



Department for Business, Energy & Industrial Strategy
Agency Workers Consultation (EAS)
Spur 2, 1st Floor
1 Victoria Street
London
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8th May 2018

Sent by email to: awconsultation@beis.gov.uk

Dear Sir or Madam,

**RE: GOOD WORK: THE TAYLOR REVIEW OF MODERN WORKING PRACTICES
CONSULTATION ON AGENCY WORKERS RECOMMENDATIONS: TSSA RESPONSE**

Please find enclosed the response of the Transport Salaried Staffs' Association (TSSA) to the above consultation.

TSSA welcomes the opportunity to contribute to the Government's consultation on this issue. We are an independent trade union with approximately 20,000 members throughout the United Kingdom and Republic of Ireland. Most of our members work in the UK rail industry in management, technical, professional, supervisory, retail and administration functions. TSSA is recognised for collective bargaining purposes across the rail industry, including by Network Rail and many of its contractors, the train and freight operating companies, Transport for London and London Underground as well as Northern Ireland Railways (Translink). TSSA also has similar arrangements in place with travel firms like Thomas Cook, ferry companies like Stena, etc.

TSSA policy is determined by our Annual Conference that comprises delegates from our Branches throughout the United Kingdom and Ireland.

Introduction

From the start, it is worth stating that TSSA believes the review of the 'Swedish derogation' in the Agency Worker Regulations is long overdue and, in fact, should be repealed because it is being used to mistreat agency workers and drive down pay and conditions. The Union also believes that there should be:

- Better enforcement of the existing Regulations
- Increased regulation of umbrella companies
- An end to the outsourcing of employment obligations and risks
- Far better employment rights for agency workers
- Recognition that many agency workers do not step into permanent roles.

In the railway industry the use of agency workers varies greatly. Some are professional engineers with impressive technical qualifications and experience, employed through an agency for a specific contract. At the other end of the spectrum, agency workers can be

found working in call centres, revenue protection teams and as track workers, supplied sometimes by agencies working exclusively for the company with the job vacancies.

In response to the specific consultation questions, we would comment as follows:

Section 1: Improving the transparency of information provided to work seekers

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

In common with the TUC and other trade unions, TSSA is concerned that agency workers are often unaware:

- who their employer will be;
- whether they will be employed via an umbrella company;
- how much they will be paid for work on an assignment;
- what deductions will be made from their wages.

This lack of transparency is compounded by the use of umbrella companies for recruitment purposes.

We feel that transparency may be improved by the provision of key fact sheets to agency workers prior to commencing an assignment. We do have reservations, however, and at the heart of those is what choice many work seekers actually have about whether to accept or reject a job. If the option is no work and no pay - or accept what they are offered - the choice for many workers is to accept what is put in front of them as they have no alternative.

Question 1 (a): If slightly or strongly agree, what key facts do you think should be made prominent?

See answer to Question 2

Question 2: What information would be important to include in a “key facts” page?

In our view, the sort of information agency workers must receive in writing includes:

- the start date for an assignment and how long the contract is likely to last
- pay/salary rates
- hours of duty
- who will be responsible for paying the worker
- holiday entitlements
- how holiday pay is calculated
- details of any health and safety risks
- whether they'll be employed under a contract for services or a contract of employment
- the relevant notice period
- the type of work the work seeker will be expected to undertake
- the location of the work
- any experience, training or qualifications needed for the role

- any expenses they may have to pay
- whether they employed via an umbrella company or intermediary. Where this is the case, they should also receive written confirmation that includes that:
 - they are employed on a contract for employment and therefore will be entitled to all employee rights;
 - any administrative fees for umbrella companies will be deducted from any uplift negotiated between the agency / umbrella company and the end user but not be deducted from the pay assigned for their work;
 - they will be paid at least the same hourly remuneration that they would have received had they been employed directly by the agency;
 - they will have rights under the Agency Worker Regulations
 - what statutory or other deductions will be made and by whom.

We believe it would be helpful for all this information to be provided in a single document which can be updated upon starting a new assignment with any relevant information changes.

The government should assist the recruitment sector by preparing online template forms.

Agency workers who receive a completed template form would also have some reassurance that they have been provided with all the relevant information.

Question 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?

TSSA would argue that it is important for a work seeker to receive all relevant information when:

- they first register with an agency or umbrella, and
- before each assignment.

We would also support the TUC's proposition that:

- employment businesses and umbrella companies which fail to provide work seekers with a key fact sheet, or a complete fact sheet, should face substantial penalties
- the work seeker should also be properly compensated; and
- the provision of accurate key fact sheets should also be a condition of receiving and retaining a GLAA (Gangmaster and Labour Abuse Authority) licence.

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

Yes, of course.

Question 3(a): If yes, how do you think this should be achieved?

It should be achieved by the employing business, umbrella company or intermediary meeting on a face-to-face basis with the work seeker when they first register with the firm. This would give an opportunity to:

- explain the key facts sheet;
- inform the work seeker of the terms under which they will be offered work;

- get to know each other and build a good working relationship with the individual.

We also support the TUC's suggestion that work seekers who agree to sign a contract with the agency or umbrella company should be entitled to a cooling-off period lasting at least one month which will enable them to obtain independent advice which could lead them to seek to renegotiate the terms of the agreement.

Similarly, we support calls for the government to include advice on the benefits of meetings and to include information about cooling off periods on template forms.

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

Yes, we do.

Section 2: Extending the remit the Employment Agency Standard inspectorate to cover umbrella companies and intermediaries in the supply chain

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

Please provide reasons for your answer below

TSSA has had sight of the TUC's submission on this consultation and wishes to support the comments made in relation to:

- the lack of opportunity to accrue employee rights to unfair dismissal and redundancy payments unless the worker is able to remain with the same agency;
- lack of transparency and misinformation about pay rates which can be subject to deductions for factors not revealed to the worker;
- The involvement of umbrella companies drives down pay for agency workers because of agency fees and other factors;
- The involvement of umbrella companies increases the length and complexity of the supply chain making it harder for individuals to enforce their rights.

Question 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?

Please provide reasons for your response.

In TSSA's response, we draw attention to the need to ensure that umbrella companies operating in the recruitment sector should be regulated on the same basis as employment businesses and employment agencies through the extension of the Conduct Regulations. This would help to create a level playing field within the sector and mean that individuals employed through umbrella companies receive the same level of protection as other agency workers.

We support the TUC's calls for the Conduct Regulations to be amended to include specific provisions relating to umbrella companies in areas such as:

- To avoid deductions from the agency workers' pay, an uplift should be agreed to contractual rates to cover additional costs such as those charged by the umbrella company as well as the individual's National Insurance, etc;
- Work seekers should have the right to decide whether they wish to be employed via an umbrella company or not and should not suffer any detriment as a result.

If the remit of the Employment Agency Standards Inspectorate (EAS) is to be extended, it is important that they are provided with additional resources as it is seriously under-resourced following significant cuts imposed by the government.

In fact, the restoration - or not - of the budget cuts (and beyond) gives an indication of just how seriously the current government is committed to this review. Without provision of sufficient additional inspectors who can ensure an adequate enforcement regime is implemented, the only verdict is that the government is happy to undermine the opportunity that it currently has to improve the working lives of over a million people.

TSSA is also sceptical about the government's commitment to the EAS's current enforcement strategy given its introduction of the Trade Union Act in 2016. We concur with the TUC's comments that "Unions report that EAS regularly fail to take effective enforcement action in response to complaints, including where unions report that agencies have supplied agency workers to replace striking workers in breach of regulation 7 of the Conduct Regulations 2003." Consequently, we call for a strengthening of the enforcement strategy in terms of additional powers and staff resources.

Question 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. Individual work seeker

Requiring umbrella companies to provide work seekers with a key facts sheet may also have a small positive impact for individual work seekers:

- TSSA shares the TUC's concerns that practices in the recruitment sector increasingly lack transparency, especially where umbrella companies are involved;
- Agency workers are often unaware who their employer is or whether an umbrella company is involved in their engagement, making it difficult for them to enforce their rights;
- Individuals are also likely to be unaware how signing up with an umbrella company may affect their take home pay or the rights to which they are entitled in the workplace;
- Some may be lured into signing a contract with the umbrella company on the promise of more take home pay as umbrella companies are able to offset their travel and work-related expenses against national insurance contributions (NICs). Individuals might not realise some such practices may be unlawful,¹ and could mean they lose out on future contributory-based benefits, such as statutory maternity pay, statutory sick pay and their state pension;
- Work seekers, employed via umbrella companies, are often misinformed about the rate of pay they will receive or the level of deductions which will be taken from their pay to cover employers' National Insurance Contributions and to cover the umbrella company's profit margins. As a result, there is often a significant gap between the advertised rate of pay for an assignment and the gross wages eventually paid to agency workers;

¹ Since 2013, it has been unlawful for agencies, umbrella companies and intermediaries to offset costs of travelling to and from work against NICs. Although it is still possible to offset expenses incurred during the course of work.

- Deductions like those described in the last bullet point inevitably lead to lower rates of pay for agency workers. They can also lead to non-payment of the national minimum wage.

Requiring umbrella companies to provide work seekers with additional information may assist in improving transparency. However, to prevent the wider abuses experienced by work seekers employed via umbrella companies, the government should adopt wider measures discussed above in relation to better regulation and enforcement, including through an amendment to the Conduct Regulations. This last would ensure that the contractual rates agreed between the recruitment agency and the umbrella company must include an uplift reflecting any administrative fees charged by the umbrella company as well as any employer's national insurance and other related costs which may be deducted.

ii. The recruitment sector

Requiring umbrella companies to provide work seekers with a key facts sheet is likely to improve compliance levels in the recruitment sector. As the TUC notes, "This will mean that reputable agencies and umbrella companies are less likely to be undercut or to face unfair competition from unscrupulous firms."

Question 7) (b): What impact would extending the regulations of the Employment Standards Inspectorate to umbrella companies have on individual work seekers and employers in the recruitment sector.

i. The work seeker

In terms of work seekers, it would mean that they would have the same rights as other agency workers, including rights to:

- be paid in time and in full
- be informed about their pay and other working conditions in advance of any placement with an end user
- not be charged for any work seeking fees
- refuse wider services and charges levied by agencies, without suffering a detriment

ii. The recruitment sector

For the recruitment sector, the extension of the Conduct Regulations to umbrella companies will help to create a level playing field within the sector and to ensure that reputable businesses are not undercut by non-compliant and unscrupulous employers.

Section 3: Ensuring the Swedish Derogation is used appropriately

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

TSSA believes the review of the 'Swedish derogation' in the Agency Worker Regulations is long overdue and, in fact, should be repealed because it is being used to mistreat agency workers and drive down pay and conditions.

However, if this loophole in the law is retained, the key facts sheet must make it clear if the agency worker is being asked to sign a pay between assignments (PBA) contract. It should emphasise that by signing the contract the individual will lose the right to be paid at least the same pay as directly employed staff doing the same job.

Such information may assist individuals to assess whether they are receiving their full statutory and contractual rights and to take any enforcement action where this is not the case.

Enforcement agencies and union officials will also be able to use the key fact sheets to assess whether the employment business or umbrella company/intermediaries are breaking the law and to take relevant enforcement action.

In our response we would also draw attention to the TUC's new (2018) report: *Ending the Undercutters' Charter: Why agency workers deserve better jobs*² which confirms that agency workers are experiencing widespread abuse because of the derogation. In particular, the report highlights how employers and agencies are exploiting the Swedish derogation to employ agency workers on a long-term basis to reduce their wages' bill and to undercut the pay and conditions of permanent staff. Research published by the government³ reveals a very clear but stark picture of hirers, agencies and umbrella companies all using the Swedish derogation to reduce costs and undercut pay and conditions. The types of reasons given for using the derogation include:

- It cuts costs and means hirers and agencies can avoid enhanced pay rates for agency workers
- It is the best way to maximise revenue and to minimise risk
- The avoidance of pay parity
- It was the surest way of hirers and agencies to ensure compliance with the AWR
- It reduces administration
- It avoids the need to identify possible comparators in the hirers' firm
- The hirer does not need to disclose their pay rates.

It is notable that not a single agency or umbrella company interviewed for the government's research reported that the reason for using the derogation was to improve the working conditions of agency workers.

² TUC (2018) Ending the Undercutters' Charter available at:

<https://www.tuc.org.uk/sites/default/files/EndingtheUndercuttersCharter.pdf>

³ Berry-Lound, Greatbatch and Tate (2015) "Qualitative Analysis of the use of Pay Between Assignment contracts for Agency Workers" - Final report to BIS by HOST Policy Research

We also want to emphasise that working under the Swedish derogation is not a positive choice. The government's consultation document on the Taylor review recommendations on agency work suggests that agency workers can choose whether to opt-in to the Swedish derogation.

But as union case studies highlight at best this is an 'Hobson's choice' with agency workers being told either sign a Swedish derogation contract or they won't get the work. Many agencies also opt to move agency workers onto Swedish derogation contracts between assignments. With agency workers being told they either sign the contract or face the sack.

The TUC has highlighted the decision of an employment tribunal in the case of *Bray v Monarch Personnel Refuelling*⁴ confirmed that agency workers have very limited protection from being pressurised into signed a Swedish derogation contract, even half way through an assignment with an end user.

Question 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?

We believe that this is not at all effective

Some employers claim that the Swedish derogation provides workers with a fair trade-off. They give up the right to equal pay on the promise of pay between assignments when the agency cannot find them work. However, the TUC has highlighted the raw deal that agency workers are receiving at work:

- Unions report that agency workers rarely receive pay between assignments in practice. This is partly because agency workers employed on Swedish derogation contracts are often hired by the end user on a long-term basis, in place of a permanent workforce.
- Recently published research, commissioned by the government, also reveals that sometimes - maybe often - any monies that are paid to agency workers between assignments do not amount to an extra benefit for agency workers. Instead they are deducted from pay they would otherwise receive for doing the job.⁵

The report referenced in the last point revealed that seven of the 11 umbrella organisations interviewed revealed that they use some form of 'roll-up' deductions from the salaries of workers on PBA contracts (pay between assignment contracts - otherwise known as Swedish derogation contracts). This means that a figure is calculated at each salary payment proportionate to the possible PBA payments and held in reserve.

As the report to government highlights, these practices raise questions about compliance. Clearly such practices are not consistent with the spirit and aims of the derogation.

The research also includes telling evidence from an umbrella company which chose not to use agency contracts. The research states that this agency *"does not offer PBA [Pay Between Assignment - or Swedish derogation] contracts because they view them as a way of avoiding the equal pay aspects of AWR which is unfair to workers as well as increasing the risk to themselves in terms of compliance and tax liability.... They suggest that pay between assignments is not a benefit for workers as organisations will simply calculate a*

⁴ Bray and others v Monarch Personnel Refuelling (UK) Ltd ET/1801581/12

⁵ Berry-Lound, Greatbatch and Tate (2015) "Qualitative Analysis of the use of Pay Between Assignment contracts for Agency Workers" - Final report to BIS by HOST Policy Research.

*deduction from this from the hourly rate in the same way as holiday pay is calculated. However, in their experience any workers will never receive any pay between assignments...*⁶

Question 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?

TSSA supports TUC calls for the enforcement of the Agency Worker Regulations (AWR) to be enhanced and that individual agency workers should be able to rely on the employment tribunals to enforce their equal treatment rights. The responsibilities of the Employment Agency Standards inspectorate (EAS) should be expanded to include the AWR.

As far back as January 2012, the Gangmasters Licensing Authority (GLA - now the GLAA) decided to enforce the AWR, as least as regards rights to equal treatment on pay.⁷ It is welcome that the government is now proposing that the EAS should enforce all aspects of the AWR, and not just rights equal pay - a decision that is long overdue.

However, an extension in the EAS remit must be accompanied by a substantial increase in funding.

As noted above, the EAS is inadequately resourced. In the current year (2017/18) the EAS only has a budget of £725,000⁸ to protect approximate 1.2 million workers⁹ and to ensure that 23,980¹⁰ recruitment agencies comply with the Conduct Regulations. They have a total of 12 full time equivalent inspector. The scale of the task for these 12 inspectors is already unenviably enormous. If the remit of the EAS is to be expanded to include enforcement of the AWR, the government must provided the EAS with significantly increased resources.

In closing, we look forward to your response to the points raised above.

Yours faithfully

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⁶ Ibid page 12

⁷ www.gla.gov.uk/media/1795/gla-32-81-licensing-standards-review.pdf

⁸ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-02-02/126332>

⁹ BEIS (2018) Good work: the Taylor review of modern working practices; consultation on agency workers recommendations

¹⁰ <https://siteassets.pagecloud.com/adelectus/downloads/Recruitment-Industry-Trends-2015-2016-ID-1cb824a2-b37c-4ead-a78c-b9f74f792d99.pdf>