Department for Business, Energy and Industrial Strategy
Taylor Review – Agency workers recommendations
Response by Thompsons Solicitors
April 2018

1. Thompsons is the UK's largest firm representing workers and trade unions. Thompsons has acted for individuals, groups of workers and trade unions in thousands of cases concerning rights at work, including many leading cases in the UK and European courts, and has contributed to policy and campaigns on rights at work.

2. This response forms part of Thompsons' response to the consultations issued by the government as part of 'Good Work: A response to the Taylor Review on Modern Working Practices'. Thompsons is submitting a response on each of the four consultations: on Employment Status; Enforcement; Transparency; and Agency Workers.

3. It is right that the government should address the issue of insecurity and unfairness at work. However, the government's response is disappointing in the extreme. It does not address the fundamental issues. The government's response to the Taylor Review and the recommendations from the House of Commons Committees on Work & Pensions and Business, Energy & Industrial Strategy is merely to consult further. The government has not put forward any concrete legislative proposals nor indicated any timescale for legislation. This fails to address the real issues faced by many thousands of vulnerable workers. Action is needed now.

4. Thompsons has long campaigned for rights at work to be extended to all workers from day one. This should be based upon a clear definition of worker, which places the onus on the employer to prove that anyone working for the employer is not an employee but is carrying out the work in business in their own account. Workers should be given a clear statement of their rights from day one. Trade unions should be given access to workers to advise and represent. Enforcement of rights at work should be strengthened and simplified. Exploitation through zero-hours and similar contracts should be outlawed. Loopholes in agency worker legislation should be closed. The government should guarantee that the rights of UK workers will not be worse than those of workers across the EU. The government should commit that there will be no reintroduction of Employment Tribunal fees.

5. The government's response on all these areas is inadequate. We set out our detailed response to specific points in our response to each of the four consultation documents.

Section 1. Improving the transparency of information provided to work seekers

6. It is telling that the first of Matthew Taylor's recommendations to be actioned comes from the section in his report titled 'One-sided flexibility'. The recommendation itself was:

   'Government should amend the legislation to improve the transparency of information which must be provided to work seekers both in terms of rates of pay and those responsible for paying them.'

7. It came about after noting that:

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"Employers must not use flexible working models simply to reduce costs and must consider the impact on their workforce in terms of increased sickness rates and reduced productivity."

8. And in a section titled 'Informed Choices', it noted that the rise of the use of umbrella companies has caused confusion about what the rate of pay actually is and about who the employer actually is. The Taylor Report appears (p.46) to ascribe that confusion to a change in tax laws which broadened the use of Pay As You Earn. It is our experience that the use of umbrella companies was fuelled by the desire of agencies to force people into formal self-employment because:

   (a) It evaded many key employment rights;

   (b) It allowed them to protect their profitability by pushing down employment costs; and

   (c) It allowed them to charge separately for certain administrative services.

9. Thompsons welcomes the attempt to improve the provision of clarity in these circumstances, but feels that the suggestion of a 'key facts page' misses some important points.

10. Firstly, paragraph 10 suggests that an effect of this key facts page will be to "…allow work seekers to make a better informed decision on whether to accept a contract" and thus fails to recognise that jobs are not like different brands of baked beans on a supermarket shelf hoping to be picked. In practice, the job is accepted first and the paperwork is sorted out later. This notion of choice is risible for those work-seekers who are on Universal Credit. If they exercise the 'choice' of rejecting a contract then they face sanction for doing so, and the loss of Universal Credit for between 13 and 156 weeks (a period which might be longer than the job was due to last). We are unaware of how many registered work-seekers are in receipt of Universal Credit as we have been unable to find that data. However, we anticipate that it would be a significant number.

11. Secondly, regulation 21(1)(b) of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 already requires agencies to provide work seekers with the following information prior to starting the job:

   (a) The identity of the hirer and, if applicable, the nature of the hirer's business;

   (b) The date on which the hirer requires a work-seeker to commence work and the duration, or likely duration, of the work;

   (c) The position which the hirer seeks to fill, including the type of work a work-seeker in that position would be required to do, the location at which and the hours during which the work-seeker would be required to work, any risks to health or safety known to the hirer and what steps the hirer has taken to prevent or control such risks;

(d) The experience, training, qualifications and any authorisation which the hirer considers are necessary, or which are required by law, or by any professional body, for a work-seeker to possess in order to work in the position;

(e) Any expenses payable by or to the work-seeker; and

(f) In the case of an agency —

(i) the minimum rate of remuneration and any other benefits which the hirer would offer to a person in the position which it seeks to fill, and the intervals at which the person would be paid; and

(ii) where applicable, the length of notice which a work-seeker in such a position would be required to give, and entitled to receive, to terminate the employment with the hirer.

12. There appears to be some overlap with the sort of information which this consultation envisages in the key facts page, which therefore raises the question of enforcement: if similar statutorily required information is not being given out, how will a requirement to provide even more assist?

13. Thirdly, we are shocked by the omission of enforcement from the consultation. There is nothing asking about how such a failure is to be enforced.

The consultation blithely suggests:

'On the assumption that the requirement for the key facts page would be included in the Conduct of Employment Agencies and Employment Businesses Regulations 2003, the same penalties would apply for non-compliance. These penalties would be enforced by EAS and could range from the issue of a warning letter through to prosecution and/or prohibition (from owning/ running/managing an employment business) proceedings being brought by EAS.'

14. The Employment Agency Standards (EAS) Inspectorate is too small to undertake this task with the degree of reach that is required. Its own published strategy is of 'targeted enforcement' and that:

'The targets will be based on intelligence or information where there is likely to be a higher incidence of non-compliance with the employment agency legislation.'[1]

15. In other words it will, at best, be reactive and will not seek to enforce the law against infrequent or small offenders. The dwindling effectiveness of this is shown by the modest Strategy Target of carrying out just four planned targeted and evidence based 'street-sweep' proactive inspections of employment businesses a year[2] and also in the following

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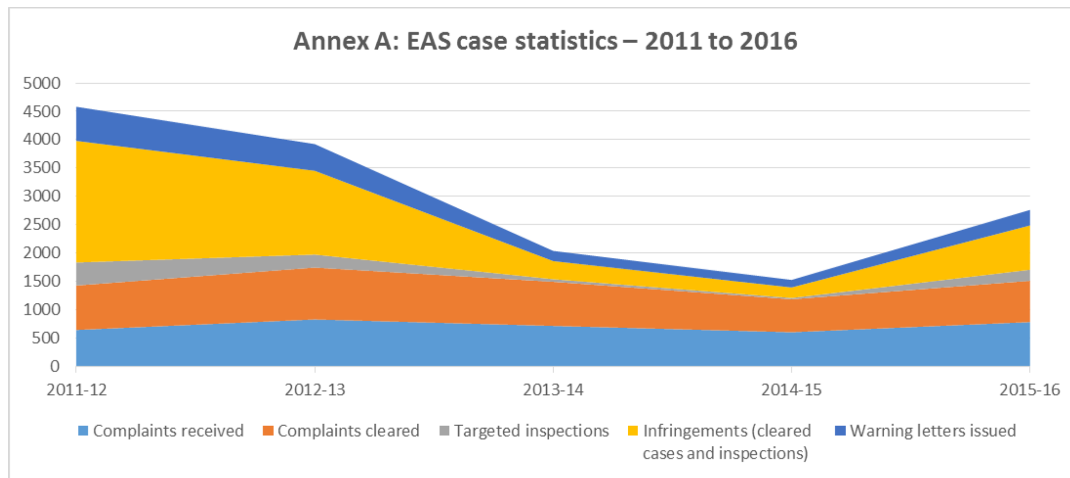
[1] Employment Agency Standards Inspectorate Annual Report 2015-2016, July 2016, paragraph 22

[2] Employment Agency Standards Inspectorate Annual Report 2015-2016, July 2016, Annex H

graph which contains a 'complaints cleared' total in five successive years of 784, 916, 779, 581 and 730[3]:



16. Matthew Taylor's report noted that:

    'There is a lack of robust data on the number of agency workers in the UK. Estimates range from 800,000 to around 1.2 million. The Recruitment and Employment Confederation (REC) estimate of 1.2 million is generally considered to be more reliable, with REC suggesting that the number of agency workers has remained fairly stable over the last number of years.'[4]

17. Against this background, a total clearance of 730 cases (0.06%) in the most recent year for which figures are available is modest in scale. A far simpler and more effective deterrent would be to introduce an Employment Tribunal claim that the information had not been provided with a receipted copy being a complete defence and a failure to produce one attracting a fixed penalty (e.g. £500). This could be done on the papers and reduces the risk of agencies gaming the enforcement system where they are also capable of reading the publicly available information cited above.

    Turning now to the questions:

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

18. We disagree slightly. It is likely to assist some, but for the reasons above will fail many others.

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[3] Compiled from information in Annex A of Employment Agency Standards Inspectorate Annual Report 2015-2016, July 2016

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Question 1 (c): Thinking about work seekers and employers in the recruitment sector, what impact would ensuring work seekers are provided with a key facts page have for:

19. Individual work seekers – a small positive impact for the reasons given above.

20. Employers in the recruitment sector – a small negative impact. This group is already under obligations to provide information of this kind and, although a small amount of extra work will be necessary, it is not likely to be very great, with much of it standardised. We note that, even in the worst case scenario in paragraph 18 of the consultation, the costs spread over a decade are £1m for 13,665,000 agency placements, i.e. 7 pence each.

Question 2: What information would be important to include in a "key facts" page?

21. This seems to us to an obvious opportunity to mirror the Statement of Particulars provisions which are contained in s.1 Employment Rights Act 1996.[5] We also think that it could be useful to provide a worked example based on a 35 hour week, showing the typical deductions which can be expected from the income which that would work attract. This can easily be produced from a spreadsheet.

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

22. This is an important issue, especially where English is not the worker's first language. We would suggest:

    a) That there is a requirement to provide the worker with a copy of the 'key facts' page on day one;

    b) That a named individual certify that they are satisfied that it has been provided and explained fully (this to be made available for any future inspection or enforcement); and

    c) That the format and content is standardised and compulsory. This allows for online advice to be standardised, thereby promoting its translation into other languages.

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

23. Yes. There is no benefit if the information is not understood. We think that this should be achieved by having an identifiable individual certify that they have explained the information to the work seeker, that to the best of their knowledge and belief they believe that the information was understood, and to say why. We would suggest that the work-seeker signing something to say they have understood is <u>not</u> to be taken as this evidence.

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[5] We note that this is proposed to be extended to 'workers' with effect from 6 April 2019

It is too easy to get someone to sign something without them understanding the paperwork, especially if they are desperate for the work.

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

24. No, we think this is a gross over-estimate, especially where the agency requests the information from the hirer in the first place and is simply either handing that over to the work-seeker. We have no further comment on 'other business costs'.

Section 2: Extending the remit of the Employment Agency Standards inspectorate to cover umbrella companies and intermediaries in the supply chain

Question 5: Have you used or are you currently using an umbrella/intermediary?

25. Not applicable.

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

26. Yes. We are aware of workers in the construction industry, entertainment industry and distribution sector (drivers and warehouse workers) who have been compelled to work through an umbrella company without the terms of the arrangement being made clear at the outset. Workers in these situations often accept work without question as an alternative to remaining unemployed. This was the case *in Blakely v (1) On-Site Recruitment Solutions Limited and (2) Heritage Solutions City Limited*[6] where the tribunal found that the Claimant had no choice but to accept the appointment on anything other than a subcontracted basis. The Claimant brought a claim for unlawful deduction from wages after he was asked to pay employer national insurance contributions for the umbrella company as well as management fee to them. The EAT held that a tribunal had been wrong to find that there was no contract either between the worker and the agency or the umbrella payroll company. The EAT criticised the, "lack of proper and full disclosure of several key documents pertaining to the relationships between the parties…" The case was referred back to a newly constituted tribunal to determine the contract on which the Claimant was engaged.

27. We are also aware of workers in the above sectors being advised that they must set up their own companies through which they will be engaged without being given the option of being employed directly even in circumstances where the company engages workers directly. This is usually to avoid the costs of providing employment rights such as paid holidays as is evident from the length of some of these arrangements which are for more than two years.

[6] **UKEAT/0134/17**

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Question 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; (please tick all relevant boxes)

28. We support the wider expansion proposed, but repeat our concerns about the resources available to the EAS to take on new work and the impact which that would have on an already constrained enforcement strategy. An increase in resources available to the EAS would be required. We also repeat our suggestion for the key facts page that an individual 'day-one' Employment Tribunal right be given to work-seekers as a means of enforcement.

Question 7 (a) and 7(b):

29. Not applicable.

Section 3: Ensuring the Swedish Derogation is used appropriately

30. Before we address this section we wish to state our opposition to the existence of the Swedish Derogation.

31. The Swedish Derogation refers to an opt-out clause negotiated by Sweden during the drafting of the European Directive on temporary agency work (Regulation 10 under the Regulations).

32. This states that the right to equal treatment on pay under Regulation 5 will not apply to an agency worker who has a permanent contract of employment with the temporary work agency, including umbrella companies.

33. The agency worker can, however, still claim equal treatment in relation to the other basic working conditions: hours of work, holidays, night work, rest periods and rest breaks.

34. We are aware that Matthew Taylor's report notes the evidence he received of numerous examples of workers being unlawfully forced to accept these contractual arrangements instead of more traditional models[7]. He also records the abuse of the system by agencies and umbrella companies.

35. It is our view that the Swedish Derogation causes an imbalance in the balance of workplace rights and tips it too far away from workers. In our view it is too readily open to abuse.

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

[7] Page 59

36. Not applicable.

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

37. Not applicable.

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

38. Not applicable.

Question 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 to facilities, rest break, annual leave or job vacancies?

39. Not directly. We refer to the TUC's March 2018 report: *Ending the Undercutters' Charter: Why agency workers deserve better jobs*. This sets out how agency workers too often get paid much less than directly employed staff for doing the exact same work due to the 'Swedish derogation' loophole. The provision perpetuates and fosters insecurity and instability in the job market.

40. The key findings in the report include:

    a) More than 420,000 agency workers have been in their jobs for more than a year and over 120,000 have worked for an agency for over five years;
    b) Agency workers employed under the Swedish derogation suffer a significant pay penalty with some agency workers earning up to £4 less per hour than directly employed staff even though they do the same work;
    c) Case studies provided by unions also shows that agency workers often receive fewer rights and fewer paid holidays than workers on a regular contract doing the same job; and
    d) While some have claimed that the workers have a choice about the form of agency contract they accept, at best this is a 'Hobson's Choice', with workers told they can either sign the contract, or miss out on the chance to work.

41. The research also shows that agency work is no longer a stepping stone into secure employment in many sectors and workplaces. Instead, agency workers can remain trapped in low paid, insecure work, with few rights in the workplace. Younger agency workers are particularly missing out on career progression.

Question 11 (a): Do you believe that that the above issues would justify wider state enforcement?

42. Yes.

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

43. See above, Question 7.

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