

Employment Relations Comment

March 2015

Three sides to every story: the impact of the Agency Worker Regulations

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Employment Relations Comment will provide short accessible features on topical employment relations issues.

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In a recent discussion in the European Parliament, the European Commission's Director of Employment, Social Affairs and Inclusion, Armindo Silva, reminded MEPS that the primary objective of the Agency Workers Directive had been "to establish a fair balance between two goals: improving the protection of agency workers (by establishing equal treatment) and supporting and recognising the positive role of agency work in bringing flexibility to the labour market (by encouraging the removal of excessive restrictions on this type of work)."

Silva's comments have resonance not only for agency workers, but for atypical work in general (including the much contested zero-hours contracts) where the debate has sought to shuffle the differing viewpoints around achieving a "fair balance" between labour market flexibility on the one hand, and the individual rights of employees on the other.

At the time of their introduction in 2011, the UK's Agency Worker Regulations (AWR) were heralded by the TUC as an "important step in tackling discrimination" against agency workers, but a report from the CBI a year later stated that "the experience of businesses has been that using agency workers became more expensive because of the complex compliance framework". A 2013 report from the Institute of Directors cites the regulations as an example of European legislation that has an "adverse affect on UK competitiveness", and yet, a European Commission review of the impact of the regulations in Northern Ireland, found that "clear feedback from agencies and hirers" was that, although "the regulations were too vague", only "a small number of hirers noted substantial additional cost in using agency workers."

The underlying premise of the regulations has also been contested. For example, in their 2012 report the CBI argued that regulations were "crafted with the view that agency workers are inherently vulnerable", something they

strongly disagree with, stating that “this is at odds with what agency temps in the UK themselves believe”. However, trade unions, along with other stakeholders, have expressed the opinion that this ‘inherent vulnerability’ is not only genuine but is being exacerbated by the way the regulations are being used by hirers and employers. Referring to the Swedish Derogation model of employment (whereby agencies pay workers between assignments but the worker waives their right to equal treatment on pay and other matters), Ed Milliband commented that “there is a loophole in the laws around agency work, which allows firms to avoid paying agency workers at the same rates as directly employed staff...” (January 2014). The Chief Executive of the Recruitment and Employment Confederation, Kevin Green, argues that far from being a ‘loophole’, these contracts are a “legitimate part of the regulations” (REC blog, 13 February 2015).

The arguments for and against protection and flexibility are so strong and persuasive that it begs the question: are the two things compatible at all? It is, perhaps, one of the most important questions facing policy makers concerned with the world of work, as the issue of achieving a ‘fair balance’, between employers and employees, between regulation and flexibility, goes right to the heart of the employment relationship.

Firstly, the introduction of the regulations does not seem to have had a dampening effect on the use of agency workers (according to Labour Force Survey figures). Although numbers reached a trough during the recession (245,000 in 2009), they have risen steadily since (reaching 320,000 by winter 2012, accounting for 1.27 percent of the employed workforce).

In recent years, the debate about the number of agency workers has been further complicated by the question of how best to calculate the volume of zero-hours contracts – with the Office for National Statistics changing their estimates of people working on zero-hours contracts to those who have “no guarantee of minimum hours”, which include some agency staff.

Acas Helpline: analysis of calls* relating to agency work

Of the 900,000 calls to the Acas helpline in 2014:

- 19% came under category of ‘contracts’
- 8,390 calls were about ‘zero-hours contracts’ (1% of total calls)
- 2,250 calls were about the Agency Worker Regulations (0.3% of total calls)

Of the calls about the Agency Worker Regulations:

- 43% were from agency workers
- 28% from employees
- 15% from employers
- 11% from employee representatives

** these figures are not an absolute indication of call volumes and are dependent on information disclosed by the caller*

But, beyond the numbers, what do we know about the experience of this section of the UK workforce? Acas has undertaken new research and done an analysis of calls to its telephone helpline to find out the issues most affecting agency workers and their employers and to gauge the impact of the Agency Worker Regulations on this unique employment relationship.

Some of the key findings of Acas analysis echo similar analysis Acas carried out on the use of zero-hours contracts. Our analysis shows that agency workers were often:

- **unaware of their rights**, particularly around holiday pay, notice periods and, critically, the ‘twelve week threshold’. One caller to the helpline had been working on the same assignment for over four years and didn’t know they were entitled to the same pay as an equivalent permanent employee

- **afraid of asserting their statutory rights** due to the perceived imbalance of power in the employment relationship. One caller working in a care home had flu and, concerned for the health of the clients he worked with, rang in to say he could not work his shift that day. He was fined £50. The system of fines had recently been added to his contract but he had refused to sign the new contract thinking it illegal. He told the helpline adviser that he was worried “people would come to work while sick to avoid the fine”, and that “the agency would stop giving him work if he made a fuss”
- **frustrated by ‘administrative’ issues.** For example, several workers calling the Acas helpline had not been paid for the final part of their assignment. Chasing payment wasn’t easy and they often didn’t know who to chase, so getting hold of someone was very difficult. One woman calling the helpline said she had tried emails and phone calls to no avail and felt “I deserve every penny I get”.

It is worth comparing these findings with the expectations and experiences of some employers. A recent CIPD report found that as many as 56% of employers used some form of fixed term contracts though they estimated that such workers amounted to just 5% of their workforce. One issue that concerned them was inconsistencies in the quality of work they are likely to get from ‘atypical workers’. And yet, despite this, atypical workers are not provided the same staples of a good employment relationship as permanent employees. For example, the CIPD report notes that far few workers on zero-hours, for example, have line managers (just 54% compared to the UK average of 80%), only a third receive performance appraisals, and only half get access to training and development opportunities.

An issue raised in calls to the helpline was individual agency workers taking on tasks that they felt poorly qualified to handle. One caller who worked for social services, said that she was coerced into working with vulnerable adults even though she had not

received training in “things like safeguarding and direct payments”. This different attitude towards atypical workers, on the part of some employers, is also echoed by the comments of an employer to the Acas helpline. The hirer had employed an agency worker for two years but claimed that their conduct and performance had deteriorated. Rather than following any standard good practice – around performance appraisals or disciplinary procedures – the hirer simply wanted to “terminate the assignment” immediately.

An Acas research paper, published last year by Forde and Slater states that the regulations provided “an ‘external shock’ to the activities of the three main actors in the agency relationship, which, it might be anticipated, would have a significant impact upon the relationship between the three parties.” From the evidence gathered through the Acas helpline, it appears that this shock has not altered concerns about the perceived imbalance in the employment relationship between the three players or the lack of awareness of employment rights on the part of agency workers (something that was also found in the Acas research).

But from the perspective of the hirer and the agency there have also been positive developments, with the research noting that many agencies were taking their responsibilities very seriously and felt that they were able to “ensure equal treatment over pay”. The report also suggests that the introduction of the regulations has sometimes helped to galvanise union activity with “unions adopting a range of organising strategies to try and improve terms and conditions for agency temps”. However, there remain considerable challenges for unions here, particularly in the light of shifting client and agency responses to the regulations.

In particular, the Acas research finds evidence to support the view that many agencies and hirers have developed stronger bonds after the regulations, but that this may not always have been to the advantage of agency workers. For example, there has

clearly been some evidence of agencies and hirers getting together to use contractual arrangements, including the so-called Swedish Derogation, that suit them best. As one agency manager is quoted as saying: "clients are getting together and insisting on the Derogations ... it's a zero cost strategy for them. They can push it onto agencies. But agencies are working with them on it too". Research from the Department for Business, Innovation and Skills in 2013 also reported that virtually all employers that regularly used agency workers "had changed their working practices to avoid using agency workers for more than 12 weeks". The reason they gave was a reluctance to "offer agency workers paid annual leave or equal pay."

Some might argue that the biggest challenge to these triangular relationships also provides them with the greatest opportunity to thrive – that is, competitive edge. One of the themes to emerge from the Acas research is ambivalence on the part of some agencies to share information and promote good practice with other agencies with whom they are competing. But if competition is to remain such a strong determinant of workplace practice, it may have to be counterbalanced by a greater awareness of the experiences of agency workers and how their employment rights can be protected.

References

1. H Meerkamp, 'Towards equal treatment of temporary agency workers', The Parliament magazine, 21 Nov 2014
2. TUC Press Notice, 26 September 2011
3. Institute of Directors – The Midas touch: gold-plating of EU employment directives in UK law, 2013
4. RSM McClure Watters Review of the Agency Workers and the impact of the Agency Worker Regulations (Northern Ireland), Department for Employment and Learning, European Commission, June 2014
5. Give and Take? Unravelling the true nature of zero-hours contracts. Acas Policy Discussion paper, 2014
6. CIPD, 'Getting smart about agile working', 2014
7. C Forde and G Slater, Acas research paper: 'The effects of Agency Workers Regulations on agency and employer practice', 2014
8. Department for Business, Innovation and Skills, 'Employment perceptions and the impact of employment regulation', Employment Relations Research Series 123, March 2013
9. Approximately 70 calls to the Acas helpline were analysed during February 2014 and November 2014