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The *Acas Policy Discussion Papers* series is designed to stimulate discussion and debate about key employment relations issues.

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The Agency Workers Directive: a permanent solution to temporary work?

The government has just launched a consultation on proposals to implement the EU's Agency Workers Directive in the UK. Under the proposals agency workers will get the same rights to basic pay and conditions as permanent workers once they have spent 12 weeks in a given post. The government is also introducing measures to give greater protection to those workers deemed to be 'vulnerable' – that is "someone working in an environment where the risk of being denied employment rights is high and who does not have the capacity or means to protect themselves from that abuse" (*Vulnerable Worker Enforcement Forum Final Report*).

The issue of vulnerable agency workers is an emotive one and a great deal of evidence has been gathered by the TUC, CAB and others about the day-to-day hardships endured by many workers in low paid and insecure jobs. Of course, not all agency workers are low paid or would describe themselves as vulnerable. The job profile of agency workers is wide and can cover anything from seasonal agricultural workers to specialist IT consultants.

It is hard to predict what impact the agency directive will have on the employment scene. While the directive may attempt to be prescriptive about issues like holiday

entitlement and pay, it may prove more difficult to pin down the precise relationship between the worker, the agency and the end-user. Also, as the consultation document indicates, there is a great deal of discussion to be had around what constitutes a reasonable 'comparator' in terms of establishing equality and how to avoid abuse of the 12 week threshold.

This *Acas Policy Discussion Paper* looks at:

- agency workers: who they are and their experiences
- government proposals
- the nature of the triangular relationship between agency, employer and worker and the challenges this presents.

Who are agency workers?

There is some dispute over the number of agency workers in the UK. The BERR Survey of Recruitment Agencies (2007) reported that there were approximately 1.5 million agency workers in the UK, while the Recruitment and Employment Confederation puts the figure nearer 1.1 million.

The Centre for Employment Relations, Innovation and Change (CERIC) at Leeds University has produced a report that illustrates the main characteristics of agency

workers. The report – *Agency workers in the UK: what do we know?* – finds that:

- two-thirds of agency workers are in clerical, semi-skilled and unskilled occupations
- the average time an agency worker stays in a job is 4.5 months
- 5% of agency workers have arrived in the UK since 2004
- agency workers have broadly equivalent qualifications to permanent employees
- a high proportion of agency workers are young and unmarried.

A recent report from the *British Journal of Industrial Relations*¹ describes how a large hotel and NHS hospital in London use employment agencies to provide workers for low wage jobs. Typically, these involve cleaning hotel rooms and hospital wards, making and serving meals and doing general maintenance and security work. The report highlights what has been called the ‘super-diversity’ of the UK’s migrant population, as well as the globalisation of the agency industry – for example, the hotel studied in the report used off-shore agencies to recruit workers from their home countries. These workers were often specifically chosen for their national stereotypes – for example, Vietnamese workers were described as ‘compliant’ by the head of housekeeping at the London hotel – and asked to do specific jobs, such as room attendant or waiter.

A report² by one of Europe’s largest employment agencies, CIETT, reveals that:

- the number of agency workers in the UK doubled between 1996-2006
- the UK has the highest agency work penetration rate (defined as the average daily number of agency workers as a percentage of total employment) – 4.5 % in 2006 compared to 2% in the USA and 1% in Germany
- after Japan, the UK has the largest number of employment agencies in the world (10,500 in 2006)

Agency workers are not just used to provide ‘warm bodies’ to do routine, often repetitive tasks – in hospitals, hotels and call centres. They are also used to provide highly

skilled workers in areas such as IT and web development. According to the CBI/Pertemps *Employment Trends Survey 2007* the skilled sectors are “significant users of well paid agency workers”. These sectors include the energy and water sectors (with agency workers making up 7% of their workforce) and the manufacturing sector (5% of the workforce). Indeed the CBI believes that this commercial arrangement, between the agency and the end-user, not only offers great commercial value to the economy but also provides employers and employees with much needed flexibility.

Inevitably, it is abuses of low-paid workers that naturally grab the headlines. Many of these abuses involve migrant workers, such as the story reported in the *Guardian* (30 June 2008) of the migrant builder who took home £8.80 for a week’s work while employed on a government scheme. There are strong calls for the government to extend the Gangmasters Licensing Act to cover the building trade, yet it is the wider argument over the definition of a vulnerable agency worker that throws some light on the public’s relationship with what the TUC describes as these ‘hidden lives’. Are agency workers vulnerable because they are at risk of being denied rights, as the TUC argue, or is their vulnerability only triggered, as others say, if an employer exploits their position? In other words, is it a question of ‘out of sight, out of mind’ until something goes wrong?

Any discussion of the role that agency workers play in our society inevitably comes back to getting the balance right between protection and flexibility in the market place. Those who argue in favour of greater flexibility often base their arguments on choice – allowing employers the choice to take on and let go of staff quickly and easily as demand and the economic climate dictates; and allowing working parents, carers or those returning to work and young people entering the labour market for the first time like students to choose where they work and for how long without too much commitment. The demand for more government protection is often linked to issues of equality and social inclusion. Achieving a balance between the two is supposed to give employers the ability to hire and fire easily and, at the same time, provide a strong safety net for those who lose their jobs.

Behind this balancing act there is also the question of morality. The government wants to promote social inclusion

by supporting ‘good employers’ so that fairness at work – what Acas has called “a moral and legal duty”³ – goes beyond issues like disability, sex and race to encompass equal pay and holiday entitlements. It will be interesting to see whether agency workers are still regarded as ‘good workers’ once the directive has been introduced and an employer has to weigh up the flexibility they offer against any new administrative costs.

Experiences of agency workers

Although agencies can offer some workers the flexibility and variety they are looking for at work, there are conflicting reports of how well employers treat agency workers.

An article published in *Labour Research*⁴ is just one of many recent accounts of employers treating agency workers less favourably than permanent staff doing the same work. This story involves some of the 8,000 agency staff employed by a large telecommunications company. Many of these staff are paid at a lower rate and have inferior terms and conditions than permanent colleagues they sit alongside.

The CERIC report reveals that although it often costs an employer more to use an agency worker, the agency worker often receives less as the agency takes a fee for providing the labour. In effect the agency worker pays all or part of this fee by having lower wages but this is what the Regulations are trying to tackle. The BERR consultation document on agency workers compares the hourly rate of agency and permanent employees and reports that full-time agency workers earn only 80 per cent of the wages of their comparable full-time employees.

In 2006 Acas published a qualitative study of *The experience of ethnic minority and migrant workers in the hotel and catering industry*. The study does not specifically cover agency workers but it does support the view that many agency workers at the low-paid end of the spectrum often work very long hours and receive little training or career development. A Polish agency worker in London recounts a typical working week working on multiple agency contracts:

“36 hours cutting grass, 10-20 hours in the [catering job], and 10 hours of being a doorman. I haven’t

even thought about how many hours I do, about 58 hours, not a tragedy. Yesterday, for example, I did a day from 8am to 1am.”

A Lithuanian waitress employed through an agency to work in several hotel restaurants described a reactive attitude to training on the part of her employer:

“They tell us how to do things only after we do something wrong, then they explain the thing to us.”

As well as a lack of training and promotion opportunities the report highlights a lack of awareness of employment rights – something the government is hoping to target with its helpline for vulnerable workers and supporting awareness campaign.

Low pay, long hours, poor conditions, repetitive work, and little say in what you do or the way you do it. If this is the experience of many agency workers in the UK then the case for more regulation seems open and shut. The Recruitment and Employment Confederation (REC) report⁵ on temporary agency workers in the UK challenges this assumption. The report suggests that temporary work provides workers with very real answers to many very difficult questions they face during their working life – such as:

- How can I get work experience after being unemployed for so long?
- How do I keep my hand in and earn some money while I’m studying?

The research states that temporary work represents a “positive choice” on the part of most agency workers and not a last resort. REC found that “overall, most workers (81%) say that they are ‘very’ or ‘fairly’ satisfied with working as a temporary worker through an agency”. Agencies may well be functioning as a ‘shock-absorber’ for the UK economy, as the REC report states, “cushioning employers and workers from increased uncertainty”, but what impact does this constant uncertainty have on organisational effectiveness and productivity?

The Centre for Economic Performance⁶ has published research that suggests there is “no evidence that the use of temporary staff reduces average organisational

commitment in the workplace”. This seems to make sense – after all, agency workers are more likely to be anxious to impress and the temporary nature of their work contract may ‘keep them on their toes’. However, a growing body of research contradicts these findings by drawing on the link between the degree of control employees have over the way they do their jobs and the impact on:

- health and wellbeing
- organisational commitment; and
- positive discretionary behaviour.

In other words, the greater control, the greater the sense of wellbeing and the higher levels of motivation. The 2006 Skills Survey found that agency workers enjoyed far less ‘task discretion’ than other workers. Roughly one in six agency workers were dissatisfied with the variety of their work, compared to one in twenty permanent workers. Boring repetitive jobs where workers have little say in what they do and how they do it is more likely, according to research, to make them feel less committed to their workplace.

Workers v Employees

Most agency workers are classed as ‘workers’ and not ‘employees’. This means they are not entitled to redundancy pay. They are also not able to claim unfair dismissal at an employment tribunal.

Although workers may often have contracts of employment they do not have the same “mutuality of obligation” with their employer, which reflects the more permanent nature of the employee/employer relationship.

This lack of commitment is not just associated with agency work. The CIPD⁷ has published useful research on the important role that line managers play in employee engagement. Employee engagement can be triggered by many things, including job security, career development and effective training. Agency workers are less likely to experience job security and although there has been some evidence of employers using the ‘temp to permanent’ strategy when selecting workers for established jobs, agency workers receive much less training than their

permanent counterparts. As the recession bites it is temporary and agency staff who are often the first to go since the redundancy costs tend to be zero or very low. Very few agency staff have enough service to qualify for redundancy payments and even if they have these will be paid by the agency and not the client company. The client company has very little to lose and the risk is placed on the workers. For example, when a large telecommunications company announced in November 2008 that it was cutting 10,000 jobs it was widely reported that the company’s indirect labour force would be primarily affected, including agency workers, contractors and offshore staff. These jobs were predicted to be cut by 12%, whereas direct staff numbers were expected to come down by 4%.

CERIC’s research found that fewer than one in five agency workers had experienced any type of training in the previous three months (the average agency worker is employed for 4.5 months). The report also found that agency workers are not only given little opportunity to develop new skills, they are also very much less likely to make use of their existing skills. Many are working at the bottom end of the labour market doing low skill work. The consultation document on agency workers asks specific questions around access to employment, collective facilities and vocational training and how these issues can act as stepping stones from temporary to permanent employment.

Government plans: protection v flexibility

According to the government, vulnerable agency workers represent part of a vast untapped skills resource. The DTI’s *Success at work: protecting vulnerable workers, supporting good employers*, published in 2006, states that “there are still too many people who aren’t fulfilling their full potential or are stuck on the margins of the labour market”.

The individualisation of employment rights has made greater protection for agency workers inevitable, but is a compromise between flexibility and protection possible? The agreement between the TUC and CBI to give equal treatment to agency workers after 12 weeks was seen by many as a landmark yet the BERR press notice still juggled the need to “respect the overall protection of agency workers” while avoiding “unnecessary administrative burdens for business”.

More importantly, what will the government changes mean to agency workers? Agency workers are currently entitled to some of the same rights as permanent employees – namely health and safety protection, the national minimum wage, limits on working time, paid holidays and many anti-discrimination laws. The agency directive plans to give agency workers equal rights after 12 weeks to the same “basic working and employment conditions”. Principally, this means equal treatment in terms of pay and holiday entitlement, but does not include occupational social security schemes like pensions. In fact, agency workers rarely have access to occupational pensions and are often not eligible for various state benefits. We will have to see what response the government’s consultation gets, but already some interesting questions are emerging:

- what is ‘any given job’ and how easily will the 12 week rule be open to abuse? In other words, will 11 week contracts become the norm, as some people fear?
- how do you compare **the job** of an agency worker and permanent worker? In many workplaces, such as call centres, teams of agency workers are employed and there are no comparable employees
- how you compare **wages**? The consultation document suggests that wages should include payment for overtime, shift allowances, unsocial hours premiums/bonuses but exclude things like profit sharing schemes
- who is responsible for resolving **disputes** over issues such as pay?

Another important question: how many agency workers will actually be affected by the directive? It is hard to find figures for the number and proportion of agency workers who have worked for an employer for 12 weeks or more. The BERR consultation paper suggests that only 40 per cent of agency workers have “assignments in excess of 12 weeks with a hirer”.

In its report *Hard work, Hidden Lives* the TUC reproduces a case study of one of those agency workers who would not be covered by the proposed changes. In the case study Imran is sacked without notice or explanation after working for a large public service provider for four weeks. The study relates how, to compound matters, Imran was also not paid for two weeks’ worth of work and had not received

the premium rate he was due for working on public holidays. If the directive was in place Imran would still not be able to claim equal pay with comparable permanent employees (if there were any). However, even after 12 weeks, the issue of parity may not always be clear cut. For example, an agency worker might discover that his permanent colleagues have been given a Christmas bonus. He could take up this claim for the same bonus with his agency (if he’d worked in the post for 12 weeks) but the agency, in turn, may plead ignorance of the arrangements the organisation has for bonuses. How well agencies communicate with their clients may not have been a pressing issue in the past but it may become increasingly important.

Pay and job security are not the only concerns troubling agency workers. Workers who call the Acas helpline are often anxious about discipline and grievances. The callers are typically confused about who they take up grievances with and who is responsible for conduct and performance matters. They ask questions such as:

- who do I talk to about the problem I have with my boss?
- who is responsible for setting my performance levels and for checking these are maintained?

Put simply, who is the boss? The employment contract is with the agency, yet it is the manager in the client company who is responsible for managing performance and allocating work. Anecdotal evidence suggests that some end-user companies are often discouraged from using discipline and grievance procedures. To do so would suggest a “mutuality of obligation” with the agency worker that they are keen to avoid. Yet the issue of discipline and grievances is important to any employment relationship. If the agency is responsible for these key areas, how can they realistically be managed when there is often so little communication and interaction with the worker?

Ignorance of employment rights is widespread among many of the more vulnerable agency workers. Citizens Advice have recently published a report⁸ detailing the discussions between vulnerable workers and CAB advisers. The report finds that approximately one in four perceived employment right breaches were identified by bureau advisers without the worker knowing that a right had been breached. Over

half of workers having initial discussions with bureau advisers had already left their employer.

The government has set up a Fair Employment Enforcement Board which will coordinate the work of the government enforcement agencies covering minimum wage, health and safety, employment agencies and gangmasters. Later this year there will also be a dedicated helpline so that vulnerable workers can report employment abuses, along with an awareness campaign.

The triangular relationship: an Acas perspective

Linda Dickens⁹ has eloquently pointed out that the study of employment relations, and regulation, has tended “to focus on the standard, typical employment relationship”. Models of employment, she argues, have taken “the male worker and male patterns of employment as the norm”.

The Acas ‘brand’ is still often linked to the high-profile work it carried out in the late 1970s and early 1980s, resolving disputes between unions and employers. Our role was akin to a boxing referee, pulling apart heavyweight fighters. They really were the days of ‘beer and sandwiches’, when cans of lager and fish and chips were routinely bought in to help fuel the conciliatory process. This old model of employment is based on a reciprocal relationship: the employer needs long-term skilled employees who are committed to their jobs and employees need security for themselves and their families.

Of course, the growth in employment rights has changed the landscape dramatically. The majority of Acas resources are now devoted to resolving disputes between individuals and their employers before they reach employment tribunal. The growth in these employment rights reflects the more diverse, flexible workforce in operation today. Dickens argues that “standard legislation designed to provide worker protection may be seen as establishing a poor fit with changing organisations, managerial approaches and also worker preferences”.

One of these significant worker preferences is the choice amongst a growing number of workers not to have a permanent job. Boxall and Purcell¹⁰ argue that some

workers can achieve a better work-life balance and career through agency work – such as those agency nurses in hospitals – than through permanent work. Many of these workers may be making their own choice about the balance between protection from employment abuses and the need for flexibility, but if they are deliberately opting out of permanent employment are they also opting out of the traditional employer-employee relationship upon which so much good employment practice is based?

Put bluntly, most employment advice, including that produced by Acas, is directed towards giving employers the guidance they need to become good managers. This means getting to know your employees and understanding their training needs, their health concerns, their family commitments, and the way they work best. This understanding underpins the notion of a psychological contract as espoused by Rousseau and others. Some commentators argue that the trappings of this understanding or contract between an employee and employer – ie recruitment, training, written policies and procedures – represent the administrative burden to business, particularly small businesses, that the government is keen to avoid. Administrative burden may be a genuine concern for small firms – particularly with the current economic downturn when organisations may be inclined to get rid of agency workers first – but lack of employment protection is also causing high levels of anxiety amongst workers.

Agency workers, the CERIC report finds, experience the greatest anxiety about all cases of mistreatment compared to permanent, fixed-term, seasonal and other temporary workers. About one-third of agency workers reported feeling ‘very anxious’ about arbitrary dismissal, discrimination and victimisation by management. The TUC case study referred to earlier illustrates this point clearly, with Imran feeling ‘stress and humiliation’ at what had happened to him. So, there is a real price to pay for the flexibility work can offer.

Who is responsible for protecting agency workers? Davidov¹¹ argues that in the UK the role of employer is not played by the client company or the agency. Davidov believes that the responsibility for protecting agency workers should actually fall to both parties. Responsibility is obviously a key issue when it comes to nurturing trust



and the kind of cooperative working that Acas advocates. Building trust and the mechanisms for joint working takes time – a commodity that is often in short supply when establishing relationships between an agency worker and the client company.

Twenty-five years ago John Atkinson, of the Institute for Employment Studies, produced a ‘core-periphery (flexible) employment model’ which still helps to explain changing ways of working. The model consists of a series of concentric rings showing the core and two different types of peripheral workforce. If the old employment models described by Dickens and others reflect the male-oriented paternalistic work environment of their times, the new flexible model resembles a complex, extended family where employers have to manage homeworkers, the self-employed, agency workers, seasonal and contract workers as well as permanent employees.

The model is based upon the idea of functional and numerical flexibility. If organisations are increasingly made up of ‘core’ groups of employees and ‘peripheral’ groups of workers do we need two different tiers of employment protection to cover these different kinds of working people? Or does our idea of what constitutes a typical or standard working relationship need to change? It is an area that urgently requires further research, specifically to look at worker, agency and employer experience of how the triangular relationship works and what further guidance may be needed.

The CERIC report is a timely jolt to remind us just what we do, and don’t know, about agency workers. The report concludes by saying that “there is clear cause for concern and an extension of regulation requires serious consideration”. The Government’s consultation period for the Agency Workers Directive, which runs until 31 July, gives us all a chance to reflect on the role agency workers play in our society. Is the directive just the start of regulation for agency workers and how far will these measures go, and will the directive be able to address some of the underlying concerns raised in this paper – such as, ‘who’s the boss?’

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