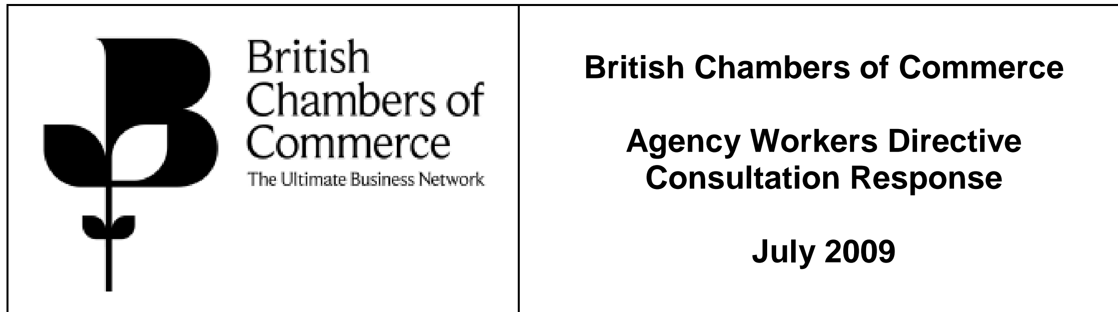

British Chambers of Commerce

Agency Workers Directive Consultation Response

July 2009

The British Chambers of Commerce is the national body for a powerful and influential Network of Accredited Chambers of Commerce across the UK; a Network that directly serves not only its member businesses, but the wider business community. Representing over 100,000 businesses who together employ more than 5 million employees, the BCC is the Ultimate Business Network.

Consultation process

The British Chambers of Commerce has consulted its members extensively on this topic. We have both agencies and end users in membership and our response reflects this.

Agency working in the UK

Agency workers are vital to the UK economy. Our recent Workforce Survey[i]. 1 in 4 businesses said that they use temporary agency workers with this rising to over half for businesses with more than 250 employees. Over two thirds of firms who use agency workers do so to improve the flexibility of their workforce with 18% using temporary workers for short term cover.

Although agency workers are often characterised as 'vulnerable' our survey shows they are highly valued workers who are critical to the success of business. Only 3% said that they used agency workers because they are cheaper then permanent employees.

In the same survey we asked businesses who easy they found it to navigate employment law surrounding recruitment and 34% found it difficult. This rose to 46% for micro-businesses. For these employers, using agency workers is often a way of getting the skilled personnel they need without the risks and complications that they perceive to be inherent in direct employment.

It is clear that there is a real risk that, if this Directive is badly implemented, it could severely impact on the economy and job creation in the UK, at a time when economic growth should be being nurtured. The Government's impact assessment places this regulation as the third most costly to the private sector since labour came to power in 1997[ii].

The Government's timeline

Given the impact that these regulations will have on business it is important that they are well thought through and carefully considered. They must give business enough certainty to be confident in using agency workers (and not leave all the detail to guidance) while also being flexible enough to be practical. This is a huge task and

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one that should not be rushed. The ambitious timetable to get these regulations laid before Parliament this year puts successful implementation at risk. After this consultation, the Government needs enough time to consider the responses they have received, draft regulations and then consult on these; we do not believe the current timeline allows sufficient time to do this.

Response

Implementation date

The BCC firmly believes that implementation should be delayed until October 2011, the last common commencement date allowed under this directive. This will give the sector time to prepare, reduces the risk of harming economic recovery and, crucially, will give the Government sufficient time to write clear, business friendly guidance.

Our Economic Forecast predicts that unemployment will peak at 3.2m in 2010. Although the economy is showing signs of recovery, poor, early implementation of this Directive will further damage job creation in the UK and will impede economic growth.

Scope of the Directive

The British Chambers of Commerce (BCC) is pleased that limited company contractors and those working on a ‘managed service contract’ have been excluded from the scope of the directive. The definition of worker used in the Working Time Regulations is familiar to employers and should offer sufficient clarity.

Holiday and working time entitlements

The BCC believes that agency workers should only be entitled to the basic statutory minimum holiday entitlement and that this would fulfil the requirements of the Directive. It would cause tremendous administrative problems for agencies if different workers had to be given different holiday entitlements after 12 weeks in a given job.

Businesses often hire agency workers to cover a busy period, such as Christmas time. These temporary workers are often expected to work bank holidays, and may, or may not, be offered the same rate for doing so as permanent employees. The Directive refers to ‘public holidays[iii]’, which does not equate to bank holidays. Therefore, we do no think that all agency workers should be given the same back holiday rights that permanent employees enjoy and we do not believe that the Directive prevents this interpretation.

Pay

The BCC believes that pay should be defined as basic hourly pay. We do not agree that this definition would be invalid for the purposes of implementing the Directive, nor do we agree with the contention that this would not reflect the true value of the work done by the agency worker. Many end users will choose to give additional benefits to their temporary worker. However, the agency worker is free to choose to work, or not, on that assignment. If they do not believe that their pay package reflects their true worth then they do not have to take the job. Pay and benefits for agency workers are not only determined by the end user organisation’s benefit structure, but also by the supply and demand of labour in the economy. For example, under current conditions an oversupply of labour has a deflationary impact on pay and benefits.

BCC believes that implementation of this Directive should require end users to pay agency workers the same basic pay as permanent counterparts but that legislation should not force them to go further than this. To do so would be to ignore the way demand and supply works in our flexible labour market.

The consultation document refers to, 'contractual entitlements that are directly linked to the work undertaken by the agency worker while on assignment.' This attempts to draw two distinctions; one between contractual and non-contractual entitlements and one between benefits directly linked to work undertaken as opposed to indirectly linked.

Most entitlements are contractual in nature, although many, such as bonuses, may have a discretionary element. Therefore, in reality, most benefits will be covered by this legislation. In the case of bonuses, even pro-rata bonuses may be paid after the temporary workers have finished the assignment, or even after they have left the agency. The factors in the good performance of the worker which led to the bonus are unlikely to be very short term. Even in the case of sales, teamwork, marketing, product selection and an endless list of other factors will also have played a part. Therefore, to say that if a temporary worker is not given a bonus payment then this does not reflect the true value of their work misses the point of why bonuses are paid to permanent employees. Very few, if any projects, will be so self-contained that only the workers involved in it at a specific point in time made any contribution.

Pensions

Agency workers are included in the 2012 pensions reforms which will mean that they will be entitled to a minimum 3% contribution by the agency. This does not mean that they will have equal pension rights to the permanent workers in an end user organisation which is what the consultation document infers. On the contrary, their pension rights will be managed by the agency, without reference to the end user.

12 week qualifying period

BCC supports the view that 12 weeks should be interpreted as 12 calendar weeks. This is the fairest, and also the most administratively simple, method of implementation.

The consultation document does not make clear when a new qualifying period has begun with the same employer. Both the phrases 'substantially and 'substantively' different are used, which do not mean the same thing. The question then refers to, 'a change in responsibilities'. Although for the sake of expediency it may be attractive for the Government to leave the detail to guidance, we think that this uncertainty would be very dangerous for employers and agencies and leave both parties open to unnecessary and costly tribunal claims.

Our preferred term would be 'materially' different. This is a recognisable and clear legal term. There should be a rebuttable presumption that if the end user informed the agency that the worker was undertaking a materially different role that they were indeed doing so. From our consultation, it is clear that this does not happen very often. It would also encourage employers who *do* materially change an agency worker's assignment to inform the agency so that they can be aware of what, where and when their temporary worker is working.

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The ‘material’ difference could be drawn from a list including a different location, different shift time or different work. If this difference is deemed to be material then the qualifying period would start again. For example, in the case of location, it would not be materially different if a commercial driver began their journey in location A for the first 12 weeks and location B for the following. However, if an agency worker worked on a production line in location A for the first 12 weeks and then transferred to location B to do the packing of the product, this would be a material difference, as it would be an entirely different work environment.

Guidance here will be crucial. For some end users it may be legitimately attractive for them to place workers in different areas of their business for 12 weeks at a time and they should able to do this with some degree of legal certainty. This should not be seen as circumvention; if the roles are materially different then the 12 week qualifying period should restart.

Break between assignments

The break should be four weeks; this is long enough to constitute a true break and should be acceptable to all parties.

Workplace agreements

Businesses should be able to make use of this derogation if they wish. The BCC does not believe that the tripartite relationship makes this complex; the agency will not be involved in the workplace agreement, it will be a matter for employees and employers. The same level of protection given in other types of workplace agreements will apply here.

Pregnant women

The agency should have an obligation to find the pregnant worker alternative work if a risk assessment means that suitable alternative work cannot be found within the end user’s organisation. However, it should clearly state in the regulations that if a pregnant worker refuses an offer of suitable alternative work proposed by the agency then the agency will not be liable to suspend the worker on full pay. We agree with the Government view that this obligation should only be for the length of the original assignment that the worker was unable to carry out.

Access to employment vacancies

This right does not mean that all agency workers should be told about all employment vacancies in the end users businesses. Many workplaces will not tell all employees about all vacancies, particularly if they require special skills that only a small percentage of the workforce will have. This needs to be borne in mind when interpreting the Directive. Our concern is that the current interpretation may be too broad and that it would require all agency workers to be informed of a vacancy that only a few permanent employees were given access to. Therefore, we would like the regulations to better reflect current internal recruitment law and practices.

Access to on-site facilities

As the consultation document states, many benefits, such as crèche facilities, are offered on a first come first served basis. Therefore, they are benefits which an agency worker, quite legitimately, may miss out on, as will permanent employees.

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The allowance for objective grounds here is crucial; if there is a bus which takes call centre workers to an out of town location with a spare seat on it, then it is right that the agency worker can take that seat. If there is not a seat, an end user should not have to hire a new bus. Childcare vouchers are not mentioned in the consultation document and it would be useful to know how these will be treated under the UK implementation of the Directive.

Establishing Equal Treatment

The BCC believes that the Government's proposals here 'goldplate' the Directive and could lead to dangerous uncertainty which will increase the number of vexatious claims at tribunal and also make agency workers in the UK less attractive to hirers.

The comparator should not be, as stated in the consultation document, an employee doing 'broadly similar work.' This is too wide. The directive talks about the 'same job', a much stronger test then 'broadly similar work.' 'The Government definition would allow for an agency worker who is a cook to compare themselves to a permanent employed painter or for agency worker who is a cleaner to compare themselves to clerical staff. These examples are taken from equal pay claims where such a broad interpretation of the comparator is allowed. If the same interpretation is made here, this risks making the law so uncertain that hiring agency workers becomes too risky as the comparator is too broad.

The BCC believes that if there is an actual comparator then this should be the reference point for the case. The Government plans would allow 'other factors' to be taken into consideration but this uncertainty risks allowing vexatious claimants to hold employers to ransom and force them to settle, or else risk a costly tribunal battle. If an employer can point to an actual comparator, and this comparator is accepted by the tribunal as the right one, then there should be no other admissible information.

If there is no comparator then there can be no claim. This is an equal treatment directive and so by definition, there must be someone to whom the agency worker is equal to for there to be a claim.

The Equal Pay Act 1970 should be used as the model here and this legislation demands that the comparator must be a real person. If a woman works in an all female workforce then she can have no equal pay claim. This is still the case if she works for a contractor with all women staff for an employer with male staff, even if, had she been directly employed, one of the male employees could have been an actual comparator.

Liability

BCC agrees with the basic model that the agency should have primary liability with the option available to the Tribunal to join an end user to the claim. However, we believe that the agency should also be able to join the end user to the claim if they wish. Commercial realities mean that in many cases this is unlikely and should act as a filter so that only end users with a case to answer are brought to tribunal. However, this would make liability fairer and make tribunal cases more efficient.

The defence that an agency would have is not made clear by the consultation document. Furthermore, the defence only refers to the obtaining of the information. We believe that an agency should have to make reasonable steps to obtain the information *and* there should be an 'irrationality' in the processing of that information. This would be a high threshold; in public law terms, irrationality refers to a decision

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'outrageous in its defiance of logic.' The reason for wanting this extra test is to protect, particularly smaller businesses, which may have little knowledge of the law and no knowledge of the agency sector. Currently, if this situation arises, then it is the agency (the party with the specialist knowledge of the temporary worker market) who will be advising the business. We do not want these roles to be removed or hampered by implementation of this Directive.

It is also unclear in the document how the 'information flow' would work in practice. This first obstacle is the hypothetical comparator; if the Government does decide to allow the use of the hypothetical comparator here then there won't be any information that can pass from the hirer to the agency as they have no actual person to compare to.

It is also unclear what the necessary information would be. Again, this depends very much on the interpretation of equal treatment and the use of the comparator. However, the plans in the consultation document mean that the definition of pay and the comparator are so broad that an end user would have to provide a huge amount of information for an agency to sift through. This would probably include the pay rates of different people in the organisation (as it may not be clear who the comparator would be) and also all the benefits these employees are receiving, whether based on length of service or purely contractual. Many businesses will not want to give all this information and even for those that do, they may find it too time consuming and costly and therefore prefer to directly employ, if at all.

Indemnity clauses are often found in standard form contracts now, on both the side for the agency worker and the end user. This issues is not mentioned in the consultation document and whilst we would like to prevent changes to legislation (especially regarding such an important issue as freedom on contract), indemnity clauses risk undermining the legislation.

Workers do need to be able to request information to help build a tribunal claim but a refusal by the agency to give the information cannot infer anything about whether or not their treatment was equal. An agency may not have passed on the request to an end user and in this case, it would be unreasonable to infer anything on about the treatment that an agency worker was given.

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[i] 3500 businesses were surveyed in April 2009

[ii] According to the British Chambers of Commerce Burdens Barometer which uses the Government's own impact assessment figures.

[iii] Public holidays in the UK are limited to Christmas Day and Easter Sunday

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