Irish Congress Trade Unions

Observations and Recommendations for Amendment of the Protection of Employees (Temporary Agency Work) Bill 2011

January 2012

Introduction

The Irish Congress Trade Unions is the representative body for workers and their unions on the island of Ireland. The ICTU has 49 affiliated trade unions, directly representing almost 820,000 members from all sectors, industries, occupations and professions. This includes those parts of the labour market where agency working is concentrated such as manufacturing, financial services, hospitality, construction and public services, including local and central Government, health and education services and social care.

The ICTU has consistently argued for improvements to the rights of agency workers, including the need for better regulation of their activities. We have previously set out our recommendations to Government on how the Directive should be implemented and a copy of that submission is attached. In summary, from the trade unions' point of view it is essential that the legislation should:

- *Provide agency workers with a right to genuine equal treatment and equal pay, including allowances, bonuses, and redundancy pay;*
- *Close loopholes which would allow unscrupulous employers and agencies to avoid the law and to undercut reputable firms.*
- *Enable effective enforcement and provide for realistic remedies and dissuasive sanctions on employers and agencies that choose to ignore workers' rights.*

The ICTU is not convinced that the Bill meets these basic objectives. It is in the interests of employers, agencies, agency workers and their trade union representatives that the legislation would implement the Directive effectively and lawfully. This would reduce the risk of future litigation or infringement proceedings. The ICTU takes the view that the Bill does not comply with the requirements of the Directive in the following areas:

1. ***The Bill fails to provide effective anti-avoidance measures.*** *Article 5(5) of the Directive places a clear duty on the Government to introduce appropriate measures which prevent the abuse of the derogations. However, under the Bill it will be all too easy for employers or agencies to use the so called 'Swedish Derogation to circumvent the equal pay rights. The use of this derogation without sufficient safeguards is likely to undermine the whole Directive and Congress is calling for its removal from the Bill. However if it is to be used the legislation will need to be amended to provide for safeguards against abuse otherwise the legislation will be in breach of the Directive. The type of safeguards include, a guaranteed rate of pay, a guaranteed minimum number of hours, a guaranteed period at the last assignment, an obligation on the temporary agency to take reasonable steps to seek suitable work for the agency worker between assignments.*

2. ***The definition of 'pay' is not sufficiently precise.*** *The definition of pay must include any allowances that are automatically paid as an industry norm and to directly employed employees, examples of these in the nursing profession – qualification allowances, location allowances, acting allowances, etc. Further, the definition should, in line with Article 157 of the Treaty on the Functioning of the European Union, include special bonuses paid by the employer, termination payments in the case of dismissal and occupational pensions , work related allowances, work related bonuses and work related travel and expenses. The Directive provides an entitlement to equal 'pay' not equal 'basic pay' and it would give greater clarity to the entitlements if they were expressly provided for in the legislation. In addition, for the purposes of equal treatment rights must include payments relating to maternity, adoptive and parental leave. Failure to do so is likely to be in breach of the Directive.*

3. ***Problematic construction of the comparator.*** *Article 5 of the Directive provides that 'the basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by the undertaking. The Bill in the definitions section 2 sets out a much more constrained 'comparator' - a comparable worker is one where the agency worker, does ' the same work under the same or similar conditions" and is "interchangeable' with the directly recruited worker, and they are doing work that is at least "equal in value to" that done by the directly recruited worker in "skill, physical or mental requirements, responsibility and working conditions", and the work must be the "same or similar in nature", with only minor or irregular differences'. The Bill then in section 6 (1) (b)*

sets out that where there is no comparable employee then the agency worker is entitled to equal working and employment conditions that 'a comparable employee would be paid if they were so employed'. Congress is concerned about how this will operate in practice, for example is it a case of 'all or nothing', will a case fail because there is a partial comparator? We know from bitter experience of the past that equal pay claims were defeated because the worker did work of greater value than the comparator? Will these type of rulings, contrary to the Directive crop up because of the formulation of the comparator the legislation? Has the bar been set too high for the 'hypothetical comparator' and in a manner contrary to the Directive by referring back to the problematic definition of comparable employee?

Congress is requesting clarification on the operation of the 'comparator' in section 2 and the 'hypothetical comparator' in Section 6 on how their operation meets the Directives' requirement that the an agency worker is entitled to at least those basic terms and conditions that ***'would apply if they had been directly recruited by the undertaking'.***

4. ***Charging workers fees is unacceptable and contrary to the Directive:*** *The Bill provides for agencies to charge workers 'reasonable' amounts for training associated with their recruitment, this is unacceptable as it is a device though which unscrupulous agencies will charge workers for their recruitment by the back door, contrary to Article 6 of the Directive which provides that agencies will not charge the workers 'any fees'.*

5. ***Joint and Several liability needed for effective enforcement.*** *Agency workers should not be deprived of their EU rights due to the complexity of any enforcement process. The Bill, despite the guidance from the EU Commission does not provide for joint and several liability. Providing for joint and several liability would enable employment tribunals to determine where the responsibility for breach of regulations lies -whether it sits with the user employer or the agency. It also would ensure that agency workers would always be able to enforce their rights, including where an agency or user employer has become insolvent or in situations where the contract for the supply of agency workers has been outsourced through a supply chain of agencies or from outside the jurisdiction. Other rights needed include a right for the worker to request and receive information from the 'end user undertaking' and for protection from penalisation for directly recruited staff.*

We set out below these and associated points and areas for amendment below.

Safeguarding against abuse of the 'Swedish' Derogation

As set out throughout the consultation process, Congress' strong view that this derogation should not be used in the Irish situation. The use of the so called 'Swedish Derogation' means that equal pay rights will not apply to agency workers, when they have a permanent contract with the Agency.

To illustrate the effect, under the Bill when a worker is signed up to employment Agency X and they are placed with a company they are entitled to equal rates of pay as the directly recruited worker. But using the "Swedish" derogation, when employment Agency X takes the worker onto their books as an employee the worker becomes an employee of the employment agency, with a contract of employment – and is no longer an agency worker strictly speaking, even though they work with an agency and are placed with an employer.

This causes a serious problem as it means that when the Agency sends the worker to an assignment, they can legally be paid less than someone directly employed by the that company, thus potentially undercutting agreed rates of pay in that workplace and undermining the whole purpose of the legislation.

That is why Congress cautions against the use of the derogation by means and we are recommending that it be removed from the Bill. If this derogation is used, the Bill must be revised in line with the Directives requirement to take appropriate measures to prevent misuse in the use of derogations by:

- ***Guaranteeing agency workers a rate of pay*** *(90%) between assignments and no less than minimum wage(s) including EROs and REAs (in Sweden, Germany and the Netherlands the rate is 80% -90%)*

- ***Guaranteeing 'the minimum number of hours per week*** *that may be offered to an agency worker must reflect the normal hours that agency workers are expected to work on an assignment in that particular sector, industry or workplace' and in any event should be no less that 90% of the previous assignment and no less than 15 hours per week .*
- ***Guaranteeing a period at the end of the last assignment, (****this has to be sufficiently long to protect agencies and employers from using the derogation to circumvent the rights afforded in the Directive by simply dismissing the person at the end an assignment) this period should be set with regard to the length of previous assignments (as this is the length of time that the worker has potentially suffered a loss in pay) and in any event should be no shorter than two months;*
- ***Protecting agency workers from agencies using unsuitable assignments*** *(unreasonable hours, location or the nature of the work) as a means to avoid paying in between assignments, by providing that the anti-penalization provisions apply to selection for in between assignments and that 'the nature of the work, and the terms and conditions applicable to the agency worker whilst performing the work, must not differ from the nature of the work and the terms and conditions in the previous assignments'*
- ***Placing an obligation on the temporary agency*** *to take reasonable steps to seek suitable work for the agency worker between assignments.*
- ***Prohibiting abuse of this derogation via 'in-house' temporary work agencies*** *that are set up by a company to supply workers largely for its own use rather than to other user companies. To deal with this situation, in Belgium, temporary work agencies cannot procure more than 30% of its turnover from a single company by law.*

It is worth pointing out that under this derogation, Agency workers could significantly lose out on pay, especially in sectors that are not covered by an ERO or REA. In this situation the only safeguard is the national minimum wage. This may mean that agency workers will be combining family income supplement (FIS) with their wages. It may be necessary to deal with questions relating to payment of (FIS) for the period between assignments as some payments are only available if the worker is at work. Likewise questions of PRSI need to be clarified, as being paid between assignments should not adversely affect agency workers' future eligibility for certain unemployment, maternity, adoptive or illness benefits.

Definition of Basic Working Conditions

Under the terms of the Directive all agency workers are entitled to equality when it comes to of equal treatment and conditions of employment.. The Directive provides that the 'basic working and employment conditions' would be at least equal to those that would apply had the agency worker been directly recruited. However the definitions section 2 of the Bill only seems to provide for statutory entitlements, i.e. those laid down by legislation, for example an agency worker under the Directive has an entitlement to equal treatment for annual leave, this means more than the statutory provision of annual days leave, it includes any extra days and the manner in which these can be taken. Likewise the Directive provides for equal treatment in public holidays. Consequently, agency workers have the right to be treated no less favourably in relation to bank holidays. This involves rights to bank holiday pay premia and the right not to be disproportionately required to work on bank holidays as compared with directly employed staff. Likewise the right to 'overtime' refers to normal rates and normal working hours in the sector and working time refers to working time arrangements, including the application of flex-time systems.

Section 8 – protection of existing equality rights *provides that existing employment equality rights are replaced by the equality rights in the Bill. Our concern is that this section of the Bill might operate to worsen existing equality rights, and provide for equality avoidance especially in the application of the Swedish Derogation and at the recruitment phase. If so, this will constitute a breach of the Directive as Article 5 (1) which requires respect for existing equality rights and a breach of equality rights enshrined in the EU Treaty (TFEU). Congress is recommending that the section be referred to the Equality Authority for them to clarify the equality impact of this provision.*

Section 12 – Charging Agency Workers *allows agencies to charge workers for their recruitment by the back door by allowing agencies to charge 'reasonable' amounts for training people for reasons associated with their recruitment. This is a substantial change contrary to existing national law and practice - and contrary to Article 6 of the Directive that specifically requires member states to prohibit agencies charging 'any fees' in*

relation to their recruitment. This section should refer to prohibitions in the Employment Agency Act 1971 (this Act already prohibits charging fees) and should be amended to remove the permission for agencies to charge for training for reasons associated with their recruitment.

If this section is to remain it needs to be amended so that it applies only to training directly and genuinely related to an assignment (i.e. not to recruitment). Where an agency provides genuine training for an assignment, then the test of 'reasonableness' needs to apply equally to the reasons for the training and why the agency worker should pay (i.e. that the agency worker genuinely needed the training to carry out the assignment; and that the training was not solely for benefit of the employer), as it does to the cost of the training. Further similar to the Minimum Wage Act 2000 there should be a required standard applied to establish the genuineness of the training. The ICTU stresses again our strong view that this provision should be removed.

***Part 4 Protection of Employees and Redress**: Under the Directive Member States must provide for appropriate penalties which must be effective, proportionate and dissuasive. Congress believes the legislation needs to be strengthened to give workers and their unions an adequate means of assessing compliance with the legislation. We are therefore calling for the legislation to be strengthened to*

- ***Provide a right to information:** Congress is calling an amendment to give the agency worker, and their trade union representative, an entitlement to request (and receive) any necessary relevant information relating to pay, hours, holidays and collective facilities in the hirer's organisation. Agency workers should have a statutory right to ask for a written statement relating to suspected unequal treatment (as defined in the Bill) from both the agency and from the hirer. It is particularly important that the agency worker can seek information directly from the user employer. The agency will often not have sufficient information relating to pay and conditions or workplace facilities in its possession, unless previously provided by the user employer. Agency workers should therefore be entitled to ask for information directly from the hirer. It may be prudent to include a Statutory Form requesting information of particulars, similar to that under S.76 of the Employment Equality Act, 1998-2004.*
- ***Provide for Joint and several liability :**The legislation should provide for agencies and user employers to be jointly and severally liable for breaches of agency worker rights. The EU Commission guidance on implementation provides for joint and several liability between agencies and employers. This approach accurately reflects the reality of agency working and would enable more effective enforcement of the legislation. Joint and several liability, that would enable Rights Commissioners and the Labour Court to determine where the responsibility for breach of regulations lies - whether it sits with the user employer or the agency. It also would ensure that agency workers would always be able to enforce their rights, including where an agency or user employer has become insolvent or in situations where the contract for the supply of agency workers has been outsourced through a supply chain of agencies or from an agency outside the jurisdiction.*
- ***NERA must be legally equipped to investigate:** NERA should have an investigative role and the remedies for breaches of the Act should be increased to ensure they are effective, dissuasive and proportionate. Congress is seeking clarification of the role, expected to fulfilled by the Gardai under section 20 and 21.*
- ***Protect directly hired workers from penalisation when they report breaches or act as comparator.** Amendments are needed to ensure that the anti-penalisation measures extent to complaints made to NERA and in circumstances for directly hired workers who are used as a comparator (such protection has proved necessary under employment equality law).*
- ***Provide for adequate redress including a 'Minimum Basic Award':** The legislation should allow for a minimum basic award for any breach of an agency workers rights. It should provide an entitlement to the return of any money unlawful charged to workers in respect of their recruitment. It should also provide for compensatory redress for any losses, including non-monetary losses.*

***Confirm that ERO and REA rates apply :** It may be helpful for the legislation to confirm the existing situation and rulings of the Labour Court that employment agency workers working in sectors and occupations covered by an REA or ERO are covered by those agreements.*

Finally, it is worth pointing out that Congress supports the Bills' provisions for dealing with the derogation in Article 5(3) i.e. to allow derogation on the basis of the define "collective agreement". Trade unions have a strong track record in working with employers in setting standards in a manner which reflects the nature of different sectors and industries. The formula used in Bill largely mirrors that used in the working time legislation and collective agreements have been concluded by trade unions to deliver flexibility and fair treatment for working people. Although trade union density is low amongst agencies in an increasing range of sectors unions have recruited, organised and bargained on behalf of agency workers. Leading examples of this include SIPTUs work among the retail and distribution sectors and other agreements in the construction sectors.

Ends

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