

**Department for Business, Energy and Industrial Strategy (BEIS)
consultation on agency worker recommendations**

**NASUWT submission to the Department for Business, Energy and Industrial
Strategy (BEIS) consultation on agency worker recommendations**

The NASUWT's submission sets out the Union's views on the key issues identified by the Department for Business, Energy and Industrial Strategy (BEIS) consultation on agency worker recommendations.

The NASUWT is the teachers' union, representing teachers and headteachers exclusively.

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Executive Summary

- There are significant concerns about the procurement of agency and self-employed workers in the education sector.
- These concerns are intensifying with the increased casualisation of the workforce and the growth of supply agencies and umbrella companies.
- Almost four fifths (79%) of supply teachers report that the use of private supply agencies is now the only way to obtain work.
- Agencies and umbrella companies are making substantial profits in a largely unregulated schools sector, whilst depressing the pay of teachers.
- There is evidence that supply teachers are denied access to their employment rights such as those afforded under the Conduct of Employment Agencies and Businesses Regulations, the Agency Workers Regulations (AWR) and other associated legislation.
- Improved transparency through a key facts sheet could play a significant part in addressing the way in which supply teachers as agency workers are treated. However, this is not a substitute for legislation and statutory enforcement.
- The widespread evidence of abuse in the system highlights the need for greater regulation and enforcement by the Government, including substantial fines and penalties for employers and appropriate compensation and redress for the agency worker.
- The Conduct of Employment Businesses Regulations and the remit of the Employment Agencies Standards (EAS) Inspectorate should be strengthened to ensure that specific provisions relating to umbrella companies are incorporated, but this must be accompanied with improved levels of funding and additional resources to enable the EAS to deliver its extended remit.
- There should be enhanced fines for agencies and umbrella companies found to be breach of the minimum standards.
- Public procurement rules should be strengthened to ensure public sector bodies are prohibited from using those employment agencies and umbrella companies which fail to adhere to minimum standards.

- There is compelling evidence that the use of pay between assignments (the 'Swedish Derogation') cannot be rectified through wider state enforcement. Instead, government should look to repeal the legislation as a matter of urgency.
- There is a clear case for the remit of the EAS to be expanded to incorporate the enforcement of these provisions.

1. GENERAL COMMENTS

- 1.1 The NASUWT welcomes the opportunity to respond to the Department for Business, Energy and Industrial Strategy (BEIS) consultation on agency worker recommendations, as part of the Government's response to the Taylor Review into Modern Working Practices.
- 1.2 The recommendations in the consultation are significant and wide-ranging and cover a number of areas associated with the role of the recruitment sector in the labour market. The NASUWT submission seeks to address these issues.
- 1.3 There have been significant changes in the UK labour market over recent years which have impacted upon pay, job security and conditions of employment.
- 1.4 For example, there has been an increase in the number of people reporting that they are self-employed. According to the Office for National Statistics (ONS), this now accounts for approximately 15% of the workforce.¹
- 1.5 Between February to April 2007 and February to April 2017, self-employment rose by 1 million (26%) compared to just 7% for employees over the same period.²

¹<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/trendsinselfemploymentintheuk/2001to2015>

²<http://researchbriefings.files.parliament.uk/documents/CBP-8045/CBP-8045.pdf>

- 1.6 A third of UK firms surveyed reported that it was now a 'strategic' active business decision rather than a stop-gap approach when considering the use of agency workers.³
- 1.7 Although most self-employed people work full time, it is part-time self-employment that has been growing faster in recent years. Part-time self-employment grew by 88% between 2001 and 2015, compared to 25% for full-time people.⁴
- 1.8 Recent research by the McKinsey Global Institute has suggested that the true number of people working part-time in the 'gig economy' is much higher than the official employment statistics suggest.⁵
- 1.9 Figures published by the Trade Union Congress (TUC) show that over three million people – one in ten of the UK workforce – now face uncertainty about their working hours and their rights and protections. Of these, 730,000 are agency workers.⁶
- 1.10 The Labour Force Survey (LFS) puts the estimate at 865,000 agency workers in the UK today, made up of those in temporary and permanent agency work, as well as those classed as self-employed but paid by an agency, and those who undertake agency work as a second job.⁷
- 1.11 The Resolution Foundation believes that the number of agency workers is significant and rising fast. For example, Figure 1 below shows that the number of agency workers has increased by 200,000 between the period 2011 to 2016,⁸ the equivalent of a 30% increase over the period. If such a rate of change is sustained then this would result in over a million agency workers by the end of decade.⁹

³ <http://www.resolutionfoundation.org/app/uploads/2018/02/business-survey-slide-FINAL.pdf>

⁴ Ibid.

⁵ <http://www.mckinsey.com/global-themes/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy>

⁶ <https://www.tuc.org.uk/sites/default/files/the-gig-is-up.pdf>

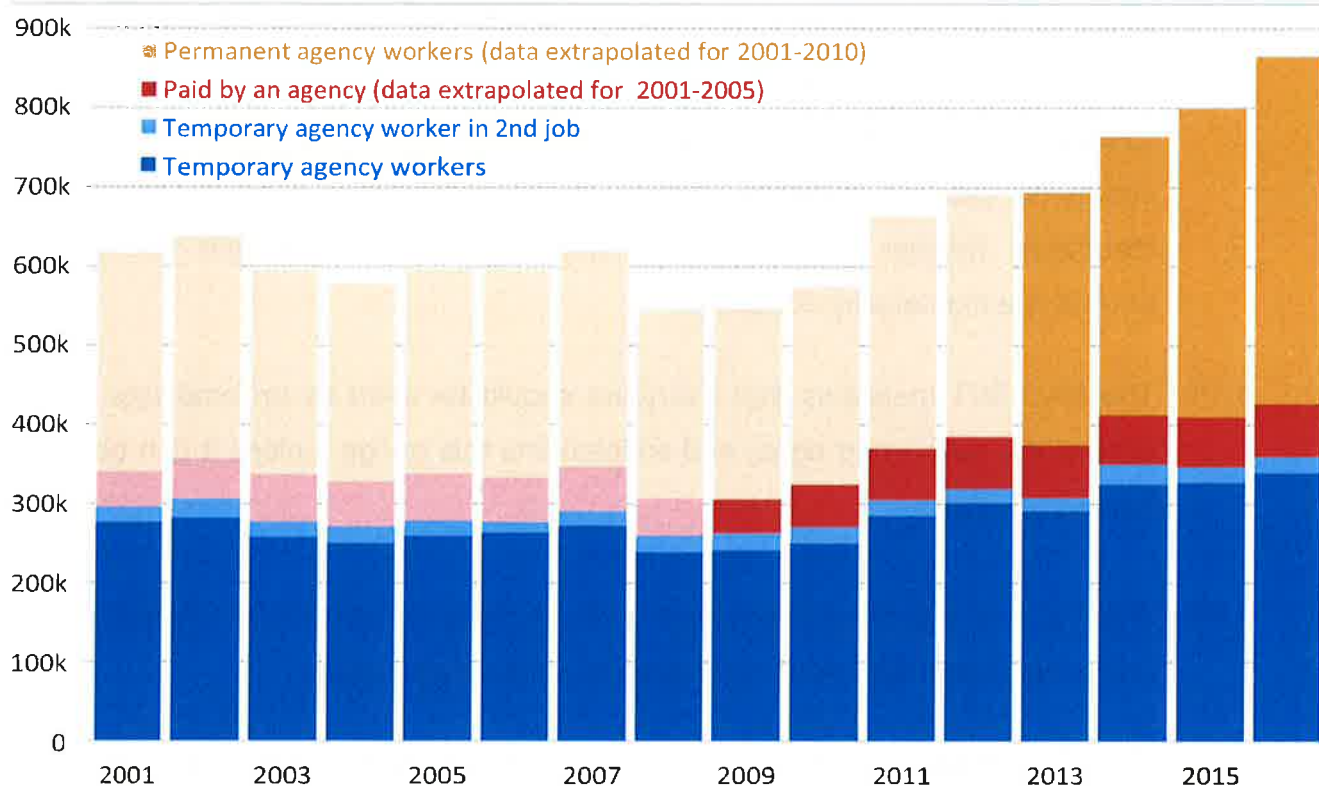
⁷ <http://www.resolutionfoundation.org/app/uploads/2016/12/Secret-Agents.pdf>

⁸ <http://www.resolutionfoundation.org/app/uploads/2016/12/Secret-Agents.pdf>

⁹ Ibid.

1.12 It should not go unnoticed that it is not easy to estimate the number of agency workers in the UK labour market, as no official figures are produced by the ONS and surveys rely on people knowing and understanding exactly what their employment status is. The level of agency working currently reported could therefore be seen as just the 'tip of the iceberg'.

Figure 1



Source: Resolution Foundation, *Secret Agents: Agency workers in the new world of work*, December 2016, p17

1.13 The Union acknowledges that there has been a lot of public interest regarding the 'gig economy' following the GMB case against UBER,¹⁰ and the more recent case involving drivers working for Addison Lee.¹¹ However, the NASUWT is concerned that the Government has failed to recognise and address the issue of workers' rights and the level of protection and support agency workers should be afforded, irrespective of whether or not they work in the gig economy.

¹⁰ <https://www.judiciary.gov.uk/wp-content/uploads/2016/10/aslam-and-farrar-v-uber-reasons-20161028.pdf>

¹¹ <https://www.leighday.co.uk/News/News-2017/September-2017/Victory-for-AddisonLee-drivers-as-Tribunal-finds>

- 1.14 The Union also notes that the rise in insecure work is having a disproportionate impact upon groups who already suffer a labour market disadvantage, such as women and black, Asian and minority ethnic (BME) workers¹². The TUC estimates that BME workers are over a third more likely than white workers to be in temporary or zero-hours work.¹³
- 1.15 One of the sectors the TUC has identified as having the fastest growth in insecure work is the education sector, which has risen by 42% since 2011.¹⁴ The NASUWT is concerned about the growing trend towards the casualisation of work, precarious employment and the use of zero-hours contracts, and the negative impact of these practices upon teaching standards, teacher morale and the entitlement of children and young people to a high quality education.
- 1.16 The NASUWT maintains that everyone should be seen as an employee, with all the associated rights and entitlements this brings, unless it can be proved otherwise.
- 1.17 The Union is, therefore, committed to employment in the education system that is fair to all employees regardless of employment status.
- 1.18 The Government must act in order to ensure that basic rights and entitlements are extended to all other categories of worker.
- 1.19 Supply teachers are committed and dedicated professionals who provide an invaluable resource for schools. As such, supply teachers make a vital contribution to securing high educational standards for all children and young people.
- 1.20 Teachers may undertake supply for a variety of reasons. However, lack of availability of suitable permanent employment is a reason which is increasingly given, despite the recruitment and retention crisis. This is

¹² <http://www.resolutionfoundation.org/app/uploads/2016/12/Secret-Agents.pdf>

¹³ <https://www.tuc.org.uk/sites/default/files/the-gig-is-up.pdf>

¹⁴ Ibid

because too many schools are using the deregulation provisions not to employ qualified teachers.

- 1.21 Personal Service Companies (PSCs) is a feature of the educational landscape in schools, in the form of supply agencies and umbrella companies.
- 1.22 The NASUWT's annual survey of supply teachers found that the overwhelming majority of supply teachers (79%) reported that private supply agencies were the only way to obtain work.¹⁵
- 1.23 Indeed, the Recruitment and Employment Confederation (REC) Industry Trends Survey 2014-15 reported that the average daily number of placements in education had increased by 71.2% from the previous year.¹⁶
- 1.24 The evidence suggests that in the increasingly fragmented context in which schools operate, the role previously undertaken by local authorities is now being carried by privatised supply agencies who are exploiting the recruitment challenges in school for profit.
- 1.25 There is a plethora of agencies and umbrella companies operating within the system.
- 1.26 The REC alone lists in excess of 120 members in its website directory.¹⁷ There are also members linked to the Association of Professional Staffing Companies (APSCo).
- 1.27 It is important to note that some of the agencies identified in such lists can be subdivided into different regional offices across the country. Furthermore, the REC list only refers to those who have been through their auditing process and achieved REC Audited Education status.
- 1.28 Many other employment agencies are neither a member of the REC nor APSCo, so it is difficult to be definitive on the total number operating within

¹⁵ <https://www.nasuwt.org.uk/uploads/assets/uploaded/e7d27137-a3cb-4db8-ae6d1c34024d344a.pdf>

¹⁶ https://www.niesr.ac.uk/sites/default/files/publications/NIESR_agency_working_report_final.pdf

¹⁷ <https://www.rec.uk.com/business-support/audited/audited-members-directory>

education. The National Institute of Economic and Social Research (NIESR) publication, *Use of Agency Workers in the Public Sector* estimates that the number of employment agencies in education has doubled to 500.¹⁸

1.29 It is clear that the market in agency workers in education is big business. The amount spent by maintained schools on supply teachers for 2016/17 was in excess of £700 million.¹⁹ Of this, approximately £520 million went to employment agencies. The figure for academy schools for the year ending August 2016 was almost £438 million. Approximately £272 million of this went to supply agencies.²⁰

1.30 The data in Figure 2 shows that spending on agency staff in education has shown year on year increases since 2010.

Figure 2

Agency supply teaching staff expenditure for local authority maintained schools and academies in England.

Year	2010/11	2011/12	2012/13	2013/14	2014/15
LA maintained schools (spending in £ millions)	483.2	431.8	469.1	523.2	559.6
Proportion of total supply spend (%)	53.3%	56.3%	63.1%	64.5%	68.2%
Academies (spending in £ millions)	N/A	47.8	152.6	225.5	295.3
Proportion of total supply spend (%)	N/A	48.4%	63.0%	63.7%	69.7%

Source: NIESR *Use of Agency Workers in the Public Sector*, February 2017, p.97

1.31 The profit margins of supply agencies are increased by depressing the pay of teachers or by mis-selling the services of qualified teachers by hiring them out to perform tasks which do not require their professional skills and abilities, such as supervisory roles, but at the same time charging schools for the provision of a qualified teacher.

¹⁸ https://www.niesr.ac.uk/sites/default/files/publications/NIESR_agency_working_report_final.pdf

¹⁹ <https://www.gov.uk/government/statistics/la-and-school-expenditure-2016-to-2017-financial-year>

²⁰ Based on an analysis of income and expenditure figures provided by academies in England found at: <https://www.gov.uk/government/statistics/income-and-expenditure-in-academies-in-england-2015-to-2016>

- 1.32 Taxpayers' money is being siphoned off to agencies. Supply teachers are getting less, schools are paying more, whilst agencies and umbrella companies profit.
- 1.33 The TUC estimates that agency workers, such as supply teachers, are suffering up to a 20% hourly pay penalty when compared to the pay of an 'average' employee.²¹
- 1.34 The NASUWT's research demonstrates that three quarters of supply teachers (75%) reported being paid more for an assignment when employed directly by a school compared to being employed through an agency. At the same time, the agency employing the teacher is able to charge the school up to £100 more than the teacher receives.
- 1.35 The high levels of variation in pay rates and commission in a decentralised market can result in employment agencies charging different rates to supply the same teacher to the same school.²²
- 1.36 The consequence of this for workers is that they fall victim to the replacement of regular, secure full-time employment with increasingly precarious, low-paid, insecure and irregular work.
- 1.37 Almost a fifth (18%) of supply teachers reported that they have had to claim Jobseeker's Allowance since becoming a supply teacher and over one in ten (12%) reported that they have had to claim other state benefits.²³
- 1.38 Many supply teachers are reporting that their financial situation over the last 12 months has resulted in them having to cut back on expenditure on food (36%), take a second job (14%) and even resort to the use of food banks (1%).²⁴

²¹ <https://www.tuc.org.uk/sites/default/files/the-gig-is-up.pdf>

²² https://www.niesr.ac.uk/sites/default/files/publications/NIESR_agency_working_report_final.pdf

²³ <https://www.nasuwt.org.uk/uploads/assets/uploaded/e7d27137-a3cb-4db8-ae6d1c34024d344a.pdf>

²⁴ Ibid.

- 1.39 The NASUWT is clear from its research that the main financial benefits of supply work accrue to the agencies and umbrella companies themselves, rather than to the workforce or the service provision, particularly when schools report aggressive negotiation tactics²⁵ which see employment agencies charging £10,000 in finder's fees and up to 40% in commission charges.
- 1.40 Extortionate and inappropriate finder's fees in education have restricted or removed the right to work for many supply teachers, reducing the opportunity to secure permanent employment, especially for women, BME and disabled workers, who are disproportionately represented as agency workers.
- 1.41 Many supply teachers report that they are treated as 'second-class citizens' who are not always able to access their employment rights.
- 1.42 The NASUWT's research shows that almost four fifths (78%) of supply teachers reported that the agency through which they undertake the majority of their work does not fully disclose all fees and charges they make for the services they provide. Eight per cent indicated that they had been asked to sign an exclusivity clause with the agency in order to obtain work.²⁶
- 1.43 Other concerns, of which the NASUWT is aware, includes supply teachers being told they will only receive £140 for a day's work when the contract they have with the agency stipulates £160 a day.
- 1.44 Some supply teachers are signing contracts that are so long and opaque (sometimes 27 pages long) that they do not necessarily understand what they are signing, especially when clauses may include waiving their rights to equal pay, in order to gain regular supply work.

²⁵ https://www.niesr.ac.uk/sites/default/files/publications/NIESR_agency_working_report_final.pdf

²⁶ <https://www.nasuwt.org.uk/uploads/assets/uploaded/e7d27137-a3cb-4db8-ae6d1c34024d344a.pdf>

- 1.45 Schools have also expressed concerns over the recruitment procedures operated by some agencies regarding the vetting and interview of supply teachers.²⁷

2. SPECIFIC COMMENTS

Improving the transparency of information provided to work seekers

- 2.1 The evidence provided demonstrates that the current balance of benefits between agency worker (i.e. supply teacher) and employer is skewed significantly in favour of the employer (i.e. the agency).
- 2.2 Issues of non-compliance, coupled with a lack of transparency demonstrate that many agency workers are unaware of their rights and are unsure how to report unfair practices. Where supply teachers do complain about poor practice, work often dries up. Therefore, supply teachers are often unwilling to complain due to the potential impact upon their income and financial security.
- 2.3 The Union, therefore cautiously welcomes the recommendation that there should be greater transparency in the information provided to work seekers through a proposed statutory right to a key facts sheet.
- 2.4 Supply teachers often report being unaware who their employer is and the exact nature of the way in which their pay will be processed, including information on deductions such as National Insurance Contributions (NICs), for both the employer and employee, holiday pay and the Apprenticeship Levy. It is, therefore, not uncommon for there to be discrepancies between the rate advertised and that which the supply teacher receives as gross pay.
- 2.5 The NASUWT welcomes the intention to reaffirm and strengthen the position on what should be contained within the key facts sheet in a transparent and consistent manner, including details on: who is responsible

²⁷ https://www.niesr.ac.uk/sites/default/files/publications/NIESR_agency_working_report_final.pdf

for pay (e.g. the agency or an umbrella company); rates of pay; start dates and how long an assignment is; holiday entitlement and how it is calculated; any health and safety risks; whether employed by an umbrella company or intermediary, including confirmation of the fact they are employed on a contract for employment; the hourly rate paid compared to what would have been received working through the agency; what fees are deducted; statutory deductions; and any additional benefits,

- 2.6 However, the Union recognises that the level of clarity and transparency outlined above does not necessarily have an impact on a supply teachers decision to work. The benefits derived from such information will, therefore, be limited to those who have a genuine choice about whether or not to accept the work which has been offered to them. Most supply teachers are not in such a position as their assignments can be intermittent and sporadic.
- 2.7 Supply teachers often have no choice but to sign up with an umbrella company as a pre-condition for an employment agency finding them work. Making this more transparent in a key facts sheet does not necessarily give a supply teacher greater choice, such as whether or not they would they are paid on a pay as you earn (PAYE) basis as opposed to through an umbrella company. In many ways, greater transparency just shines a spotlight on what is already occurring.
- 2.8 Furthermore, the Conduct of Employment Agencies and Businesses Regulations already prescribe details on what should be included when an agency worker signs up with an employment agency, yet the NASUWT is aware of examples of non-compliance from supply teachers in respect of this.
- 2.9 How the information is explained and the language used is just as important as what is contained in a key facts sheet. Unless the information is presented in a clear and unambiguous way that is easily understood then there is still the potential for employment agencies to use convoluted jargon and legalistic terminology in a key facts sheet.

- 2.10 The consultation over the detail included in a key facts sheet fails to address the issue of why the information is there. For example, supply teachers have contacted the NASUWT because the Apprenticeship Levy has been deducted from their income, but there is no explanation as to why this has been deducted. In extreme cases it appears that this has been deducted despite the employment agency not having a turnover in excess of £3 million.
- 2.11 A list of details contained within a key facts sheet may not capture or contextualise information in this way so that any agency worker's understanding is enhanced and they are empowered to challenge how the information has been provided. This is critical if the purpose is to empower agency workers and end the unscrupulous practice of some employment agencies.
- 2.12 The NASUWT believes that greater transparency, through a statutory entitlement to a key facts sheet could have a positive impact for supply teachers as agency workers. It would enable them to understand if they are receiving their full entitlements, and will also assist enforcement bodies and trade unions in assessing cases.
- 2.13 The Union believes that such an entitlement has the potential to drive up compliance levels across employment agencies. The Quality Mark²⁸ launched between the REC and the Government, which was axed back in 2013, could be seen as the first step to identifying agencies that had adopted good practice in regards to a key facts sheet in education.
- 2.14 Such a scheme, however, is not a substitute for legislation and statutory enforcement. The Union advocates a requirement to provide a key facts sheet must go hand in hand with greater regulation and enforcement by the Government, including substantial fines and penalties and proper compensation for the agency worker.

²⁸ <http://www.sec-ed.co.uk/news/new-standard-replaces-axed-quality-mark-for-school-recruitment/>

- 2.15 It is essential that agency workers are able to evidence that they read and clearly understood the information contained in the key facts sheet. This should be done through a face-to-face meeting when the work seeker registers with an employment agency.
- 2.16 Any additional burden on the employment agency is negated as this should be seen as part of their normal compliance procedure. Such considerations are also secondary to the principle that the work seeker has had adequate time to digest the information before being engaged on assignments. Consideration should also be given to an appropriate cooling-off period when the terms can be re-examined, and, if appropriate, renegotiated.
- 2.17 The Government should consider seriously a licensing scheme with the provision of an accurate key facts sheet, including proof that it has been read and understood, as a condition for receiving and retaining a licence. This has the potential to be self-funding if the correct fees are applied to cover any costs incurred.
- 2.18 Employment agencies working in the education sector would be an ideal area to pilot such an initiative, where there is growing concern over the way they operate and the levels of fees they charge, which is, in essence, money being diverted away from the public purse and the education of children and young people.
- 2.19 Any such scheme must be fit for purpose and should have the necessary buy-in from all relevant stakeholders, including NASUWT and other trade unions. The NASUWT notes, in this regard, comments made by Professor Sir David Metcalf on the important role played by trade unions in preventing or reversing the fissuring of employment relationships.²⁹
- 2.20 There should be consideration given to the issue around joint liability, specifically during the procurement process, so that clients, as end users, have an onus placed upon them to ensure that supply agencies and/or

²⁹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/632074/labour-market-enforcement-strategy-2018-19-summary-of-issues.pdf

umbrella companies can evidence that a worker has been provided with, understood and signed a key facts sheet.

- 2.21 Consideration should also be given to the extension of both civil and criminal sanctions to those found operating non-compliant agencies. For example, Labour Market Enforcement Undertakings and Labour Market Enforcement Orders should be reviewed to see if they are working and acting as an effective deterrent.

Extending the remit of the Employment Agency Standards Inspectorate (EAS) to cover umbrella companies

- 2.22 It has been suggested that using an umbrella company is the best way to maximise revenue and minimise risk. Agencies have a preferred supplier list and will decide on which umbrella company to use based not on what is best for the agency worker, but on the best margins for the employment agency.³⁰
- 2.23 The kickbacks from umbrella companies are quite lucrative, and even where they are not, the agencies believe they will lose business if they do not work with umbrella companies.³¹
- 2.24 Umbrella companies are an additional revenue stream for employment agencies as they are able to demand upfront payments for referring an agency worker to an umbrella company. There is even some evidence that employment agencies are setting up their own umbrella companies to increase their margins through savings on payroll costs, a practice known as 'white labelling'.³²
- 2.25 This is compounded by the fact that clients appear fairly indifferent to the type of contract that agency workers are on, and agency workers have very little recourse to redress or formalised complaints procedure other than an Employment Tribunal or ACAS's mediation services.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

- 2.26 The NASUWT is concerned about the growth and prevalence of umbrella companies in education. The lack of robust data on the number of umbrella companies means that any estimates are likely to be inaccurate, but reports indicate that one of the three biggest areas for umbrella companies includes education.
- 2.27 The NASUWT has investigated the role played by umbrella companies as a ruse for employing supply teachers. These companies essentially straddle the relationship between schools and teachers, raking off money from the public purse and delivering very little added value to the system.
- 2.28 Many umbrella companies working in education supply teachers using pay between assignment arrangements (PBA), thereby denying supply teachers the right to equal pay under the Agency Worker Regulations (AWR).³³
- 2.29 Research conducted by the NASUWT found that two thirds of supply teachers (66%) reported that they have been asked to sign a contract or agreement with an umbrella/offshore company when working through a supply agency, and over four fifths (81%) of those respondents stated that their pay had included deductions in respect of both employee and employer National Employer Contributions (NICs).³⁴
- 2.30 The NASUWT engages with thousands of supply teachers and has received information that where supply teachers have raised concerns about their treatment, they have then found that they are subject to blacklisting practices by these agencies/companies. The process is that they are led to believe there is no longer any work for them. In essence, their experience is that the work just 'dries up'.

³³https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/679564/HOST_Final_Report_final_version-.pdf

³⁴ <https://www.nasuwt.org.uk/uploads/assets/uploaded/e7d27137-a3cb-4db8-ae6d1c34024d344a.pdf>

- 2.31 Such practice is deeply concerning. When this occurs, there is no recourse or action that can be taken, a failure which significantly disadvantages agency workers in comparison to permanent employees. This is because it increases the length and complexity of the supply chain which makes it harder for teachers to enforce their rights.
- 2.32 However, ensuring fair practices by these agencies and umbrella companies, and seeking to close loopholes, should not be reliant upon individual teachers being prepared to challenge their practices.
- 2.33 In a context where supply teachers are already subject to intermittent and insecure work, being registered with these agencies is of critical concern as otherwise it could deny an individual the opportunity for work.
- 2.34 Some employment intermediaries are promoting products that encourage supply teachers to set up as a limited company. The NASUWT has serious concerns about such products and the implications for supply teachers in regards to their tax liabilities, specifically in setting up a new limited company where the supply teacher is the 'sole owner', director and employee.
- 2.35 Furthermore, many teachers report that they would prefer to have the option to be paid PAYE rather than have their money processed through an umbrella company. However, agencies rarely provide teachers with a choice or alternative and often exploit the precarious nature of supply teaching so that teachers feel they have no option but to sign up.
- 2.36 When teachers are engaged through an umbrella company there is a lack of transparency and misinformation about their pay rates, specifically in comparison to the rate teachers believe was advertised or agreed with the employment agency.
- 2.37 The use of umbrella companies can be seen to drive down the pay for teachers as the agency will not wish to reduce its profit margin to pay any fee owed to the umbrella company. The inevitable consequence of this is that the teacher receives less.

- 2.38 At the root of this problem is the lack of regulation governing these arrangements and the lack of monitoring and scrutiny. The NASUWT, therefore, welcomes the EAS having its remit extended to cover umbrella companies so that a minimum set of standards is enforced, such as those employed to regulate employment businesses and employment agencies.
- 2.39 The Conduct of Employment Agencies and Businesses Regulations should be strengthened to ensure that specific provisions relating to umbrella companies are incorporated. This should include the right for an agency worker to decide whether or not they want to be employed through an umbrella company or not and a requirement for agreed rates of pay to include an uplift to cover any fees charged by the umbrella company, including the employer's NICs and other related costs.
- 2.40 There must be improved levels of funding and additional resources to enable the EAS to meet its extended remit. For example, the Employment Agency Standards (EAS) Inspectorate must have comparable levels of funding with other agencies (such as GLAA) given that they have 12 staff covering approximately 23,980 agencies with just a budget of £725,000 (2017/18).³⁵
- 2.41 On this basis, each member of the EAS team has to deal with in excess of 1,998 agencies each, many of which operate across different sectors throughout the UK. The NASUWT believes that such a situation is unacceptable and must be addressed with the utmost urgency if changes to the enforcement regime are to be effective and give the public and those working as agency workers confidence in the system.
- 2.42 This is particularly prescient when considering the fact that education is one of the top three sectors identified by the EAS for regulatory breaches, with the EAS reporting a tenfold increase of these in 2015/16 compared to the previous year.³⁶

³⁵ <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-02-02/126332>

³⁶ Ibid

- 2.43 In addition, public procurement rules should be strengthened to ensure public sector bodies are prohibited from using those employment agencies and umbrella companies which fail to adhere to minimum standards.

Pay between assignments (PBA) or the Swedish Derogation

- 2.44 The NASUWT welcomes the consultation over whether or not the government should repeal the legislation that allows agency workers to opt out of their entitlement to equal pay (the 'Swedish Derogation').
- 2.45 The Agency Workers Regulations 2010 (AWR) should afford supply teachers the right to the same pay and conditions as permanent staff after 12 weeks employment.³⁷
- 2.46 However, the AWR does permit workers to opt out of their rights to equal pay, but this can only be done with the agreement of the worker and there has to be the provision of suitable alternative work and a minimum hours guarantee.³⁸
- 2.47 Many agency workers rarely receive pay between assignments as the agencies employ contracts that are designed to minimise the risk of pay between assignments by the use of unrealistic terms and conditions. For example, research undertaken into the use of PBA has uncovered examples where agency workers are expected to travel two hours for work or accept work offered within a 50 mile radius.³⁹
- 2.48 Research carried out by the NASUWT showed that many agencies do not inform workers of their rights. Many supply teachers reported that they were unaware of the provisions available to them, and when they became aware, recognised they had not been afforded them.

³⁷ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32121/11-949-agency-workers-regulations-guidance.pdf

³⁸ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32121/11-949-agency-workers-regulations-guidance.pdf

³⁹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/679564/HOST_Final_Report_final_version-.pdf

- 2.49 41% of supply teachers report that they are not made aware that after 12 weeks of working in the same workplace they are entitled to the same pay and conditions as permanent members of staff.⁴⁰
- 2.50 Of even greater concern is the fact that the NASUWT has obtained evidence of the manipulation of the Regulations. For example, over a fifth (22%) of supply teachers reported that work had been cancelled on specific longer term assignments at or approaching the 12 weeks' qualification period for AWR.
- 2.51 Some supply agencies exploit the provisions in the Regulations which provide that if a worker has a permanent contract of employment with an agency, the right to equal pay may not apply.
- 2.52 The NASUWT believes that such evidence suggests that the derogation is being used to the detriment of agency workers. Despite the suggestion that agency workers have a choice of whether or not they opt-in, the reality is that they have very little choice. If they do not sign up then they will not get work.
- 2.53 The ruling in the case of case of *Bray v Monarch Personnel Refuelling*⁴¹ shows that agency workers have very limited protection from being pressurised into signed a Swedish derogation contract, even if they are half way through an assignment with an end user.
- 2.54 The evidence presented suggests that pay between assignment contracts are not effective in supporting workers and work seekers when they are not working. Agencies and umbrella companies are complicit in the use of pay between assignments for long term placements when they know that the possibility of having to pay between assignments is less likely. At the same time this denies the agency worker access to equal pay after 12 weeks as well as the possibility of permanent work.

⁴⁰ <https://www.nasuwt.org.uk/uploads/assets/uploaded/e7d27137-a3cb-4db8-ae6d1c34024d344a.pdf>

⁴¹ *Bray and others v Monarch Personnel Refuelling (UK) Ltd* ET/1801581/12

- 2.55 Other provisions contained with the AWR are also being abused. For example, many supply teachers report that they are unable to access the same facilities which are available to employees. Almost a fifth (19%) stated that they do not always have access to staffrooms where they are available, over two fifths (42%) stated that they do not always have access to food and drink facilities, and over one in ten (12%) said that they do not always have access to toilet/washroom facilities. Over a third (37%) reported that they do not always have access to car parking.⁴²
- 2.56 The AWR should afford such employment rights to supply teachers as either day-one rights or rights after 12 weeks' employment.⁴³
- 2.57 The Regulations give all supply teachers basic rights from day one when they are in school, including the right to access facilities used by other staff at the school and equal rights at work after 12 weeks.
- 2.58 There is compelling evidence that the use of pay between assignments cannot be rectified through wider state enforcement. Instead, the government should look to repeal the legislation as a matter of urgency.
- 2.59 In regards to other aspects of the AWR, the Union believes there is a clear case for the remit of the EAS to be expanded to incorporate the enforcement of these provisions. This would enable agency workers and trade unions to pursue issues through avenues other than employment tribunals.

3. ADDITIONAL COMMENTS

- 3.1 Currently, many agency workers are unaware of where to report issues and the process by which any issues raised are resolved.
- 3.2 There has been an increase in the number of online platforms. The Union has serious concerns about the increased use of online apps as a means of managing vacancies and placing supply teachers. Whilst apps might be

⁴² <https://www.nasuwt.org.uk/uploads/assets/uploaded/e7d27137-a3cb-4db8-ae6d1c34024d344a.pdf>

⁴³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32121/11-949-agency-workers-regulations-guidance.pdf

used as a holding diary, the companies could be based anywhere in the world. This makes it difficult to take action against poor practice. The Labour Market Enforcement Director should therefore recommend that these are brought under tighter scrutiny and regulation, possibly through the auspices of the EAS.

- 3.3 As part of the Labour Market Enforcement Director's strategy⁴⁴, the NASUWT sees the benefit of an intelligence hub provided there is joint working and the sharing of intelligence to produce a more effective and coherent response, with clear objectives around non-compliance. This has the potential to build up a better picture on both a national and regional level, as well as by sector.
- 3.4 Obviously, the development of such a resource must attract an appropriate level of funding and be adequately resourced in terms of manpower and technical support. It should also not duplicate the work which is currently done by various different agencies working under the Labour Market Enforcement Director.
- 3.5 The NASUWT would wish to be involved in discussions. Summary data and statistics should be shared regularly and made available to trade unions with a view to identifying trends and analysing 'pinch points' so that appropriate strategies can be developed.
- 3.6 It is of deep concern that employment by or through agencies is currently not pensionable for supply teachers under the Teachers' Pension Scheme (TPS), despite the fact that 94% of supply teachers stated that it should be.⁴⁵ Supply teachers should be able to access the TPS rather than basic and inferior auto-enrolment schemes.
- 3.7 The lack of access to occupational pension provision is preventing many supply teachers, and other agency workers, from making prudent financial

⁴⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/632074/labour-market-enforcement-strategy-2018-19-summary-of-issues.pdf

⁴⁵ <https://www.nasuwt.org.uk/uploads/assets/uploaded/e7d27137-a3cb-4db8-ae6d1c34024d344a.pdf>

decisions for their future. In doing so, there is increased risk of reliance on the welfare system in later life.

- 3.8 The right to work and the right to representation are also key concerns for the NASUWT. The right to trade union representation and the right to withdraw labour, free from victimisation, is a vital and fundamental principle and right that should apply to all workers, including agency workers.

