The communications union

RESEARCH

8th May 2018

CWU response to BEIS on 'Good Work: The Taylor Review of Modern Working Practices, Consultation on agency workers recommendations'

Introduction

1. The Communication Workers Union (CWU) is the largest union in the communications sector in the UK, representing approximately 192,000 members in the postal, telecoms, financial services and related industries.

2. The CWU has campaigned over more than a decade for equal treatment for agency workers. Our current campaign - 'Close the Gap!' – calls for an end to the 'Swedish derogation' in the Agency Workers Regulations that allows workers on Pay Between Assignment (PBA) contracts to be paid a lower rate for the job.[1]

3. There is evidence of wide scale misuse of PBA contracts as hirers and employment businesses seek to avoid pay equality for agency workers. Most of the 2,000 CWU represented Manpower agency workers in BT are on a PBA contract and are paid up to £3.26 per hour or £529 per month less than their directly employed colleagues in identical roles. PBA contracts have been standard for Manpower workers in BT since the Agency Workers Regulations were introduced in 2011.

4. Umbrella companies are being used by employment businesses to shift responsibility for tax, national insurance and employee rights from the business on to the agency worker. After an umbrella company deducts their 'margin' and any other costs, workers often receive much less than the rate agreed when they took the job. Workers are often unaware who their employer is when an umbrella company is involved, making it difficult to enforce their employment rights.

5. We urge the Government to act swiftly to tackle these issues and other problems facing agency workers such as their lack of access to basic rights in the workplace.[2] We support the TUC's call for a range of government reforms, including the following:

    - The first priority must be the repeal of the Swedish derogation, to ensure all agency workers have the same rights to equal pay. This cannot be resolved through enforcement of existing legislation.

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[1] Close the Gap! CWU Campaign web page, accessible at: https://www.cwu.org/campaign/close-the-gap/

[2] For example, agency workers who qualify as employees do not have the right to request flexible working. They also do not have the right to protection from unfair dismissal as they do not have a contract with the end user.

- After 12 weeks doing the same job for the same hirer, hirers should be required to carry out a review to assess whether the work will be required on an on-going basis. Where this is the case, agency workers should be offered a permanent contract with the hirer.

- The rules on employment status should be revised to ensure agency workers benefit from the same decent floor of rights as employees.

- The law should be reformed to ensure end-users, agencies and umbrella companies are jointly and severally liable for any breaches of employment law during any assignments.

- The government should substantially increase the level of resources for the Employment Agencies Standards Inspectorate (EAS) to ensure that the inspectorate can properly fulfil its enforcement duties.

- The penalties for non-compliance with agency workers' rights should be increased. Agencies and umbrella companies which breach minimum standards should be required to pay increased fines and full compensation to work seekers.[3]

Questions

1) To what extent would you agree that a 'key facts' page would support work seekers in making decisions about work?

6. We support the introduction of a key facts page because it will help to clarify what work seekers can expect in relation to their rights and conditions of work. However, we believe the information it provides will by itself have a limited impact on work seekers' decisions about work. As the TUC has pointed out, any benefit will be limited to those who have a genuine choice whether to accept the work being offered. For many individuals, no choice exists, because of the prevalence of agency work in certain parts of the country.

2) What information would be important to include in a 'key facts' page?

7. The key facts page should include all the information required under the Conduct Regulations, including a worker's pay and hours of work; their holiday entitlement and how their holiday pay will be calculated; the start date for an assignment; how long the contract is likely to last; any health and safety risks; and any expenses they may have to pay.[4]

8. We agree with the proposal to strengthen the current provision to show additional information including details of: Who will be responsible for the employment of the work seeker; how much the work seeker will be paid by the umbrella company or

[3] Taylor Review: Agency Workers Recommendations, TUC Response to BEIS Consultation, May 2018
[4] The Conduct of Employment Agencies and Employment Businesses Regulations 2003, accessed at: http://www.legislation.gov.uk/uksi/2003/3319/regulation/18/made

intermediary; any fees payable by the work seeker if applicable; any statutory deductions and benefits such as childcare vouchers.

9. However, we believe further details should also be provided on the rights to which workers are entitled. These include their pro-rata holiday and pensions allowances; access to onsite facilities such as staff canteens and childcare; and confirmation that after a 12-week qualifying period agency workers will be entitled to the same basic conditions of employment as if they had been directly employed from day one of the assignment. Finally, it should be made clear that all workers have the right to join a trade union along with details of their employer's recognised union (if available).

2 (a) What conditions should be in place to ensure the 'key facts' page is provided and understood by the work seeker before any contractual engagement?

10. The right to a key facts page should become a statutory requirement for all new starters, supported by stronger investigatory powers on the part of the EAS Inspectorate and substantial penalties for non-compliance. It should become standard practice across the labour market.

3) Should an employment business be required to ensure that the work seeker understands fully the information being given to them?

11. In short: yes. It is clear that abuses have taken place in innumerable agencies and that workers have too often been exploited due to a lack of information. In future, employment businesses should be mandated to ensure that workers understand their rights at work to safeguard against this.

4) Do you feel an hour is an accurate estimate of the time it would take to produce information document for a work seeker?

12. In general an hour will be sufficient time. However, given there may be variabilities due to, for example, differing levels of English comprehension or contractual complexity, this should be seen as a floor rather than a ceiling and an area to be monitored in future.

5) Have you used or are you currently using an umbrella / intermediary?

13. Members of the CWU who are agency workers are employed by employment businesses (also known as temping agencies) rather than umbrella companies or other intermediaries (such as personal service companies).

6) Do you know of any examples of the benefits and/or problems for agency workers of using an umbrella company or intermediary?

14. There is detailed and mounting evidence to show that umbrella companies bring serious problems for workers in relation to pay and employment rights. Umbrella companies and other intermediaries are widely used as a device for employers to convert their workforce from employed status to self-employed status in order to avoid tax, national

insurance and employment liabilities. The victims are largely lower paid workers, including security guards, couriers, drivers, cleaners and chefs[5]. They also include qualified professionals such as supply teachers.[6] The NASUWT told the Lords Select Committee on personal service companies that '*Workers are getting less, schools are paying more, while offshore umbrella companies are engaged in profiteering*'.[7]

15. The use of umbrella companies has escalated in response to changes to the law in 2014, which were designed to force employment agencies and payroll companies to deduct tax and national insurance at source when paying workers.[8] This followed a consultation by the HMRC in December 2013, in which it stated that *"much of the growth in false self-employment can be attributed to employment intermediaries who are facilitating it*."[9]

16. The TUC has found that employment through umbrella companies creates many additional problems for agency workers, including:

    - A lack of transparency and misinformation about pay rates
    - Lower pay for agency workers
    - Difficulties for individuals to enforce their rights due to an increase in the length and complexity of the supply chain.[10]

17. It appears that umbrella companies are nothing more than a device for false self-employment, tax avoidance and worker exploitation. We see no rightful place for umbrella companies in the labour market and we believe there is good reason to ban them completely. There is growing support for this view, and last year Unite called for umbrella companies to be outlawed after a BBC report exposed how they are exploiting and ripping off workers.[11]

18. The Institute of Employment Rights has also questioned the use of umbrella companies as a vehicle for self-employment, stating in its recommendations on the need for legislative clarity in the application of employment rights:

    "Some engagements will need to be deemed to be employment – such as the worker induced to work under an umbrella contract with her own company which has contracted commercially with the end user".[12]

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[5] House of Lords Select Committee on Personal service companies, report of session 2013-14, personal service companies, 7th April 2014, para 147, p.39 accessed at: https://publications.parliament.uk/pa/ld201314/ldselect/ldpersonal/160/160.pdf

[6] House of Lords Select Committee, ibid, 7th April 2014, para 152, p.40

[7] NASUWT evidence to House of Lords Select Committee on personal service companies, oral and written evidence, February 2014, p.264, accessed at: https://www.parliament.uk/documents/lords-committees/Personal-Service-Companies/personalservicecompaniesevvolume.pdf

[8] LRD, Casualisation at work, a guide for trade union reps, August 2014

[9] HMRC, Consultation: *Onshore employment intermediaries: False self-employment* (December, 2013)

[10] Shifting the Risk, TUC, 2 April 2018, accessed at: https://www.tuc.org.uk/sites/default/files/Shifting%20the%20risk.pdf

[11] Unite demands government outlaws umbrella companies

[12] A Manifesto for Labour Law: towards a comprehensive revision of workers' rights, Institute of Employment Rights, June 2016.

19. As a minimum, significant changes are needed to tackle the harmful practices used by umbrella companies. We support the TUC's call for the following reforms:

- Umbrella companies should be required to comply with the same standards which apply to employment businesses and agencies.
- The remit of the EAS should be extended to cover umbrella companies.
- The Conduct Regulations should be amended to ensure that the contractual rates agreed between the recruitment agency and the umbrella company include an uplift to cover any administrative fees charged by the umbrella company.[13]

7) Should the extension of the remit of the Employment Agency Standards inspectorate to cover the regulation of certain activities of umbrella companies and intermediaries in the supply of work seekers to a hirer:

i. Be limited to the regulation of the key facts page and provision of information relevant to those facts as part of a work offer by the hirer or employer?

ii. Be aligned to the regulation of the types of employment rights already regulated by EAS under the current legislative framework such as non-payment of wages, deductions from wages which the work seeker has not agreed to, and failure to provide written terms and conditions before the assignment starts?

20. The EAS Inspectorate should have a role across all legislative matters rather than merely being limited to regulating the key facts page provided to workers before they begin employment. However, to adequately undertake this remit, it is clear that the EAS Inspectorate will require substantial investment.

21. Between 2010 and 2016, the Inspectorate suffered from funding cuts of over 50% and a 70% fall in staff levels. As a result, it failed to yield a single prosecution that year.[14] While empowering the Inspectorate would be a positive step forward for worker's rights in the UK, it will only have an impact if matched by the requisite resources.

7) (a) What do you think the impact of ensuring that umbrella companies provide work seekers with a key facts page would be on:

i. the work seeker; and

ii. the recruitment sector?

22. As we have said in response to Question 1, a key facts page will by itself have a limited impact on work seekers' decisions about work if few alternative employment opportunities exist.

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[13] Taylor Review: Agency Workers Recommendations, TUC Response to BEIS Consultation, May 2018

[14] Worker rights watchdog fails to bring a single prosecution in a year, Guardian, 14 August 2016, accessed at: https://www.theguardian.com/business/2016/aug/14/employment-agency-standards-inspectorate-worker-rights-watchdog-labour

23. However, it should provide workers with greater clarity as to their rights in the workplace and an enhanced understanding as to what they are owed and by whom. If backed up by robust legislation against worker exploitation, this information should help to protect workers.

24. For employers in the recruitment sector we believe the relative time and capital expenditure required to provide a key facts page will be minimal, particularly if aided by clear government guidelines.

8) Have you used or are you currently using a pay between assignments (PBA) contract?

25. Currently around 2,000 CWU represented agency workers employed by Manpower are engaged on PBA contracts.

9) In your experience, what are the benefits and any problems associated with working on a PBA contract basis?

26. In our experience, the problems of working on a PBA contract basis are considerable, whilst there do not appear to be any benefits for workers.

27. Although PBA contracts offer a guaranteed income for four weeks this only applies to full weeks without work and guarantees just 50% of the rate of pay from the last assignment. It is therefore at a much lower level than normal rates of pay.

28. Meanwhile, agency workers are prevented from enjoying the same treatment on pay as their permanent colleagues, even after 12 weeks. As a result, CWU agency members on PBA contracts who are employed by Manpower and assigned to BT, are paid substantially less than their permanent counterparts doing the same work. This can be as much as £3.26 less per hour, which amounts to £122 a week and £529 a month.

29. Since the Agency Workers Regulations were introduced in 2011, PBA contracts became the standard employment method in BT for agency workers. There is no option to switch contracts and people who refuse to work under such arrangements would not be offered work.

30. There are currently around 2,000 CWU represented Manpower agency workers in BT, 97% of whom are employed on a PBA contract. Rather than being employed on a short term basis to help meet peaks and troughs of demand, many of these agency workers are on long term assignments and have been on a PBA contract for several years. Their experience exposes the myth that agency work is a stepping stone into permanent employment.

10) In your experience, how effective do you think pay between assignments contracts are in supporting workers and work seekers when they are not working?

31. We have found no evidence that PBA contracts are effective in supporting workers and work seekers when they are not working. In fact, the opposite has been the case. CWU represented agency workers on PBA contracts have struggled due to low incomes and little reassurance that they will be expediently moved into a suitable position.

11) Do you have evidence that there are wider issues (beyond equal pay) with PBA contracts, for example agency workers not being able to access to facilities, rest break, annual leave or job vacancies?

32. Yes, we have found that some members of the CWU have experienced problems beyond access to equal pay while on a PBA contract. These include difficulties with the scheduling of annual leave at the required time; unsocial shifts and being mandated to work during bank holidays; in accessing and applying for permanent positions; poorer pension terms and conditions; and no access to occupational maternity/paternity and sick pay.

11 (a): Do you believe that that the above issues would justify wider state enforcement?

33. We do not believe the enforcement of existing regulations will resolve the problems outlined above, which are inherent to agency work. Instead a regulatory overhaul is needed to ensure that day one rights exist across the workforce and to prevent the kind of exploitation that has become normalised in too many workplaces.

12) To what extent do you agree that enforcement of the Agency Worker Regulations 2010 should come within the remit of the Employment Agency Standards inspectorate?

34. As above, we consider that the challenge is not one of enforcement, or lack thereof, but of poor regulations and loopholes that enable exploitation. Consequently, we believe that a review and overhaul of the Agency Worker Regulations Act 2010 is now required as a matter of urgency.

35. In particular, the extent of the abuse of PBA contracts is such that enforcement is not sufficient to tackle this issue, and there must be a repeal of the Swedish derogation in line with the Taylor Review proposals.

36. Not only does the Swedish derogation create a disparity in payment received for tasks performed, denying agency workers the going rate for the job, but it undermines the universality of entitlements in the workplace.

37. Ultimately however, once the law has been strengthened and the loopholes closed, we agree that the EAS Inspectorate should be responsible for the enforcement of agency regulations. Provided that the EAS Inspectorate is properly funded and resourced, this will help to ensure compliance with the law and protection for agency workers against unequal treatment and exploitation.

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