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GOOD WORK: THE TAYLOR REVIEW OF MODERN WORKING PRACTICES

Submission from the Employment Lawyers Association on the Agency Workers Consultation document

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EMPLOYMENT LAWYERS ASSOCIATION

EMPLOYMENT LAWYERS ASSOCIATION SUBMISSION

GOOD WORK: THE TAYLOR REVIEW OF MODERN WORKING PRACTICES

AGENCY WORKERS CONSULTATION

WORKING PARTY RESPONSE

Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. The ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation.

A sub-committee, co-chaired by David Widdowson and Catrina Smith was set up by the Legislative and Policy Committee of ELA to respond to the four consultation documents issued by the Department for Business, Energy and Industrial Strategy in respond to the Matthew Taylor Review of Modern Working Practices.

In each of the documents there are some questions which we have not answered mainly because they are directed at employers and/or employees. We have concentrated our response on the areas of legal relevance.

A. AGENCY WORKERS RECOMMENDATIONS

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

The value of a key facts page may depend not only on the information to be included but also on when it is issued and the availability of viable alternative options to work seekers. The issue of what information would be important to include is covered in our response to question 2 (see below).

The Taylor Review suggests that the 'key facts' page be issued on registration or engagement or any job offer conversation. A 'Key facts' page issued on registration at an employment business may be of limited value as it would not necessarily be able to provide sufficient information to allow work seekers to make a decision about specific work opportunities as the information (for example the rate of pay) may vary from assignment to assignment. However, being provided with clarity around the employment relationship at the commencement of registration with an organisation, and other information (see question 2), could provide work seekers with enough information initially to consider their options. We would envisage therefore that the key facts were updated as and when someone took up or was considering an actual engagement.

We consider that a key facts page does have the potential to support work seekers in making decision about work. However, for vulnerable workers (for example those who are low paid or with limited skills) the decision making process may be very limited if alternative work, or work on better terms, is not available.

The benefits of a key facts page would go beyond supporting work seekers in decisions about work as it would increase transparency and thereby support workers even once engaged on assignments by providing them with some clarity around their status and associated rights and responsibilities.

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

Key information to include on the key facts page for each assignment could include (in no particular order):

- the parties to the contract,
- commencement and termination date/arrangements,
- who is paying the work seeker,
- how pay is calculated,
- what deductions are being made (including administrative fees/charges levied by umbrella companies or under PBA contracts as well as for income tax, national insurance, pension contributions etc.), and
- Employment status in the sense that it should be identified whether the relationship is one of employer/employee and who is to be the employer .
- Benefits available
- Entitlement to paid holiday
- Entitlement to equal pay after 12 weeks
- Arrangements for job seeking directly with the client

2a) What conditions should be in place to ensure the 'key facts' page is provided and understood by the work seeker before any contractual engagement?

Employment businesses could be obliged to retain evidence that work seekers or those who have been offered work have been provided with a 'key facts' page in a form which is accessible and with adequate time to allow the work seeker to consider its contents.
Provided the 'key facts' page has been provided in an easily understandable format and prior to commencement of the assignment there could be a presumption that it has been understood unless the work seeker indicates otherwise. Alternatively, there could be an obligation on the employment business to obtain confirmation that the work seeker has received and understands the 'key fact' page (possibly by obtaining a signed copy of the 'key facts' page). The key facts page could be provided at the same time as other relevant paperwork e.g. contract, contact details, so as to minimise the administrative burden on both parties.

There would need to be adequate recourse /enforcement for failure to provide a clearly understandable 'key facts' page in a timely manner.

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

The employment business should be required to provide a 'key facts' page using accessible language which should not be buried in legal jargon. The provision of a standard format for a 'key facts' page may assist in this. However, the question of whether the same employment business should be required to ensure the work seeker understands fully the information provided is more nuanced.

There could be a presumption that the 'key fact' page has been understood unless the work seeker indicates otherwise. It may be appropriate for the employment business to enquire whether the work seeker requires any further explanation or has any questions.

It could be that requiring the work seeker to make a written declaration that they understand the contents of the 'key facts' page may be appropriate. However, this could be open to abuse as it could be that work seekers may feel pressured into signing a declaration in order to obtain work even when they do not fully understand the information provided.

There is potentially a conflict of interest in the employment business being required to ensure the work seeker understands the information being given to them. If it is a requirement that the work seeker must understand fully the information being given to them then this would arguably require independent advice. Clearly this would need to be proportionate but inclusion of information on the 'key facts' page about where independent advice could be sought in the (for example in the form of an online tool or by speaking to someone at ACAS) may be appropriate.

Where it is obvious that the work seeker may have difficulty in understanding the key facts page e.g. because of educational issues, language barriers or disability, appropriate arrangements could be put in place to help ensure understanding e.g. verbal explanation, translations etc. This would be particularly important in the low wage sector where workers are more likely to have these issues and are therefore more vulnerable to exploitation.

It will never be possible to absolutely ensure a work seeker understands fully the information being provided to them but the way in which it is provided, and directing the work seeker to information and possibly independent advice (if required) may be a reasonable expectation.

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

The amount of time it may take (an employment business) to produce a 'key facts' page will depend upon what information is required to be included and the availability of that information at the time the document is being drafted. However, we do not consider that preparation should take any longer than one hour per assignment once initial processes have been set up.

It is important to take into consideration that a key facts page will need to be updated and reissued prior to the work seeker accepting each new position/assignment. In such cases it may be the case that a subsequent 'key facts' page could be produced more quickly especially if the information included is much the same as for the previous assignment(s).

5. **Have you used or are you currently using an umbrella/intermediary?**
(a) If so, for what reason? e.g. as a work seeker or employment business for payroll purposes. What has your experience been?

Our members have advised umbrella companies. Typically it is our experience historically that they have been used by workers on middle-upper pay rates. Principally this is to share administrative costs between the workers who would otherwise trade through their own individual service companies. We are also aware that there can be economies of scale in the cost of benefits provided.

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

The main advantage is that the rate of gross pay is higher because it incorporates PAYE benefits (eg holiday pay), rather than being paid out separately as PAYE. Further, umbrella companies can manage all the finances of an agency worker without them setting up a Limited company; offer their own benefits; and National Insurance is calculated slightly differently as not PAYE, so ultimately take home pay tends to be very slightly higher.

Some workers use the same umbrella company for many years which enables them to work for different organisations without having to become an employee of each and so to be subject to PAYE.

Umbrella companies do charge a fee for every payroll run and the difference in take home pay between using an umbrella company and being paid through PAYE now is very small.

There may be umbrella companies or intermediaries who operate in an unscrupulous way, for example in the charges they levy. A lack of clarity around employment status and obligations in terms of taxation may increase the opportunity for abuse. We are aware that some employers only use approved umbrella companies that have been through their own compliance process.

7. **Should the extension of the remit of the Employment Agency Standards Inspectorate to cover the regulation of certain activities of umbrella companies and intermediaries in the supply of work seekers to a hirer:**

   i) **Be limited to the regulation of the key facts page and provision of information relevant to those facts as part of a work offer by the hirer or employer?**
   ii) **Be aligned to the regulation of the types of employment rights already regulated by EAS under the current legislative framework such as non-payment of wages, deductions from wages which the work seeker has not**

agreed to, and failure to provide written terms and conditions before the assignments start?

It may be appropriate to extend the remit of the EAS inspectorate to cover the regulation of certain activities of umbrella companies and intermediaries if there is evidence to suggest that

there is a particular issue with umbrella companies operating in an unscrupulous manner. We are not aware of this being the case but, given the policy issues apparent behind the increased obligation on employment businesses to provide information on assignments, we can see little difference for these purposes between employment businesses and umbrella companies – see also our response above. Although the types of employment rights such as deduction of wages is already regulated under the Employment Rights Act 1996 and recourse is available through the Employment Tribunal system (for which there is now no fee imposed) for breaches we would agree that this is an issue which could be investigated by the Directorate for Labour Enforcement in order to obtain more reliable data than presently exists.

7 **(a) What do you think the impact of ensuring that umbrella companies provide work seekers with a key facts page would be on:**
(i) The work seeker; and
(ii) The recruitment sector?

This would be dependent on what information is contained within the key facts page but is likely to provide clarity for the work seeker in terms of their pay, employment and tax status and associated rights and obligations. It would be important to ensure that the administration and costs associated with preparing a key facts page is not passed onto work seekers in any way either overtly through additional charges or in more intangible ways.

Ensuring umbrella companies provide work seekers with a key facts page may have an overall positive effect on the recruitment sector as it may lead to increased transparency and higher standards. However, the time and cost taken to produce key facts pages (especially from assignment to assignment) would be an additional administrative burden and cost to the recruitment sector. It is possible this could encourage employment businesses to advocate the use of umbrella companies more frequently in order to pass on the administrative burden.

Section 3

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

No

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

A PBA can provide security of income between assignments for the work seekers. This may be particularly attractive for those on lower incomes or those who do not have contingencies for periods without work.

The Employment Business may benefit from retaining the work seeker for the longer term rather than recruiting new work seekers which may be a cost saving to the business. This could also be attractive to client's (hirers) who may enjoy the benefit of continuity in their agency staff.

Problems associated with PBAs can include:

- A lack of understanding and clarity on the part of the work seeker in terms of how the agreement operates and what their rights (for example in relation to annual leave and applying for vacancies) and obligations are.
- Work seekers may, in some circumstances, feel pressurised into agreeing to enter into a PBA.
- PBAs may be a disincentive to hirers to offer work seekers more permanent contracts direct with the hirer (see reference in the Taylor Review to possibility of offering temporary workers permanent/fixed term contracts after 12 months).
- The cost of PBAs may be passed on to hirers making it more expensive to engage work seekers.
- There is the possibility of umbrella companies or employment businesses seeking to abuse such an arrangement in order that it operates in their favour.
- If the employment business is responsible for PAYE etc, it may need to require the worker to notify it of work undertaken and earnings during "down time" to ensure that the correct allowances etc were taken into account.
- Problems of status and defining continuous service for work seekers rights.

10. In your experience, how effective do you think pay between assignment contracts are in supporting workers and work seekers when they are not working?

Fairly operated PBAs could be effective in supporting workers, by assisting with consistency of pay, thereby allowing them to plan for the expenses of life more effectively.

11. Do you have evidence that there are wider issues (beyond equal pay) with PBA contracts, for example agency workers not being able to access facilities, rest breaks, annual leave or job vacancies? If so, do you believe the above issues would justify wider state enforcement?

Where workers are not aware of their rights the wider issues outlined may not be apparent. Clarity and transparency around agency workers' rights (possibly by these being outlined in the key facts page or on an online tool) would support agency workers in their awareness of these rights. However, awareness of these rights is unlikely to solve wider issues where workers are not accessing their rights because of the fear of detrimental treatment.

If there is sufficient evidence that there are wider issues with PBA's, especially in relation to low paid and/or vulnerable workers, then wider state enforcement may be required.

12. To what extent do you agree that enforcement of the Agency Worker Regulation 2010 should come within the remit of the Employment Agency Standards Inspectorate?

The current legislation provides for breaches to be enforced via the current Employment Tribunal provision. A Claimant can therefore lodge a claim at the Tribunal for a breach of the legislation (without fee).

Taking a case to an employment tribunal may provide a solution for one person, but the likelihood is that if one person's arrangements are inappropriate, others are in the same position. The advantage of using the Agency Standards Inspectorate would be that they are more likely to have a remit to look at the arrangements at the particular agency as a whole rather than focusing on one claim by one person (which may be settled by the agency to avoid more widespread scrutiny).

Members of ELA Working Party