



## **Unite the union response to the BERR/BIS consultation on the Conduct of Employment Agencies and Employment Businesses Regulations 2003**

Sent by email: [agencyregs2009@berr.gsi.gov.uk](mailto:agencyregs2009@berr.gsi.gov.uk)

### **Introduction**

This submission is by Unite the Union. Unite is the UK's largest Trade Union with 2 million members across the private and public sectors. The union's members work in a range of industries including manufacturing, financial services, print, media, construction, local government, food, agriculture, education, health, not for profit and the transport sector.

### **Focus of Unite's response**

We wish to focus our response on the issue of hiring or supplying work-seekers to perform the duties normally performed by a worker who is taking part, or intends to or is about to take part, in a lawful strike or other lawful industrial action (see Regulation 7 of the 2003 Regulations).

Unite believes there should be a positive response to the matters we raise in this regard, because:

- The Consultation paper "welcome[s] views on further measures – legislative or otherwise – that would: remedy abuses not practiced by legitimate agencies that would make a real difference to workers but would not introduce new burdens; *or* make it easier for employment agencies and employment businesses, and hirers to comply with the legislation, without reducing essential protections for workers" and/or

- In any event at a meeting with representatives of the Employment Agencies Standards Inspectorate on 13 May 2009, we were invited specifically to raise this issue in relation to this consultation and/or
- This is a matter of fundamental human rights concerning freedom of association, the need for governments to promote collective bargaining and the related right to withdraw labour effectively without unnecessary restriction (see appendix 2).

### **The current law**

Regulation 7 of the 2003 Regulations prohibits employment businesses (but not employment agencies) from supplying work-seekers to perform the duties normally performed by workers taking part, or intending to or about to take part, in a lawful strike or other lawful industrial action. There is a defence that the employment business did not know of the circumstances. There are exceptions including the supply of labour accompanying a vessel.

There is no obligation on the hirer to tell the employment business that workers are required to break a lawful industrial dispute. There is no law prohibiting the hirer from hiring work-seekers who would perform duties of those involved in legitimate industrial action.

### **The problem**

In the context of the explanation of the current law above, Unite is aware of many instances in which agency workers are brought in to cover jobs performed by those who are likely to be or who are involved in lawful industrial action. One such incident occurred during a dispute to protect jobs at Dover Port in November 2008 (see emails at Appendix 3). In that dispute some of the strike breaking labour accompanied a vessel (a tug), thus relying on an exception in the Regulations.

This can be a very emotive issue in the context of any industrial dispute, in addition to being a human rights issue.

Further, hirers can readily disguise the circumstances in which they hire or recruit agency workers to undermine lawful action.

There are problems identifying those businesses that are “employment agencies” or “employment businesses”. Some businesses perform the functions of both. Unite notes the

description of an employment agency on page 8 of the consultation paper, but that is not what the regulations, nor indeed the 1973 Act, says.

In any event the Employment Agencies Standards Inspectorate – that now wants to be known as “EAS” rather than “EASI” has proven completely ineffectual at enforcing Regulation 7. Not only have they never prosecuted, but their response to any complaint by a trade union is far too slow to be of any use whatsoever.

## **Solutions**

First, EAS needs to set up an effective procedure to respond almost instantly when a union draws a breach of the law to their attention.

Second, the lacunae identified above should be filled. Employment agencies, employment businesses and hirers should be prohibited from engaging, or continuing to engage in the supply or hire of work-seekers, *who have the effect of* undermining lawful industrial action or proposed industrial action.

At Appendix 1 there are draft amendments to fill the lacunae and also to provide for more effective enforcement by giving unions the opportunity to seek an injunction.

The third solution would be to provide the right for a union to take out an injunction to prevent breaches of the Regulations in this regard.

**For clarifications and more information please contact:**

**Roger Jeary**

**Director of Research**

Unite the Union

128 Theobald's Road, Holborn, London, WC1X 8TN

Email: [Roger.Jeary@unitetheunion.com](mailto:Roger.Jeary@unitetheunion.com)

## Appendix 1

Two proposed amendments to the 2003 Regulations

### Proposed amendment 1

Insert the following new Clause—

#### **“Agency labour replacing those taking lawful industrial action**

In the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (2003 S.I. No. 3319), after regulation 7 (restriction on providing work-seekers in industrial disputes) insert the following regulation—

#### *“Restriction on hirers in industrial disputes*

7A (1) A person shall not hire or continue to hire a work-seeker who has the effect of performing

(a) the duties normally performed by a worker who is taking part, or intends to or is about to take part, in a lawful strike or other lawful industrial action, and in respect of whom notice of a strike or other industrial action has been given by a trade union (“the first worker”), or

(b) the duties normally performed by any other worker employed by the hirer and who is assigned by the hirer to perform duties normally performed by the first worker (whether or not the employer is contractually entitled to require the other worker to perform those duties).

(2) Where a person seeks to become the hirer of a work-seeker wholly or partly by reason of (or of the prospect of) a strike or other industrial action, that person shall, before being supplied with a work-seeker by an employment business, inform the employment business of that fact.

(3) Paragraphs (1) and (2) shall not apply if, in relation to the first worker, the strike action or other industrial action in question is an unofficial strike or other unofficial industrial action for the purposes of section 237 of the Trade Union and Labour Relations (Consolidation) Act 1992.

(4) In this regulation and in regulation 7, “employment business” includes an agency.”

Proposed amendment 2

Insert the following new Clause:

“Restriction on providing work-seekers in industrial disputes

(1) The Conduct of Employment Agencies and Employment Businesses Regulations 2003 (No. 3319) is amended as follows.

(2) In Regulation 30 (civil liability), after paragraph (2) insert –

“(3) For the purposes of these regulations –

(a) damage is caused to a trade union from contravention of, or failure to comply with, Regulation 7 and 7A when members of that trade union are taking part or intending to take part in a strike or other industrial action that is not unofficial industrial action, and

(b) subject to proof of actual damage which may be sought by a trade union, for the purposes of this subparagraph, nominal damage, which is more than de minimis, will be deemed to have been caused, sufficient to bring an action and enable the trade union to seek an injunction, or interdict.”

## Appendix 2

Under Article 11 (Freedom of Association and Assembly) of the European Convention on Human Rights and Fundamental Freedoms, the right to form trade unions for the protection of members' economic and social interests is illusory unless there is the opportunity to engage in effective collective bargaining and to take industrial action without restrictions that are demonstrably necessary.

This principle has recently been reinforced in the decisions of the European Court of Human Rights in *Demir and Baykara v. Turkey* (*Application no. 34503/97*) on 12 November 2008 and *Enerji Yapi-Yol Sen v Turkey* (*application no. 68959/01*) on 21 April 2009

Further, in the Charter of Fundamental Rights of the European Union 2000, Article 28 reads:

“Right of collective bargaining and action

Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.”

Article 28 is also useless, if an employer can readily bring in agency workers to make the industrial action ineffective.

Unite also refers to ILO Conventions 87 and 98 and the observations of the Committee on Freedom of Association and the Committee of Independent Experts, as well as the Council of Europe's European Social Charter of 1961 (revised in 1996) and observations of the Committee of Social Rights.

### **Appendix 3**

#### Industrial Action at Dover Port

1. Email to the Minister 26 November 2008

**From:** Gold Brendan, T&G UNITE Nat. Sec. Textile Group

**Sent:** 26 November 2008 09:33

**To:** 'jim.fitzpatrick@dft.gsi.gov.uk'

**Cc:** 'mikegibbons@btinternet.com'

**Subject:** Dover Port

Dear Minister

We spoke briefly at the UK Major Ports Group reception last night.

Our members at Dover Port held a 48 hour strike last Tuesday and Wednesday in protest at the decision by Dover Harbour Board to outsource 190 jobs.

Unite has 350 members employed by DHB

Our Dover members will be taking further strike action for 3 days commencing at 07.00 on Thursday. Our members are determined to protect their direct employment with DHB and not be subject to being outsourced into a variety of third party companies.

As this is an official dispute it has the full support of Unite, Tony Woodley is taking a close watch on developments, and I have of course liaised with the CGT and Calais Chamber of Commerce who have given their support for our dispute.

I am aware that you visited the port recently and have received representation from port operators who are extremely disturbed at the impact that DHB proposals will have upon their businesses.

The CEO at Dover has consistently refused to negotiate with the Union making it plan that he only wishes to consult with the union on the detailed impact on the transfer of jobs which is an unacceptable stance.

Dover Port has a Trust status and therefore falls within the DfT's jurisdiction I would therefore request an urgent meeting with yourself to discuss the situation at Dover I would also ask that you contact the CEO at Dover cancel his divisive plans and instruct him to open negotiations with Unite.

Brendan Gold

National Secretary

Docks and Waterways

2. Email from EAS 25 November 2008 (attached)
3. Draft letter to "Osprey Shipping" who were able to rely on the exception of workers on a vessel

MD  
Osprey Shipping Limited  
Osprey Limited  
GORDANO ROAD  
ROYAL PORTBURY DOCK  
BRISTOL  
BS20 7XQ

Cc  
Unit 4A  
Morston Quays  
Stephenson Street  
Wallsend  
Tyne & Wear  
NE28 6UE

Email [pete.fletcher@ospreyltd.com](mailto:pete.fletcher@ospreyltd.com)

Fax: 00 44 (0)1275 372872

& 44 (0) 1912 340888

Dear Sir

Re Dover Harbour Board industrial dispute

In the matter of the Employment Agencies Act 1973 and the Conduct of Employment Agencies and Employment Businesses Regulations 2003

My union is engaged in lawful industrial action to protect jobs at Dover Harbour Board. Current action began on 07.00 on Thursday 27<sup>th</sup> November and is due to conclude at 12.00 midday on Saturday 29<sup>th</sup> November.

It has come to my attention that you have supplied crew to conduct duties normally performed by a worker who is taking part in industrial action. If you knew of this fact before receipt of this letter you have committed a criminal offence. As soon as you have this letter, you cannot deny that you are aware of this fact, and you are committing a criminal offence.

We require your immediate undertaking that you will take action forthwith to withdraw the crew. We reserve the right to seek compensation for damages under s30 of the 1973 Act, but that is without prejudice to our argument that damages are not an adequate remedy.

If we do not hear from you by close of business today, we will not hesitate to seek further advice on taking out and injunction and a costs order against you. We will also encourage the Employment Agencies Standards Inspectorate to prosecute.

By way of explanation if any were needed, under Regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003, it is an offence for an employment business to introduce or supply a work-seeker to a hirer to perform the duties normally performed by a worker (the "first worker") who is taking part in a strike or other industrial action, or the duties normally performed by any other worker employed by the hirer and who is assigned by the hirer to perform the duties normally performed by the first worker, unless in either case the employment business does not know, and has no reasonable grounds for knowing, that the first worker is taking part in a strike or other industrial action.

For the purposes of the 2003 Regulations you are engaging in the activities of an employment business. Under the 1973 Act, Section 5 (3) "employment business" means the business of supplying persons in the employment of the person carrying on the business, to act for, and under the control of, other persons in any capacity.

Yours faithfully,

Brendan Gold  
National Secretary  
Docks and Waterways  
Brendan.Gold@unitetheunion.com  
Mobile 07970 081526

Reply to: