would continue to receive the same level of financial protection that ATOL currently provides. The CAA proposes that a CPC would be introduced for all bookings taken after 30 September 2007 and bonds would no longer be required as a licence condition after that date.

Once the CAA has reviewed responses to the consultation paper, there will be a second formal three month consultation, with a Regulatory Impact Assessment, on draft legislation dependent on the outcome of this initial phase.

The meaning of "Package"

On 16 January 2006 in the case of *R (the Association of British Travel Agents Ltd) v Civil Aviation Authority & Secretary of State for Trade and Industry* [2006] EWHC 13 (Admin), the High Court held that the Civil Aviation Authority's ("CAA") guidance note on the Air Travel Organiser's Licence ("ATOL") regulations ("Guidance Note 26") should be quashed. At issue in this application for judicial review were the circumstances in which a travel agent is obliged to have an ATOL. At the heart of the dispute between ABTA and the CAA was the definition of "package" for the purposes of the Civil Aviation (Air Travel Organisers' Licensing) Regulations 1995 as amended in 2003 (the "ATOL Regulations"). ABTA challenged the CAA's view in that

regard contained in its Guidance Note 26 which set out how the CAA intended to interpret and enforce (including by possible criminal sanction) the ATOL Regulations.

Background to the claim

The CAA was constituted by the Civil Aviation Act 1971 and the provisions relating to it were consolidated in the Civil Aviation Act 1982 ("the Act"). The Act provides that a function of the CAA is *"the licensing of the provision of accommodation in aircraft"*. The Act stipulates that anyone who makes available, as principal or agent, accommodation for the carriage of persons on flights or holds himself out as such a person, must hold and comply with the terms of a licence issued in pursuance of the regulations. The

ATOL is such a licence.

The ATOL Regulations were made under the Act. In 2003 they were amended in order to prevent the practice of "contract splitting" which the CAA became concerned about in the late 1990s. "Contract splitting" refers to the practice by some firms not holding an ATOL of advertising flights and hotel accommodation as a package and then deliberately selling the component parts under separate contracts in order to avoid the requirement of holding a licence. The consumer would, in fact, be buying a package holiday. However, to evade the requirement to have an ATOL as the supplier of air accommodation, the travel agent would artificially separate component parts of the package and



present what was in truth one contract between the consumer and the travel agent as two separate sales; the sale of an airline ticket on behalf of an ATOL registered supplier of air accommodation and the discrete sale of hotel accommodation. The effect of this being that whilst the flight accommodation would be governed by an ATOL because it was sold as agent for an ATOL holder, the other services would not because they were being sold separately.

The ATOL Regulations were, therefore, amended to deal with the situation where the substance of the transaction was the single sale of a package holiday and the appearance was of two or more distinct transactions between the consumer and the travel agent. As part of the amendment, the ATOL Regulations incorporated a definition of package identical to that contained in the Package Travel, Package Holidays and Package Tours Regulations 1992 ("PTR"). Paragraph 1(2) of the ATOL Regulations defines package as follows:

“Package” means the pre-arranged combination of at least two of the following components when sold or offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation:

- (a) transport;*
- (b) accommodation;*
- (c) other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package, and (i) the submission of separate accounts for different components shall not cause the arrangements to be other than a package; (ii) the fact that a combination is arranged at the request of the consumer and in accordance with his specific instructions.... shall not of itself cause it to be treated as other than pre-arranged”.*

Guidance Note 26

The CAA produced Guidance Note 26 to help travel organisers and agents understand the definition of an air package set out in the European Council Directive on package travel,

package holidays and package tours 1990 (the "Directive"), the PTR and the ATOL Regulations. Guidance Note 26 sought to set out the meaning of the words "package", "pre-arranged" and "inclusive price". Under the heading "package" the Guidance stated that:

"One reasonable test is to consider what the consumer thinks he is getting when he approached the agent or travel organiser; artificial arrangements to sell components at separate times with separate billing would not mean that a package had not been sold".

Under the heading "inclusive price", the Guidance stated:

"It does not matter if the cost of a package is made up of separate sums relating to the value of each element (travel, accommodation, other ancillary tourist services). In these circumstances, the whole arrangement can still be sold at an inclusive price".

Guidance Note 26 also set out the basis on which the CAA would monitor compliance with the ATOL Regulations and prosecute travel agents if necessary for failure to comply.

ABTA submitted that the guidance was plainly wrong and did not accurately reflect the ATOL Regulations. ABTA stated that its understanding of the effect of the 2003 amendments was to prevent the unbundling of what is in truth a package: in other words to prevent a contract with the consumer being split. It was not to prevent the travel agent providing the consumer at the same time with different travel services if they are provided outside a package. ABTA commented on the potential impact of Guidance Note 26 on the travel industry, highlighting the

financial effect on small businesses who would be required to have an ATOL in addition to the bonding they provide through ABTA.

Decision

Mr Justice Goldring found that the definition of "package" in the ATOL Regulations contemplated that a travel agent could sell or offer to sell to the consumer component parts (transport, accommodation and other tourist services) outside a package and that to amount to a package the component parts had to be sold at an "inclusive" price. He said that the sale or offer for sale of the component parts at a price which is not "inclusive" means that what is sold is not a package. The ordinary and natural meaning of the word "inclusive" connoted more than a mere arithmetical total of the component parts of the price. The sale of a package at an inclusive price required the components to be bought and paid for as a whole. The word "pre-arranged" in the definition of package meant that the combination could be put together at any time up to the sale, that the consumer could

wholly dictate the component parts of the package and that advice or information from the travel agent was not necessary for something to be pre-arranged. In light of that interpretation of the ATOL Regulations by the CAA, Mr Justice Goldring found that Guidance Note 26 was wrong to a degree that required it to be quashed.

What next?

There have been substantial changes to the travel industry in recent years, principally as a result of the availability of cheap flights direct from airlines and the ease with which flights and accommodation can be bought over the internet. This has led to an increasing tendency for people to buy separate holiday components rather than pre-arranged packages and these sales, at present, fall outside both the ATOL Regulations (and their primary enabling legislation) and the Directive. They therefore, carry no statutory protection against the insolvency of any of the suppliers. Indeed, it would seem that neither the ATOL Regulations nor the PTR now provide protection for the substantial majority of holidays and

leisure travel that was envisaged. As Mr Justice Goldring concluded:

"The Directive and the legislation following it were, as the CAA has in the past stated, based upon a concept of a "package" which is now to a significant extent out of date. The use of the words "inclusive price" reflected that old concept of a package. It may be, as the CAA has said, that fresh legislation is needed to cover the current way in which flights are sold".

The CAA has sought and received, permission to appeal this decision. The appeal is expected to take place in June and it is anticipated that there will be a judgment before the ATOL September renewal. If the judgment is upheld, it is likely to trigger widespread changes. Thomas Cook has indicated that it will reorganise the way in which it sells holidays and travel services and within two years will no longer hold an ATOL. It is thought that other tour operators may follow suit.



Small claims limit

The Government's Better Regulation Taskforce has advised Government to consider raising the small claims limit in personal injury claims from £1000 to £5000. The Department of Constitutional Affairs House of Commons Select Committee also recommended recently that the limit should be raised to £2500.

The small claims track ensures access to justice by allowing small, straightforward claims to follow a simpler process without incurring significant costs liability. The advice

Government has received assumes that claims under £2500 / £5000 are simpler, so people can handle them without expert advice. This is true in many cases, but not in personal injury claims.

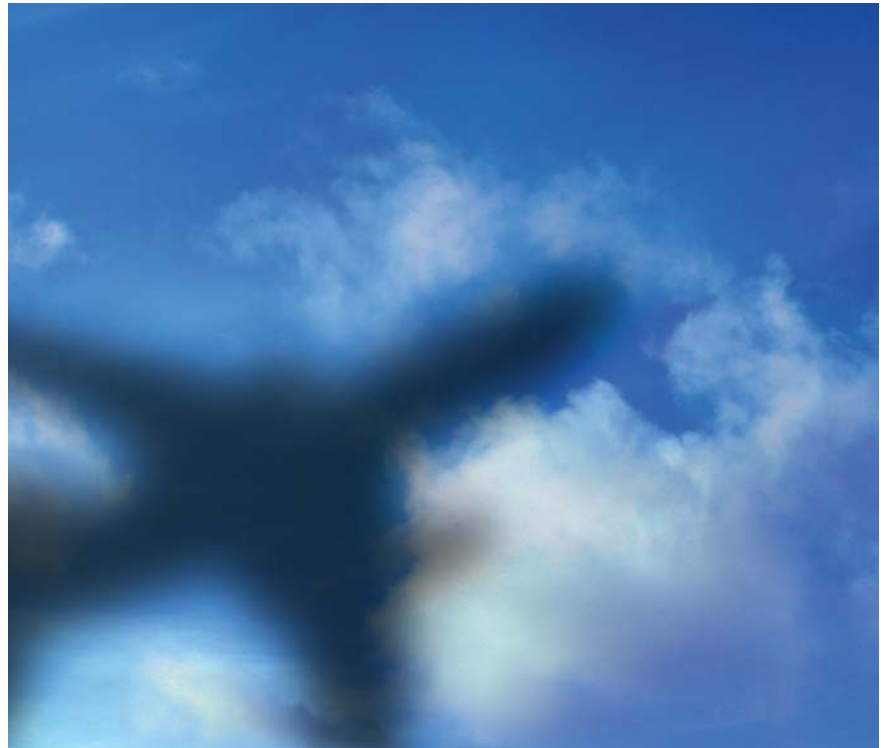
According to the Law Society, raising the limit to £2500, will encompass the majority of personal injury claims. They consider that this will have a significant negative impact, from a costs perspective, on those defending this type of claim and restrict their access to justice.

European Sky protected against unsafe airlines

The safety of air transport has been a top priority for the European Community ever since the introduction of a common air transport policy. Regulation 2111/2005 EC, which came into force in January 2006, is a further step towards enhancing European air safety and passenger protection by allowing the European Commission to ban or restrict the activities of unsafe airlines within the European Union.

On 22 March 2006, the European Commission adopted the first EU list of airlines banned in the European Union. These airlines are considered to be unsafe and are therefore not permitted to fly passengers or cargo in the EU or operate within European airspace. The objective is to ensure that all airlines operating in Europe's sky meet the highest safety standards. In addition to the list, the Commission will also advise people to avoid travelling with these airlines in other parts of the world.

The black list has been compiled on the basis of national contributions and after an in-depth analysis with Member State experts. Since 16 January 2006, when Regulation 2111/2005 EC came into force, Member States have informed the European Commission of any flight bans or operating restrictions in their territory and of the reasons for such bans. Bans and operational restrictions are only imposed based on evidence of violation of objective and transparent criteria which are published in Regulation 2111/2005. These criteria focus on the results of checks carried out in European airports; the use of poorly maintained, antiquated or obsolete aircraft; the inability of the airlines to rectify shortcomings identified during inspections; and the



inability of the authority responsible for overseeing an airline to perform its task properly. The list will be updated as often as is necessary and at least every three months.

If an airline feels that it should be taken off the list because it again complies with safety standards, it should contact the Commission or a Member State. The Committee of Aviation Safety experts will assess the evidence provided by the airline or its supervisory authority. The Commission will take its final decision based on the Committee's opinion. The same procedure applies if an airline should be added to the list. Herein, the Commission can act at the request of a Member State or on its own initiative, a right which it did not have for drawing up the first list which is based exclusively on national contributions.

The Commission will act upon information gathered by its own services, the European Aviation Safety Agency (EASA), Member States or the International Civil Aviation Organisation.

The European Commission believe that the black list will have a real impact on aviation safety in the European Union. In addition to its punitive effect, the black list will encourage all airlines operating in Europe to comply fully with safety standards and will dissuade unscrupulous airlines from starting up services in Europe. It will avoid discrepancies between national flight bans and restrictions. The European Commission also thinks that through its wide publication, the list will have an impact world-wide.

Compensation Bill

The Compensation Bill was introduced to the House of Lords on 2 November 2005. It provides a framework for the regulation of claims management services and contains a provision on the law of negligence to make clear that the social value of activities is a factor which the court can take into account in considering a claim. The Bill forms part of a wider programme of work which the Government is taking forward to tackle perceptions that can lead to a disproportionate fear of litigation and risk averse behaviour; find ways to discourage and resist bad claims; and improve the system for those with a valid claim.

The Bill will allow for the Secretary of State to designate a regulator who will be responsible for ensuring that claims management companies abide by clear rules and a code of practice. A person providing claims management services without the requisite authorisation (or if exempted or subject to a waiver) will be committing an offence and liable to a maximum of up to 2 years imprisonment. Those providing claims management services will be required to give consumers clear advice about the validity of their claim, options for funding the costs and provide a complaints mechanism if things go wrong. The Bill is still in draft form and it is anticipated that it will have a second reading by the House of Commons at some stage in June.



Playing the age card?

From 1 October 2006 discrimination on the basis of age will be unlawful in the UK. The Age Equality Regulations 2006 (the "Regulations") were published on 9 March and will impact on all aspects of the employment relationship. This will affect employers in all industries but is particularly likely to affect the Travel and Leisure industry which traditionally relies on a younger workforce.

The current legal position

At present, employers can dismiss employees with relative impunity at the employer's normal retirement age ("NRA") and there has been no prohibition on discrimination on the grounds of age. Employees generally have no legal recourse against compulsory retirement. Age discrimination is not unlawful and employees are ordinarily barred from claiming unfair dismissal or redundancy rights after they reach the NRA or, in the absence of a NRA, 65.

What are the key changes that will take place on 1 October 2006?

- Prohibition of unjustified age discrimination in employment. This covers all aspects of employment, including recruitment, promotion, training and retirement. It will be unlawful to treat employees less favourably, directly or indirectly, on the basis of their age unless such treatment can be objectively justified.
- There will be a national default retirement age of 65, which the Government has committed to review in 2011. Employers who set a retirement age below the default age of 65 will be required to justify or change it.
- Employees will have the right to request the ability to work beyond retirement age and there is a new duty on employers to consider an

employee's request. Employers will have to inform employees at least 6 months in advance of their intended retirement date of this right.

- The upper age limit for unfair dismissal and redundancy rights will be removed, giving older workers the same rights to claim unfair dismissal or receive a redundancy payment as younger workers, unless there is a genuine retirement.
- It will be unlawful to harass or victimise an employee on the basis of their age.
- Younger employees will also be protected from age discrimination. By contrast in the US only workers aged 40 and above are protected.

Under limited circumstances age discrimination may be lawful. For instance, where there is an objective justification for treating people differently (which will require employers to show that the treatment in question is pursuing a legitimate aim and is a proportionate means of doing so) or where the discrimination is covered by one of the exemptions in the Regulations (such as pay related to the National Minimum Wage or certain service related benefits). It is also permitted where there is a genuine occupational requirement that a person be of a certain age (for example, a play which has parts for older and younger characters) and there is a specific exemption that permits employers to refuse to recruit a person where that person is older than, or within six months of, the employer's NRA.

The Regulations are likely to affect the Travel and Leisure industry in the following ways:

Employers who market, for instance, holidays for 18 to 30 year olds would traditionally employ holiday representatives of a similar age. However, from 1 October such employers will need to think carefully about their recruitment, training and promotion system. For instance, an advertisement placed only in a magazine aimed at young people may indirectly discriminate against older people because they are less likely to subscribe to the magazine and therefore, less likely to find out about the vacancy and apply. Employers will need to avoid using language that may imply that they would prefer someone of a certain age, such as "energetic", "young", "experienced" and "mature". Hidden messages present in recruitment literature, such as, a photograph of a young representative taking holiday makers on a pub crawl around bars in Ibiza, should be avoided wherever possible. This scenario could

also be viewed in reverse, whereby a travel company providing holidays for the retired may be marketing itself indirectly to older employees.

Another example of indirect age discrimination could be where a job as a coach driver or holiday representative is advertised as having a minimum requirement of 10 years driving experience. This would effectively prevent people under 28 from applying for the job unless this 10 year criterion could be justified, bearing in mind that only 4 years experience is required to qualify as a driving instructor.

All employers will need to ensure that there are no policies or practices in place that indirectly (or directly) discriminate against employees of certain age groups. For example, an older employee in the travel industry may find it harder than a younger employee to be travelling abroad all the time due to family commitments or health problems. Employers will have to ensure that such employees are not indirectly discriminated against as a consequence.



Conclusions

The extension of unfair dismissal rights will increase the number of claims brought, but employees will still have to acquire one year's service to bring a claim and the damages available will still be capped (currently £58,400).

As age applies to all employees, the real risk for employers is that the claims brought will be for age discrimination rather than unfair dismissal or that multiple discrimination claims are brought (for example, disability and age). There is no service qualification for bringing an age discrimination claim; damages are uncapped and can include damages for injury to feelings. Employers should audit their

employment terms and conditions to make sure that they are not unjustifiably discriminatory on the grounds of age. They should not impose unilateral changes to employees' contracts but should consult with the employees to secure their consent even where the changes are to comply with the Regulations (for example, changing contractual redundancy schemes). Promotion decisions should be transparent and fully documented. Stereotypes should be rooted out. Finally, employers should ensure that staff receive full training on their Equal Opportunities policies and that these are enforced.

It is essential that all companies review and conduct an audit of their policies in relation to age and where necessary, seek legal advice as to the appropriate amendments to be made and procedure to be followed.

It remains to be seen whether there will be a significant rise in the number of Tribunal claims after October. One thing is certain, however, one of the first questions that employers will be asked by their advisers when considering dismissing an employee is the employee's age.

Who to Contact

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