



GOOD WORK

**THE TAYLOR REVIEW OF MODERN
WORKING PRACTICES**

AGENCY WORKERS

USDAW SUBMISSION

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Introduction

The Union of Shop, Distributive and Allied Workers (Usdaw) is the UK's fifth largest trade Union, with more than 430,000 members. Our members work primarily in the retail sector, but we have significant membership in the road transport, warehouse, food manufacturing, home shopping and pharmaceutical sectors.

Usdaw followed the Review of Employment Practices with interest, and were pleased to take part in the events in Nottingham, Newcastle and Coventry. Usdaw was also involved in BEIS roundtable discussions reviewing the recommendations from the Taylor Review prior to the launch of the consultation programme.

We appreciate the opportunity to submit our views on the issues surrounding agency work in the UK economy. Usdaw has significant experience of agency worker issues having run a number of campaigns over the last ten years. As a result of these campaigns, we have a number of agency workers in membership. The issues outlined in our response below have been raised by Usdaw members and Shop Stewards through regular surveys, motions raised at our Annual Delegate Meeting and conversations with full-time Union employees.

Usdaw has been involved in compiling information for the TUC's complaint to the EU over the abuse of the Swedish Derogation provisions within the Agency Workers' Regulations. The Union has multiple examples of agency workers being placed on Pay Between Assignment contracts which do not offer the individual any guarantees of working hours or pay. Usdaw is wholeheartedly committed to campaigning for the removal of the Pay Between Assignment provisions from the Agency Workers' Regulations. We were pleased to see such a recommendation forming part of Matthew Taylor's Review into Modern Employment Practices and support the Government's moves to enact this recommendation.

Agency workers miss out on many basic workplace rights. Agency workers are excluded from, or have limited entitlement to, rights such as the right to request flexible working and paid time to attend ante-natal appointments. The nature of the employment relationship also means that individuals miss out on protections such as unfair dismissal and redundancy. Usdaw has a current example in Shop Direct where agency workers have been consistently working on site for 10 years, and having been placed on a Pay Between Assignments Contract since the Agency Workers' Regulations were introduced, yet now that a site closure has been announced, these individuals are not entitled to any redundancy consultation or pay, unlike the colleagues they have been working next to.

The above example shows that agency work is not typically a route to regular permanent employment. Usdaw is concerned that the recommendation from the Taylor Review that agency workers are given a 'right to request a direct employment contract with the hirer when they have been engaged with the same hirer for 12 months' has not been included in this consultation paper. We believe that the Government needs to ensure that people do not become trapped in low-paid, vulnerable work, for long periods of their lives and therefore recommend that the Government immediately acts upon this proposal. Therefore we call upon the Government to take action on this recommendation.

Consultation Questions

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

Slightly agree.

Usdaw believes that providing agency workers with additional information would be a good first step however will not address the current imbalance in the employment relationship. Agency workers are all too often unaware of their rights, their rate of pay or who their employer is when they take up an assignment. As stated in the Government commissioned review, "Qualitative Analysis of the use of Pay Between Assignment contracts for Agency Workers including the role of Umbrella Organisations" "...there is little choice; the PBA contract is what is required in order to work on a particular assignment and so individuals will sign it for that reason, and not enquire too deeply about the content. People accept it because they need the work."

On this basis, even if people were aware of the terms and their implications, they would still need to accept the contract. Therefore, we need to improve the rights that agency workers have, including by removing the Swedish Derogation, in order to improve the function of the market.

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

Our response to question 2 outlines what we believe should be contained within the key facts page. All information is important for a work seeker and should be given to them when they first register with an agency and prior to each assignment. However, it may be helpful if prominence was given to information about:

- 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. Where this is the case, 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.
 - 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.

- 1(b) As outlined above, Usdaw believes that the Swedish Derogation should be repealed. Until this is done, the key facts sheet must make clear if the agency worker is being asked to sign a Pay Between Assignments Contract. It should emphasise that by signing a PBA contract, the individual will not be entitled to be paid the same rate of pay as directly employed staff doing the same job. The key facts page should also make clear how an individual would be defined as 'in between assignments' according to the contractual terms and what the rate of pay would be during such a period.
- 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** - As outlined in our response to question 1, ensuring work seekers are provided with a key facts page would have a small positive impact for individual work seekers. Such a page may help individuals identify if they are not receiving their full statutory and contractual rights. However, without effective protection against unfair dismissal, agency workers are unlikely to be able to take enforcement action on individually. The key facts sheet may assist union officials and enforcement agencies in highlighting unlawful treatment. As part of the proposals, the Government must do more to promote trade union representation in the workplace and enhance agency worker protections against unfair dismissal.
 - ii. **Employers in the recruitment sector** – Ensuring work seekers are provided with a key facts page would have a small positive impact for employers in the recruitment sector. The key facts sheet is likely to improve compliance levels leading to less opportunity for accidental errors and ensuring that reputable agencies are less likely to be undercut or face unfair competition from unscrupulous firms.

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

In line with existing requirements under the Conduct Regulations, the key fact sheet should include information about:

- Whether they will 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.

The key facts page should include the following addition 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 the course of 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.

It would be helpful for all this information to be provided in a single document. The employment business and/or umbrella company or intermediary should also provide the individual with an updated document whenever the individual starts a new assignment with an end user and when any of the 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.

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 must be given to the worker when they first register with the agency and when they are offered a new assignment with an end user. This should be a statutory entitlement with agencies and umbrella companies which fail to provide a complete fact sheet liable to substantial penalties. The work seeker should also be appropriately compensated.

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

Employment businesses should, where possible, arrange to meet face-to-face with work seekers when they first register with the firm.

Work seekers should also be given a one month cooling off period where they can get advice on the key facts and seek to renegotiate the terms.

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?**

About right.

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

The information required on the key facts page should already be in the possession of the employment business as part of their normal compliance activities. There will be some investment required by businesses to create an initial factsheet however Government could reduce this by preparing online template forms.

- 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?**

Potentially.

- 4(c): **If yes, please provide further details below:**

As noted above, the information should already be readily available to the employment business and therefore should not create significant additional costs. There may be some further costs associated with holding face-to-face meetings with work seekers however this is already best practice amongst many employment businesses.

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

Usdaw has extensive experience of such contracts being used in food manufacturing, distribution and call centre operations. These contractual provisions have consistently been used to undercut the collectively agreed pay rate on site. Usdaw has not seen a single PBA contract that provides reasonable expectation of an individual ever being deemed as 'between assignment'. Or one that pays individuals the same, or a higher, rate than the agreed terms on site.

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

Perceived benefits are circumvented

Usdaw has experienced significant problems with PBA contracts. We understand that part of the trade-off for allowing a provision whereby agency workers will not gain entitlement to equal pay with permanent employees on site is that the agency workers will continue to receive some payment when there is no work available. Usdaw does not believe that individuals should be expected to give up their equal treatment rights in exchange for a guarantee of contractual hours.

Where PBA contracts have been utilised, Usdaw has seen contractual arrangements devised to ensure that individuals are never classed as 'between assignments'. The most common form of such evasion is to contract agency workers to an annualised hours arrangement based on 336 hours per year. As a result, in many cases, agency workers will fulfil their annual assignment within the first three months of the year yet if they are given no further work during that year they will not be entitled to any payment. This arrangement clearly evades the provisions of PBA contracts.

Usdaw is yet to see a PBA contract that genuinely provides for payment whilst an individual is not on assignment.

Significant Financial Penalties

At the same time, every single PBA contract we have witnessed has utilised the provision to pay individuals less than permanent employees on site. Usdaw has not witnessed or been made aware of any occasion where PBA contracts have been used to enable agency workers to earn higher rates of pay than the directly employed workforce.

As lower pay rates flow through to premiums such as overtime and unsocial hours, the financial impact of missing out on equal pay can be substantial:

- 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, 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 overtime, 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 are used to achieve significant savings and undercut the pay and conditions of their core workforce.

Not a Path to Permanent Employment

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 Government 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 or employment prospects of agency workers. Usdaw has numerous examples of individuals being engaged on PBA contracts for numerous years. As mentioned in the introduction, we are currently dealing with

members who have 10 years' service on the same job yet when the site is closing, they will not be entitled to any redundancy protection. PBA contracts currently give employers the opportunity to avoid employment protection on a long-term basis.

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.

As noted above, Usdaw has not seen any evidence that PBA contracts offer support for workers and work seekers when they are not working. It has proven far too easy for hirers and agencies to abuse the provisions of PBA contracts and create contracts designed to ensure that individuals are never deemed to be 'in between assignments'. As previously explained, this is most commonly achieved through offering agency workers an annualised contract of 336 hours per year. Therefore, if the individual has not worked the 336 hours yet, and is out of work, they will not be deemed as 'in between assignments' as they will not be able to tell if they have not completed their 336 hours until the end of the 12 month reference period. This widespread behaviour is clearly abusing the Swedish Derogation loophole in the Regulations.

Beyond this structure, Usdaw has also seen instances where PBA contracts are only given to individuals when it is expected that they will be engaged at a site for longer than 12 weeks. If an assignment is due to last less than 12 weeks, an individual will be given a non-PBA contract. Due to PBA workers being engaged on a more long term basis, there is even less chance of them qualifying for payment between assignments.

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 facilities, rest break, annual leave or job vacancies?

Udaw has examples of PBA workers not being given access to equal paid holiday entitlement as direct staff. We have seen agencies and employers attempt to offer agency workers unpaid holidays under the belief that the PBA derogation excludes all forms of payment including holiday pay.

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

No. In light of the issues highlighted above, better enforcement cannot remedy the abuses of the PBA provisions experienced by agency workers or protect vulnerable workers from further exploitation. Usdaw therefore fully supports the recommendation from the Taylor Review that 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?

Udaw agrees that the enforcement of the Agency Worker Regulations (AWR) needs to be enhanced and that individual agency workers should not only 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, at least in regard to rights to equal treatment on

pay. It is welcome that the Government is now proposing that the EAS should enforce all aspects of the AWR, and not just equal pay rights - 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 £725,000 to protect approximately 1.2 million workers and to ensure that 23,980 recruitment agencies comply with the Conduct Regulations. They have a total of 12 full-time equivalent inspectors. 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 provide the EAS with significantly increased resources.

For further information please contact:

