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Welsh Government Consultation

Hiring agency workers during strike action in Wales

Response from the Employment Lawyers Association

6 December 2016

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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. 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 Daniela Mahapatra (NHS Wales) and Robert Davies (Walbrook Law LLP) was therefore reconvened under the auspices of ELA's Legislative and Policy Committee to comment on the Consultation document. Members of the sub-committee are listed in Appendix 1.

Consultation Response Form

1. The Welsh Government believes that the effect of the law currently in place should continue, in which Welsh public service employers are not be able to use workers employed by an employment business to provide cover for staff taking industrial or providing cover for them.

Do you agree? Yes/No

Commenting on the proposal, from an underlying policy perspective, is beyond the scope of the working group, although we note the Welsh Government's focus on the continued effect of the current law.

2. The Welsh Government believes that the current voluntary arrangements are adequate to ensure that 'life and limb' continues to be protected by public services during industrial action.

Do you agree? Yes/No

Whilst some members of the working group are advisers for public services and unions in Wales, we do not speak (or seek to speak) on behalf of those organisations.

We anticipate that existing voluntary arrangements between employers and trade unions in Wales are influenced by a genuine desire to maintain emergency services and to protect the public during times of industrial action. However it is also potentially the position that

on occasion the ability to do so may be perceived as being insufficient in practice from the perspective of the service provider.

On the basis that the working group comprises legal advisers rather than personnel engaged by service providers in the delivery of front line public services, it is not realistic for us to comment substantively on whether the current arrangements are adequate in practice. However, we anticipate that consultees amongst Welsh public services and trade unions will be better placed to respond to this question and will do so.

3. The Welsh Government does not anticipate that the proposal would significantly affect the financial position of employment agencies and businesses.

Do you agree? Yes/No

The working group membership does not include representatives from employment agencies and businesses and we anticipate that you will hear from those organisations directly. However, it would appear that should the status quo remain, there should be no affect on the financial position of such businesses in Wales who provide services exclusively to the Welsh public services in that the focus is upon the public sector being unable to use agency staff within the context of industrial action, rather than in some way seeking not to contract more broadly with an employment business itself should it make use of the proposed change to the law in England in respect of services outside the public services/public sector. We make this observation because we presume from the Consultation Paper that there would be no intention to impose a prohibition on businesses based in Wales from providing employees to cover industrial action in England, in competition with businesses based in England, in respect of public services.

4. Do you agree that the option to use primary legislation to create a duty on Welsh public service employers not to use agency workers best achieves our intention?

Yes/No

In our view, the method that appears to provide the most clarity and certainty in respect of creating a legal duty upon the public sector is to use legislation (whether primary or secondary) rather than relying upon guidance which may be optional or involve uncertainty as to its application. Commenting on the policy implications of either approach, however, is beyond the scope of the working group.

5. Do you agree that the option to use guidance or Ministerial direction to Welsh public service employers best achieves the intention?

Yes/No

Please see the response to question 4 above.

6. Are there any circumstances which should be exempted from the duty and if so what do you think would be the consequences of not exempting them?

Members of the working group expressed the view that it would be difficult to be prescriptive regarding potential exemptions at this stage. We anticipate that those at the

front line of Welsh public services and trade unions would be better placed to comment. It is anticipated that should the Welsh Government decide that there should be exemptions from the duty, the exemptions and the rationale for proposing them would be the subject of further consultation.

7. We have asked a number of specific questions. If you have any related issues which we have not specifically addressed, please use this space to report them.

We have nothing further to add.

Responses to consultations are likely to be made public, on the internet or in a report. If you would prefer your response to remain anonymous, please tick here:

Appendix 1 Sub-Committee members

Co-chairs: Daniela Mahapatra, NHS Wales and Robert Davies, Walbrook Law LLP

Angharad Booker, NUT Cymru
Evelyn Morgan, Vale of Glamorgan Council
Damian Phillips, Darwin Gray LLP