

Taylor Review: Agency workers recommendations

TUC response to the BEIS consultation

Introduction

The Trades Union Congress (TUC) is the voice of Britain at work. We represent more than 5.5 million working people in 48 unions across the economy. We campaign for more and better jobs and a better working life for everyone, and we support trade unions to grow and thrive.

The TUC appreciates the opportunity to respond to the BEIS consultation on the recommendations contained in the Taylor Review of Modern Working Practices on agency workers. Our key views on the Taylor review recommendations and the issues raised for consultation can be summarised as follows:

Swedish derogation

The TUC welcomes the government's long overdue review of the 'Swedish derogation' in the Agency Worker Regulations. For many years, we and unions have called for the derogation to be repealed as it being used to mistreat agency workers and drive down pay and conditions.

So serious are the TUC's concerns about the use of the derogation in the UK, that in 2013 we took the virtually unprecedented step of formally complaining to the European Commission that the UK government had failed properly to implement its obligations under the Temporary Agency Worker Directive.

A recent TUC report *Ending the Undercutters' Charter: Why agency workers deserve better jobs*¹ confirms that agency workers employed under the derogation are often paid far less than directly employed staff, even when they are doing the exact same job with the same level of responsibility. Employers and agencies are exploiting the 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.

We therefore support the recommendation of the Taylor Review that the Swedish derogation should be removed as a matter of urgency.

Enforcement of the Agency Worker Regulations

But our concerns about non-compliance with the Agency Workers Regulations (AWR) are not confined to the Swedish derogation. Recent research reveals that agency workers continue to suffer a significant pay penalty, earning on average £1.50 an hour less than

¹ TUC (2018) *Ending the Undercutters' Charter* available at:
<https://www.tuc.org.uk/sites/default/files/EndingtheUndercuttersCharter.pdf>

permanent employees.² Many agency workers also lose out on paid holidays when compared to directly employed staff who they work alongside.³

Enforcement of the AWR needs to be enhanced. The remit of the Employment Agency Standards Inspectorate (EAS) should be extended to include the enforcement of the Regulations. But, it is vital that the EAS is properly funded to perform any additional duties. EAS is currently seriously under-resourced. In 2017/18, the EAS only has a budget of £725,000⁴ to ensure that 23,980⁵ recruitment agencies comply with the Conduct Regulations. They have a total of 12 full time equivalent staff. The limited resources available to the EAS make it impossible for them to stamp out abuse in the agency sector.

Increased regulation of umbrella companies

The rapid expansion in umbrella companies and other intermediaries in the recruitment sector is having negative consequences for agency workers. The way that umbrella companies operate lacks transparency. Agency workers are often unaware who their employer is or whether an umbrella company is involved in their engagement. This makes it difficult to enforce their employment rights. Workers are also often misinformed about the rate of pay they will receive and the level of deductions to be made for employers' national insurers' contributions and to cover the umbrella company's profit margins. Such deductions lead to lower pay for agency workers and even the non-payment of the national minimum wage in some cases.

The TUC would support measures which ensure that:

- All work seekers are provided with a key facts sheet when they first register with or at the start of their engagement with an employment business or employment agency and before any new assignment with a hirer.
- Agencies and umbrella companies which fail to provide accurate key fact sheets face substantial penalties and effective enforcement.

Measures are also needed to clamp down on the substandard practices found throughout the umbrella company sector.

- 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.

² Ibid

³ Ibid

⁴ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-02-02/126332>

⁵ <https://siteassets.pagecloud.com/adelectus/downloads/Recruitment-Industry-Trends-2015-2016-ID-1cb824a2-b37c-4ead-a78c-b9f74f792d99.pdf>

Case for wider reform

But in the TUC's opinion, the government's proposals are inadequate and will fail to tackle the problems and abuses experienced daily by agency workers in the UK. These include:

(i) Widespread non-compliance with minimum standards

In recent years, union campaigns and media reporting have exposed appalling practices by agencies and the serious mistreatment of agency workers in companies such as Sports Direct⁶, ASOS⁷ and Amazon⁸. In these firms, non-payment of the national minimum wage was rife and workers were often subjected to bullying and degrading surveillance in the workplace.

But independent research suggests such practices are not be limited to a few bad employers. It is prevalent in the UK agency sector.⁹

The recent report¹⁰ published by the office of the Director of Labour Market Enforcement confirmed that the scale of non-compliance with the Conduct Regulations¹¹ has increased dramatically in recent years. According to the EAS, the top three sectors for non-compliance are industrial, entertainment and education, with breaches in the education sector alone increasing tenfold in 2015-16, compared to the previous year.

In 2016/17 the modelling and entertainment sector accounted for 19 per cent of all complaints and targeted visits.¹² Breaches uncovered in the sector included websites advertising jobs and charging fees to work-seekers to access information, employment businesses withholding wages from temporary workers and entertainment or modelling agencies failing to pass money to workers. Entertainment unions have also complained that the retention of upfront fees in this sector means many aspiring artists are enticed into paying a fee to register with an agency, even though there is very limited prospect of gaining work through the agency.

The EHRC Inquiry¹³ into the meat processing sector in 2010 also found evidence of widespread mistreatment of agency workers, particularly migrant and pregnant workers. Agency workers often failed to receive holiday pay and some were coerced to do double shifts when they are tired or ill. Research commissioned by Joseph Rowntree Foundation¹⁴

⁶ <https://www.thetimes.co.uk/article/sports-direct-agency-transline-group-is-chased-for-1-3m-c7khrfrcc>

⁷ https://www.buzzfeed.com/sarasparry/these-asos-workers-are-paying-the-true-price-of-your-order?utm_term=.msnNy1V#.uh6VOjR

⁸ <https://www.dailypress.com/news/uk-world-news/amazon-drivers-deliver-200-packages-11669904>

⁹ Wilkinson et al (2010) *'Forced Labour in the UK and the Gangmasters Licensing Authority'* The Wilberforce Institute for the study of Slavery and Emancipation, University of Hull

¹⁰ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/662732/eas-annual-report-2016-2017.pdf, Annex B

¹¹ The Conduct Regulations 2013 set the minimum standards for the agency sector

¹² <https://www.thestage.co.uk/news/2017/entertainment-modelling-agencies-receive-worker-complaints/>

¹³ *Inquiry into recruitment and employment in the meat and poultry processing sector* – Equality & Human Rights Commission – March 2010

¹⁴ Sam Scott et al (2012) *Experiences of forced labour in the UK Food Industry* Joseph Rowntree Foundation.

similarly found widespread exploitation of agency workers in the UK food industry, including the regular underpayment of wages. Workers were threatened and bullied. Racist or sexist language was sometimes used in the workplace, underpinning a climate of fear. The most notable and unexpected forced labour practice was the 'underwork scam' – recruiting too many workers and then giving them just enough employment to meet their debt.

There is nothing in the government's proposals to protect agency workers from such mistreatment.

Outsourcing of employment obligations and risks

By relying on agency workers, companies can outsource the risks of changing demand for their goods and services on to the employment business and subsequently to the work-seeker. Employers have the flexibility of hiring and firing agency workers at will, without needing to follow normal employment procedures. In contrast, agency workers are offered work at very short notice or that their hours can be reduced or cancelled without notice or financial compensation. This makes it difficult to budget, to plan childcare and organise their life away from work.

There is also concern that employers intentionally use agency work and umbrella companies to outsource their employment responsibilities. Few actively check whether their labour suppliers comply with minimum standards and are treating agency workers fairly. The involvement of agencies and umbrella companies can lead to the creation of long supply chains which, in turn, increases the likelihood of non-compliance¹⁵ and makes it harder for workers to enforce their rights.

Lack of rights in the workplace

Agency workers also miss out on basic rights in the workplace. UK legislation actively excludes or limits entitlements for agency workers, including the right to request flexible working¹⁶ and paid time to attend ante-natal appointments.¹⁷

The tripartite nature of their employment also means agency workers fail to qualify for key rights, such as protection from unfair dismissal. Access to such rights depends on an individual having a contract with the *right* employer. This creates difficulties for those employed through agencies and umbrella companies who are deemed not to have a contract with the end user, even though it is the hirer who benefits from any work performed by the agency worker. End users often decide that the individual should be

¹⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/629872/labour-market-enforcement-strategy-introductory-report.pdf

¹⁶ Agency workers, who qualify as employees, are denied the right to request flexible working, unless they are returning from a period of parental leave

¹⁷ Agency workers, who don't qualify as employees, lose out on day one rights to paid time off to attend ante-natal appointments. They must for at least 12 weeks in the same job with the same hirer before qualifying.

dismissed.¹⁸ As a result, individuals are trapped in a 'Bermuda triangle' in which their rights all but vanish and employers cannot be held to account for breaches of employment law.

Being in such a precarious situation means it is very difficult for workers to complain if they are treated badly. Agency workers rely on agencies and umbrella companies to provide them with work. They are usually reluctant or afraid to challenge bad practice. As a result, they risk having the few rights they do have disregarded.

Agency working not a stepping stone into regular employment

Agency work no longer appears to be a stepping stone into regular employment in many sectors and workplaces, at least for the less skilled.¹⁹ Official statistics suggest that more than 420,000 agency workers have been in their jobs for more than a year, and shockingly, over 120,000 have worked for an agency for over five years.²⁰ Agency workers can remain trapped in low paid, insecure work, with few rights in the workplace. Younger agency workers are particularly missing out on career progression with over forty per cent of all those who have been in agency work for over a year are aged 16-34.²¹

In the light of these findings, it is regrettable that the government has sought to quietly ignore the recommendation in the Taylor review that agency workers should be given a *"right to request a direct employment contract with the hirer when they have been engaged with the same hirer for 12 months."*

Policy recommendations:

The government should introduce wide-ranging reforms to protect agency workers. These should include

- The first priority must be to repeal of the Swedish derogation, to ensure all agency workers have the same rights to equal pay.
- After 12 weeks doing the same job for the same hirer, hirers should be required to assess whether the work done by the agency worker is required on an on-going basis. If so, the agency worker 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 floor of rights as employees.
- The government should extend GLAA licensing to other sectors, particularly high risk sectors.
- The law should be reformed to ensure end-users, agencies and umbrella companies are jointly and severally liable for any breaches of employment law.

¹⁸ James v London Borough of Greenwich [2008] EWCA Civ 35 CA.

¹⁹ Countouris, N, Deakin, S, Freedland, M, Koukiadaki A, and Prassl, J. (2016) Report on temporary employment agencies and temporary agency work: A comparative analysis of the law on temporary work agencies and the social and economic implications of temporary work in 13 European countries: ILO

²⁰ TUC (2018) Ending the Undercutters' Charter available at: <https://www.tuc.org.uk/sites/default/files/EndingtheUndercuttersCharter.pdf>

²¹ Ibid

- The government should substantially increase resources for the 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.
- Public procurement rules should be revised so that agencies and umbrella companies which breach agency workers' rights are not awarded public contracts.

Responses to consultation questions

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

The TUC is concerned that practices in the recruitment sector increasingly lack transparency, especially where umbrella companies are engaged.

Agency workers are often unaware who their employer is, whether they will be employed via an umbrella company, how much they will be paid for work on an assignment or what deductions will be made from their wages.

Providing work seekers with a key facts sheet may help to improve transparency. But, being provided with additional information - by itself - is unlikely to have a significant impact on worker seekers' decisions about work. Such benefits will be limited to those who can make a genuine choice whether to accept the work which is offered or not. For many no such choice exists.

In many industries and communities, agency work is one of the few work options open to them. For example, a report prepared for Liverpool City Council in 2014, revealed that of the 13,771 vacancies advertised in Merseyside at the time, nearly half – 6,600 – were for temporary agency work.²²

And in some sectors, individuals have no choice but to sign up with an umbrella company when seeking work. For example, teaching unions have reported that many supply teachers are pressurised by recruitment agencies to use umbrella companies as a pre-condition of being assigned to a school. According to a NASUWT survey of supply teachers in 2017, two thirds of supply teachers (66 per cent) reported being asked to sign a contract or agreement with an umbrella company when working through a recruitment agency.

Question 1 (a):

If slightly or strongly agree, what key facts do you think should be made prominent?

²² <https://www.theguardian.com/commentisfree/2015/jan/19/jobs-agency-workers-britain-economy-insecure-low-paid-work>

In our response to question 2 below, we have detailed the information which should be included in the key facts sheet.

The TUC believes that it is important for a work seeker to receive a complete set of information when they first register with an agency or umbrella and before each assignment. However, it may be helpful if the following information was highlighted:

- their pay and hours of work who will be responsible for paying them
- their holiday entitlement and how holiday pay is calculated
- the start date for an assignment and how long the contract is likely to last
- any health and safety risks
- whether they will be employed via an umbrella company or intermediary. If so, they should also receive written confirmation that:
 - they are employed on a contract for employment and are entitled to all employee rights
 - any administrative fees for umbrella companies will not be deducted from their pay but instead will be taken from an uplift negotiated between the agency / umbrella company and the end user
 - they will be paid at least the same hourly remuneration that they would have received if 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
- the right to join a trade union.

The TUC believes that the Swedish derogation should be repealed. But if this legal loophole is retained, the key facts sheet should make clear if the agency worker is being asked to sign a pay between assignments contract. Agency workers should be warned that by signing the contract they will lose the right to equal pay.

Question 1 (c):

Thinking about work seekers and employers in the recruitment sector, what would be the impact of ensuring work seekers are provided with a key facts page for:

(i) Work-seekers

Creating a new statutory right to a key facts sheet may have a small positive impact for individual work seekers

The TUC agrees it would be helpful to provide work seekers with a key fact sheet setting out clear and full information about:

- who their employer is (including, where relevant, an umbrella company or intermediary)

- their pay rates, hours of work, and who is responsible for paying them
- their holiday entitlements and how their holiday pay has been calculated
- any statutory and non-statutory deductions which will be made from their gross pay

Such information may assist individuals to assess whether they are getting their full rights.

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 complying with the law.

(ii) Employers in the recruitment sector

Creating a new statutory right to a key facts sheet may also have a small positive impact for employers in the recruitment sector

Requiring employment businesses to prepare key facts sheets is likely to improve compliance levels in the recruitment sector. This will mean reputable agencies are less likely to be undercut and to face unfair competition by unscrupulous firms.

And it will improve businesses' awareness of their responsibilities to people at work.

Question 2:

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

The key fact sheet should include information already required by the Conduct Regulations, including:

- whether they'll be employed under a contract for services or a contract of employment
- the relevant notice period
- their 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
- the type of work the work seeker will be expected to undertake and the location of the work
- about any experience, training or qualifications needed for the role
- any expenses they may have to pay

It should also include the following information:

- who will be responsible for paying the work seeker, and how they are being engaged
- what statutory deductions will be made and by whom

- any other fees, costs or charges that will be deducted. Work seekers should be reminded of their right to refuse any services provided by the agency and to do so without suffering any detriment. The facts sheet should also clearly state it is unlawful for employers to charge fees for work searches.
- any additional benefits that will be provided or offered, for example, access to a benefit in kind scheme or childcare vouchers.
- whether they will be employed via an umbrella company or intermediary. Where this is the case, they should be informed about:
 - what they will be paid by the umbrella company or intermediary
 - any statutory deductions which will be made, including relating to employers' national insurance contributions, employers' pension contributions or the apprenticeship levy
 - any tax relief they will receive on any travel expenses incurred during their work

They should also receive written confirmation 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

This information should be provided in a single document. The document should be updated when the individual starts a new assignment or if any of the relevant terms and conditions change.

The government should prepare online template forms. This would assist agencies and umbrella companies to comply with their duties.

It would also give agency workers 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 workseeker before any contractual engagement?

Work seekers should have a right to a key facts sheet when they first register or start an engagement with an employment business and when they are offered a new assignment with an end user.

Employment businesses and umbrella companies which fail to comply should face substantial penalties. The work seeker should also be properly compensated.

The provision of accurate key fact sheets should be a condition of receiving and retaining a GLAA licence.

Question 3:

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

Yes

Question 3(a):

If yes, how do you think this should be achieved?

Wherever possible, employment businesses, umbrella companies and other intermediaries should arrange to meet face-to-face with work seekers when they first register with the firm.

Such meetings will provide a good opportunity for the companies to explain the key facts sheet and to inform the work seeker about the terms under which they will be offered work.

Such meetings will assist the company to get to know and build a good working relationship with the individual.

Work seekers who agree to sign a contract with the agency or umbrella company should also be provided with a cooling-off period of at least one month during which time they can seek independent advice and seek to renegotiate the terms of the agreement.

Question 4:

BEIS has estimated the cost of a new information document to be between £33,000 and £1 million over a ten-year period. This assumes that it will take up to one hour to produce a key facts page.

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

This estimate is about right.

Question 4 (a):

If too high or too low, please provide reasons for your answer below:

Employment businesses, umbrella companies and other intermediaries should already gather the information needed for the key fact sheet during their normal compliance activities.

Producing fact sheets should therefore not create significant additional administrative duties for these firms.

The government could assist the recruitment sector by preparing online template forms. This would reduce costs for businesses and improve compliance.

Question 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?

Question 4 (c):

If yes, please provide further details below:

The TUC believes that agencies and umbrella companies should hold face-to-face meetings with work seekers when they first register with the firm. This is already considered to be normal practice for some agencies. But for some agencies and umbrella companies, it may lead to additional costs.

Section 2

Extending the remit of 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

The TUC is not aware of any significant benefits for agency workers employed through umbrella companies.

Businesses claim that such agency workers employed through umbrella companies are more likely to have a contract of employment and to qualify for wider 'employee' rights. Most employee rights only apply if an individual meets the relevant qualifying period (2 years in the case of unfair dismissal protection and statutory redundancy pay). This means agency workers will only benefit from increased employment protection if agencies and end users agree to engage the same umbrella company every time the individual moves to a new assignment. In most cases this doesn't happen because agencies and end users choose to use their preferred supplier.

In contrast, unions and agency workers report that employment through umbrella companies creates many problems. In summary:

- **Lack of transparency and misinformation about pay rates:** Individuals are often misinformed about how much they will be paid, with workers frequently not receiving the advertised rate of pay or the rate that was agreed with the employment business. The hourly or daily rate for the agency worker which is agreed with the employment business is paid to the umbrella company, as the umbrella company's income. The umbrella company then deducts their administrative costs and sums to cover employers' National Insurance Contributions, pension contributions, the apprenticeship levy and holiday pay (as the umbrella company is the employer). The remainder is then classed as the work-seeker's gross pay, from which income tax and employees' National Insurance Contributions are deducted, with the work seeker receiving the resultant net pay.

A report by UCATT²³ (now Unite the Union) neatly summed up the problems faced by workers employed by umbrella companies:

"By using these middle men to pay workers, employment agencies have engineered a situation where the amount a construction worker receives in their pay packet is often a lot less than the rate agreed when he or she took on the job."

- **The involvement of umbrella companies drives down pay for agency workers:** Employers who decide to use agencies to supply workers will inevitably incur agency fees, which on average amount to 16.5 per cent of the costs of any assignment²⁴. Although, in sectors such as education, the commission fee charged by the employment agency can be as high as 40 per cent of the total contract for employing a teacher on a daily assignment. The costs of agency fees are often transferred to the worker. Teaching unions, for example report that the use of agencies, inevitably leads to lower wages for supply teachers, as schools cannot afford to increase their overall wages bill. Where umbrella companies are engaged, the amount of the pay bill available for agency workers is further reduced due to the umbrella company's profit margin which is also deducted from the wages assigned for to agency workers. In many cases the agency worker will not aware of this, so the pay rate they've agreed with the employment agency is not reflected in their final pay packet.

A Unite the Union member working in construction highlighted the day to day experience of workers using an umbrella company:

"On top of all of this, when I do work, I am having money taken off my wages due to an umbrella company's greed. I think it is ridiculous that I have to pay someone to receive my own wages I've worked hard for. This is public money for a public service, why are umbrella companies who add nothing of any value to the project I am employed on profiting from the tax payers money? Something needs to change and change very soon."

These problems could partly be alleviated if the law was amended to ensure that the contractual rates agreed between the recruitment agency and the umbrella company had to 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.

- **The involvement of umbrella companies increases the length and complexity of the supply chain making it harder for individuals to enforce their rights.** The use of umbrella companies inserts another link in the chain between the agency worker and the business hiring them to do work. This is another link which transfers risk and responsibility away from the hirer and employment business.
- **Loss of worked-related benefits.** Some work seekers may be lured into signing a contract with the umbrella company on the promise they will receive more take home

²³ <https://www.ucatt.org.uk/files/publications/141023%20Umbrella%20Company%20Con-Trick%20Report.pdf>

²⁴ <https://siteassets.pagecloud.com/adelectus/downloads/Recruitment-Industry-Trends-2015-2016-ID-1cb824a2-b37c-4ead-a78c-b9f74f792d99.pdf>

pay because umbrella companies will offset their travel and work-related expenses against national insurance contributions (NICs). Individuals are unlikely to know such practices may be unlawful.²⁵ They are also often unaware that by paying lower NICs they will lose out on future contributory-based benefits, such as statutory maternity pay, statutory sick pay and their state pension.

See the new TUC report on *Shifting the risk* for more detail.²⁶

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.

The TUC believes that umbrella companies should be regulated on the same basis as employment businesses and employment agencies. The extension of the Conduct Regulations to umbrella companies 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.

The Conduct Regulations should also be amended to include additional, specific provisions for umbrella companies, including:

- Any contractual rates agreed between the recruitment agency and the umbrella company should include an uplift to cover any administrative fees charged by the umbrella company, as well as any employer's national insurance and other related costs which may be deducted from the agency workers' pay.

²⁵ 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.

²⁶ TUC *Shifting the risk* available at: <https://www.tuc.org.uk/sites/default/files/Shifting%20the%20risk.pdf>

- Work seekers should have the right to decide whether they wish to be employed via an umbrella company or not. Where they decline, they should not suffer any detriment, including missing out on offers of future assignments from an employment business.

It is vital that the Employment Agency Standards Inspectorate (EAS) receives additional resources, if its remit is to be extended to regulating umbrella companies.

The EAS is seriously under-resourced. Between 2010/11 and 2015/16 the EAS saw its budget cut roughly in half with the number of inspectors falling to just 2 at one point.²⁷ Since then budget cuts have only been partially reversed. In the current year (2017/18) the EAS only has a budget of £725,000²⁸ to protect approximate 1.2 million workers²⁹ and to ensure that 23,980³⁰ recruitment agencies comply with the Conduct Regulations. They have a total of 12 full time equivalent staff. The scale of the task for these 12 inspectors is already unenviably enormous. If the remit of the EAS is to be expanded, it must be accompanied by a significant injection of additional resources and lead to a rapid expansion in the number of inspectors.

Failure to invest additional resources would mean that any changes to the enforcement regime will be ineffective.

And EAS's enforcement strategy should be substantially strengthened. Current issues for concern include:

- during 2016/17 the EAS only pursued one successful prosecution and one application for a prohibition
- correspondence with agencies remains a primary method of enforcement for EAS, rather than active inspections of workplaces.
- unions report that EAS regularly fail to take effective enforcement action in response to complaints that agencies have supplied agency workers to replace striking workers in breach of regulation 7 of the Conduct Regulations 2003.

The penalties for non-compliance with agency workers' rights should also be increased:

- Agencies and umbrella companies which breach minimum standards should be required to pay increased fines and full compensation to work seekers.
- Public procurement rules should be adjusted to ensure that agencies and umbrella companies which breach agency workers' rights are excluded from being awarded public contracts.

Question 7) (a):

²⁷ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-01-23/61285/>

²⁸ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-02-02/126332>

²⁹ BEIS (2018) Good work: the Taylor review of modern working practices; consultation on agency workers recommendations

³⁰ <https://siteassets.pagecloud.com/adelectus/downloads/Recruitment-Industry-Trends-2015-2016-ID-1cb824a2-b37c-4ead-a78c-b9f74f792d99.pdf>

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 have a small positive impact for individual work seekers.

The TUC is concerned that practices in the recruitment sector 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 not likely to be aware how signing up with an umbrella company may affect their take home pay or the rights at work.

Requiring umbrella companies to provide work seekers with additional information may assist in improving transparency. But, increased information, by itself, will not prevent the wider abuses experienced by work seekers employed via umbrella companies.

The government should also increase the regulation of umbrella companies. As a minimum, the Conduct Regulations should also be amended to ensure 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 may also have a small positive impact for the recruitment sector.

Requiring umbrella companies to prepare key facts sheets is likely to improve compliance levels in the recruitment sector. As a result, 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

Extending the Conduct Regulations, enforced by the Employment Agencies Standards Inspectorate to umbrella companies may also have a small positive impact for individual work seekers.

It would mean that work seekers employed through umbrella companies have the same rights as other agency workers, including rights to:

- be paid on 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 services provide by umbrella companies and other charges, without suffering a detriment

ii. The recruitment sector

Extending the Conduct Regulations, enforced by the Employment Agencies Standards Inspectorate to umbrella companies may also have a small positive impact for the recruitment sector.

The extension of the Conduct Regulations to umbrella companies would 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 8:

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

TUC affiliates organise in workplaces where the Swedish derogation is being used by employers and agencies to drive down wages and undercut the pay and conditions of directly employed staff.

Question 9:

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

The TUC welcomes the government's long overdue review of the 'Swedish derogation' in the Agency Worker Regulations. For many years, we and unions have called for the derogation to be repealed. All available evidence suggests that the derogation is being used to mistreat agency workers and to drive down pay and conditions.

So serious are the TUC's concerns about the use of the derogation in the UK, that in 2013 we took the virtually unprecedented step of formally complaining to the European Commission that the UK government had failed properly to implement its obligations under the Temporary Agency Worker Directive.

On 5 March, the TUC published a new report: *Ending the Undercutters' Charter: Why agency workers deserve better jobs*.³¹ A copy of the report is attached as part of this submission. This report confirms that agency workers are experiencing widespread abuse because of the derogation.

The key findings from the report can be summarised as follows:

(i) The pay penalty for agency workers employed on the Swedish derogation

Agency workers employed under the Swedish derogation suffer a significant pay penalty with some agency workers earning up to £4 less per hour than directly employed staff even though they do the exact same work with the same level of responsibility.

For example:

³¹ TUC (2018) Ending the Undercutters' Charter available at:
<https://www.tuc.org.uk/sites/default/files/EndingtheUndercuttersCharter.pdf>

- In Argos distribution centres, agency workers earn £4.36 less per hour, with directly employed staff earning 63 per more than their agency counterparts
- In BT call centres, agency workers can earn up to £3.26 per hour than directly employed staff, which equates to £122 less per week and £529 less per week.

See the TUC report *Ending the Undercutters' Charter: Why agency workers deserve better jobs* for more detail

(ii) Missing out on enhanced pay for work in anti-social hours

Agency workers need to work overtime and anti-social hours to make up for the shortfall in their wages packets, but often face a bigger pay penalty when doing so.

- For example, in one food manufacturing plant, agency workers earn nearly £3 less per hour than directly employed staff when working weekday night shifts. Agency workers on Sunday daytime shifts earn £7 per hour less per hour, whilst, Sunday night working brings a pay gap of £6.33 an hour.
- In the same factory, agency workers miss out on enhanced overtime rates. When working extra hours agency workers continue to be paid £7.53 an hour, when core staff receive a 50 per cent premium for over time, being paid up to £17.06 an hour.

Employers have a clear incentive to use agency workers on Swedish derogation contracts to cover longer shifts and anti-social hours agency workers to achieve significant savings and undercut the pay and conditions of their core workforce.

(iii) The undercutters' charter

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.

Recent research published by the government³² 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

³² 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

- 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.

(iii) 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'. Agency workers are told they either sign a pay between assignment contract or they won't be offered work or will be sacked.

Many agencies opt to move agency workers onto Swedish derogation contracts between assignments. The decision of an employment tribunal in the case of *Bray v Monarch Personnel Refuelling*³³ confirms 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?

Not at all effective

Some employers claim that the Swedish derogation provides workers with a fair trade-off. Agency workers give up the right to equal pay on the promise of pay between assignments when the agency cannot find them work.

But, evidence gathered by unions and researchers commissioned by the government suggests that agency workers are receiving a raw deal 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 hired on a long-term basis, in place of a permanent workforce.

Recently published research, commissioned by the government, also reveals that sometimes - maybe often - monies paid to agency workers between assignments do not amount to an extra benefit for agency workers. Instead they are deducted from pay the agency workers would otherwise have received for doing the job.³⁴

³³ *Bray and others v Monarch Personnel Refuelling (UK) Ltd* ET/1801581/12

³⁴ 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.

The report 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.
- One umbrella company offered workers the choice of being paid the money up front in return for waiving their right to pay between assignments: 'it is up to the worker to decide which they prefer'.
- At least two umbrellas reported deducting an amount for PBA from the worker but then paying them the same amount in the form of a loan; in the event of PBA being triggered, they would pay out but also require repayment of the loan: 'the net effect is always zero.'

As the government commissioned research pointed out, such practices raise serious questions about compliance. They are clearly 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 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..."*⁸⁵

Question 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?

Yes

Unions have reported that agency workers are usually informed about job vacancies with the hirer.

In several workplaces, unions have negotiated agreements with employers which exceed these minimum statutory rights. The agreements not only permit agency workers to apply for jobs. In workplaces, such as BT and Bentley agency workers have been transferred onto

³⁵ Ibid page 12

direct, permanent contracts with the hirer. (See the TUC report *Ending the Undercutters' Charter: Why agency workers deserve better jobs* for more detail.)

However, agency workers on Swedish derogation contracts often receive significantly fewer paid holidays than workers on a regular contract doing the same job.

For example:

- In Argos distribution centres agency workers on PBAs miss out on an extra 4 days paid holidays a year.
- In a food manufacturing factory, core staff are entitled from the start of their job to 26 days leave plus 8 days bank holidays. They receive an additional two days' leave after 10 years. In contrast, agency workers receive just 28 days leave.

This suggests agency workers are missing out on equal treatment on holidays, even though regulation 10 of the AWR only exempts agency workers from the right to equal treatment on pay. The exemption does not apply to other basic working conditions, including holidays and working hours.

Question 11 (a):

Do you believe that that the above issues would justify wider state enforcement?

No

There is clear and compelling evidence that the abuse of agency workers employed under the derogation is widespread. Agency workers are paid far less than directly employed staff doing the exact same job. They also lose out on paid holidays. It is also evident that pay between assignment arrangements do not compensate agency workers for the loss of equal treatment rights. Indeed, in many workplaces pay between assignments does not amount to additional benefit for agency workers. It is simply deducted from the pay they would otherwise have received when working for an end user.

The TUC firmly believes that better enforcement cannot remedy the abuses experienced by agency workers employed under the Swedish derogation or protect them from future mistreatment.

We therefore support the recommendation of the Taylor Review that the Swedish derogation should be repealed as a matter of urgency.

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?

The TUC agrees that the enforcement of the Agency Worker Regulations (AWR) needs to be enhanced. Rights contained in the Agency Workers Regulations should not only be enforced through employment tribunals. The Employment Agency Standards inspectorate

(EAS) could also play an important role in ensuring agency workers benefit from their equal treatment rights.

As far back as January 2012, the Gangmasters Licensing Authority (GLA - now the GLAA) decided to enforce rights to equal treatment on pay contained in the Agency Worker Regulations.³⁶ It is welcome that the government is now proposing that the EAS should enforce all aspects of the AWR, and not just rights to equal pay - a decision that is long overdue.

However, any extension in the remit of the EAS 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 £725,000³⁷ to protect approximately 1.2 million workers³⁸ and to ensure that 23,980³⁹ 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 EAS is to be responsible for enforcing the Agency Worker Regulations, the government must provide the EAS with significantly increased resources.

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³⁶ www.gla.gov.uk/media/1795/gla-32-81-licensing-standards-review.pdf

³⁷ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-02-02/126332>

³⁸ BEIS (2018) Good work: the Taylor review of modern working practices; consultation on agency workers recommendations

³⁹ <https://siteassets.pagecloud.com/adelectus/downloads/Recruitment-Industry-Trends-2015-2016-ID-1cb824a2-b37c-4ead-a78c-b9f74f792d99.pdf>