

GOOD WORK: THE TAYLOR REVIEW OF MODERN WORKING PRACTICES

Consultation on agency workers

**Submission by Prospect to the Department for Business, Energy
& Industrial Strategy**

9 May 2018
www.prospect.org.uk

INTRODUCTION AND SUMMARY

Prospect is an independent trade union representing over 140,000 members in the public and private sectors. Our members work in a range of jobs in both the public and private sectors in a variety of different areas including in aviation, agriculture, broadcasting, entertainment and media, defence, education, energy, environment, heritage, industry, scientific research and telecommunications.

Prospect has provided responses to previous consultations on agency workers and has particular concerns about the treatment of such workers who work alongside permanent staff. In our experience, this can have a depressing effect on hours, pay and conditions. For example, in the aviation sector, where Prospect is widely recognised, zero hours contracts are used extensively in aviation security. This affects hours of work where those on zero hours contracts may be offered extra hours with very little notice or, alternatively, they may be offered insufficient hours or no work at all. Even in situations where excessive hours are worked on a regular and consistent basis by temporary staff, employers often refuse to convert those on zero hours contracts to permanent contracts.

Swedish derogation

We therefore welcome the review of the "Swedish derogation" in the Agency Workers Regulations which has contributed to driving down terms and conditions of employment. We support the TUC's position that steps should be taken to address the mistreatment of agency workers by employers who may undertake the same or similar work of permanent staff but are treated less favourably. We support the recommendation made in the Taylor Review that the Swedish derogation should be removed.

Enforcement

As it is the case that agency workers often earn less than permanent employees and lose out on paid holidays and sick pay, the Agency Workers Regulations [AWR] are not delivering for agency workers by providing fair treatment. The TUC has proposed that the Employment Agency Standards Inspectorate [EAS] should be extended to include the enforcement of the AWR, but they will require additional resources to undertake this task. We agree that the EAS would be the appropriate body to undertake this task.

Umbrella companies

We also support the increased regulation of umbrella companies which often operate in a less than transparent way, leading to workers being misinformed about terms and conditions and their rights and obligations under the contract. We therefore support the measure that all work seekers should be provided with a key facts sheet when they first register with an employment business or at the start of a new assignment with a hirer. Failure to provide a key facts sheet should lead to substantial penalties for agencies and umbrella companies.

Umbrella companies are often cited as having substandard practices and therefore they should be required to comply with the same standard as those applying to employment businesses and agencies. We agree with the proposal that the remit of the EAS should be extended to cover such companies and that the Conduct Regulations should be amended to ensure that rates agreed between the agency and umbrella company include an uplift to

cover administrative fees to avoid these being charged to the work seeker as a deduction from pay.

Non-compliance with minimum standards

The TUC and widespread reporting in the media have shone a light on the poor employment practices of companies using agency workers, These are relatively large employers and therefore poor practice and mistreatment of agency staff is wider than previously reported.

There is a specific problem with agencies in Prospect's BECTU Sector, representing members in broadcasting media, and entertainment, which includes Background Artists working in Film and TV. Although the general rule on fees is that job-seekers should not be subject to them, there is a specific exemption to this in Schedule 3 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003, which allows a range of entertainment workers, models, and sportspersons to be charged. This leads to background artists, and other performers in Film and TV, invariably having to commit to an upfront fee to the agency in addition to commission on their pay as a condition of being considered for engagements.

Often this fee will be taken from the payment for the first assignment they do in the booking year (and they have to re-register annually), wiping out much of their income. Some agencies will cynically offer only one or two engagements a year, extracting their fee, but offering no further work which would result in full pay.

Others, equally cynically, have targeted the "wannabe" community who want to get into the world of film-making, and will charge an up-front fee before putting a new worker on their books, with little or no intention of finding them any work.

These abuses affect both established performers who are booked only through agencies, and therefore must register with them, as well as gullible members of the public who have an ambition to break into the Film and TV sector who pay up-front fees, but are allocated little or no work at all by the agency which has charged them a fee.

Outsourcing of employment obligations and risks

We fully endorse the TUC's position that companies and organisations can outsource the risk of changing demand for their goods and services ultimately on to the work seeker or agency worker. Flexibility allows them to hire and fire, often without recourse to proper employment procedures. Workers are often offered work at very short notice and their hours can be reduced or cancelled without notice or compensation. Prospect has previously advised in previous consultations that agency workers should be given the right to notice, with compensation for loss of the notice period in situations where the offer of work is cancelled at the last minute.

By outsourcing work to agencies and umbrella companies, employers avoid their employment responsibilities and appear to have minimal concern about compliance with minimum standards. The creation of long supply chains can also have an impact on compliance and transparency.

Workplace rights

It is relatively well-known that agency workers have fewer basic rights than permanent employees and current legislation limits entitlements to such rights. For example, the right to request flexible working unless returning from a period of parental leave, and the right to attend ante-natal appointments unless at least 12 weeks in the same job with the same hirer. The lack of basic fairness on family-friendly rights can impact severely on the everyday lives of agency workers.

The right to protection from unfair dismissal is compromised because of the tripartite nature of agency work which allows the end user not only to benefit from the agency worker's work but also to request their dismissal. The TUC has aptly named this as the "Bermuda triangle" in which all rights vanish and employers cannot be held accountable for breaches of employment law. The precariousness of agency work means that workers are reluctant to complain because of the fear of not being offered future work.

Agency work not a stepping stone to permanent employment

We agree with the TUC that it is rare for agency work to be a stepping stone to permanent employment. We have had examples of Prospect members being engaged as agency workers for many years, but never offered permanent status, as in the aviation sector. Inferior terms and conditions and lack of career progression can be significant issues, particularly for younger workers. The Taylor Review recommended the right to request direct employment with the hirer after 12 months. Regrettably, this has not been taken up by the government, but we believe it should be.

Policy recommendations

We support the TUC's recommendations for wide-ranging reforms to protect agency workers including:-

- Repeal of the Swedish derogation to ensure equal treatment of agency workers in respect of pay.
- After 12 weeks in the same job for the same hirer, a review should be undertaken to assess whether the work is required on an ongoing basis, and if so, agency workers should be offered permanent contract with the hirer.
- Rules on employment status to be revised to ensure agency workers have the same basic floor of rights as employees.
- Reform of the law to ensure end-users, agencies and umbrella companies are jointly and severally liable for breaches of employment law during assignments.
- The EAS should be adequately resourced to fulfil its extended enforcement duties.

- Penalties against agencies and umbrella companies should be increased for non-compliance with agency workers' rights where minimum standards are breached, including increased fines and full compensation for work seekers.
- Where agencies and umbrella companies breach agency workers' rights they should be excluded from public procurement and contracts.

We respond to the specific questions below:

Respondent type:

- Trade union

If you are responding as an individual which best describes your employment status?: N/A

If you are an employer, how would you classify your organisation? N/A

If you are an employee or worker, what type of organisation do you work for?
N/A

If you represent employers or employees/workers, who do you represent?

- A trade union

Consultation questions

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

With the increase in agency work and the consequent loss of permanent posts in many sectors, agency work is on the increase. Such workers often have limited information about pay and conditions for an assignment and any deductions from pay. Whilst a key facts sheet will be of value in providing additional information, it will not impact on genuine choice for workers in terms of jobs being available. We are also aware that in some sectors, workers have no choice but to operate through an umbrella company when seeking work.

Agree strongly	Agree slightly	Neither agree nor disagree	Disagree slightly	Disagree strongly	Don't know
	X				

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

Workers should be given key facts information when they first register with an agency or umbrella company and before each assignment. Key facts should include:

- a) Pay and hours of work and who will be responsible for paying them.
- b) Holiday entitlement and how holiday pay is calculated.
- c) Start and end date of assignment or how long the contract is likely to last.
- d) Any health and safety risks, rules or regulations to be pointed out.
- e) Statutory and other deductions to be made and by whom.
- f) Right to join a trade union and, where appropriate, information about any collective agreement in force.
- g) Whether employed by an umbrella company or intermediary. In such circumstances, the worker to be given written confirmation that:
 - They are employed under a contract of employment and entitled to employee rights.
 - Administrative fees will not be deducted from pay assigned to their work, but negotiated as an uplift between the agency and umbrella company.
 - They will be paid the same hourly rate had they been employed directly by the agency.
 - They will have rights under the AWR.

In circumstances where the Swedish derogation is applied, the key facts sheet should include clear information that the worker must sign a pay between assignments contract and that by signing such a contract, the worker will lose the right to the same pay as directly employed staff doing the same job.

1 (b): If slightly or strongly disagree, please provide reasons below

1 (c): Thinking about work seekers and employers in the recruitment sector, would ensuring work seekers are provided with a key facts page have a:

	Significantly positive impact	Small positive impact	Some negative and some positive impact	Small negative impact	Significantly negative impact	No impact	Don't know
Individual work seekers		X					
Employers in the recruitment sector		X					

For work seekers, the new statutory right to a key facts sheet will have a small positive impact and useful information to be included on key facts page includes:

- The identity of the employer, including if an umbrella or intermediary
- Pay rates, hours of work and who is responsible for paying them.
- Holiday entitlement and how holiday is calculated
- Statutory and non-statutory deductions to be made from gross pay.

It may be feasible and practical to merge the key facts sheet and the Written Statement of Particulars, providing all relevant information is included and this could be updated as and when required.

We agree with the TUC that if employment businesses are required to provide key facts sheets, it will improve compliance in the recruitment sector in that reputable agencies are less likely to be undercut or face unfair competition by unscrupulous firms.

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

The key fact sheet should include [as under Conduct Regulations]:

- Whether a contract for services or contract of employment
- Relevant notice period
- Pay and hours of work
- Holiday entitlement and how holiday pay will be calculated
- Start date for an assignment
- How long the contract is likely to last
- Health and safety risks; reference to relevant rules and regulations
- Type of work to be undertaken and location
- Any experience, training or qualifications needed
- Any expenses they may have to pay

Additional information to be included:-

- Who will pay the worker and how they are to be engaged
- Statutory deductions to be made and by whom
- Any other deductions such as fees, costs, or charges and workers to be reminded that it is unlawful to charge fees for work searches
- Any additional benefits such childcare vouchers
- Whether employment is by an umbrella company or intermediary and if so, information about:-
 - What they will be paid
 - Any statutory deductions including employers' NI , pension contributions or apprenticeship levy

- Any tax relief on travel expenses incurred during the course of their work
- Written confirmation that they are employed on a contract of employment and entitled to employee rights
- Any admin fees should not be deducted from pay but negotiated as an uplift between the agency and umbrella company.

This information should be provided in a single document and it should be updated when a new assignment commences with an end user or any of the information changes. We agree with the TUC that the Government could assist by providing online template forms to standardise the procedure and information provided.

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?

The key facts sheet should be provided when the work seeker first registers or starts an engagement with an employment business and when they are offered a new assignment with an end user. Those businesses refusing to provide a key facts sheet should be subject to severe penalties and compensation should be available for work seekers where appropriate.

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

Yes	X
No	
Don't know	

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

Face to face meetings between work seekers and business would provide an opportunity for the key facts sheet to be explained to the work seeker and what is being offered. This will also facilitate good working relationships between the parties and create confidence in the process.

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

About right	X
Too high	
Too low	
Don't know	

4 (a): If too high or too low, please provide reasons for your answer below:

The estimate of one hour is about right. However, employment businesses should collate and codify this information as part of normal compliance. After the creation of the initial key facts sheet, this should not prove too onerous and procedures for updating should be standardised.

4 (b): Other than the time taken by personnel to produce a "key facts" document, are there other business costs we should be aware of?

Yes (please provide details below)	X
No	
Don't know	

4 (c): if yes, please provide further details below:

Although key facts sheets should be standardised, there may be some additional cost in holding face to face meetings with work seekers, but this is regarded as good employment practice.

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

Yes	
No	
Don't know	

(a) If so, for what reason? e.g. as a work seeker or employment business for payroll purposes. What has your experience been?

--

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

Prospect is not aware of any significant benefits of using umbrella companies or intermediaries

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; (please tick all relevant boxes)

	Yes	No	Don't know
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?		X	
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?	X		

Please provide reasons for your response.

We agree with the TUC that umbrella companies should be regulated as employment businesses and agencies and the Conduct Regulations should be applied to create a level playing field for workers employed through such companies in terms of protection.

We also agree that the Conduct Regulations should be amended to include provisions relating to umbrella companies so that:

- contractual rates agreed between the agency and umbrella company provide an uplift to cover any admin fees, as well as the employer's NI and other related costs
- work seekers should have the right to decide whether they wish to be employed via an umbrella company or not and if they decline, should not suffer any detriment, including missing out on offers of future assignments.

EAS enforcement strategy should be strengthened, given that the TUC report that there has only been one successful prosecution and one application for prohibition in 2016/17. Penalties should be increased so that agencies and umbrella companies breaching minimum standards must pay increased fines and compensation to work seekers. Where such bodies breach agency workers' rights, they should be excluded from public procurement and public sector contracts.

7) (a) Thinking about work seekers and employers in the recruitment sector, would ensuring umbrella companies provide work seekers with a key facts page have a:

	Significantly positive impact	Small positive impact	Some negative and some positive impact	Small negative impact	Significantly negative impact	No impact	Don't know
Individual work seekers		X					

Employers in the recruitment sector		X					
--	--	---	--	--	--	--	--

Please provide reasons for your answer below

Key facts will have a small positive impact, as lack of transparency creates problems for work seekers who may not know what they are signing up to and the effects on pay and other rights and the level of deductions. The TUC has documented evidence of some workers receiving less than the minimum wage when deductions are made and abuses where they have lost contributions-related benefits

7) (b) Thinking about work seekers and employers in the recruitment sector, would extending the regulations of the Employment Agency Standards inspectorate to cover umbrella companies have a:

	Significantly positive impact	Small positive impact	Some negative and some positive impact	Small negative impact	Significantly negative impact	No impact	Don't know
Individual work seekers		X					
Employers in the recruitment sector		X					

Please provide reasons for your answer below

We agree with the TUC that extending the Conduct Regulations to be enforced by the EAS may have a small positive impact for work seekers. The main benefits would be:-

- to be paid in time and in full
- to be informed about level of pay and other working conditions in advance of any placement
- not be charged for any work seeking fees
-]refuse wider services and charges levied by agencies without suffering a detriment.

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

Yes	No	Don't know

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

The TUC has called for the Swedish derogation to be repealed and we support this proposal on the basis that it is used to undermine agency workers' rights, particularly pay. Employers have an incentive to employ agency staff on these types of contract to achieve significant savings by undercutting pay and conditions of the core workforce.

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?

Very effective	Fairly effective	Not very effective	Not at all effective	Don't know
			X	

The TUC reports that agency workers rarely receive pay between assignments in practice because they are often hired on a long-term basis by the end-user in place of permanent staff. Government research quoted by the TUC has found that monies paid to agency staff between assignments is not an extra benefit, because they are deducted from pay they would otherwise receive for doing the job. [2015 - "Qualitative Analysis of the use of Pay Between Assignment contracts for Agency Workers" final report to BIS by HOST Policy Research.]

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?

--

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

Yes	No	Don't know
	X	

Please provide reasons for your answer below

Where Swedish derogation contracts are used, workers lose out on rates of pay and on paid holidays. Evidence from research shows that pay between assignments does not compensate agency workers for the loss of equal treatment rights. Therefore the Swedish derogation should be removed as a matter of urgency.

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?

Agree strongly	Agree slightly	Neither agree nor disagree	Disagree slightly	Disagree strongly	Don't know
X					

Please provide reasons for your answer below

As previously proposed, the EAS should have a role in enforcement of the AWR, so that they do not have to rely on Employment Tribunals. However, the EAS will require additional resources to undertake this role.

Any further comments

The role of trade unions in enforcing workers' rights has always been crucial and Prospect will continue to support and represent its members. However, some employment law reforms are long overdue; particularly to redress the poor treatment of agency workers.

