



Qualitative Analysis of the use of Pay Between Assignment contracts for Agency Workers including the role of Umbrella Organisations

Final report to BIS by HOST Policy Research

**by Dorothy Berry-Lound, Professor David Greatbatch
and Sue Tate**

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HOST Policy Research
Tel No: 07826 879492

HOST Research and Evaluation Services LLP
trading as HOST Policy Research
Registered in England and Wales
Partnership No. OC366813
Registered Office Anova House Wickhurst Lane
Broadbridge Heath Horsham West Sussex RH12 3LZ

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Section One: Background

1.1 Introduction

The Swedish Derogation, which is also called pay between assignments¹ (PBA), involves employment businesses (referred to as 'agencies' for the remainder of this report) or umbrella companies converting their temporary workers into permanent employees with the promise of paying them between assignments (either at least 50 per cent of the pay they received during the last 12 weeks on their last job or the national minimum wage rate for the hours they worked on the last job, whichever is the greater). This must be done with the agreement of the agency worker. Agencies are also required to try to find and offer suitable jobs for workers when they are not working.

Crucially, PBA contracts exempt the agency workers from the equal pay element of the Agency Workers Regulations (AWR), which otherwise stipulate that agency workers should receive the same pay (and conditions) they would have received if recruited directly by the hirer (Acas 2013). Employment agencies (and umbrella companies) are therefore free to pay agency workers who sign these contracts less than permanent staff doing the same job. It has been argued that this makes these contracts particularly attractive to hirers who require large numbers of agency workers on a long-term basis (e.g. see Forde and Slater 2014; Eichhorst et al. 2013). Hirers also benefit from a reduction in the administrative burdens and risks associated with having to ensure they maintain pay parity between temporary workers and comparable permanent workers.

From the agency workers' perspectives, PBA contracts potentially offer a degree of flexibility and financial security. However, there are considerable risks and trade-offs, especially for lower paid agency workers, given the contracts mean they have to forgo pay parity. The extent of this trade off will depend on each case with those operating in sectors where pay is at or around the national minimum wage potentially not losing out as a result of opting out of equal pay. The TUC is now opposed to such arrangements and has called for the removal of the Swedish Derogation clause (Regulation 10) from the AWR. In September 2013 the TUC submitted a formal complaint to the European Commission against the UK Government 'for failing to implement the Temporary Agency Workers Directive properly'. Ideally, the TUC wish to see the use of the Swedish Derogation abolished (TUC Press Release, 2 September 2013)

'The so-called Swedish derogation should be removed from the Agency Worker Regulations to ensure that all agency workers qualify for equal treatment. This would also ensure that employers cannot use agency workers to undercut the pay and conditions of other workers' (TUC 2014:27).

However, it is also important to remember that different considerations may apply in the case of highly-qualified agency workers who are paid more than permanent staff and would not benefit from equal pay.

The Department for Business, Innovation and Skills (BIS) has commissioned HOST Policy Research (HOST) to conduct a Qualitative Analysis of the Use of Pay Between Assignments Contracts for Agency Workers Including the Role of Umbrella Organisations. The objectives for the project were two-fold and interlinked:

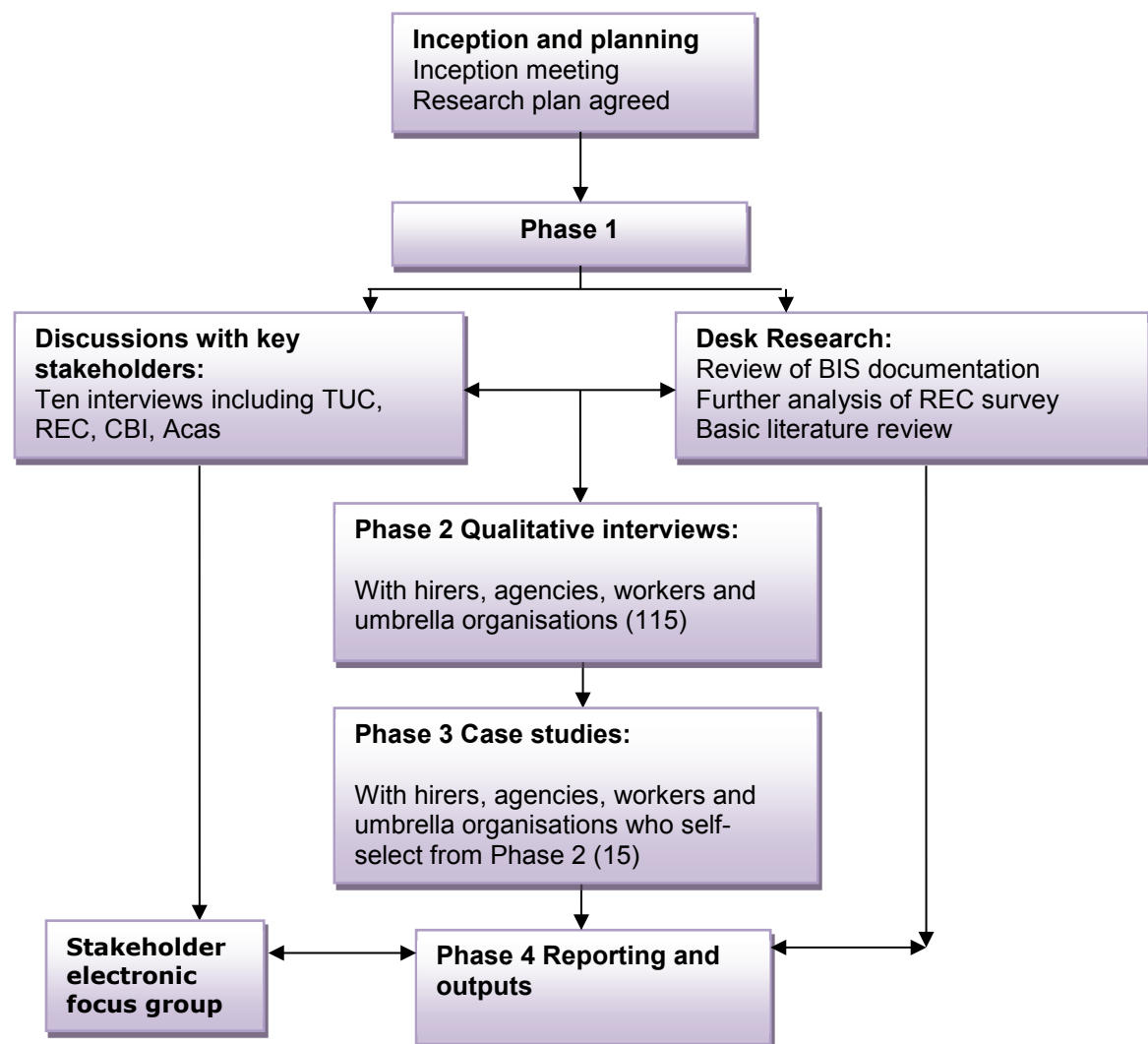
¹ hereafter referred to as 'PBA' except where Swedish Derogation is referred to in a report.

- To fill the information gap on PBA contracts and the reasons why individuals choose to sign up to them.
- To obtain more information on the role of umbrella organisations in the use of these contracts.

1.2 Overview of Methodology

The project was conducted over an eight week period leading up to purdah. The initial methodology agreed for the project was as set out in Figure 1.1 below.

Figure 1.1: Project Plan



Phase 1

Following the inception discussion, the project got off to a fast start with the commencing of stakeholder interviews and a detailed literature review.

a) Discussions with Key Stakeholders

Initially the intention was to conduct ten interviews with key stakeholders at an early stage in the research. Partly owing to the difficulties in persuading agencies, umbrellas, employers and workers to participate in the qualitative interviews (see below), the range of interviews with key stakeholders expanded and continued throughout the research. 42 interviews or detailed email exchanges were conducted with a range of national bodies, employer representative organisations, trade unions and interest groups. A further 19 were given the opportunity to participate in the research but did not do so, including three who were unable to conduct an interview prior to the purdah deadline. As well as conducting ten stakeholder interviews, the original intention had been to hold a follow up focus group discussion. At interview stakeholders expressed concern at participating in such a focus group, some wishing to act merely as observers. Therefore, the focus group was not conducted.

b) Desk Research

The main purpose of the literature review was to provide an overview of the research evidence concerning the use of PBA. Systematic searches of the web and bibliographic databases identified several pertinent studies. These were read and relevant information from each one was summarised. The evidence was then synthesized and related to BIS's key questions. The literature review also focused on policy discussions and journalistic reports concerning the use of PBA contracts.

In order to compensate for the lack of employer and worker direct evidence (see below), the desk research was later broadened in scope to include, for example, reviewing forum discussions, legal cases and local press reports. This involved searches of the web and relevant online communities such as blogs, forums and social media. This enabled us to gather important contextual information and assisted in the development of several of the case studies.

Phase 2: Qualitative Interviews

There are an estimated 7,000 recruitment agencies. The Recruitment and Employment Confederation (REC), which has 3,500 agency members, asked for volunteers to come forward to be interviewed for the project with the promise of anonymity. In the end only a handful did so. Using the internet and stakeholder discussions we identified other agencies that we approached directly and the majority either ignored our approach or refused to participate in the research. However, we did manage to attract a few more interviews using this approach. We were also offered the opportunity to conduct a telephone discussion with a group of nine agencies who participated anonymously and this was a very helpful contribution to our research. In total, therefore, 18 agencies participated directly in our research.

Estimates on the number of umbrella companies vary between around 150 and 200. HOST intended to interview at least 20 umbrella companies in the course of this research and contacted around 60 different organisations to ask for their participation. The Freelancer and Contractor Services Agency (FCSA) provided a

list of umbrella websites that we could pursue. Despite assurances that individuals and their organisations would not be named, many umbrellas were reluctant to talk to us and, in the event and despite repeated requests, only 17 were willing to be interviewed. Because this was very much a self-selecting group and there were concerns about how representative of the sector those we talked to might be, we also explored the websites of 60 listed umbrella companies (around a third of the estimated total) to try and determine the extent to which they used PBA contracts. For two of these we were unable to find a web presence despite their listing on Companies House.

We conducted three interviews with employers: one in Care and two in Construction. Identifying employers to speak to and then encouraging them to participate in the research proved difficult. Both the agencies and umbrellas we interviewed refused to put us in touch with their employers or workers and where we were able to identify employers who use PBA contracts they refused to speak to us in spite of the fact that interviews would be confidential and they would not be named.

In relation to workers, the only way we found to access workers was via trade unions but even there numbers were small as workers were concerned that discovery that they have spoken out could lose them their jobs. We conducted nine worker interviews and we report their views in general terms in order to protect the identity of the individuals.

Resources that would have been used for interviews with employers and workers were diverted into increasing the stakeholder interviews (particularly employer representative groups and unions) and also into the desk research. This enabled us to gather additional evidence to compensate for the lack of evidence with these two groups.

It is important to remember that all interviews for this research were conducted anonymously and in the report we have endeavoured to present sufficient information whilst concealing the identity of the individual or organisation².

Phase 3: Case Studies

Owing to the difficulties in obtaining interviews with workers and employers in particular, we took a broad approach to the development of case studies such that evidence from the desk research was also included where appropriate. We have presented 25 case studies in the report.

Phase 4: Reporting and Outputs

During the project we delivered fortnightly progress reports and an interim report. A draft final report was produced which was discussed with the BIS steering group. Following receipt of comments we produced this final report.

² It should also be noted that in discussions with the Department of Employment and Learning in Northern Ireland it is clear that when doing their research they hit exactly the same problems of people not wishing to be involved. The recurring publicity on this subject recently and the proximity of the general election has also had a negative impact on people's willingness to participate as it has been seen as a 'political' issue.

Data Issues

As a general caveat caution should be taken when making any inferences about all hirers, agencies, umbrella organisations and agency workers based on the findings of this research. Specific issues include:

- Representativeness - interviewees were to some extent self-selected volunteers, not chosen at random and as such there may be an element of voluntary response bias in the results. The sample may not therefore be representative in some or all respects of the whole population.
- Sample size – we were not able to obtain the intended number of interviews across all of the groups. Caution should therefore be taken when interpreting the results of these interviews.

However as this is a piece of qualitative research we are more interested in identifying what people think and why they behave as they do as opposed to obtaining statistically robust findings to our questions.

1.3 Report Structure

The report is structured to reflect the key research questions, namely:

Section Two: How widespread is the use of PBAs?

Section Three: Who requests the PBA contracts?

Section Four: To what extent are workers aware of the type of contract they are employed on?

Section Five: To what extent do workers feel they have little or no option but to sign PBA contracts?

Section Six: What happens when the PBA element comes into force?

Section Seven: What is the role of Umbrella Organisations?

Section Eight: What are the strengths and weaknesses of PBA contracts?

Section Nine: Areas for Consideration

Annex A: References

Sections Two-Nine are structured consistently and present i) the results of the literature review, ii) the evidence from the qualitative interviews and iii) an overview summarising the main points arising from the research.

Section Two: How widespread is the use of PBAs?

2.1 Results from the Literature Review

PBA contracts are being used in a range of sectors/areas, including:

- Transportation and Storage/Logistics (BIS 2014; Forde and Slater 2014; Scottish Affairs Select Committee, April 2014: 46; Unite 24 January 2014).
- Hospitality/Accommodation and Food Service (BIS 2014; Forde and Slater 2014).
- Retail (Eichhorst et al 2013; Forde and Slater 2014; Green 2015).
- Manufacturing (BIS 2014; Forde and Slater 2014; Unite, 24 January 2014).
- Food Production and Processing (Scottish Affairs Select Committee, April 2014: 46; Equality and Human Rights Commission 2012).
- Telecommunications (Sweeney 2014).
- Education (National Union of Teachers 2013; National Union of Teachers 2015).
- Financial Services (Sweeney 2014).
- Administrative and Support Service Activities (BIS 2014).
- Call Centres (Scottish Affairs Select Committee, April 2014: 46).
- Healthcare (BIS 2014; Eversheds 2012).
- Social Work Activities (BIS 2014).
- Professional, Scientific and Technical Activities (BIS 2014).
- Public Administration and Defence (BIS 2014).

Construction is also cited as a sector in which PBA contracts are widely used (BIS 2014; Forde and Slater 2014; Scottish Affairs Select Committee, April 2014: 46). However, this does not appear to be the case. The Scottish Affairs Select Committee (April 2014: 460) noted that:

'in the construction industry, despite a falling number of workers, the number on these types of contracts increased by 30,000 over the last year'.

However, the evidence they cite is a UCATT report (UCATT, 7 February 2013), which in fact refers to a rise in self-employment and does not mention PBA contracts. It is noteworthy that UCATT's recent report (Elliot 2014) on the role of umbrella companies in the construction sector since Spring 2014, when large numbers of construction workers were moved en bloc onto umbrella company contracts (in response to the Government deciding to ban employment businesses from claiming that construction workers were self-employed), does not mention PBA contracts either.

The numbers of workers, agencies and hirers using PBA contracts is far from clear:

- *Number of agency workers on PBA contracts:* Forde and Slater (2014) suggest that Labour Force Survey data (relating to 2011-2012) indicates that PBA contracts may affect up to one in twelve (just short of 8%) of agency workers³, which is similar to an estimate by the Chief Executive of

³ Forde and Slater's (2014) estimate is based on responses to a question asking whether a worker is paid for their work by the client firm, or by an employment agency, which reveals that the numbers of agency temps stating they were paid by an agency rose sharply between Autumn 2011 (just before the AWR) and Winter 2011 (just after the AWR were introduced) rising from 195,000 to 218,000 (a rise of 11 per cent). The report authors suggest that this measure might be seen as a proxy (but not

REC, who recently suggested that *'it wouldn't be unreasonable to estimate (the Swedish Derogation) relates to less than 10 per cent of all temporary workers in the UK'* (Green 2015).⁴ However, at the other end of the spectrum, research by Unite in 2012 suggests that almost one in three (30%) of agency workers are on PBA contracts (Quoted in Unite 24 January 2014).⁵

- *Number of employment agencies using PBA contracts:* A survey from The Employment Agency Movement (TEAM) in conjunction with BIS conducted in 2012 found over a quarter (28%) of employment agencies had opted to use PBA contracts (TEAM 2012). This figure is consistent with the findings of the recent BIS/REC survey (2014) which reported that one third (33%) of agencies that responded to this survey said they find work for individuals on PBA contracts (BIS 2014: 4). However, Osborne Clarke (September 2012) found that 60% of the blue collar staffing companies, and 45% of professional staffing companies, had workers engaged under a PBA arrangement.⁶
- *Number of hirers using agency workers on PBA contracts:* Surveys undertaken by the CBI indicate that over one quarter of companies use agency workers who are on PBA contracts. A CBI/Harvey Nash (2012) survey in 2010 (of 319 businesses employing 1.9 million people in the UK) found that over a quarter of hirers (27%) were using PBA models, while the results of a CBI/Accenture (2014) survey of employment trends in 2014 indicate that over 31% of companies were using PBA models.⁷

However, two smaller scale surveys conducted in 2012 reported smaller numbers of hirers involved in the use of PBA models. Six months after the introduction of the AWR in April 2012, a survey of 143 companies undertaken by the law firm Eversheds found that just under one in five (17%) of 143 end-users/hirers had opted for PBA contracts (which was said to be more than anticipated)⁸ (Eversheds 2012); while another survey of seventy-five companies carried out at recruitment Expo 2012 at Olympia on 14 and 15 February 2012 found that 14% of the companies that participated in the survey intended to use PBA contracts (which was said to be much less than media reports might suggest) (Tim Johnson Solicitors 2012).

The REC view is that PBA contracts are not as widespread as has been reported, and that these contracts are unlikely to take hold significantly, given the risks associated with them for agencies (Forde and Slater 2014; Green 2015). Nonetheless, the use of PBA models is reported to be firmly embedded and gaining in popularity in some sectors such as retail and distribution, where there is a high volume of agency workers over the long term (Eichhorst et al. 2013). In a report for the European Parliament, Eichhorst et al. 2013) reported that:

a precise indicator) of the rise of Swedish Derogation arrangements.

⁴ It should be noted that in 2014 the Scottish Affairs Select Committee (2014) reported that the REC had estimated that around one in six (17%) of agency workers were on Swedish Derogation contracts.

⁵ A review of the impact of AWR in Northern Ireland found that 17% of 458 agency workers who participated in the study said they were on a Swedish Derogation contract (RSM McClure Watters, June 2014).

⁶ In the review of AWR in Northern Ireland, 9 agencies (26%) noted that they currently had workers on Swedish Derogation contracts (RSM McClure Watters, June 2014).

⁷ This is based on: 67% use Swedish derogation, 46% of these said removal of derogation would lead them to reduce or stop taking on agency workers.

⁸ The previous year a survey indicated that just 12% of employers would be adopting PBAs following the introduction of the AWRs.

'The UK Chartered Institute of Personnel and Development (CIPD) predicts that many employers will choose to keep agency workers as agency workers employed by the agency itself for the sake of continuity rather than employing agency workers for themselves and changing staff every twelve weeks to save money. This is also the view of the trade unions, which believe that using agencies who keep workers as their employees will be easier to administer than worrying about putting into place 11-week contracts' (Eichhorst 2013: 85).

The literature offers very little insight into the numbers of umbrella companies using PBA contracts. However, the review of umbrella company websites suggests that a sizeable proportion is using them. Of the umbrella websites explored, which includes the 17 umbrellas we interviewed, 21 (36 per cent) made it clear that they used PBA contracts and 11 (19 per cent) made it clear that they did not. The remainder did not provide details of the types of contracts they operated although a further seven (12 per cent) mentioned having available 'a number of AWR compliant models', which suggests that a PBA model might be amongst them. For the remaining 19 (33 per cent) it was impossible to tell one way or the other. Those umbrellas that stated that they offered PBA models, a number of AWR compliant models or that they did not offer PBA contracts, tended to do so on that part of their site targeted at recruitment agencies. Those umbrellas where this was not mentioned were predominantly those that marketed themselves directly to freelancers and offered a range of services covering the self-employed and those wanting to work via a limited company as well as umbrella services.

2.2 Findings from the qualitative interviews

We set out below a summary of the results by type of interviewee group.

2.2.1 The Umbrella Organisations

Number of umbrellas using PBA contracts

Of the 17 umbrella organisations that agreed to be interviewed, six (35 per cent) do not use PBA models and 11 (65 per cent) do. Of those that use PBA contracts, the extent to which they are used varies considerably. Five umbrellas used them with a very small percentage of employees (three per cent or fewer), one used them exclusively, and the remainder had between a quarter and a half of their employees on PBA contracts. Umbrellas were often unable to be precise about the number of active workers on their payroll; this is in part because workers may move onto the payroll of another umbrella or agency if they obtain work through a new agency that insists workers work through a particular organisation and also because others move into permanent roles. As most umbrellas operate on a charge per timesheet system and do not charge if no timesheets are submitted, it can take time before the umbrella contacts them and discovers they have moved on⁹. This, together with concerns about the representative nature of the sample and uncertainty about the exact number of operational umbrella organisations, makes it impossible to place an exact number of workers on PBA contracts in the sampled umbrellas (our best estimate would be in the region of 9,000) or to translate this into a national figure for all umbrellas.

⁹ This immediately raises the question of 'who is the employer of the worker?' If, as should be the case under these arrangements, the umbrella is the employer then the worker would be required to give a period of notice.

One thing the umbrellas have in common is the large numbers of agencies, workers and hirers they can work with at any one time. One umbrella, for example, works with 'hundreds' of agencies and 'thousands' of workers and hirers, all workers being on PBA contracts. They are not alone, several of the umbrella interviews report working with very large numbers of agencies, up to 600 in one case.

Sectors using PBA contracts

Umbrella companies reported using PBA contracts with workers in health, education, IT, engineering, social care, automotive services, construction, customer services, veterinary services, oil and gas and with HGV drivers.

One umbrella uses this type of contract only with HGV drivers because of the complexity of trying to work out pay comparators when a driver might work for multiple hirers during the course of a week. The umbrella argued that the lack of matched pay did not disadvantage the drivers as they were in high demand, '*knew their worth*,' and were paid as much, if not more, than permanent staff.

Those umbrellas working in education suggest that the majority of contracts for supply teachers are PBA.¹⁰ Many supply teacher contracts are just day to day; they get called up early in the morning to provide cover for one day, for example. There is a lot of emergency supply. But there is also long-term supply as well, for example for maternity cover or long term illness. The use of PBA contracts applies to both.

One umbrella working in the medical industry includes doctors, nurses and physiotherapists on PBA contracts. These are often for periods of 6-9 months to cover maternity or long term sick leave for example.

Those umbrellas suggesting that PBA contracts were common in the IT, education and health sectors were hiring comparatively well-paid workers (one mentioned an average figure of around £30,000 a year). Conversely, those umbrellas using PBA contracts only rarely and those not using them at all, all commented that they were routinely used to drive down wage costs at the lower end of the pay scale and that this was one of the main reasons why they avoided them as far as possible.

Example of an Umbrella Organisation only using PBA contracts

This umbrella organisation covers a wide range of sectors. The umbrella works largely with agencies, although they do work directly with a small number of hirers. The size of the hirer and the number of workers they employ varies considerably. The umbrella uses PBA contracts by default as they see this as the only way to be sure of being compliant with regulations. The view of the umbrella is that, for agencies, using an umbrella company is the best way of maximising revenue and minimising risk as they rely on the umbrella to ensure compliance: '*most agencies don't understand the employment regulations and they don't want the hassle of keeping up to date with any changes.*' The umbrella needs to establish a relationship with agencies who will then direct workers to them.

Agencies will often have a preferred supplier list and will often decide which umbrellas to put on that list based on the best margins. Some agencies require umbrellas to pay a 'rebate' or 'referral fee' for every timesheet processed and see

using umbrella companies as an additional revenue stream. Others require an upfront payment to send workers to the umbrella. This organisation refuses to pay agencies for workers and is convinced that it loses potential work as a result.

The umbrella thinks that agencies seldom give workers a choice in the type of contract they are on - either they take the job under the preferred approach or they will not be offered work, although more highly skilled workers may have greater leverage. PBA contracts can benefit workers as they don't have to cope with tax and national insurance arrangements and they like the idea of being employed and having employee benefits – e.g. sick pay, travel costs paid. Some, especially in the Health and Education sectors, see temporary work as a something they will do in the short term only so don't want to set up a Limited Company but do need to ensure they are IR35¹¹ compliant and that they are paying all due taxes and National Insurance. An overarching employment contract can also be of benefit for their CV.

The umbrella thinks that, for the most part, hirers are fairly indifferent to the type of contract their workers are on and often don't know. They are concerned with the overall cost of the worker to them, that all the employment regulations are being met and that they have as little to do administratively as possible. They let the agency take care of this and so the use of umbrella companies and PBA contracts are mostly at the instigation of agencies.

The umbrella has never had to pay workers between assignments as their workers have always found work. One issue that concerns them, however, is that when workers find new work it is often through a different agency. If the umbrella is not on this new agency's preferred supplier list, the agency might well insist that the worker moves to an umbrella that is (often one prepared to pay a referral fee to the agency). The umbrella often only finds this out when they contact the worker to ask why they have received no timesheets recently. This obviously has an impact on the worker in terms of continuity of employment and associated benefits but the agencies do not explain this.

Reasons for using PBA contracts

An argument for the need for umbrella organisations made by many is that agencies and hirers are relieved from the costs of payroll and ensuring compliance in a changing world which can be a problem for smaller organisations - although this is true of all umbrella solutions not just PBA contracts. Two umbrellas saw PBA contracts as the only way to be sure of being compliant. Another commented that when the AWR were introduced, people were very confused about the rules and a lot still are, with the PBA model promoted as the solution. However, the organisation took legal advice and also purchased a software system to help them be compliant with AWR rules and they have found it actually to be quite straightforward.

One umbrella interviewed thought the ability to offset travel and expenses in PBA contracts against tax (which they saw as not being available in any other type of contract) should make up for the likely lower pay rate. Others mentioned cost considerations, difficulties establishing comparators and the need to keep contractors' pay rates confidential, as reasons for using PBA contracts.

Umbrellas differed in their understanding of existing rules on the claiming of travel and expenses with a small number saying that this was only allowable

¹¹ IR35 applies if, without an intermediary such as a limited company, the relationship between client and contractor would otherwise be one of employer/employee (known as 'disguised employment')

when workers were employed through PBA contracts and others arguing that claiming is legitimate on any overarching contract. Some umbrella organisation websites, in sections on AWR, suggested that to be compliant, an overarching contract had to provide a minimum hours' guarantee over the course of the year (336 hours being the suggested figure).

Examples of reasons for using PBA contracts

Cost considerations

The umbrella covers a wide range of sectors; the three biggest areas are education, the veterinary industry and the medical industry (doctors, nurses, physiotherapists etc). Just over a third (763) of all the umbrella company's employment contracts (2,220) use PBA contracts, mainly for supply teachers (both emergency and short term supply and long-term supply). The umbrella company gets advice from the agencies which liaise with the local authorities or the schools and send them the paperwork and ask them which route they want to go. They have no idea how much the agency is charging their clients or of what the budgetary constraints are of the local authorities or hospitals or other end client. So ultimately, although the umbrella company supplies the relevant contracts, the decision on whether temporary workers are placed on PBA contracts depends on the local authority and the agency.

Cost considerations

This umbrella works with thousands of agencies across a wide range of sectors. After the AWR were introduced, they were approached by agencies who saw the Swedish Derogation as a means effectively of not having to worry about comparators, which wasn't necessarily in the spirit of why the legislation was introduced. The umbrella has tried not to go along with that type of approach. They explain to agencies when they start to work with them that PBA contracts are not something they want to promote. The use of PBAs is determined to a large extent by pay levels and in their experience is largely used with lower-paid agency workers. They are now only dealing with a very small number of requests for Swedish Derogation contracts, normally driven by cost considerations. This is not, in their experience, sector-specific. They have about 3,000 employees, of which only 2.5%/3.0% are on PBA contracts. PBA contracts do not come into play much for them because they are not caught up in the low pay rate area, which normally means that PBA contracts are the only option for the rest of the supply chain. There is a place for PBA contracts based on dwindling day rates in some areas.

Difficulties establishing comparators

This umbrella operates in numerous sectors across the UK and employs 4,500 agency workers through their umbrella each month. Currently they have only 24 workers on PBA contracts. These are in different sectors, with different agencies. PBAs are not prominent in the areas in which they operate. These are not central to the business of the majority of the agencies with which they work. They have PBA contracts as part of their offer to use if required. But it is not something they like to use. It's only used if an agency or end client working through an agency doesn't feel comfortable with the matching terms and pay scenario and want the employee put on a PBA contract. PBA contracts are normally used where an agency/end client have difficulty establishing what equal pay is, e.g. due to end clients having a complicated bonus structure or overtime hours.

Keeping contractors' pay rates confidential

This umbrella company employs highly-skilled professionals (mainly in IT, finance and engineering). It uses PBA contracts for approximately one-third of its employees. The average salary of the umbrella company's employees is around £30,000 per annum and they have people on their books that command salaries of up to £200,000-£300,000 per year. The decision to use PBA contracts tends to be driven by agencies and end clients but this has nothing to do with minimising agency workers' pay rates. The reason why PBA contracts are used is that some of their end clients do not want to release to third parties what contractors/agency workers are actually being paid. A lot of the umbrella's contractors get paid a lot more than their permanent counterparts (if there are any) and agencies, driven by the end client, do not want that data/the high pay rates received by the contractors released due to union pressures. If the Swedish Derogation was removed many of the umbrella's contractors would have to become limited companies in response to end clients insisting on them keeping their pay rates confidential.

At this umbrella company, difficulties finding a comparator rarely lay behind the decision to use PBA contracts. In those circumstances the umbrella would normally go down the route of match permanent pay and tick the no comparator box. If confidentiality is not the issue, they will normally go this route.

Umbrellas not offering PBA contracts

Five of the umbrella organisations interviewed said that they had never employed anyone through a PBA contract and one had employed a very small number of workers in this way but no longer did so.

One of these umbrellas does not see PBA contracts as having anything to offer the workers they employ and only work with agencies who match permanent staff pay as a matter of principle. They have never been put under any pressure by agencies to use PBA contracts.

Another does not offer PBA 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. Although PBA contracts offer workers 'employee' status, they argue, so do standard contracts of employment with the umbrella. They suggest that pay between assignments is not a benefit for workers as organisations will simply calculate a deduction for this from the hourly rate in the same way that holiday pay is calculated. However, in their experience, many workers will never actually receive any pay between assignments as agencies often have criteria for offering these contracts such as long assignments/high volume work/particular skills needs that are designed to minimise the risk of workers not having paid work. However they did acknowledge that one risk of AWR compliant contracts is an increasing tendency for agencies/hirers to take on temps for a maximum of 12 weeks and then replace them with new temps to avoid pay matching, generally with lower paid workers.

One umbrella has developed a PBA contract in the last 12 months, largely because this is a requirement for being on many agencies' preferred suppliers lists. However, as yet they have had little interest in it as workers prefer the parity route. They would use the PBA contract if workers request it or agencies/hirers insist on it but, as yet, this has not happened.

Another umbrella thought that PBA contracts are more likely to be used by large employers using a high volume of temps over long periods of time who would have most to gain from not giving equal pay and are unlikely to need to pay between assignments. Such organisations tend to work in this way with a single agency with which they have a close relationship. They have been asked about PBA contracts but don't think they have lost too much business as a result of not offering them.

A fifth umbrella said that when the AWR were implemented the company decided they would not use PBA unless absolutely necessary because it was (and is) just an added complication in their process. For a short period of time they had a very small number of workers on a PBA contract at the insistence of one of their agencies. Since then agencies have not requested PBA contracts. Moreover, a situation has not arisen in which they have found that what they (the umbrella) is being paid is not enough to pay the comparator rate. A sixth umbrella, which was operating with highly-paid contractors, did not believe that these contracts were needed for their workers.

Example of an Umbrella that does not use PBA contracts

The umbrella works across all sectors; generally speaking, they work with medium to high earners (£15 - £25 per hour) but do have lower paid workers too. They understand PBA contracts through contact with agencies and through workers coming to them who have previously been employed on them. In their experience, PBA contracts tend to be most widespread in low paid sectors such as warehousing and distribution, although they are increasingly being approached by agencies supplying construction staff as margins in the sector are tight and costs fixed a long way in advance.

Increasingly, they find that hirers are resistant to rate increases (even where these are triggered by legislation such as rises in National Insurance) and agencies and umbrellas have to compete for business through offering them the lowest costs. This makes Swedish Derogation attractive although hirers are probably unaware that this is the model being used, they just look for the lowest costs. This really is an issue for low paid workers in the main; where workers are more in-demand because they can offer specialist skills, equal pay is often irrelevant as they are already paid more than permanent employees.

They do not offer PBA contracts because they see them generally used as a way of avoiding the pay comparator element of the AWR and therefore unfair to workers. Conversely, if used properly, they increase the risk to themselves in terms of compliance and financial liability. They offer workers employed status through their standard AWR umbrella company contracts so there are no additional benefits to workers except for PBA which they think is not sufficient recompense for the likelihood of lower pay. Some workers have been told there is a tax benefit to being on a PBA contract but the umbrella is not sure that some practices are fully compliant. Workers often come to them with payslips issued under previous SD contracts and ask them to explain all the stoppages – often the umbrella's own tax specialist is baffled!

Many workers who come to them do not know they have previously been on a PBA contract and have never been paid between assignments. Those offering PBA contracts will often only do so when they know the risk of paying out is small – for example, where hirers are looking for long term workers or where workers have skills that are in high demand. In any case, many organisations simply calculate a deduction for PBA from the hourly rate in the same way that holiday pay is calculated.

They do have agencies which will not use them because they do not offer Swedish Derogation contracts. However, the umbrella did acknowledge that one risk of not using a PBA contract is, in their view, an increasing tendency for agencies/hirers to take on temps for a maximum of 12 weeks and then replace them with new temps to avoid pay matching – again this is generally with lower skilled and lower paid workers.

2.2.2 The Agencies

The agencies that were interviewed cover a range of sectors overall but the main sectors within which they operate PBA contracts are:

- Food Manufacture and Distribution
- Manufacturing
- NHS Trusts
- Telecommunications
- Call Centres
- Logistics
- Warehousing

Usage of PBA contracts varies within these sectors up to as much as 100 per cent with some supermarket and large distribution companies where agencies are not given a choice but are told to use these contracts by the hirer.

The percentage of workers on PBAs varies between agencies from a few (for example 600 out of 12,000) up to around 10,000 (28% of 35,000) in one case.

Example of an Agency using PBA contracts

The agency has been in business for many years and works across a range of sectors though mainly PBAs are used in low level manufacturing. Those on PBA contracts in any one week range between 450 and 500 compared to 6,000 agency workers overall (approximately 8%).

The agency finds that requests for PBA contracts initially were because of large volumes of temporary staff that were being used. More recently, however, they recognise that it is now also a cost issue and it is the level of pay that triggers it. Employers say they don't want to pay parity and pass the problem back to the agency to find a commercial solution or they will take their business elsewhere. PBA contracts are used predominantly by clients who are commercially pressured to have a cost-effective model. It is always client led and for this agency a lot of it is inherited business.

'Clients will deny they instigate it and try to make it the agency's responsibility – the client puts pressure on the agency to keep costs low and then want to distance themselves from these contracts.'

The agency reports that if they do not offer these contracts they will lose business. However, they are also aware that they compete with agencies which are non-compliant, offering 'tax dodges' for example. Workers for those agencies don't know what contract they are on, they are not actually employed, they are not getting the right hours, the right pay etc. *'This has tainted the model for everyone else.'*

Agencies not using PBA contracts

Three agencies did not use PBA contracts. In one case, the agency had never been approached to use a PBA and was not aware that they were used in their specialist sector. In the group interview, attended by nine agencies, there were only two agencies who used PBA contract and seven who did not, all of whom had heard of PBA contracts.

The main reason for not using these contracts is because the agencies do not believe it is right that someone should be on different pay rates and it is seen as a way of 'getting round' the AWR. According to one interviewee:

'PBA should be outlawed – the worker can't work for someone else but is tied down to working one hour a week in between assignments which means their weekly pay is reduced and their holiday pay is also calculated on that which is also less money. Workers don't realise what they are signing up for.'

Another stated that the big agencies were winning 'big business' by tempting clients into using PBA to cut cost.

Example of an Agency not using PBA contracts

The agency has been in business for many years and mostly supplies warehouse staff along with some labourers and production line workers. Typically, workers are earning from the minimum wage to around £8 per hour. On any one day, they are likely to have between 200 and 500 workers depending on seasonal fluctuations. Last year, they worked with around 270 end hirers in total, ranging from very small organisations to large ones.

The agency has never used a Pay Between Assignments model. Used in the way they believe the Swedish Derogation was intended would be unachievable for them without a substantial change to their business model, and paying at the stipulated rate between assignments would increase their costs considerably. However, the agency does not believe that the Swedish Derogation is being used as intended:

'If you look at how it is actually being used, which is to circumnavigate the AWR, it's just something ethically we don't want to do. Every single instance we've experienced (and there have been a large number of these) where we've been tendering for work or where our rates are being undercut by other agencies the way the Derogation is being used is for workers to give up their right to equal pay after 12 weeks but they are never paid between assignments and there are lots of artificial ways to get round this.'

Examples the agency has seen of ways to avoid PBA include a contractual stipulation for workers to be constantly available for work, with some contracts specifying anywhere in the UK and others giving a substantial radius. If people can't accept this work (which may only be for a few hours) they do not receive pay between assignments. Another example is people with family commitments who can only work during the day being offered night shifts when they have no childcare arrangements. The agency has yet to see an example of a worker actually being paid between assignments.

The agency has been under pressure from hirers to use the Swedish Derogation model and has lost work as a result of its refusal, some quite substantial. The agency feels that the use of the Swedish Derogation model is growing, especially in organisations that are large users of labour who have the most to gain financially:

'A lot of companies where price is all are gradually bulking up on their temp workforce and letting their permanent staff whittle away.'

The agency feels strongly that they, and others like them, put themselves at a massive commercial disadvantage compared with agencies prepared to use the Swedish Derogation model as they will never be able to compete with them on price. Nevertheless, he believes that there are significant advantages in using the fully AWR compliant route. As an agency, for the most part, they have found delivering the pay comparator part of the AWR a fairly straightforward process and their clients understand their responsibilities when they take them through the AWR due diligence process and are comfortable with them. Those hirers offering equal pay have a more contented workforce which is more likely to stay with them and therefore improve continuity and productivity. Workers benefit too in addition to receiving equal pay as, unlike the Swedish Derogation model where hirers will keep them as temporary staff to keep costs down, those supplied on a fully AWR compliant basis are often moved on to permanent contracts as the hirer then no longer has to pay the agency.

2.2.3 The stakeholders

Part of the discussions with stakeholders involved identifying sectors and/or particular occupations where PBA contracts are used. The following is a summary of those identified (in alphabetical order).

- **Care** – One care employer stated that she did not know the types of contracts her company's agency workers were on and three stakeholder organisations have stated they were not aware of the use of PBAs in the sector – and yet it is clear they exist and are supplied, for example, by some of the agencies and umbrellas we have interviewed. They are used by those employing social workers but in this case the individuals get paid considerably more than their comparator.
- **Cleaning** – This was highlighted in a report by the Equality and Human Rights Commission (EHRC)¹² as an area of concern for temporary workers, and therefore likely to employ individuals on PBA contracts. We have held discussions with various employer organisations and we have been unable to find evidence that the use is widespread.
- **Construction** – There is widespread use of Umbrella Organisations but it has proved difficult to find a lot of evidence of PBA contracts (although it is mentioned by two of the umbrella organisations above). Interviews with two large Construction employers suggest that they themselves do not use PBA contracts but they do not know the status of workers used further down the supply chain and this may be where they are operated. Interviews with unions also suggest they are little used in the sector.

¹² The Invisible Workforce: Employment Practices in the Cleaning Sector
<http://www.equalityhumanrights.com/about-us/our-work/key-projects/invisible-workforce-employment-practices-cleaning-sector>

- **Food Manufacturing and Processing** – Stakeholders have suggested large scale use of PBA contracts in food manufacturing, as much as 25% of the workforce in the case of some employers. For example in one manufacturer, agency workers on PBA contracts represent 25% of a 400-500 strong workforce; this food manufacturer has similar numbers and proportion of agency workers across a number of sites such that there are approximately 1,000 agency workers, all on PBA contracts, in this business alone. Other interviews suggest this pattern is not uncommon for the food manufacturing sector. **Meat Processing** was highlighted as a sector of concern in another report by the EHRC¹³ as there are a large number of agency workers, mainly migrants, but we have been unable to verify this and it is an area worthy of further research.
- **Food Retail Distribution** - sites vary a lot in size with workforce numbers ranging from 300 to 700. Agency staff will be found at nearly every site. Typically, agency workers will form 20% of the workforce – although this can go up to 30%. All of these agency workers are on PBA contracts.
- **Graphic, Paper, Media, Print and Binding** – our interviews suggest widespread use of PBA contracts amongst publishers, particularly in warehousing activities. This goes above seasonal fluctuation requirements, suggesting that agency workers have become an essential part of the business (not just the case for this sector of course).
- **Health** – Agency workers cover shifts where usual staff would be paid a higher rate, for example night shifts, as a way of keeping costs down. An NHS Trust has used PBAs because they have had to cut costs but still provide the same level of service and PBAs allow them to do that.
- **Hospitality** - REC figures suggest that there are some 70-100k agency workers in hospitality in any one week out of a total workforce of three million. However, it is clear for those employing cleaners, for example, that hoteliers themselves would not necessarily know what type of contract their temporary workers have with their agencies and indeed, much of the management of these workers would be through hotel Housekeepers. Therefore we cannot say definitively whether PBA contracts are prevalent or not in this sector.
- **Logistics** (lorry drivers) – Stakeholder interviews confirm what we know from the agency interviews, that PBA contracts are used but not all driver agencies operate them.
- **Public Sector** – our evidence suggests some use of PBA contracts in the public sector. However, we were unable to arrange an interview with UNISON prior to the purdah deadline.
- **Security** – particularly warehouse security. The issue here is who controls the worker, the agency (for example where a worker might just drive to premises to check gates and move on to check other premises) or

¹³ Equality and Human Rights Commission (2012). Meat and Poultry Processing Inquiry Review: Report of the Findings and Recommendations.
<http://www.equalityhumanrights.com/legal-and-policy/our-legal-work/inquiries-and-assessments/inquiry-meat-and-poultry-processing-sectors>

the hirer if the person provides security inside their premises for long periods.

- **Teaching** – This was mentioned by some of our umbrella interviewees as an area where PBA contracts are used. Some stakeholders have identified a growth in foreign-based umbrella organisations in teaching. This is an area worthy of further research.
- **Telecommunications and call centres** – Several employers use PBA contracts in these areas. In one company, agency workers represent 10 per cent of the overall workforce and significant numbers of these agency workers are on PBA contracts.

2.3 Overview

It is clear from our findings that PBA contracts are more widespread than perhaps originally envisaged. Those on PBA contracts with agencies are not encouraged to work for other agencies or organisations (without resigning) a point returned to later in the report. This suggests that the possibility of double counting with workers between agencies may be exaggerated. Double counting between umbrella organisations would be possible given the nature of how they operate and how workers can switch or be switched by agencies to other umbrellas without the original umbrella being aware (explored later in the report). Obtaining clear numbers of agency workers on PBA contracts with umbrella organisations will also be difficult owing to the picture of constant change that is presented (as individuals move between jobs for example) and also because some umbrellas work with very large numbers of agencies.

Far from being confined to certain sectors, PBA contracts are used in a range of sectors and occupations and are particularly prevalent in low wage occupations. Whilst some agencies and umbrella organisations do not use PBAs, for others they are the contract of choice.

Section Three: Who requests Pay Between Assignment contracts?

3.1 Results from the Literature Review

Following the introduction of the AWR, there was much speculation about whether end-users/hirers would push agencies towards PBA models, and whether agencies would actively promote PBA as a new type of approach to temporary labour supply (Professional Contractors Group 2011). Some viewed PBA models as one of a range of contracting relationships that agencies might consider following the introduction of the AWR (Professional Contractors Group, 2011). Others saw the potential use of PBA models as a 'workaround' to the AWR, allowing agencies and hirers to pay agency workers considerably less than permanent workers doing identical jobs (Veale, 2011).

The chief executive of the REC recently suggested that where PBA contracts are used, *'it is normally driven by the end user or client of the agency who use flexible employment models to match demand from consumers'* (Green 2015). The research evidence lends support to this view. In 2012, almost twelve months after the AWR came into force, a comparative study of the use of PBA models by blue collar staffing companies and professional staffing companies suggested that hirers are frequently the driving force behind the use of PBA contracts (Osborne Clarke, September 2012), although the study also found:

'a clear difference in impetus for the use of Swedish derogation arrangements, with 68% of blue collar agency respondents indicating that their clients and/ MSP/RPOs have insisted on use of the Swedish derogation compared to just 25% amongst professional staffing respondents and 65% of blue collar agencies confirming that they regarded hirers as driving the need for Swedish derogation arrangements' (Osborne Clarke, September 2012).¹⁴

In 2014 Forde and Slater also concluded that PBA contracts were being pushed by hirers, but they also suggested that agencies were complicit in their promotion (Forde and Slater 2014).¹⁵ PBA contracts were seen as attractive to clients where large numbers of agency workers were being supplied on a long-term basis to clients. Here, the costs to the client of complying with the equal pay element of the AWR, was seen as especially significant (Forde and Slater 2014). It is under these high-volume, long term supply conditions that agencies may be willing to accept the risks associated with PBA models (assuming they do not pass on these risks to umbrella companies), and where the possibility of having to provide pay agency workers between assignments is least likely to arise (Forde and Slater 2014).

¹⁴ This online survey was carried out between 18th May and 19th July 2012. In contrast to previous AWR surveys it was aimed specifically at staffing suppliers rather than hirers. A representative spread of staffing suppliers from large to SME (55:45) and professional/technical/engineering staffing and blue collar/industrial/high volume temp (60:40) responded to the survey.

¹⁵ Forde and Slater's (2014) study was concerned with the effects of the Agency Working Regulations (AWR) on employer and employment agency practice. This report was only able to shed light on PBA contracts indirectly, through evidence from agency managers and personnel consultants. The research encompassed: recent statistical data on agency working from the Labour Force Survey; 28 interviews (face to face and telephone), conducted across 11 agencies, four user firms, union and industry representatives, and a small number of agency temps. The research was constructed between January and August 2013.

A similar picture emerged in the BIS/REC survey of agencies in England (BIS 2014) and the review of AWR in Northern Ireland (RSM McClure Watters June 2014). Agencies that were using PBA contracts in England listed a number of reasons as to why they chose to use PBA models, however the most common response was that this was at the request of the client or the umbrella company they worked with (BIS 2014:4). In Northern Ireland six (two-thirds) of the agencies that had workers on PBA contracts, noted that their hirers requested this type of contract. Four of the agencies noted that PBA contracts had created challenges for them because either they were now obliged to supply workers under these contracts to keep clients or they believed it was the only way to remain competitive. The authors of the review concluded:

'Pay between assignment contracts were regarded by some hirers as the only way they could continue to utilise temporary workers. Employment agencies confirmed that a small number of their clients (or potential clients) specifically required workers using Swedish Derogation contracts and that the only way they would win the contract to supply workers was by using such contracts' (RSM McClure Watters (June 2014).

There is no evidence to suggest that agencies regard agency workers as driving the need for PBA arrangements either in England (e.g. see Osborne Clarke, September 2012) or elsewhere in the UK (e.g. see RSM McClure Watters, June 2014). None of the research studies in this area report examples of workers requesting this type of contract.

Tellingly, only two responses to questions in the BIS/REC survey which asked respondents to explain why their agencies use PBA contracts refer to benefits for the worker. The key drivers appear to be lower costs and avoidance of pay parity with permanent employees, and some of the agencies indicated that they have only reluctantly become involved with PBA contracts.

3.2 Findings from the qualitative interviews

The following section sets out the results from the qualitative interviews by type of interviewee group.

3.2.1 The Umbrella Organisations

Only one umbrella interviewed uses PBA contracts as their only model. They do this because they believe this is the only fully compliant overarching contract that gives workers the security of employed status. The umbrella is not convinced that contracts not offering PBA fully meet the test of employed status and therefore allow expenses to be offset against tax.

For all other umbrellas that use PBA contracts, the choice of whether to use a PBA or matched pay model is down to the agency or, more rarely, the end client. None reported the PBA model being used at the request of contractors, although one did say that they would talk through the different models with contractors and help them to decide which the best choice was for them. However, one umbrella did think that the choice of contract type (and, indeed, whether to work through an umbrella or through their own personal services company) was restricted to more skilled workers who were in a position to negotiate terms.

One umbrella argued that the decision to use Swedish Derogation is not necessarily in order to minimise pay rates; rather the motivation is the end client not wanting to release to third parties what contractors are actually being paid. A lot of the umbrella's contractors get paid more than their employed counterparts

(if there are any) but, because of union pressures, end clients do not want that data released. However, things are different at the lower end of the skills and pay scales, the umbrella thought, where the motivation was to reduce the overall wage bill.

Difficulties in finding a pay comparator rarely lie behind the decision to use Swedish Derogation contracts, in the case of one umbrella organisation; in those circumstances the umbrella would normally go down the route of matching permanent pay and '*tick the no comparator box*'. Another took the opposing view, saying that the Swedish Derogation option is normally used where an agency and end client have difficulty establishing what equal pay is, for example because of complicated bonus structures or overtime payments.

Another umbrella active in the education sector said that whether or not teachers are placed on PBA contracts depends on the local authority and the agency. Umbrella companies are in the middle of a chain between hirers and contractors and they get advice from the agencies who, in turn, liaise with local authorities or schools. Ultimately, the umbrella company has no idea how much the agency is charging their clients or what the budgetary constraints of the local authorities or schools may be, so the decision is based on advice from the agencies.

The remaining umbrellas thought that PBA contracts were, for the most part, used for low paid workers who were given little, if any, say in the matter. One commented that agencies request the use of Swedish Derogation contracts in particular when end clients seek a relatively high number of workers and have indicated that they have a particular budget. The PBA model allows agencies to meet these constraints in a way that also maximises revenue for the agency. However, were it not for the availability of Swedish Derogation contracts, the umbrella felt that available work would be reduced.

Another umbrella made a similar argument, saying that there is a place for Swedish Derogation contracts based on dwindling day rates in some sectors:

'The client/hirer at the end of the chain is trying to push the price down with the agency and the agency instantly look to the umbrella company to do something because they are not prepared to make any less of a margin themselves. So the umbrella gets caught up at the wrong end of the chain.'

The larger the end client, the umbrella argued, the more power they have to try and push back against the cost of labour and this gives rise to the less compliant models of supplying agency workers, which result in the worker getting less in terms of money and employment rights.

One umbrella does not promote PBA contracts, although they will provide them if required, stating that this because they do not operate in the low pay rate area where the Swedish Derogation model is more routinely used. Another umbrella offered similar views, commenting that some agencies they dealt with saw PBA contracts as a way of not offering matching pay, which the umbrella felt was not in the spirit of the legislation. This umbrella, and two others for similar reasons, avoids the use of PBA contracts where possible and all three have fewer than three per cent of their workers on such contracts.

3.2.2 The Agencies

It is clear from the umbrella organisation interviews that it is not those umbrella organisations that have pushed for the use of PBA contracts, rather they are

responding to requests from agencies and hirers. The view from the majority of agencies is that it is the hirers that are pushing these types of contracts.

For one agency, it is the level of pay that triggers the use of PBA contracts. PBA is used where it is cheaper to do so. The biggest driver is cost (99% of the time) and always driven by the client and not the agency. If the hirer wants someone more than 12 weeks they want more flexibility, particularly for long term shifts. From an agency standpoint PBA is not first choice – there is no benefit to the agency, only the hirer. The agency has a greater administrative burden and has to ensure they are offered the right number of assignments and provide sick cover.

Another agency reports it is the volume of people rather than the pay level that triggers the PBA, though they also state that whilst it was originally volume in some areas, such as call centres, it has now become a cost issue. It is not the workers who ask for PBA contracts, it is part of commercial terms with the client (which is a joint negotiation). This agency suggests that when bidding for work an agency might put forward several options to a client, one of which would be PBA. The choice is then down to the client. According to another agency, often the client will say how much they are prepared to pay and the agency has to come up with a 'workaround'.

Whilst responding to what clients want, one agency states that PBA contracts are not a solution they would openly offer to clients. Another agency does not want to use them but the three clients who have them insisted. The interviewee 'gets annoyed' because it is always made out the agency pushes these contracts when in fact it is the clients. Four other agencies also state that PBAs are insisted on by the client.

One agency was pushed to use it in one sector, told by the hirer their competitors used it and they would take their business elsewhere; they refused and the hirer still stayed with them, so they didn't lose the business. *'PBA contracts are used predominantly by clients who are commercially pressured to have a cost-effective model.'* It is always client led and for this agency a lot of it is inherited business. Clients will deny they instigate it and try to make it the agency's responsibility – the client puts pressure on the agency to keep costs low and then want to distance themselves from these contracts.

One agency interviewee stated that PBA contracts are used to mitigate the full AWR. It is the bigger industries that use them and the PBA worker will get less than a permanent worker so it is pure cost-saving. In some cases the disparity can be wide, in others small. It is totally client-led, and of no benefit to the agency other than keeping the client.

Two of the agencies who do not use PBA contracts have been approached by hirers and told they should use that approach. They have refused and the hirer still gave them the work. There is another agency that refused and lost work as a result and another that refused and *'walked away from the client.'*

3.2.3 The Employers

The three employers that have been interviewed have stated they have no idea what type of contract their temporary workers are on; it is a matter for the agency.

3.2.4 The Stakeholders

From discussion with the stakeholders, it is clear that it is rare that a worker will ask to be put on a PBA contract, except perhaps in order to work with a particular umbrella organisation, but this is the exception rather than the rule.

One clear line of argument is that if the agencies don't offer PBA contracts they will lose business as they have to respond to the requirements from hirers. In the end it comes down to a commercial decision and for some agencies PBA is the default contract and some employers don't know what types of contract the people that work with them are engaged on.

Example of an End Client Requesting the Use of PBA Contracts

In December 2014, approximately 14 months after the AWR came into force, an important Employment Tribunal ruling was delivered in the case of *Bray & others v Monarch Personnel Refuelling (UK) Ltd*. The case involved a recruitment agency, Monarch Personnel Refuelling (UK) Ltd, which had a long-term arrangement to supply tanker drivers to BP. When the AWRs came into force, BP was concerned that, if agency workers were given equal pay, the trade unions would demand a pay rise for BP's permanent staff, as BP's permanent employees were paid 70p per hour more than agency workers and this premium was closely monitored by the trade union on site. BP was concerned that if it increased the agency workers' pay to comply with Regulation 5 of the AWR, it would face pressure from their permanent workforce to restore the pay differential over the agency tanker drivers.

Having taken advice BP required its agencies to place agency workers on PBA contracts. BP terminated its agency assignments on 30 November 2011 and from 1 December 2011 took on only agency drivers who had signed PBA contracts. Monarch Personnel Refuelling, met with its agency drivers individually and explained that, by signing PBA contracts, they would be giving up their right to pay parity with BP's permanent tanker drivers, in return for a permanent contract of employment and the right to be paid for up to four weeks when no work was available for them. In practice, many of the drivers had only ever worked on BP assignments for this agency.

The claimants all ultimately signed their new PBA contracts. Some did so reluctantly, believing that they had been given no choice but to do so. However, they subsequently brought an employment tribunal case for pay parity with BP's permanent drivers under Regulation 5 of the Agency Worker Regulations.

The employment tribunal went through the detailed provisions of the Swedish Derogation and considered whether or not the PBA Contracts exempted the agency from paying the agency drivers the same as BP's drivers. The employment tribunal rejected the drivers' claims. This ruling confirmed that the PBA model is a valid model under which recruitment agencies can take on workers or hirers can ask agencies to operate. It stated that PBA contracts can be used in relation to an existing relationship between an agency and agency worker during the course of the worker continuously working for the same hirer. However, it also underlined that the requirements in the AWR must be followed exactly.

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<http://www.paystream.co.uk/an-update-on-swedish-derogation>

<http://www.personneltoday.com/hr/tribunal-provides-guidance-on-agency-workers-and-swedish-derogation/>

3.3 Overview

It is clear that PBA contracts are very rarely requested by workers themselves but our findings suggest a split between the agency and the hirer in terms of who makes the request or offers PBA contracts by default. Clearly, even where agencies and umbrellas are not keen to use them, if they are under pressure from clients to cut costs they are one way of doing so.

Section Four: To what extent are workers aware of the type of contract they are employed on?

4.1 Results from the Literature Review

The importance of this issue was underlined by the ruling delivered by the Employment Tribunal in the *Bray & others v Monarch Personnel Refuelling (UK) Ltd* in December 2012, which is summarised above. Having concluded that the use of a PBA model is not restricted to where agency workers are moving between hirers and that existing contracts can be varied to satisfy the provisions laid down under Regulation 10 of AWR, the Tribunal emphasized that employment agencies (and/or umbrella companies) must make sure that the agency worker clearly understands that by signing a PBA contract he or she would be waiving their right to equal pay (XperthHR, January 2013).

However, in practice, it appears from our review of the literature that agency workers often have little, or no, knowledge of the implications of signing PBA contracts. According to many of the agencies interviewed in Forde and Slater's (2014) research for Acas, most agency workers have very little knowledge about what the AWR means for them, especially around issues such as PBA contracts.¹⁶ This chimes with the findings of the recent review of the Impact of the AWR in Northern Ireland (RSM McClure Watters, June 2014), which found that agency workers entering into PBA contracts often were not making an informed choice:

'64% of workers on Swedish Derogation contracts (who responded to this survey) said that they were not aware that they were not entitled to equal pay after 12 weeks on assignment' (RSM McClure Watters, June 2014: 43).

Union and legal representatives confirmed that often agency workers who sign a PBA contract do not understand that they are not entitled to equal pay after their twelfth week on the same assignment (RSM McClure Watters, June 2014: 39). The review team were puzzled by this because a high percentage of employment agencies said that they had informed their workers about all rights under the AWR. The team recommended that further research should be undertaken to investigate this issue. They also recommended that (the Department of Employment and Learning in Northern Ireland

'should consider what measures might be needed to raise the level of understanding of the rights of agency workers, including Swedish Derogation contracts among the agency worker population, to help workers make an informed choice before signing a contract and accepting an assignment' (RSM McClure Watters, June 2014).

4.2 Findings from the qualitative interviews

This section summarises the findings from the qualitative interviews. They are presented below by type of interviewee and consider what information is given to the worker as well as whether they know they are on a PBA contract.

¹⁶ A recent Acas (2015) paper reveals that amongst callers to the Acas helpline agency workers are often unaware of their employment rights or afraid of asserting them.

4.2.1 The Umbrella Organisations

Most umbrella organisations who agreed to be interviewed said that they took their role as an employer very seriously. All said that they would talk through the implications of the contract and, where appropriate, alternative ways of working (through a limited company, matched pay contract etc.). Generally, umbrellas felt that they were best placed to do this as agencies would not have the knowledge and understanding to fill this role. They were confident that those workers on PBA contracts understood the implications – one even had 'Swedish Derogation Contract' stamped across the front in red in order to make clear that this was a special type of contract and to encourage workers to ask about it before signing. However, some reported workers coming to them who had previously been on PBA contracts and were unaware of the fact.

One umbrella stated that the agencies will provide some information but they take also each worker through the details of the contract. They also supply them with guidance documents. However, the interviewee said:

'To be honest, I doubt those workers on SD contracts understand the difference though.'

Examples of how agency workers are briefed about their contracts

Umbrella Organisation 1: verbal briefing

The umbrella organisation briefs agency workers about their contracts as in their view the agencies are not best suited to explaining the technicalities of contracts to the worker. Part of the umbrella's business model is explaining to the agencies that they outsource the employment of the worker and everything that goes with it to them, the umbrella organisation. In a scenario where a worker ends up on a PBA contract one of the umbrella company's contract team speaks to that person and explains the details of the process, including the process of how they go about paying between assignments. This is normally done over the telephone (rather than face to face) because their contractor base is UK wide and they are based in an office in one location. If contractors live close enough and want to come in to the office that is fine, but generally speaking the location of their office prohibits that. While they try their best to explain the details of PBA contracts to the worker they are not one hundred per cent sure how much the worker really understands about the detail. Their workers are mainly concerned about '*how much am I getting paid every week, and am I getting paid every week*'. In general they are content so long as they are happy with their pay illustration.

Umbrella Organisation 2: (mainly) written briefing

This umbrella company sends out the relevant paperwork to agency workers, whether it is a PBA contract or a comparative model contract. Information is included as to what is involved and what different elements of the contract mean. In some cases this is followed up with a verbal conversation. They are not convinced that their workers generally understand the details of their contracts because they often don't read the paperwork. Their workers don't often raise issues about their contracts. The umbrella company maybe gets one phone call a week from people saying they don't understand what they signed.

Umbrellas operate grievance and disciplinary procedures, though few had needed to invoke these. Some said they provided employee handbooks or downloads on

their web site that provided additional advice and guidance for employees. All said that advisers were available to help with queries. Many offered additional services themselves, or through partners, including support for obtaining a mortgage, insurance (public liability and professional indemnity) included as part of the package and other employee benefits.

Examples of umbrella companies' grievance and disciplinary procedures

Umbrella Organisation 1

The umbrella company is trying to get their employees to approach them in the first instance if they have queries or grievances. They say to their employees, and it is in their contracts, that if they have a grievance, they should let the umbrella company help them through it and work with all concerned to try and get a resolution. However, it is common for the worker to go immediately to the agency or the end client and sometimes things still happen outside of their knowledge.

Umbrella Organisation 2

The umbrella company has an HR team that deals with grievances, queries and disciplinary issues. If an employee has a grievance or a question (e.g. to check that they are being paid the right amount), the starting point is that they should approach the HR team – via telephone, email or post. Sometimes employees do not do this because the umbrella is not out on site. In this case, they will actually approach their line manager who will approach the agency, who will refer the matter to the umbrella company. Two thirds of cases are dealt with directly, one third come by a circuitous route. The umbrella has to deal with about half a dozen Tribunal claims per year.

Umbrella Organisation 3

The umbrella points out to workers, agencies and end-clients that grievance and disciplinary issues and health and safety are dealt with by them and are not the responsibility of either the agency or the client. Getting workers to remember this rather than ringing the agency is a challenge. But the agencies are instructed to pass workers on to them if this happens. There has been little or no questioning on the PBA process, partly because the number on these contracts is very low and partly because they explain the contracts to the workers.

All said that their pay slips were easy to understand and that they were happy to answer any queries on it. Some said that they would work out an indicative amount that workers would receive, including an explanation of any deductions, at the beginning of employment. However, some umbrellas reported less satisfactory practice by other umbrellas. One said that workers coming from another umbrella had pay slips so complex that *'they baffled our tax expert.'* Most said that they would use their network of agencies to help find work for employees coming to the end of assignments and some operated their own job boards.

A disruption in the employer/employee relationship can come when employees switch agencies to one that requires them to work with a different umbrella. The employee does not always notify the previous umbrella of the change, which only finds out when they contact the employee after not receiving any timesheets for a while. This is less likely to happen with more skilled workers who tend to maintain

the relationship with their umbrella and are able to insist on staying with them should they change agencies.

4.2.2 The Agencies

Where agencies use PBA contracts they are used alongside other contracts for the wider temporary workforce. For example, in some agencies temporary workers have a contract for services, in which case those with PBA contracts are the only ones on an employment contract. For those agencies, managing the PBA contracts means considerably more work than their usual arrangements with workers. In other cases, agencies might have all of their temporary workers on employment contracts but one variation of that contract is a PBA. Some agencies might have several variations of contract that they are managing.

Given that some of the agencies interviewed came via REC, it should be noted that REC membership requires that agencies provide an individual briefing on their contracts. Therefore it is not surprising to find that those interviewees do so.

Across all of the interviews, agencies are clear that they have provided briefings to their workers either as individual face-to-face or telephone discussions or through group presentations, for example:

- Two of the interviewed agencies provide in-house training for their own staff on how to work with PBA contracts.
- One agency has someone from HR who sits with each individual and has a checklist to go through, what will happen after 12 weeks etc. They give the advantages and disadvantages of the PBA to the worker and the workers has to sign a document to say they have had this all explained – the interviewee said that this is part of good practice but also '*back watching*'.

Although workers can sign the contract or not, one agency says there is no alternative offer, these are the conditions of the job and the workers can take or leave it. They have an individual consultation to talk through contract issues and the employee handbook.

Some workers at one agency are reported as raising queries on whether they are self-employed or on PAYE and the interviewee suggested '*potentially these workers don't know they are on a PBA contract.*' Another agency also suggests that whilst workers may not understand the term 'pay between assignments' they understand they are on a contract of employment.

Another agency reports that in some sites the PBA approach is exclusively used by all workers at the place of work. The contract is available in English and in their native language (they employ a lot of East Europeans). However, whether they understand they are on a PBA contract and what it means is not clear.

4.2.3 The Employers

From the three interviews it is clear that those employers are not aware of the type of contracts their temporary workers are engaged on and are unable to comment on whether the workers themselves understand.

4.2.4 The Stakeholders

It is important to recognise that there is no legal requirement for agencies or umbrellas to talk through contracts with individual workers and they are not required, nor qualified to provide tax advice (vis the issue of NI class 3/4 and the impact on state pension). However, there is a legal requirement for individuals to be given time to read a contract.

In stakeholders' experience, whilst some agencies do provide individual briefings on what contracts mean, others do not and practice in this area is very patchy. For example, there is some anecdotal evidence of individuals being given contracts to sign whilst on the production line, with no time to consider what it entails. Clearly these individuals may not be aware that they are on a PBA contract.

In the view of some stakeholders, even where individuals have it explained or have time to read it, it may not be the case they fully understand the implications or what it really means to be on such a contract. Equally, 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.

One stakeholder gave an example of Central European recruitment with people being put on to a PBA. The individuals are happy to sign as it is an employment contract (contracts are supplied in both languages, predominantly Polish) but of course they don't understand the backdrop of the AWR and don't understand what they are giving up by signing as they come from a different culture.

4.2.5 The Workers

It is clear that all of the worker interviewees were not aware of the implications of the contract when they started but had discovered the drawbacks since. Two of the interviewees knew they were on PBA contracts but had not registered that this meant they should be paid between assignments. They are all aware that they are getting paid less than comparators.

4.3 Overview

Based on all the evidence so far, it is clear that many individuals sign contracts because they need work and they are either not given all the details at the time of signing or don't fully understand the implications of a PBA contract.

Section Five: To what extent do workers feel they have little or no option but to sign PBA contracts?

5.1 Results from the literature review

Advocates of the use of PBA contracts emphasise that they involve 'workers (...) freely opt(ing) to trade a degree of short-term remuneration for longer-term job security and a greater range of employment rights' (CBI, September 2012). However, trade unions have reported that agency workers are sometimes being pressured by agencies to sign PBA contracts. For example, the National Union of Teachers' (2013) guidance on PBA contracts indicates that this sometimes occurs in the case of supply teachers:

'We understand that some agencies are telling agency supply teachers that if they do not sign these Swedish Derogation contracts, then they will be offered no further work. While we believe that members should not be pressurised into signing away their rights to equal pay, we appreciate that, in practice, if you do refuse to sign such a contract it is possible that your assignment could be terminated early and/or you may not be offered any further work by your agency'.

Reports in the national press have suggested that agency workers are being given little or no option but to sign PBA contracts in a range of sectors. By way of example, in 2013 an article in the Daily Telegraph stated:

'It is understood that thousands of temporary staff working for supermarkets, manufacturers and services firms nationwide have been urged to waive their rights to the new rules, or risk losing their job' (Peacock 2013).

The best available research evidence is provided by the independent review of the impact of the AWR in Northern Ireland:

'Consultations with workers and legal representatives suggested that often workers were given no choice in the type of contract on offer. If they wanted the assignment they had to accept the contract on offer, including Swedish Derogation contracts' (RSM McClure Watters, June 2014).

5.2 Findings from the qualitative interviews

5.2.1 The Umbrella Organisations

Little has come up in this respect from the discussions with umbrella organisations. Where PBA contracts are used they are usually the default contract and there is no choice. For example, one umbrella stated that for low skills workers, he thinks that the agencies give them little choice in regard to the PBA contract – either they take the job under this approach or they will not be offered work.

5.2.2 The Agencies

The evidence from the agencies is stark. It is clear that workers have a choice but in reality it is 'Hobson's choice'. The worker does not have to accept the PBA

but there are consequences. If they are currently working they can stay in their current role and not sign the new PBA contract that has been introduced but the likelihood is that their contract will be terminated in favour of someone who will sign the PBA contract. For those looking for work there is no alternative offer, the PBA contract is one of the conditions for the job and they either take it or leave it. The majority of course want the work and sign the contract as shown by the BP drivers' case study.

5.2.3 The Stakeholders

Anecdotally, stakeholders tell us that workers do not have a choice on the type of contract and that some are told that they have to sign the contract or their employment will be terminated. This echoes some of the evidence from the agency discussions.

5.2.4 The Workers

One individual, where PBAs were introduced into the workforce, refused to sign a PBA contract and was told that as a result they had no work for that person and they had to leave.

Interviewees say categorically that there is no choice - you are told to sign the new contract or not get any more work. One individual stated that when the AWR came out he and his agency colleagues were really pleased as they thought this would be of real benefit to them. However, almost immediately the agency turned up with PBA contracts which they had to sign. He asked if signing meant they would waive the right to equal pay and was told *'yes, but if you don't sign you will no longer have any work.'*

In one case a new agency took over from their previous one and the workers were told they would have to sign the new contract to continue working. In another example, workers were called in to an office one by one and told to sign the new contract then and there with no explanation other than that if they didn't immediately sign they would no longer be given any work either where they were working currently or anywhere else through the agency. They were not allowed to seek advice, it was *'sign it or walk'*.

Others about to start work with an agency were told it was the standard contract for this type of work and there was no choice.

One worker is clear that the employer is well aware of what is going as they talk openly of having a flexible workforce using these contracts.

Examples of workers feeling they had little or no option but to sign PBA contracts (from the literature review)

Factory worker

'I have been in a meeting today with other agency workers and been told to sign a new contract. Reading this article about Swedish Derogation makes the new agency workers rights act a mockery. I have canteen rights but the new contract means I will not get the same wage as a proper factory worker even though I do the same job as them or any of their benefits. It means I have to sign this new contract by next Monday (19 December) or I will be out of a job. It sounds to me like blackmail to me.'

Tue, 13 Dec 2011

http://www.contractorcalculator.co.uk/contracting_awr_swedish_derogation_mitigate_fears_380910_news.aspx?VIEW_TYPE=All

Supply teacher

'I am a supply teacher and am coming up to the 12 weeks threshold. I was appalled to receive a phone call from my agency today to ask me to go in for a meeting to sign a contract with them that means that I will not receive the equal pay that I am entitled to. I was told that if I didn't, I would 'price myself out of the job and they could just get an NQT who would be cheaper'.

April 3, 2012 4:40 PM

[<http://blogs.mirror.co.uk/investigations/2011/10/heres-more-evidence-that-the.html>]

Sector/role unspecified

'I was forced to work for an umbrella recently who provided a projection, but when I started I received £175 LESS per week, on querying this I was told I had been put on a 'special' contract on the request of my agency, my agency knew nothing about this. Also their charges were much higher than I was led to believe'.

[When asked to define contract by another contributor the agency worker responded: *'Some Swedish work time contract, which nobody but them has ever heard of, the agency certainly didn't request it. I asked several times for an explanation but didn't understand a word'.*]

26th September 2013

<http://forums.contractoruk.com/umbrella-companies/88979-resign-umbrella-2.html>

5.3 Overview

The evidence is clear that generally speaking workers do not feel they have a choice in relation to signing these contracts and even the agencies themselves state that if the PBA contract is required for the work there is no choice.

Section Six: What happens when the PBA element comes into force?

6.1 Results from the literature review

The Swedish Derogation stipulates that employment agencies and umbrella companies have an obligation to try to find suitable jobs for agency workers when their assignments come to an end and, crucially, to pay agency workers during any non-working periods between assignments. Acas (2013) summarise the rules concerning pay between assignments as follows:

'It must be at least half of pay received on assignment based on the highest rate during (the) previous 12 weeks; it can't be below the National Minimum Wage. The payment between assignments must last for at least four weeks before the contract can be terminated.'

As the following quotation from a Daily Mirror blog illustrates, when the AWR came into force in 2011 concerns were raised that some agencies might take measures to avoid or minimise the cost of paying workers between assignments:

(A)gencies (might find or) *'invent'* a new *'assignment'* which may involve just a few hours work a week; if the new assignment ends, then the *'pay between assignments'* will be based on a lower wage than the client received during their previous job (e.g. see Somerland 2011).

The Scottish Affairs Select Committee suggests that:

'Agencies can avoid paying workers between assignments by offering a minimum of one hour's paid work per week' (Scottish Affairs Select Committee, April 2014: 45).

Moreover, the recent review of the AWR in Northern Ireland noted that it appears that some agency workers have not been paid between assignments, despite being on PBA contracts (RSM McClure Watters (June 2014: 32). A key recommendation of the review was that this issue should be investigated in more detail:

'The Department (of Employment and Learning) should also explore the extent to which workers on Swedish Derogation contracts are not paid between assignments, when payment should be made (RSM McClure Watters' (June 2014: 44).

6.2 Findings from the qualitative interviews

The qualitative interviews have explored what actually happens when an assignment ends and the pay between assignments element comes into force. It is a very mixed picture, as will be seen from the overviews from each of the groups below.

6.2.1 The Umbrella Organisations

Most of the umbrella organisations interviewed commented that paying out between assignments was comparatively rare. This was in large part due to careful selection of which workers were offered a PBA contract. One agency had HGV drivers on PBA contracts and, occasionally had needed to pay between

assignments but this was unusual because HGV driving skills are in relatively high demand. The same umbrella was asked to operate a PBA contract for a large group of specialist workers who were required for a few months; they declined to do so under this model because they were doubtful of being able to find work for employees at the end of that assignment so the financial risk would be too high.

Another umbrella reported working with IT contractors whose in-demand skills mean they are rarely between assignments. Another umbrella would only put workers on PBA contracts where they envisaged that the assignments would be lengthy ones (at least a year).

Along with minimising the risk of triggering payment between assignments, seven of the 11 umbrella organisations interviewed that used PBA contracts said they used some form of 'roll-up' deductions from the salaries of workers on PBA contracts. This means that a figure is calculated at each salary payment proportionate to the possible PBA liability of the umbrella and held in reserve. Another umbrella company reported that money for PBA comes out of the agency worker's contracted rate (the rate paid to the umbrella by the agency) along with PAYE, holiday pay, pension contributions etc. Since umbrella organisations said that paying out between assignments is comparatively rare, it is not clear in most cases what happens to the PBA money held back if it is not required, although there was some suggestion that it might be paid back to the employee in the same way as holiday pay. However, one umbrella commented that

'the reason why we try not to promote pay between assignments is because anything you do in terms of funding that process today means that that person is going to earn less as a result. So we try not to do that because it negatively affects the worker.'

One umbrella 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.'* This raises queries of compliance.

Two umbrella companies who had paid between assignments, albeit on a relatively small scale, said that they did not make deductions from workers' pay to fund PBA seeing this as against the spirit of the regulations at best and, potentially, non-compliant.

Examples of how three umbrella organisations operate their PBA contracts

Umbrella Organisation 1: Funds deducted from employees taxable pay to cover PBA

The umbrella company's employees are well-paid and highly qualified professionals. The umbrella company regularly pays the contractors when they are between assignments. It works as follows: If the umbrella is getting paid £1,000 by the agency, that £1,000 goes to the worker. If the worker is on a matched perm pay contract, the worker will be getting that £1,000 every week. If the worker is on a PBA contract, they may get £800 a week and the umbrella will use the remaining £200 to build up a pot of money which can be used to pay the contractor when they are between assignments. The average tenure for one of the umbrella company's employees is about 13 months. The average active time

during their tenure is about 11 months. The umbrella uses this figure to calculate how much they need to hold back/retain on average from the invoice value that is coming in every month in order to cover PBA. Ultimately the contractor's account is always zero. Contractors are entrepreneurial and soon find other assignments. Most of their employees are aged between 30 and 42, male and married with children. They can't afford not to work. Pay between assignments smooth out cash flow for them.

Umbrella Organisation 2: Funds deducted from the employees taxable pay and then advanced to them as a loan

The umbrella company has paid people between assignments. The average assignment length for people on all employment contracts, including PBA contracts, is 4.5-5 months. Most people will work on two or three assignments overall. The umbrella company has built their system so that at the point that any of the workers on PBA contracts are between assignments and are letting the company know that they are available for and looking for other assignments, the system kicks in for them to claim pay between assignments. However, it rarely becomes an issue because there is generally no 'between assignments'. Usually a month before the end of an assignment the agency and the umbrella (and the worker) are trying to arrange for the assignment to be extended and, if the worker knows it is not going to be extended, they are already looking at securing another one. It is quite common that they finish one assignment on a Friday and start another on the Monday so there is no gap between assignments.

The umbrella holds back funds for PBAs. When they receive the daily or weekly amounts for a person working, they calculate an amount out of the income they receive in order to be able to fund PBA if it becomes necessary in the future. The reason why they try not to promote pay between assignments is because anything you do in terms of funding that process today means that that person is going to earn less as a result. So they try not to do that because it negatively affects the worker. Their system works as follows: At the time the worker goes through the process of setting themselves up with the umbrella they are given a choice. If they are going to work on a PBA approach then the amount that the umbrella would calculate and accrue for them in order to pay them the minimum wage for when they take up the four weeks between assignments affects the worker in the short term.

Each week when they get paid they are £65-£70 a week down. For that reason the umbrella pays the worker in advance each week as they earn. The umbrella sets aside £70 but also advances £70 to the worker so that there is no net effect to their pay. The follow on from that is that when workers take pay between assignments, the umbrella pays them the pay between assignments but the worker pays back the advance that the umbrella has been paying them on a weekly basis. So the umbrella will be paying the worker two hundred or so pounds a week but the worker will be paying back the weekly amounts that the umbrella loaned them whilst they were in work. The net effect is zero. The umbrella states there is no other way of funding PBA without it becoming a real issue for the umbrella company's business model.

Umbrella Organisation 3: Funds deducted from the employees taxable pay and then advanced to them as a loan

This umbrella company has 'not paid PBA in the true sense'. Money for PBA comes out of the agency worker's contracted rate (along with PAYE, holiday pay, pension contributions etc). That is the rate paid to the umbrella by the agency. The money is deducted within the 12-week window, which reduces taxable

income. They then advance it to them as a loan. So when it comes to agency workers being paid between assignments the umbrella has advanced them the money. But they do still run through the payment cycle where they will pay them the weeks they are owed up to the four weeks. It's more a question of updating income tax than an actual physical payment.

6.2.2 The Agencies

The agency interviews suggested a varied picture. At one agency, if there are no shifts available those with PBA contracts get 50% of the previous 12 weeks averaged or the national minimum wage and several, but not all, agencies do the same.

One agency interviewee stated that if it was the case that they couldn't offer any work then the PBA would kick in which case it is the highest basic hours within the last 12 weeks or NMW whichever is highest. In terms of the minimum number of hours offered *'to mitigate the payment'*, these will vary from 4 hours to 7-8 hours to full 37 hours. The worker must be prepared to travel 2 hrs or within a 50 mile radius to work.

At another agency, workers get an average pay based on a certain number of hours per week, average 35 hours (*'not low hours like 3 hours which is done by some competitors'*) and the hirer has to pay for it and cover the liability – the hirer has to agree to these conditions. The pay between assignments is calculated as a proportion of 35 hours. In between assignments another agency pays their workers a proportion of the hourly rate they have received. Contracts are normally for a minimum of a couple of days per week. The hirer in this case won't guarantee anything in terms of number of hours so the liability rests with the agency so they didn't want to make it too expensive to cover. The legal requirement is one hour, they wanted a figure that was ethically right and that they could cover so they went for two days. The average worker is working 34 hours per week on average so the risk is small. Occasionally they have to pay between assignments but *'we should be able to manage not to have breaks'*.

Another agency has guaranteed a certain number of hours work per year and rates of pay between assignments would be proportioned based on their annual guaranteed minimum and what they had done so far in the year.

Some workers at the agencies we interviewed though have had their positions for long periods, as much as five years and so PBA has never been triggered. One agency expects a 12 months commitment from the hirer at least and those workers on PBAs are only on these longer term assignments as they don't want to have to pay between assignments.

Examples of how two Agencies operate their PBA Contracts

Agency 1

One agency has been in existence for many years and reports that approximately 28 per cent of its 35,000 temporary workers are on PBA contracts. They say that PBAs are used to mitigate the full AWR. It is the bigger clients that use them and the PBA worker will get less than a permanent worker so it is pure cost-saving. In some cases the disparity can be wide, on others small, but it is totally employer-led with *'no benefit to the agency other than keeping the client'*.

In between assignments the workers on PBA contracts will get paid a proportion of the hourly rate they have received. Contracts are normally based on a minimum of a couple of days per week in order to mitigate the expense of having to actually pay between assignments. As the average worker is working a full week the risk of paying anything is small. Occasionally they have to pay between assignments but they try not to have to do so.

Agency 2

This agency works across more than 100 sites and has 12-15,000 weekly temporary workers (allowing for seasonal variation) of which some 5-10% is on PBA contracts. Again, the request to use PBA comes from the client. The client is looking for more flexibility, particularly for long term shifts. From an agency standpoint this is not a first choice as there is no benefit to the agency as they have a greater administrative burden and have to ensure they are offering the right number of assignments and provide sickness cover.

If there are no shifts available, those on PBA contracts get 50% of the previous 12 weeks wages averaged or the national minimum wage. However, the chance of the workers not having an assignment available to them is low. It is not unusual for individuals to have been on the same contract for several years.

6.2.3 The Stakeholders

At interview several stakeholders commented that there appears to be no break between assignments. Often work is one long assignment with no intention for them to have breaks.

There is a lack of transparency about expenses and topping up pay ways that are not legitimate in order to avoid paying PAYE etc. This is particularly the case where agencies and umbrellas are operating independently of the main associations but it has been discovered in some member organisations and they have been expelled as a result.

Two stakeholders raised the issue of pay between assignments being calculated by some agencies/umbrellas on the number of hours worked in a year. The PBA aspect only comes into effect if in that given year they haven't been offered the full number of guaranteed annual hours. If that were the case they would have to pay the difference. To get around that, workers are required to work one day per week to ensure they have done their annual hours. In reality, the individual actually works 2-5 days per week and travel and subsistence scheme (salary sacrifice) is also in place.

It should be noted that the majority of employer organisations are not aware of PBA contracts and report that how employers operate with agencies and the contracts that they use are down to them.

6.2.3 The Workers

None of the workers interviewed have ever been paid between assignments, although it is not possible to say whether the sample is representative of all agency workers on this type of contract. In one case the individual has a guaranteed number of hours per year and the PBA kicks in to pay the difference of the hours left. In reality there are no hours left so it is never paid. This

person works five days per week and has the statutory minimum holiday but can have an additional five days unpaid.

Another is also on a minimum number of hours per week guaranteed (equating to approximately one day) and gets statutory minimum holiday. The worker has to be available five days per week, and they often work five days a week but only three in quiet times. If between assignments, the individual would be paid the guaranteed minimum number of hours but this has never happened.

There is a similar story from another worker with a different employer where they have one day a week guaranteed work (or pay in lieu but have always had one day). Again the person has to be available five days per week. Pay between assignments has never arisen because the minimum hours have always been met.

Three other workers work full time (37.5 – 40 hours per week) and have never been paid between assignments. In one case there is always a 'workaround' and in the other two cases the individuals were not even aware they were entitled to it.

6.3 Overview

It is clear from our research that 'pay between assignments' rarely happens. Individuals either are on very long term contracts or umbrellas/agencies have devised schemes to keep their exposure to a minimum, many contrary to the requirements set out in the regulations. Whether this is intentionally flouting the regulations or is due to ignorance is unclear. Where PBA does happen it is often funded by deductions from the workers' pay when they are working on assignments. Some of these approaches, for example rolled up pay and guaranteed annual hours may not be legally compliant.

Section Seven: What is the role of umbrella organisations?

7.1 Results from the literature review

The role of umbrella companies and their use of PBA contracts are little understood. There is no mention of this issue in the Acas study of the impact of the AWR and it was out of scope for the review of the AWR in Northern Ireland. However, the recent BIS/REC survey does provide some information on the operation of umbrella companies in situations in which the PBA contracts are used (although the sample is small). The survey reveals that almost half (48%) of the agencies (that responded to the survey) who supplied workers on PBA contracts reported that umbrella organisations employed workers on PBA contracts in some (24%) or all instances (24%) (BIS 2014:5).

Of the 58 umbrella organisations whose websites we examined, 14 (24 per cent) appeared only to offer umbrella services. The majority, (42 or 76 per cent), offered clients other services such as limited company set up and accounting, accounting services for the self-employed, CIS services, payroll for small companies and financial services either themselves or through an associated company. This was particularly the case where umbrella services were part of the offer of accountancy firms.

There is also evidence of some agencies setting up their own umbrella companies in order to increase their margins through savings on payroll costs (and VAT). A company named OriginemCubed is currently offering an off-the shelf product which enables agencies to establish their own umbrella provider, using their existing premises. The company claims that this offers agencies benefits in terms of cash flow, working capital, earning more from the workforce and eliminating the need for invoice discounting. According to a recent article in Recruitment International UK (12 February 2014):

'OriginemCubed is a fully supported, white label offering of Originem's rock solid and established umbrella employment business (- all boxed up and ready to go. This in the words of their first customer is: 'Already saving 12% of payroll costs'.

OriginemCubed also claim that in the healthcare sector setting up their own umbrella companies has an additional advantage for recruitment agencies in relation to VAT:

'Originem are also quick to highlight the particular advantages to agencies operating in the healthcare sector that currently have an umbrella arrangement. They point out that, in accordance with HMRC, VAT charged to agencies by their provider can't be passed on to the end client. And so the agency has to take the hit. However, with OriginemCubed, agencies can re-structure to include their own umbrella provider within their business so that VAT is not applicable' (Recruitment International UK, 12 February 2014).

OriginemCubed claims that they can have an umbrella company (with a dedicated website) up and running within a month.

7.2 Findings from the qualitative interviews

In this section we set out the findings from the qualitative interviews which give a flavour of how umbrellas operate in relation to PBA contracts.

7.2.1 The Umbrella Organisations

One umbrella organisation that we interviewed explained that some freelancers would begin by working through an umbrella organisation, perhaps because they were not sure that contracting was something they would do in the long term and wished to avoid the time and expense of setting up a limited company, and later would decide that they wished to switch to working through a personal services company.

For most umbrellas, the relationship with end hirers is a remote one that is mediated through the agency. Most felt that end hirers were uninterested in the details of the contracts that workers were on but did want reassurance that all relevant regulations were being complied with. Most also want as little to do administratively as possible, and for this reason PBA contracts that avoid the need for establishing comparator pay can be attractive. However, some end hirers are particularly sensitive to costs and this can lead to PBA models being proposed either by the agency or the client as a solution.

Most umbrellas commented on the need to establish good relationships with agencies (although as mentioned in an earlier section, many also reported working with several hundred different ones!). The relationship is important as agencies will direct workers to the umbrella company. For the better agencies, the main concern is to ensure that the models that the umbrella uses are fully compliant with all relevant legislation, not least because the agency has a reputational risk with the end hirer should problems arise. For the same reasons, the agency will want to be sure that the umbrella company provides a good service to the employee and relieves them of potential problems (as the agency will often be the first port of call for a disgruntled worker).

'Agencies seek reassurance that umbrellas know what they are doing, that the workers are happy and get paid on time, that HMRC aren't going to come down on them. If it goes wrong, this can impact on agencies' relationships with hirers'.

By having confidence that contractual issues are being taken care of by the umbrella, the agency is free to concentrate on recruitment without the need to understand and keep up with legislation.

Agencies often operate a preferred suppliers list. One umbrella said

'we are on a lot of preferred supplier lists because agencies trust us and know we are 100% compliant. They know their workers can get hold of us if they need to so there is less come back on the agency like there is with some umbrellas who take the money but don't want to know if there are problems.'

While ideally the preferred supplier list is operated on quality considerations, a frequent complaint from umbrellas is that agencies will select on the basis of getting the best margin from umbrellas and by insisting on a 'rebate' or 'referral fee' for every timesheet that the umbrella processes. One umbrella expressed concerns that some umbrella bodies willing to pay referrals are not always fully

compliant with the law and some are off-shore, but thinks less scrupulous agencies overlook this because of the fees they are willing to pay.

Many said that agencies often insist that umbrella organisations are able to offer PBA contract options in order to be on the preferred supplier list but – with one or two exceptions – are happy to go down the pay parity route if they are confident that the umbrella organisation knows what they are doing and handles the risks.

One umbrella interviewee noted that numerous small umbrella companies have appeared in recent years and that quite a few involve what he referred to as 'white labelling', which involves agencies setting up their own umbrella companies. Agencies are looking to increase their margins – they note that there is typically £25 per week per person going to the umbrella - and then set up their own umbrella. There are, he thinks, several companies that are involved in white labelling umbrella companies for agencies; he is not sure what this involves but suggested they may run umbrellas for agencies or sell them the software to run umbrellas. There have been cases where workers have been unhappy when they have discovered that an agency is *'getting two bites of the cherry'*.

A big concern of many umbrella organisations interviewed was the proliferation of umbrella companies, some of whom were tarnishing the reputation of all umbrella companies. Those of concern seemed to be in one of two camps: those who misunderstood the legislation and offered non-compliant solutions as a result; and those who knowingly offered non-compliant solutions with promises to workers that they could take home 90 per cent of their gross pay. Not only were such organisations causing reputational problems for all umbrellas, non-compliance puts them at a competitive advantage as they can be attractive to agencies concerned to achieve the best margins. They also put workers at risk as they may subsequently be presented with a bill for back tax.

7.2.2 The Agencies

Several of the agencies interviewed will not work with umbrella organisations. Some will only work with them if the hirer insists.

Several agencies operate preferred supplier lists and in some cases this involves conducting due diligence with the umbrellas who want to work with them. Many umbrellas are turned down because they are not making the right deductions or the agency is not comfortable with the types of contract they use. For example, two interviewees have issues with some umbrella companies paying false travel and subsistence claims (so-called salary sacrifice).

Recently one agency realigned their approved suppliers and asked a question of umbrellas in relation to PBAs – the ones they work with try not to do it and where they would do is only if pressurised by the agency. The agency won't work with umbrellas that operate the low cost model.

One interviewee stated that he was *'fed up with sales calls'* from umbrellas. They are prevalent in some sectors or within particular geographies. Some of the high level contractors want to go through umbrellas but it is not worth their while if it is below £8 per hour. The general feeling is that workers don't understand how umbrellas operate and think there is a benefit to working with one that isn't there for the lower paid worker.

One issue that has arisen from the interviews is where umbrella organisations make payments to agencies. One agency commented that an umbrella might make all sorts of payments when the agency starts with them, but once they

have got established and have got the agency finding workers for them they cut back and the fee they pay the agency goes down. Another agency said they used an umbrella to run their payroll and they also enjoy 'kickbacks' from the umbrella company for putting people through. For the bigger agencies in particular, this is thought to be quite lucrative.

Examples of how two umbrella organisations work with agencies

Umbrella Organisation 1: Payment of referral fees

One umbrella has an AWR calculator which they use with agencies that are unsure about what should be paid to agency workers. Smaller agencies that do not have the resources of bigger agencies often lean on this umbrella in relation to doing these calculations. Many agencies (particularly the ethical ones that they want to work with) are 'massive' on compliance and the umbrella company gets visits from them to audit them for themselves. *'The bigger agencies, the better agencies are all over this like a rash'.*

In the experience of this umbrella, some of the smaller agencies may not care quite as much about compliance by umbrella organisations. In some cases umbrellas approach agencies and say they will pay them an amount of money if the agency gives them work for their employees. They know their competitors will give agencies money just to get people on the books.

The managing director of this umbrella thinks that in order to deal with issues like this, it is important to educate end clients because it is them that engage the agencies. End clients need to know what is going on and insist on ethical practice and choose agencies more carefully. Moreover, agencies need to look at umbrellas more closely, as has already started to happen in some cases.

Umbrella Organisation 2: Calculating daily rates

With most of their large customers (recruitment agencies) the umbrella talks with them at the beginning of their relationship about the way in which the daily rate needs to be calculated to make sure that people's pay matches comparators. They try to get this sorted out at the outset rather than waiting for 12 weeks. They consider PBA on the rare occasions in which the agency and their client are working on really tight margins. It is driven by the client saying they want to drive down the cost of the flexible workforce as much as possible and the agency saying that based on the details they can't get the pay rate to the point where it will match the comparator. So there are two choices then. If the option isn't there to increase the rate of pay, then either the umbrella are not going to put an assignment in place or there will be a PBA contract in place instead.

7.2.3 The Stakeholders

Most stakeholders expressed some reservation about umbrella organisations. One stated that umbrella organisations are sector-specific such as public affairs, life sciences, logistics and these are where you are most likely to see them operating but it depends upon the commercial arrangements. Agencies believe they will lose business if they don't work with these bodies.

Another stated that umbrella organisations are at the midpoint of the supply chain. An agency will work with an umbrella and place a worker where there is a

need. The umbrella employs them but they can have several jobs. But this arrangement keeps their tax affairs all in one place, provides continuity of employment which helps them get mortgages for example¹⁷.

It has been suggested that there are issues in relation to offshore¹⁸ (e.g. Isle of Man) schemes run by 3-4 companies who will have a dozen or two dozen companies which are all shells with UK fronts. *'As one gets 'picked off' by HMRC they start another one'*.

Umbrella companies are highly competitive and reliant on agencies. If they don't pay agencies the referral fees they don't get the business. An agency can take 40% of the fee from the hirer so compliance suffers as costs have to be covered. It is felt that there is not much guidance from HMRC in this area. In order to meet reimbursements to agencies the umbrella has to put up charges to cover costs.

Stakeholders also mentioned that many umbrellas have few staff and seem to be mobile in operation. Certainly in trying to find individuals to interview for this research many of the websites contain little or no contact information and when some are contacted they appear to be very lean operations.

Several stakeholders mentioned the travel and subsistence schemes that some operate (salary sacrifice). Two mentioned the payments that umbrella organisations make to agencies (one called them 'sweeteners').

7.3 Overview

Based on our interviews it appears quite wrong to tarnish all umbrella companies because of the ones who are operating incorrectly though it is concerning there is no regulation. Most of those we have interviewed are following the AWR regulations and are concerned about their workers but they also appear to answer to the requirements of agencies. There is an issue about the payments that some umbrella organisations make to agencies that could be looked into further, as could the issue of travel and subsistence payments.

¹⁷ Though this is not the case for many workers, particularly if they work under one of the minimum hours schemes – banks will not give mortgages to individuals who can only prove guaranteed hours of one day per week, even if they have been working 40 hours per week for the last two years.

¹⁸ There is now legislation in place to combat this.

Section Eight: What are the strengths and weaknesses of Pay Between Assignment contracts?

8.1 Findings from the literature review

The CBI and other employer organisations see PBA contracts as a key element of the UK's flexible workforce (CBI/Accenture 2014: 45). The following quotation underlines the importance that the CBI attaches to PBA contracts and the underlying argument that the removal of the Swedish Derogation would have a negative impact on business and jobs:

'Many prefer to pay an agency to provide temporary workers using the Swedish derogation, which also gives those employees security of income between jobs. The Agency Workers Directive is clear that a derogation from the principle of equal treatment is permitted where workers are paid between assignments. It was introduced in the UK with the agreement of employers, trade unions and the government and is clear that implementation includes a pay between assignments derogation. The terms of the derogation were thoroughly consulted on before being finalised, ensuring that it met the principle as well as the letter of the directive. Undermining this flexibility would put at risk a central plank of the flexible system that kept unemployment down during the recession. This is a real concern for business.' (CBI/Accenture 2014: 45).

The CBI/Accenture (2014) employment trends survey 2014 found that over two in five (41%) of those businesses that use agency workers¹⁹ would reduce their use of agency workers if PBA contracts were abolished, while 5% would cease all use of agency workers. The survey reveals that removing the option of PBA contracts would have only a very limited impact in increasing the hiring of permanent staff:

'Just over one in ten businesses (13%) say they would take this approach. An increase in the use of fixed term contracts (32%), a changed model of temp use (26%) and an increased use of self-employed individuals (16%) would all be more likely'.

The survey concluded that:

'The net result of removing the Swedish derogation would be a reduction in work opportunities and it would hit hardest many of those who find it most difficult to secure permanent jobs'.

Against this background, the REC continues to argue that in general PBA contracts are a welcome development, as the alternative would mean job losses for agency workers (reported in Eichhorst 2013: 86).

From the employees' perspectives, PBA contracts potentially offer a degree of financial security and flexibility. However, as indicated above, there is evidence to suggest that in some cases PBA contracts are not being used as originally intended. Thus, for example, in April 2014 the House of Commons Scottish Affairs Select Committee concluded that:

¹⁹ 67% of respondents were using temporary workers, freelancers, and contractors, which is 15% less than in 2013. "This drop (was said to be) due in part to the economic recovery which has given more businesses the confidence to add to their permanent payrolls" (CBI/Accenture 2014: 43-44).

'The Swedish Derogation [...] was included [in the AWR] to cover agency workers who would be worse off if they were given pay equal to permanent employees, but evidence suggests that agencies and companies are using it to pay workers less than equal pay' (Scottish Affairs Select Committee, April 2014: 45).

The Committee noted that the TUC had:

'point(ed) to evidence from UK workplaces where agency staff are paid up to £135 a week less than permanent staff, despite working in the same place and doing the same job' (Scottish Affairs Select Committee, April 2014: 46).

By way of example, the Committee cited the high profile case of agency workers employed by an employment agency (Manpower) on a British Telecom contract who, according to the Communication Workers Union (CWU), were:

'placed on a 'pay between assignment' contract which meant the agency could pay them less than permanent employees doing the same job' (CWU Press Release (14 February 2014).

The committee also noted that a union representative from UNITE had informed them that

'such practices were commonplace in the meat processing industry where agency workers, typically from a migrant background, were working alongside permanent employees but for less pay and on poorer terms and conditions' (Scottish Affairs Select Committee, April 2014: 46; see also Equality and Human Rights Commission 2012).

The committee stopped short of recommending the abolition of PBA contracts. It argued that, if used appropriately, PBA contracts can provide agency workers with greater financial security, as well as employment rights, such as maternity leave, statutory redundancy pay and protection from unfair dismissal (Scottish Affairs Select Committee, April 2014: 46). However, the Committee concluded that in some cases PBA contracts are being used as a 'loophole' by agencies and hirers²⁰ to avoid equal pay regulations and that the UK government should ensure that the Swedish Derogation is used in the spirit in which it was intended:

'The Swedish Derogation, if operated properly, can offer sufficient benefit to workers to justify its continued use, but the UK Government must tighten up the implementing Regulations to ensure that the Derogation can only be used in the spirit in which it was intended and not deliberately to reduce the pay and conditions of workers and increase the margins of employers' (Scottish Affairs Select Committee, April 2014: 46).

In their study for Acas, Forde and Slater (2014) also question the benefits of PBA contracts for agency workers. They argue that although these contracts provide agency workers with some security through a permanent contract of employment and a minimum level of pay between assignments, this comes at the 'considerable cost' of losing the right to pay parity. According to Forde and Slater (2014)], this trade-off is particularly high and detrimental for the temp if he/she is being utilised on a long-term, continuous basis within a single client firm (i.e. the areas where PBA contracts appear to be taking hold) (Forde and Slater 2014).

²⁰ The Committee do not mention umbrella companies in the context of their discussion of the Swedish Derogation.

Forde and Slater report that their study found some evidence that workers bore a lot of the risks under such arrangements:

'Some agencies argued that these contracts were being promoted by client firms, who have the most to gain from moving temps onto employment contracts with agencies. Others argued that it is firms alongside agencies that are promoting the contracts. For workers, however, the benefits of these contracts are much less clear cut' (Forde and Slater 2014).

An inquiry into the world of work undertaken by Ed Sweeney (a former trade union leader and former chair of Acas) for the influential think tank The Smith Institute²¹ arrived at similar conclusions. Sweeney (2014:36) argued that:

'under the so-called Swedish Derogation, agency workers holding a permanent contract with an employment agency are excluded from the equal treatment rights. In principle this creates the possibility of a two-tier workforce, with the employees of the hiring employer enjoying better terms and conditions than workers employed by the agency. It can be argued that this defeats the purpose of the regulations and creates an incentive to use agency staff at lower cost. [...] There is a strong case for removing the 'Swedish derogation' to stop workers from being undercut by agency staff. This would help to ensure that the benefits to workers' security are matched by benefits for employers. Government should at the very least seek to remove the loopholes that in effect exempt agency workers from securing equal treatment under the Agency Workers Regulations' (Sweeney 2014: 36).

8.2 Results from the qualitative interviews

There was considerable consistency from the qualitative interviews in respect of the strengths and weaknesses of Swedish Derogation (PBA) contracts. Below we set out the responses by type of interviewee.

8.2.1 The Umbrella Organisations

Most of the umbrella companies who used PBA contracts on a fairly small scale saw most benefits in terms of the end hirers and agencies saving time and money in not having to seek out or meet pay comparators. Umbrellas thought that, for agencies and employers, PBA contracts relieve them of any responsibilities to ensure all employment regulations are being complied with. However, the consensus was generally that employers look to agencies to ensure that regulations are being complied with (and, in turn, agencies rely on umbrellas for this) and do not necessarily know or understand the niceties of different types of contract. As one described it:

'employers are interested in what the total cost will be and agencies are interested in their margins.'

²¹ The Smith Institute describes itself as: "is an independent think tank which provides a high-level forum for thought leadership and debate on public policy and politics. It seeks to engage politicians, senior decision makers, practitioners, academia, opinion formers and commentators on promoting policies for a fairer society".

One umbrella felt that PBA contracts may be useful where employers have short term labour supply needs combined with cash flow problems that mean they can't match permanent pay.

For those umbrellas using PBA contracts as the model of choice, the big strength is compliance. While others argued that it is perfectly possible to have an overarching contract that includes matched pay and allows travel and expenses to be offset, three of the umbrellas interviewed felt that offering pay between assignments was the only way to ensure full compliance and to be able to offset expenses legitimately. The issue of offsetting expenses was one that umbrellas, while believing that they themselves were compliant, cited as being an area where other, less scrupulous organisations were not. They felt that such 'rogue operators' were bringing umbrella organisations into disrepute and also serving workers poorly who could potentially be required to pay an unexpected tax bill when expenses had not been claimed in accordance with the rules. Some umbrellas felt that this was an area where more guidance would be welcome, although measures announced in the March 2015 budget may change things. In the budget the Government announced the possibility that tax relief on travel and expenses could be restricted for contractors who cannot demonstrate they have control, supervision or direction of their own work.

For workers, the benefits of a PBA contract were seen as additional security. One umbrella dealing mainly with relatively well-paid IT specialists said that

'most of our employees are aged between 30 and 42, male and married with children. They can't afford not to work. Pay between assignments smoothes out cash flow for them.'

Some felt that workers benefitted through not having to cope with tax and national insurance arrangements and that they like the idea of being employed and having employee benefits such as sick pay and travel costs being paid. This can be particularly helpful for those making the transition between permanent employment and freelancing. The additional security offered by an overarching contract benefitted workers too through making it easier to obtain mortgages and other loans. Another benefit for workers mentioned is that umbrellas and agencies have a vested interest in trying to find work for employees as an assignment draws to a close.

However, many made the point that PBA contracts were of most benefit to workers on medium to high pay (one cited the figure of £25,000 per annum or above) who were likely to match or exceed the pay of permanent employees. One umbrella argued that removing the Swedish Derogation would lead to end hirers insisting that freelancers worked through limited companies in order that they could continue to keep their pay rates confidential; this would lead to a loss of employment rights for contractors and a reduced tax take for the Government.

For lower paid workers, many umbrellas saw the biggest weakness of PBA contracts as their use by some to circumvent the intentions of the AWR and avoiding equal pay. However, some predicted that the alternative to PBA contracts would be that workers would not get assignments lasting beyond 12 weeks, leading to more churn in the system and much less security for relatively unskilled workers. For most, the weaknesses were not in PBA contracts themselves but in the abuses of them by less scrupulous agencies, umbrellas and hirers. One umbrella felt that the very existence of the Swedish Derogation '*gives you licence not to have to match the comparators' pay*'. Awareness of this leads to pressure from end hirers and agencies to use PBA contracts to drive down costs.

Another factor that can undermine PBA contracts is the practice of some agencies of insisting that workers sign up to one of a limited number of 'preferred suppliers'; this means that workers will need to move from their existing umbrella if they are not on that list and so lose continuity of employment and the associated benefits.

8.2.2 The Agencies

According to the agencies we interviewed, the strengths of the Swedish Derogation contracts are firstly that there is some guarantee for the worker. If there is no work they get some pay and have a 'buffer' period. The hirer is the main beneficiary as they keep their costs under control. The main benefit to an agency is that they keep a client by meeting their requirement to use these contracts.

In terms of weaknesses, for the worker they are being paid less than on a comparator. There is also a lot of extra work for the agency, a heavy burden of cost and risk exposure in having to meet the payments for the pay between assignment elements.

One agency could see no benefits to the contracts but a considerable reputational risk for the agency. If working with an umbrella organisation there is a contractual risk as *'the buck stops with the agency'*.

Three agencies mentioned having employees who have to be treated different is a strain on their HR departments. In some cases the agency's other workers are on a contract for services basis. In others, the workers are on non-PBA contracts of employment.

8.2.3 The Stakeholders

One stakeholder identified three clear advantages for hirers:

- The possibility to move staff up and down if they wanted. They could *'get rid of a portion of their workforce very easily'* and with no redundancy payments.
- One of the appeals is to outsource a lot of their HR function, less staff, no sifting through adverts, leaving the agency to deal with disciplinary and grievance, etc.
- Lower terms and conditions. It is cheaper.

On the other hand agencies are very exposed. They also take on the day to day business management and all its problems.

Other stakeholders confirmed cost savings for hirers. Some cited benefits to workers as having rights as a result of the contract. Some stated that workers were giving up more than they were gaining.

Liverpool City Council - Good Practice Charter Mark

In March 2014, Liverpool City Council submitted a report to The Employment Enterprise and Skills Select Committee on the use of 7 Hours Mobility Worker Agreements in the City following evidence received by a Scrutiny Panel that it had

convened²². This was set up following approaches to the Council by workers who had been employed on these contracts.

While the Council views the use of zero hours contracts and other forms of flexible working as a solution for particular circumstances – and, indeed, uses them itself for certain roles such as sessional workers for events – they are concerned that they are becoming increasingly more prevalent. In its report to the Select Committee, the Council said of zero hours and other low hours contracts:

'The concern is that these contracts reflect the structural change in the employment market from permanent, stable, regular hourly employment to what looks more like casual labour. In addition there is a concern that these contracts are being exploited by employers to pay minimum wages and use exclusive contracts to ensure maximum flexibility for employers, but minimum opportunity for employees.'

The Council is in the process of developing a Charter mark for employers (public and private sector) willing to sign up to minimum levels of good practice. This is currently working its way through the processes of the Combined Authority but is expected to incorporate the standards that the Council has set for itself in its use of flexible working options. The Council has a strict policy that prohibits the use of such contracts as a substitute for full time employment and is committed to not using such contracts to the detriment of its employees. Implementation will be modelled on the Charter for Health and Well-being to which over 600 employers have signed up and the Council, while having no powers of enforcement, expects to exercise a degree of leverage through its procurement processes.

8.2.4 The Workers

One of the biggest weaknesses mentioned by workers on guaranteed annual hour PBA contracts is that they cannot get a mortgage as the bank will only accept the guaranteed hours – that is regardless of them working perhaps full time for several years previously in the same job. The lack of continuity makes planning difficult and they don't know how much money they will be earning week to week. Workers are also being paid less than others doing exactly the same job and that appears to create an 'us and them' scenario.

8.3 Overview

The aim of the AWR is to improve the quality of agency work through the principle of equal treatment and to contribute to the creation of jobs and the development of forms of flexible working. The AWR is also supposed to provide temporary agency workers with employment rights and this has been achieved to some extent. For workers there is added security. However, the Swedish Derogation and the use of PBA assignments have made that benefit conditional and based on our research, it seems many workers are disadvantaged by this arrangement. PBA contracts are of most benefit to those agency workers on medium to high pay who are paid more than permanent staff or for whom there are no comparators.

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<http://councillors.liverpool.gov.uk/documents/s139836/low%20hours%20report%20final%20draft.pdf>

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The biggest weakness of PBA is its use by some to circumvent equal pay. However, the main weakness is not in PBA itself but in the abuses of it that exist. Quite apart from the fact that few workers are actually getting paid between assignments, as this appears to be being avoided if at all possible, many workers on annual or limited hours PBA contracts cannot get mortgages as banks will only accept guaranteed hours.

Agencies have taken on additional risk and responsibilities with these contracts though there seems to have been some compensation in the financial arrangement that some have negotiated with umbrella organisations. The clear winner is the hirer, who has both a lower cost workforce and has outsourced a part of their HR function in order to deal with them.

Section Nine: Areas for Consideration

Based on this research we believe the following areas are worthy of further consideration.

- Explore whether the use of the Swedish derogation (Regulation 10) could be tightened up to ensure that it is used in the spirit in which it was originally intended and is not used to circumvent the equal pay element of the AWR in order to drive down labour costs .
- Consider what steps need to be taken to raise awareness amongst agency workers about the implications of signing PBA contracts and the circumstances in which they will be paid between assignments.
- Carry out further work to establish whether or not an amount for PBA can be deducted from workers' pay and, if so, how this can operate (rolled-up, paid as a loan, retained by umbrella/agency if not required by worker).
- Provide firmer guidance on what is reasonable in terms of what workers are required to do in order to remain eligible for PBA. This should cover distances from home to place of work, guaranteed hours to be worked, minimum periods of notice of work, and minimum periods of work offered, especially when working anti-social hours.
- Explore further different sectoral uses of PBA contracts, e.g. meat processing, teaching.
- Develop and disseminate exemplars of how PBA contracts should work in different scenarios so that good practice is promoted.
- Carry out further work to investigate the relationship between agencies and umbrellas, paying particular attention to: (1) referral fees paid by umbrella companies to agencies and (2) the implications of agencies setting up their own umbrella companies.
- Develop more guidance on expenses. Worker interviews implied that expenses are being claimed that have not originated from, or been paid to, the worker in order to reduce NI (and possibly tax) liabilities while bringing up workers' pay to what they would have received net from the minimum wage.

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