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**Department for Business Innovation and Skills Consultation
Paper Hiring agency staff during strike action: reforming
regulation**

Response from the Employment Lawyers Association

9 September 2015

Employment Lawyers Association Response

Department for Business Innovation and Skills Consultation Paper

Hiring agency staff during strike action: reforming regulation

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, chaired by Robert Davies was set up by the Legislative and Policy Committee of ELA to consider and comment on the consultation document on ballot thresholds in important public services. Its report is set out below. Members of the sub-committee are listed at the end of this paper.

Question 1)

a) i) How do you think the removal of Regulation 7 would affect employment businesses?

Positively	No impact	Negatively
x		

ii) Please explain briefly what you think the impact will be on employment businesses? (max 500 characters)

The majority of the working group considered that on balance it would be a positive development were employment businesses to have the option to determine whether to seek additional business (whether in some or all of the sectors most significantly affected by industrial action or otherwise) and as such the positive effects would be:

- A potential source of additional business may increase revenues generally
- For newly negotiated arrangements agencies may be able to secure margins in excess of their standard arrangements
- Agencies prepared to supply temporary work-seekers may cement positive relations with the senior management of the hirer clients which may broaden the range of services they supply to particular clients

The working group agreed with the observations generally at paragraph 63 of the Impact Assessment (page 27, second bullet) that in practice it is difficult to predict accurately how the skill-sets required for particular sectors/roles might be matched by temporary labour

generally whether nationally or locally which would be expected to influence the feasibility of the supply of work-seekers more generally.

It may be necessary for employment businesses to revisit the terms of existing contracts which may be silent on whether they are obliged to supply personnel during periods of industrial action by virtue of Regulation 7. In other words, employment businesses which would ordinarily/universally choose not to supply personnel in such new circumstances (following the removal of Regulation 7) may need to determine if they are able under the terms of their contract elect not to supply personnel without being placed in breach. It was felt that an appropriate lead-in time to permit such assessment/re-negotiation (if necessary) would be helpful.

The minority opinion, forcefully expressed, within the working group identified two potential consequences which may negatively affect employment businesses:

- Being drawn into industrial disputes to which otherwise they would have no involvement
- Souring/prejudicing their own industrial relations

It was noted that R188 - Private Employment Agencies Recommendation, 1997 (No. 188) in respect of ILO Convention 181 provides that “private employment agencies should not make workers available to a user enterprise to replace workers of that enterprise who are on strike” (Provision 6), implying a wider international view to the effect that it would be “un-ethical” to permit such conduct. (The UK has not ratified and is not bound by ILO Convention 181.)

b) i) How do you think the removal of **Regulation 7** would affect **work-seekers**?

Positively	No impact	Negatively
x		

ii) Please explain briefly what you think the impact will be on work-seekers? (max 500 characters)

The majority of the working group considered that on balance it had the potential to be a positive development for work-seekers primarily because some work-seekers might secure additional opportunities for temporary work that may otherwise not arise because of the reluctance on the part of hirers to engage personnel directly alluded to in the Consultation Paper (page 14, paragraph 14, Impact Assessment); and that their preparedness to do so may cement relationships with the hirer and the employment business to improve their prospect of securing improved engagements .

This was subject to the proviso that work-seekers should not be compelled, directly or indirectly, to accept such an engagement – whether by facing the risk of being subjected to a detriment over future allocation of engagements by a hirer or the employment business; or

through social security benefits being placed at risk in respect of any period in which a work-seeker refused to accept such an engagement. This was identified as a particularly acute potential issue were a work-seeker to be a member of the same union as that/one of those engaged in the relevant industrial action.

We note that an element of paragraph 15 of the Impact Assessment (page 12) seems unclear as a rationale for intervention. It suggests that work-seekers who may be supplied by an employment business were placed at a disadvantage in comparison with other work seekers who may lawfully be recruited temporarily directly by a hirer. This appears to imply that all individuals registered with an employment business might only seek engagements exclusively via the employment business, which appears an incorrect assumption.

c) i) How do you think the removal of **Regulation 7** would affect hirers?

Positively	No impact	Negatively
x		

ii) Please explain briefly what you think the impact will be on **hirers**? (*max 500 characters*)

The majority of the working group considered that on balance it would be a positive development for hirers to have the option available. However, the working group unanimously considered that hirers would need to consider carefully the advisability and feasibility of using the option.

Please refer to the response to 1a) (ii) above and Question 2 below as regards the scope for its utilisation in practice. It was also considered that some hirers may conclude that utilising the option might adversely affect their broader reputation to an extent that the option may be discounted in many scenarios.

It was considered that the Impact Assessment had under-estimated the potential transition costs at paragraphs 31-36 as they did not factor in the need for a broader feasibility assessment of whether entering into negotiations with employment businesses to address the scope for supply were Regulation 7 to be removed.

A minority opinion in the working group suggested that the preparedness to use agency workers might of itself exacerbate tensions between hirer and the relevant trade union/those employees taking industrial action creating two principal risks:

- Prolonging an underlying dispute
- Exacerbating industrial tensions for no discernible gain because health & safety and broader skill-set concerns (see above) coupled with potentially disproportionate additional costs of supply render it a theoretical rather than a practical option.

d) i) How do you think the removal of Regulation 7 would affect employees taking part in industrial action?

Positively	No impact	Negatively
		x

ii) Please explain briefly what you think the impact will be on **employees taking part in industrial action?** (max 500 characters)

The working group unanimously considered that the bargaining strength/leverage of those employees taking part in industrial action was likely to be reduced/negatively affected. However, it has been suggested by members of the working group that industrial action that fell short of strike action may be considered more frequently as an alternative strategy.

e) i) How do you think the removal of **Regulation 7** would affect the **wider economy and society?**

Positively	No impact	Negatively

ii) Please explain briefly what you think the impact will be on the **wider economy and society?** (max 500 characters)

Diverse opinions were expressed on this question and no single majority position was adopted. For some members of the working group the scope for the potential reduction in strike action and the associated reduction in the level of inconvenience (as identified in the Impact Assessment, and as summarised at Paragraph 20, page 7 of the Consultation Documentation) was sufficient to describe the proposed intervention as being positive for the wider economy and society.

Others expressed concern that the impact of the proposed removal of Regulation 7 coupled with additional reforms set out in the Trade Union Bill may in fact encourage a material number of workers to take unauthorised/unlawful industrial action which may prove counter-productive to society more broadly. This was irrespective of the actual scope for utilisation of the option dependent upon geography and skill-set – see 1b) and c) (ii) above.

A minority position strongly expressed within the working group considered that the various concerns identified in the previous responses meant that the proposed removal of Regulation 7 would have a negative effect.

Question 2)

a) The impact assessment for this consultation assumes that, between 17% and 27% of working days lost due to industrial action will potentially be covered by temporary agency workers, based on the limit of availability of suitable temporary agency workers, and the fact that some stoppages involve a large number of workers on a particular day. Do you think this assumption, as set out in the impact assessment, is reasonable?

Yes/no NO

b) Please give your reasons

Not all of the working group considered it appropriate to seek to express an objective conclusion. However the working group notes, in respect of this response and responses 3 and 4 below, the Regulatory Policy Committee's rating on 18 August 2015 that the Impact Assessment is "not fit for purpose". In particular, approximately half of the working group considered that the assumption(s) took insufficient account of the potential for geographical and sector specific considerations, including training, familiarisation time and cost, coupled with the attitude of individual work-seekers, to influence markedly whether coverage is feasible at the rates/levels identified in the Impact Assessment.

Question 3)

a) The impact assessment assumes that the current options for recruiting temporary labour to provide cover during industrial action are used infrequently, due to the additional costs and administrative burden of hiring staff directly, or contracting service providers at short-notice. Do you think this assumption is reasonable?

Yes/No YES

b) Please give your reasons

The assumption was felt to be reasonable provided that it is not suggested that these are the only two factors that determine whether temporary labour is/needs to be directly recruited. These are felt to be two important factors among several others such as:

- Wider considerations of on-going employee/labour relations
- The scope for duties to be covered by other categories of permanent employees not involved in the industrial action
- An awareness that there is not an existing pool of sufficiently trained/skilled/experienced employees capable of prompt deployment in relevant sectors
- Another current option not specifically identified in the Impact Assessment is using agency workers for duties relating to the business, even if indirectly relating to the

industrial action, provided they are not actually covering for employees who are taking part in industrial action. So, for example, drafting agency workers in to provide information/alternative routes to customers affected by a transport strike, or to resource a helpline etc. which may be a compromise solution for some businesses.

Question 4)

a) The impact assessment estimates that a quarter of the pool of temporary agency workers would be available for a placement at short-notice to provide cover for workers taking industrial action. Do you think this estimate is reasonable?

Yes/No

b) Please give your reasons

Not all of the working group considered it appropriate to express an objective conclusion. However, two particular concerns were highlighted in the difficulty of making such an assumption.

In summary:

- Coverage may be hugely dependent both on the specific sector/industry group, the geography of the affected business and the nature of the strike, making extrapolations from overall data challenging.
- There appears to have been no attempt to assess whether seemingly “available” agency workers would be willing to cover a strike and the extent to which a proportion of those “available” are likely to refuse this kind of work on a principle basis. (Although we accept that it may be difficult meaningfully to seek to estimate such numbers.)

Members of ELA Sub-committee

Chair: Robert Davies, CMS Cameron McKenna

Susie Al-Qassab, Howard Kennedy LLP

Rupert Farr, Blake-Turner & Co

Tessa Fry, GSC Solicitors LLP

Chris Holme, Clyde & Co LLP

Dave Palmer, Gibson, Dunn & Crutcher LLP

Tariq Sadiq, St Philips Chambers

Jeanette Sainsbury, UNISON