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Dear Mr Brady

**Policy Proposals and Draft Regulations to Implement EU Directive 2008/104/EC on temporary agency work**

The Commission welcomes the opportunity to comment on this consultation paper, and thank you for the extension to the deadline. The Commission limits its response to issues concerning scope of the Directive, notably the definition of a “worker” and protection under anti-discrimination legislation.

The Commission is an independent public body established under the Northern Ireland Act 1998. The Commission is responsible for implementing the legislation on fair employment and treatment, sex discrimination and equal pay, race relations, age, sexual orientation and disability. The Commission’s remit also includes overseeing the statutory duties on public authorities to promote equality of opportunity and good relations under Section 75 of the Northern Ireland Act 1998 (Section 75).

The Commission’s general duties include:

- working towards the elimination of discrimination;
- promoting equality of opportunity and encouraging good practice;
- promoting positive / affirmative action;

- promoting good relations between people of different racial groups;
- overseeing the implementation and effectiveness of the statutory duty on relevant public authorities; and
- keeping the legislation under review.

The Department's document reflects the findings, and resultant amendments, from the Department for Business, Innovation and Skill's consultation for the implementation of the Agency Worker Directive in Great Britain (Chapter 3, Para 3.4). The Department has proposed the use of a similar definition of "worker" to that set out in regulation 2 of the Working Time Regulations (Northern Ireland) 1998, but adjusted to reflect the triangular relationship between agency worker, employment businesses and end-users (hirers). The definition closely reflects the 'worker contract' formulation used in section 3 (3) of the Employment Rights Order (Northern Ireland) 1996 and has been framed so as to avoid possible abuses in respect to the supervision and direction by end-users (hirers) of agency workers (Chapter 3, Para 3.3). In short, the text within the section relating to the "The meaning of agency worker" in the draft Regulations is the same as the text within the Agency Workers Regulations 2010.

The Commission is concerned that the Department has adopted this definition, as case law subsequent to the commencement of the Regulations in Great Britain has demonstrated that agency workers may not be afforded protection from discrimination by end-users (hirers).

Typically workers who believe that they have been discriminated against need to show that they are employees, workers or contract workers to enable them to seek remedy under current anti-discrimination legislation. Agency workers are generally not classified as employees, workers or contract workers with the end-user of their services (the hirer). Therefore, they may not be able to seek recourse under the law for any unequal treatment they receive from the end-user. However, as agency workers generally have a contract for services with employment businesses, we understand that acts of unequal treatment perpetrated by employment businesses could be challenged through current anti-discrimination legislation.

To illustrate this, the Commission would like to raise the Department's attention to the *Muschett-v-HM Prison Service (HMPS) – 2010* decision. Mr Muschett wished to pursue employment tribunal claims against HMPS for compensation for unfair dismissal, wrongful dismissal and sex, racial and religious discrimination. Mr Muschett needed to show that his working relationship with HMPS was that of an employee under a contract of employment for his unfair and wrongful dismissal claims. For Mr Muschett discrimination claims, he needed to show that he was an employee under a contract of employment or else in "employment" within the wider sense necessary to be shown by those claiming discrimination in the employment context. In short, Mr Muschett was not an employee of HMPS and there was no contract. Furthermore, Mr Muschett also did not meet the requirements of the definition of contract worker under discrimination legislation as there was no obligation for Mr Muschett to provide personal service.

The Muschett case is important, with implications for typical agency workers and their inability to claim under discrimination law, as they are neither employees nor contract workers.

In a similar case, a recent dismissal of an appeal to the Northern Ireland Court of Appeal, *Bohill-v-PSNI - January 2011*, Lord Justice Coghlin, in the summing up discussion, stated that the case does seem to illustrate how an agency arrangement may deprive potential employees of important protections against discrimination.

Lord Justice Coghlin further stated that "Northern Ireland enjoys a well deserved reputation for the early development and quality of its anti-discrimination laws and this is an area that might well benefit from the attention of the section of the office of Office of the First Minister and deputy First Minister (OFMdfM) concerned with legislative reform. We emphasise that, as a consequence of the lack of jurisdiction, we are unable to give any consideration to the substance of the appellant's case".

The Commission has recently carried out a formal investigation into "The Role of the Recruitment Sector in the Employment of Migrant Workers" (published March 2010). In recent years, there has been significant migration into Northern Ireland, especially from Eastern European nations. As a result, migrant workers are

now a significant element of the Northern Ireland workforce. The Commission wanted to establish the extent of the role of the recruitment sector in the recruitment and employment of migrant workers, and evaluate the implications of that role in terms of equality of opportunity. In particular, the Commission wanted to identify any barriers to equality of opportunity affecting migrant workers recruited or employed by the recruitment sector, and make appropriate recommendations.

The report's main findings were that migrant workers are often employed as temporary agency workers by a recruitment business to carry out work for an end-user who would otherwise be the employer. Migrant workers employed by recruitment agencies as temporary agency workers will not necessarily have the same terms and conditions as direct employees. We found that their main terms and conditions of service, including their pay, was generally inferior to that enjoyed by direct employees, even when they were employed as agency workers for substantial periods, or when they worked alongside direct employees. Migrant workers employed by the recruitment sector generally fill jobs that attract National Minimum Wage, offer irregular hours and little in the way of job security.

In respect to terms and conditions, the report highlights that agency workers are not currently entitled to equal terms and conditions as compared with direct employees. Where temporary work through the recruitment sector is long term, in some cases over 2 years, it is difficult to justify differences between the agency worker and the employee, who may be working side by side. The report also notes that this issue has been recognised at European Union level, given the passing of the Temporary Agency Workers Directive.

In light of our formal investigation and developments in case law we are concerned that typical agency workers, who represent a significant proportion of the Northern Ireland workforce, many of whom are women and migrant workers, may not be afforded the same levels of protection from discrimination as those directly employed by end-users (hirers).

Therefore, the Commission welcomes the Department's determination to ensure that the legislation prevents abuses by end-users. However, in light of the Muschett and Bohill cases

referred to earlier, we suggest that the Regulations should include a clear statement to the effect that the protections provided by the Regulations will apply irrespective of whether the actions in question are perpetrated by the employment business or the end-user (hirer). Agency workers should not have to experience additional hurdles simply due to their employment status before being able to pursue a potential act of discrimination.

Yours sincerely



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