



IRISH CONGRESS TRADE UNIONS

Review of the Employment Agency Act 1971

Observations and Recommendations on the
Discussion Paper by
The Department of Enterprise Trade and Employment

July 2004

Background

During the discussions on the current national agreement, *Sustaining Progress*, Congress secured a commitment that the Employment Agency Act 1971 would be reviewed. The specific commitments are in *Section 18* of the Agreement and they provide that:

18.5 A review, in consultation with the social partners and others, of the need to adapt the Employment Agency Act 197, or the necessity for new legislation, will be undertaken. This will consider the most appropriate approach to the regulation of agencies and their recruitment and placement activities in Ireland and will be initiated before September 2003.

18.6 In order to effect an early update of penalties under the above act the opportunity is being availed of in the drafting of the Fixed term Contracts Bill to provide that the level of fines for operating without an agency licence will be substantially increased.

18.7 The review will take account of the ongoing discussions within the EU on a Draft Directive on Temporary Agency Workers.

Some progress has been made, the Protection of Employees (Fixed Term Work) Act 2003 made provision in *Section 19* of the Act for fines to increase from £50 to €2,000 and from £10 to €1,000.

As part of meeting the commitment to review the legislation, the Department of Enterprise Trade and Employment have prepared a discussion paper outlining the various options available. This paper was provided to Congress in May 2004 with a request for an initial response in early July 2004. The Department

identified that their discussion paper forms the basis for further discussions with the social partners.

Congress welcomed the commencement of the review and the advancement made by the publishing of the discussion document. This review is important as it provides the opportunity to promote better regulation and address the lack of controls on Employment Agencies. The review also provides us with an opportunity to introduce measures to eliminate the potential for the exploitation of workers who are seeking or being placed in employment.

During the month of June 2004, Congress undertook a consultation process and circulated the Department's discussion paper for comments to affiliates and the National Network of Congress Unemployed Centres. We also provided an opportunity for workers to tell us directly of their experiences through our webpage.

Congress organised a special meeting on this issue at the end of June 2004. This submission draws on the comments, views and recommendations outlined in the written submissions along with the issues identified during the meeting and from comments received through the webpage.

The observations and recommendations outlined in this submission aim to assist the Department to achieve better regulation of employment agencies, to limit if not eliminate the potential for exploitation of highly vulnerable workers, and to develop further coherence with the legislative provisions underpinning workers rights.

Congress recommendations in earlier submissions are still relevant.

CONGRESS OBSERVATIONS AND RECOMMENDATIONS

1. Overall Approach

- 1.1. Congress welcomes the review of the Employment Agency Act 1971 and the Departments commitment to establish a working group of the social partners to determine the best way forward for this sector. We recommend that the review and updating of the Employment Agency Act 1971 should proceed and should not be delayed further by any lack of progress on the EU Directive in the Area of Temporary Agency Work.

Recommendation: Establish the proposed working group of the social partners and progress with the review of the Employment Agency Act.

2. Comments and Recommendations on Option A

- 2.1. Congress supports the Departments recommendation that de-regulation should not be considered as part of the review. Experience shows the importance of having legislation and regulation in this area. The impact that inadequate regulation can have was pushed to the forefront by the events in the UK which saw the deaths in February of this year of many cockle-pickers in Morecombe Bay.
- 2.2. Whilst de-regulation has taken place in some countries, this trend has been found to be unsatisfactory and is largely being reversed, for example the UK Government, introduced in April of this year new legislation for the Regulation of Employment Businesses. In Spain, legislation is now in place ensuring that agency workers must receive the same pay as the employees of the user companies in which they work.

2.3. The positive benefits of regulation and licencing are recognised and well established across a wide range of business activities in Ireland. For example, the operation of a car rental business, acting as a mortgage intermediary, holding an auction, carrying on the business of a tour operator all require the business or person to hold an appropriate licence. Regulation is needed so that workers using employment agencies have guarantees of the standard of person and services that will be provided to them.

2.4. Reputable companies have high standards and treat workers with dignity and respect for their rights at work but less scrupulous companies do not. Affiliates have brought to the attention of Congress examples of hiring and placement activities that are exploitative, demeaning to workers and unacceptable in this century. Workers and reputable companies must be protected from the rogues. It would be unacceptable to Congress to allow a situation to develop whereby cowboy employment agencies could carry on exploiting workers without any fear of interruption by the public authorities.

Recommendation: Option (A) – that of de-regulation of the sector is not acceptable to Congress and should not form a part of the review.

3. Observations and Recommendations on Option B

3.1. Recent developments in the Irish labour market show that Employment Agencies are set to continue to be a feature of our labour market. Affiliates have reported a general increase in the number of employment

agencies operating. This is confirmed by the Departments own statistics which show that the number of registered employment agencies operating in Ireland has grown to 541. Given this Congress agrees with the Department's conclusion that the repeal of the 1971 Act is not a practical option at this time, although it would be possible to include transitional and saving provisions, we support the approach recommended by the Department to amend the 1971 Act.

Recommendation: That the repeal of the 1971 Act is not practical at this time. Amendment of the 1971 Act provides a realistic approach to be adopted as it will allow us the opportunity to retain, delete and add new provisions that reflect the reality of the current labour market and the experience of workers.

4. Congress Comments and Recommendations on Application for Employment Agency Licence and the Suitability of Applicants

- 4.1. Congress agrees with the Department's objective to make conditions of eligibility as unambiguous as possible. Congress strongly supports the requirement for tax clearance certificates and compliance with all other Company Law. Congress also supports the Departments proposal to strengthen the requirement for Garda clearance in relation to any of the individuals operating the agency that is seeking the licence.
- 4.2. Congress believes that the review should examine the benefits of having, as part of the assessment of the suitability of applicants a requirement that they hold a bank account in Ireland.

4.3. In addition part of the application process for all employment agencies should be the lodgement of a capital deposit with the Department of Enterprise Trade and Employment. The amount required by the deposit should be established by reference to the annual salaries of the workers hired out by the agency and subject to minimum (€20,000) and maximum (€500,000) amounts. This deposit could be retained and used to pay wages or costs of agency workers if the agency goes out of business. Congress believes that such a provision is essential to the assessment of eligibility for provision of a licence. This is a very real danger facing agency workers. The Irish Nurses Organisation has recently reported a situation to Congress where they have represented 21 members at an Employment Appeals Tribunal where the former owner of an employment agency had gone out of business owing thousands of euro to the former employees.

4.4. Congress would like to note here that our affiliates have brought to our attention that some language schools operating in Ireland are defacto employment agencies. Both MANDATE and SIPTU have outlined practices which consist of high fees some €5,000 - €9,000 being charged by these language schools which advertise to foreign students that working in Ireland is part of the programme.

4.5. If these language schools are to be permitted to continue to operate what is substantially an employment agency then the requirements laid out in the amended Act must be made to apply to them. Including the holding of a licence. This issue could be dealt with by either (i) introducing a new section dealing with the scope of the Act or (ii) by amending the

current Section 2 on General Prohibition on Unlicensed Employment Agencies or (iii) providing certainty in Section 1 , Interpretation.

4.6. An associated issue is that of “gang masters”, the UK estimate that there are some 3,000 gang masters operating involving some 60,000 workers. The practice, in Ireland, is beginning to develop within some companies of employing a person to act as recruiter and ‘supervisor’. This person then recruits fellow country nationals into the company. All dealings with the recruited workers is via the ‘supervisor’ e.g. wages, complaints, work rotas. In most incidents these ‘supervisors’ have been paid a fee by the workers.

4.7. While affiliates have reported that there is only very limited evidence of this type of activity in Ireland it may be prudent to include provisions that will provide protections against the use and potential abuses by “gang masters”.

Recommendation: Introduce a new provision requiring the opening of a bank account in Ireland and the depositing of a capital sum with the State as a pre-requirement for an employment agency licence. Ensure that the scope of the Act is such to include any activity that involves work seeking and placement. Introduce provisions to ensure against the “gangmaster” phenomenon taking a hold in Ireland.

5. Requirement for two Independent References

5.1. Congress does not agree with the Departments view that the requirement to provide two independent references brings no value to the application

process. It is an issue of concern that the Department claims to never check these references. Congress recommends that the requirement for references be strengthened and be amended to include trade union officials on the panel. This is in line with other EU member states where there is specific provision for social partners to be involved in the decision of granting or revoking a licence.

Recommendation: Maintain the requirement for two references and include trade union officials in the panel for referees.

6. Educational Requirements of Employment Agency Operators

6.1. Congress agrees with the Department that there is merit in including a requirement that applicants should hold a recognised Human Resources Qualification. Issues arise in respect of what qualifications would constitute sufficient evidence of suitability.

Recommendation: The working group should examine the inclusion of a requirement for applicants to hold a recognised Human Resource Qualification.

7. Change of Ownership/Duration of Licence/Multiple Branch Agencies

7.1. Congress supports the Departments recommendation to amend the 1971 Act to provide that the Licence can be transferred for the remainder of its duration, provided that the new owner meets the criteria regarding suitability. Congress also supports the recommendation to amend the Act to provide that the duration of the Licence is one year and that fees are payable annually. Congress supports the Departments recommendation

that a person owning different agencies should be required to hold a licence for each of the agencies they operate.

Recommendation: Amend the Act to provide that Licences can be transferred provided the new owner meets the eligibility criteria. The duration of the Licence should be for one year. The Act should clarify that a licence must be held in respect of each agency operated.

8. Employment Agencies Operated Outside Ireland

8.1. Congress believes that the amended legislation should ensure that the abuses experienced by workers whereby agencies operating outside Ireland charge exorbitant fees before the workers come to Ireland can no longer continue. It should not be possible to evade requirements, avoid responsibilities or to defeat the protections afforded in the amended Act simply by establishing an office outside the State.

8.2. Congress notes that the Department believes that the Attorney General's advice may need to be sought on this. Congress recommends that the purpose of the advice should be to establish what amendments are necessary to ensure that the provisions, or provisions substantially equivalent, apply to all agencies and their work seekers/workers operating in Ireland. Congress recognises that it may be necessary to distinguish between EU/EEA and non- EU/EEA States.

8.3. Congress believes that the solution may lie in a combination of amendments that provide both that (i) employers who recruit workers through overseas agencies or unlicensed agencies are the employer for

purposes of employment rights and that (ii) employers who use agencies to recruit and place foreign workers here are required to provide to the Department documentary evidence containing details of the agency involved, whether such an agency has been licensed or registered in the country concerned.

Recommendation: Amend the Act by placing responsibilities on the employer in Ireland to ensure that there are no abuses experienced by workers by agencies operating outside Ireland. Ensure that the same standards or standards substantially equivalent apply to agencies operated from outside Ireland.

9. Employment Agencies Operated via the Internet

9.1. Persons who operate the business of an employment agency in Ireland which is entirely over the internet and without premises must be brought within the scope of the Act. Recent reports from the International Organisation for Migration on the trafficking of persons demonstrate the importance that such business must be brought within the requirements for clearance from the Garda authorities. The fact that the agency is operating via the internet should not continue to be a reason to evade the requirement to hold a licence.

9.2. Congress recognises that extra provisions may be necessary to ensure that internet based agencies are covered by all the provisions in the amended Act.

9.3. Congress affiliates have reported growing concern among workers in relation to the content and use of records retained by agencies. The data protection rules must be made to apply to all agencies not just those

operating via the internet. Therefore Congress recommends that data protection should not be dealt with solely under provisions relating to internet based agencies as the provisions will apply to all agencies not just those that are internet based.

9.4. Congress believes that the Act should be amended with a separate section referring to the obligations and rights in respect of data protection as they refer to agencies. In this regard Congress recommends that the Data Protection Commissioners view should be sought as to whether any extra provisions are required to be included during this review and amendment of the Employment Agency Act 1971.

9.5. The Departments idea of a Code of Practice in relation to data issues is a good one and should be explored by the working group. Of particular concern to Congress is the development of appropriate rules relating to the content and use of workers records. It must be noted that Congress will be seeking a statutory basis for the Code and the introduction of remedies and penalties which are set at levels that will act as a deterrent against breaches.

Recommendation: Internet based employment agencies must be brought within the scope of the Act and required to hold a licence. The working group should seek the advice of the Data Protection Commissioner. The content of the Code of Practice on data collection, storage and use should be wide ranging enough and establish certainty to allay the fears of workers. The Code of Practice should be established on a statutory basis and be backed up with penalties.

10. Recommendation for new Part of the Act - General Obligations on Employment Agencies

10.1. Congress believes that a new part to the Act which outlines the *General Obligations on Employment Agencies* and on those using their services should be introduced. This new part should include provisions setting out in clear language the obligations and requirements placed on employment agencies.

10.2. This proposed new part to the Act can be developed by the working group but the *UK 2003 Regulations on the Conduct of Employment Agencies and Employment Businesses* should be examined in this regard. Also worth examining is the Spanish legislation which contains provisions prohibiting the use of agency workers in certain situations:

- to replace striking workers;
- to carry out high-risk activities;
- to fill vacancies arising from unfair dismissal, redundancies on economic, organisation or production grounds, or unilateral termination of the contract by workers because of serious and culpable behavior by the employer;
- to work in other temporary employment agencies;
- to fill posts occupied by agency workers for more than 13.5 months of the previous 18 months;
- to fill posts for which there is no occupational hazard assessment;
- or
- to work in the public administration.

10.3. Congress believes that a further aim of this new part on General Obligations should be to set out the standards that will be expected from employment agencies as they carry out their business. Again the task of

the working group will be to put detail on this section but some examples of the type of provisions to be included are :

- Prohibitions on employment agencies charging work seeking or work placement fees to workers.
- Regulation of the content of terms with workers and end user companies.
- Prohibition on terms requiring workers to use additional services whether provided by the agency, the user company or any other person.
- Restrictions on the inclusion in contracts of terms that are detrimental to workers working elsewhere, including the prohibition on unfair terms in contracts such as penalty or “transfer fees” to be made by the prospective employer in circumstances where they offer the worker employment directly.
- Restrictions on the requirements for reimbursement fees from employees in circumstances where the employee terminates the contract.
- Prohibition on employment agencies withholding payment from workers.
- Requirements to be satisfied by the end user (hirer) company before services can be provided including, the restrictions that will apply in relation to the supply of workers

Recommendation: Develop a new Part to the Act outlining the general obligations on employment agencies and those using their services and setting out the standards that will be expected from employment agencies as they carry out their business.

11. Congress Recommendation for new Section : Special Situations

11.1. Irish based employment agencies are placing workers with employers outside the State. In addition employment agencies are placing workers from outside the State with employers here in Ireland. Congress recommends that the amended Act will contain a section dealing with extra requirements to be satisfied in relation to situations where work seekers/workers are placed away from home. Particular reference to the rights and responsibilities arising under the work permit regime should be included here.

11.2. This section could also deal with circumstances where more than one agency is involved.

Recommendation: Introduce extra requirements to protect workers in situations where they are posted away from home.

12. Employment Rights of Agency Workers

12.1. The Employment Rights of Agency workers have been described as “both complicated and unfortunate”. Agency workers are those workers who register with employment agencies that make temporary workers available to a third party (the hirer/end user organisation). These workers often find themselves in the situation that both the temporary agency and the hirer claim that they are not the employer. This leaves agency workers in an unacceptable situation especially in circumstances where they are trying to avail of their legal rights and entitlements.

12.2. Additional problems arise for agency workers because in order for them to fall within the scope of some protective legislation, workers must be an employee working under a contract of employment (of service) for continuous periods, the service requirements range from 13 weeks on up to a year for Unfair Dismissals and two years for Redundancy. Congress recognises the value in exploring the suggestion of the Department to outline the respective rights of agency workers under various employment rights legislation. However the current situation is unsatisfactory and Congress is seeking improvements as part of this review.

12.3. Congress is seeking amendments that will ensure that temporary workers supplied through an agency are provided with the opportunity to establish an employment relationship with the end user organisation, especially if they work for the end user on a long term basis. In this regard Congress recommends that an examination of the recent UK Court of Appeal ruling in *Ducas V Brook Street Bureau* which found that temporary employees may in fact be employees of the end user client company rather than of the employment agency should form part of our discussions.

12.4. Congress is also extremely concerned about the indirect discrimination that may be occurring through the use of agencies. The recent race discrimination case heard by the Equality Tribunal (DEC-E-2004-0019) confirms that Section 8 (2) of the Employment Equality Act 1998 means that agency workers must compare themselves with other agency workers and can not compare themselves with the workers within the company where they are placed. Congress believes that this has the effect that the protections against unlawful discrimination can be

defeated simply by employing workers through an agency. This is an unacceptable situation and should not be allowed to continue as it has the potential to undermine all of the work undertaken to address discrimination at work.

Recommendation: The Act should be amended by introducing new provisions to allow temporary employees supplied through an agency to establish an employment relationship with the end user company. Additional amendments are needed to allow for a full consideration of the triangular relationships and real circumstances to ensure that employment agencies cannot be used by unscrupulous employers to defeat the rights of workers, importantly the protections against discrimination.

13. Monitoring, Inspection and Control

13.1. Employment Agencies are required to keep records and make six monthly returns to the Minister as contained in Schedule 4, Regulation 9 of the Employment Agency Regulations 1972. This requirement should be continued and the Department of Enterprise Trade and Employment should report on this annually.

13.2. The 1971 Act granted the Minister the power to make a regulation requiring licenced employment agencies to display licences in their premises. Such a regulation has not been made. Congress believes the display of licences would be one way of enabling job applicants to distinguish between licensed employment agencies and those operating outside the scope of the Act. There is also a value in developing an easily recognisable symbol that will confirm that the agency holds a licence.

13.3. The Department of Enterprise Trade and Employment should put in place a monitoring system to detect any employment agencies operating in the State without a licence.

13.4. The amended Act should set out the rules on sanctions applicable to infringements along with identifying what monitoring and enforcement measures can be taken to ensure that they are applied. It is important that the measures are taken seriously by the Department and implemented. In this respect Congress notes with concern the Department's stated practice of "*where breaches are found, agencies were given the opportunity to rectify matters*". This is not an effective, appropriate or acceptable way to enforce legal provisions.

Recommendation: Introduce amendments to ensure effective monitoring of employment agencies. Develop a recognisable emblem to distinguish between licenced and unlicenced agencies.

14. Penalties

14.1. The amended Act should include appropriate sanctions for breaches of the Act. The sanctions must be set at levels that are effective, proportionate and dissuasive. We should not allow a situation to develop where employment agencies can "buy the right to discriminate". Importantly the penalty for not holding a valid Licence must be set at a level to be dissuasive. Congress is concerned that the new level of fines, while an improvement may not be high enough.

14.2. An important new inclusion for Congress will be the introduction of a new provision to allow for the payment of compensation to the worker whose rights have been infringed by the Agency. This will require a number of amendments including :

- A section to specifically provide a new remedy which includes payment of compensation to the worker.
- An amendment to provide the Employment Appeals Tribunal and the Labour Court with the necessary powers to make the appropriate awards.
- An amendment to ensure that compensation payments made in respect of this Act can avail of the tax exemptions in Section 7 of the Finance Act 2004.
- In addition amendments should be made to
 - i. acknowledge that Trade Unions, as representative associations covered by Irish law, have a legitimate interest in ensuring that the provisions of the Act are complied with, and
 - ii. may engage, either on behalf or in support of the complainants, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under the Act

14.3. The Act should be amended to give a right to information. The Agency must be required to provide information to the Department and the Labour Inspectorate. In addition the worker must have a right to

information, if so requested, in order that they may defend his or her rights, and present their case in the most effective manner.

Recommendation: Set the sanctions for breaches of the Act at levels that are effective, proportionate and dissuasive. Introduce appropriate amendments to allow for the payment of compensation to the worker whose rights have been infringed by the Agency.

SUMMARY OF RECOMMENDATIONS

Recommendation: Establish the proposed working group of the social partners and progress with the review of the Employment Agency Act.

Recommendation: Option (A) – that of de-regulation of the sector is not acceptable to Congress and should not form a part of the review.

Recommendation: That the repeal of the 1971 Act is not practical at this time. Amendment of the 1971 Act provides a realistic approach to be adopted as it will allow us the opportunity to retain, delete and add new provisions that reflect the reality of the current labour market and the experience of workers.

Recommendation: Introduce a new provision requiring the opening of a bank account in Ireland and the depositing of a capital sum with the State as a pre-requirement for an employment agency licence. Ensure that the scope of the Act is such to include any activity that involves work seeking and placement. Introduce provisions to ensure against the “gangmaster” phenomenon taking a hold in Ireland.

Recommendation: Maintain the requirement for two references and include trade union officials in the panel for referees.

Recommendation: The working group should examine the inclusion of a requirement for applicants to hold a recognised Human Resource Qualification.

Recommendation: Amend the Act to provide that Licences can be transferred provided the new owner meets the eligibility criteria. The duration of the Licence should be for one year. The Act should clarify that a licence must be held in respect of each agency operated.

Recommendation: Amend the Act by placing responsibilities on the employer in Ireland to ensure that there are no abuses experienced by workers by agencies operating outside Ireland. Ensure that the same standards or standards substantially equivalent apply to agencies operated from outside Ireland.

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Recommendation: Develop a new Part to the Act outlining the General Obligations on Employment Agencies and those using their services and setting out the standards that will be expected from employment agencies as they carry out their business.

Recommendation: Introduce extra requirements to protect workers in situations where they are posted away from home.

Recommendation: The Act should be amended by introducing new provisions to allow temporary employees supplied through an agency to establish an employment relationship with the end user company. Additional amendments are needed to allow for a full consideration of the triangular relationships and real circumstances to ensure that employment agencies cannot be used by unscrupulous employers to defeat the rights of workers, importantly the protections against discrimination.

Recommendation: introduce amendments to ensure effective monitoring of employment agencies. Develop a recognisable emblem to distinguish between licenced and unlicenced agencies.

Recommendation: set the sanctions for breaches of the Act at levels that are effective, proportionate and dissuasive. Introduce appropriate amendments to allow for the payment of compensation to the worker whose rights have been infringed by the Agency.