
# Response to the Department of Employment and Learning's

# Consultation on The Agency Workers

# Directive

**April 2011**

## 1 Introduction

NICEM is an independent non-governmental organisation working to promote a society free from all forms of racism and discrimination, where differences are recognised, respected and valued, and where human rights are guaranteed. As an umbrella organisation[1] we represent the interests of black and minority ethnic[2] (BME) communities in Northern Ireland.

NICEM welcomes the opportunity to make a response to this consultation.[3]We also welcome the extra protection for many ethnic minority, particularly migrant, agency workers, which will be provided by the Regulations once enacted. We do not intend to respond in detail to the substance of the proposals made in the Consultation Paper. We want to concentrate on two issues of concern to us, first, the coverage of the definition of 'agency worker' used in the draft Regulations, and secondly, the system of liability and enforcement provided for in the draft Regulations.

In this response, we will deal with some specific issues concerning the grossly unfavourable employment conditions under which many migrant agency workers have to work in Northern Ireland, basing our submissions on research conducted by NICEM and also NICEM's submission to the Council of Europe Advisory Committee on the Framework Convention on the protection of National Minorities.

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[1] Currently we have 29 affiliated BME groups as full members. This composition is representative of the majority of BME communities in Northern Ireland.

[2] In this document "Black and Minority Ethnic Communities" or "Minority Ethnic Groups" or "Ethnic Minority" has an inclusive meaning to unite all minority communities. It refers to settled ethnic minorities (including Travellers, Roma and Gypsy), settled religious minorities, migrants (EU and non-EU), asylum seekers and refugees and people of other immigration status.

[3] We have recently had sight of the response of the Law Centre (NI) to this consultation and agree with its contents.

We will make a number of points on adequate implementation of the Temporary Agency Worker (TAW) Directive. We will also make some more general points about the implementation of EU directives in NI employment law, including 'parity' with employment law in Great Britain, and comment upon the equality impact assessment (EQIA) attached to the consultation paper.

In the course of this examination of the draft Regulations, we will raise grave concerns on recent case law on the employment and equality law protection for agency workers and urge the Department to use the Agency Worker Regulations to rectify this unacceptable situation.

**The key principle upon which we base this response is that agencies and hirers should not be permitted to construct contractual and other relationships which deprive migrant agency workers of their rights and also the ability to enforce their rights effectively.**

### 1.1 NICEM research into the effect of the economic downturn

The plight of migrant agency workers was highlighted in NICEM's research report, 'Za Chlebem'.[4]

Recommendation 5 of the Report states:-

"5. We urge the Department for Employment and Learning to ensure the European Directive on Temporary Agency Workers is transposed to Northern Ireland as soon as possible in order to ensure the principle of equal treatment in working conditions for permanent and agency workers. We also call on the Department for Employment and Learning to extend the

[4] Robbie McVeigh and Chris McAfee, 'Za Chlebem': The Impact of the Economic Downturn on the Polish Community in Northern Ireland', Belfast: NICEM, 2009 (http://www.nicem.org.uk/publications_view/item/za-chlebem-the-impact-of-the-economic-downturn-on-the-polish-community-in-northern-ireland).

terms of this protection to workers who have registered with employment agencies outside the UK. By taking this lead the Department will ensure that all agency workers in Northern Ireland will benefit from the principle of equality of treatment in basic working conditions between temporary and permanent workers. For example, this extension of the Directive would help reduce the vulnerability of a construction worker who registers with an agency in Poland to work in Northern Ireland."[5]

At page 34 of 'Za Chlebem', it is stated:-

"A significant concern to be raised during this consultation process is the need to protect those workers who register with agencies in another country to work in the UK, for example a Polish construction worker who registers with an agency in Poland to work in Northern Ireland".

We are now undertaking complementary research with the Filipino community and will publish our findings in the autumn of 2011.

### 1.2 NICEM's submission to the Framework Convention Advisory Committee

However, in our submission to the Advisory Committee on the Framework Convention,[6] we have already highlighted our concerns at the lack of protection for agency workers whose agency contract is with an agency outside the UK.

At §4.8.1 of our response, it is stated:-

"**Agency Workers**

> 1. Although the national minimum wage applies to all people who are working in the UK, it does not apply to agency workers whose employment contracts fall outside the jurisdiction of the UK following

[5] Ibid, p 56.

[6] NICEM, Submission to the Advisory Committee on the implementation of the Framework Convention for the Protection of National Minorities on the UK 3rd Periodic Report (February 2011) (http://www.nicem.org.uk/publications_view/item/submission-to-the-advisory-committee-on-the-implementation-of-the-framework-convention-for-the-protection-of-national-minorities-on-the-uk-3rd-periodic-report-).

their employers using the services of third country agencies. As a result these migrant workers (including A8 and A2) are not paid the minimum wage and their conditions of employment are far below UK standards, such as set by equality and employment laws, as well as health and safety legislation.

2. In most cases these are low paid jobs and employers intend to hide these people from the public domain. Their working conditions are a modern form of slavery. Classic examples in Northern Ireland relate to those working in the mushroom farming business (refer to BBC documentation in 2004) and in the fishing industry. Regarding the Filipino seafarers who are working for the Northern Ireland's fishing industry, NICEM, the Irish Congress of Trade Union, UNISON and the International Transport Federation have been jointly campaigning against the slave-like working conditions imposed by those employment agencies in the Philippines by abusing the current transit visa system (for details of conditions of employment, see Appendix 1 and 2 on the BBC documentation on Filipino Seafarers and a recent case that NICEM has dealt with)."

We have appended to this response the two appendices also appended to the Framework Convention submission.[7]

**In further submissions below, we argue that hirers and employment agencies should not be allowed to construct contractual (and non-contractual) relationships so as to avoid NI (and EU) employment and equality law protection.**

In our view, there are no territorial limitations in the Agency Worker Directive that precludes its application to agency arrangements based outside the EU (or indeed in other EU Member States). So long as an agency worker is working in any EU Member State, he or she should have the full protection of the TAW Directive, and EU law more generally. Nor

[7] Appendix 1, 'Filipino fishermen suffer abuse'; Appendix 2, 'Mr. Adeliga'

are we aware of any territorial limitations in the draft Regulations.

**Could the Department confirm that the draft Regulations apply to temporary work agencies based outside Northern Ireland, outside the United Kingdom and outside the European Union/European Economic Area, where the agency worker is working in NI?**

It also appears to us that the minimum wage will come within the definition of 'pay' in draft regulation 6(2).

**Could the Department confirm that the draft Regulations apply to payment of the minimum wage?**

We also have concerns about how regulation 14, 'Liability of temporary work agency and hirer', and regulation 18, 'Complaints to industrial tribunals etc', will work in cases where a temporary work agency is based outside NI, outside the UK, and, particularly, outside the EU/EEA.

**Could the Department also set out how the rights in the draft Regulations will be enforced against agencies outside NI, outside the UK and outside the EU/EEA and whether these rights can be enforced against locally-based hirers instead?**

Our solution to these issues, which we develop in this paper, is that **the locally based hirer should be jointly liable with a non-UK agency, at least where the hirer has benefited from any breach of rights.**

**1.3 Summary of response**

**1.3.1 We have concerns that many migrant agency workers will not be covered by the definition of 'agency worker' in the draft Regulations. In our view, the term 'employment relationship' in the TAW Directive does cover all forms of agency work and that the definition in the draft Regulations should be amended to reflect this.**

**1.3.2 In view of recent case law in the English and NI courts, we have concerns that NI equality law does not protect many agency workers, as required by the TAW Directive (and also EU equality directives) and are seeking amendments to the equality legislation.**

**1.3.3 We are also concerned that the liability and enforcement provisions in the draft Regulations are ineffective, and incompatible with fundamental principles of EU law, and therefore inadequate implementation of the TAW Directive.**

**We are proposing a system of joint liability between a hirer and a non-UK agency in situations where the hirer has benefited from any breach of agency workers' rights.**

**1.3.4 We argue that the limited definition of 'agency worker' and the liability and enforcement provisions in the draft Regulations may be incompatible with the 1968 Regulation on free movement of workers.**

**1.3.5 We argue that the limited definition of 'agency worker' and the liability and enforcement provisions in the draft Regulations may be incompatible with the Race Directive 2000.**

**1.3.6 We express wider concerns at apparent constraints on devolved**

**legislative processes on employment law and (some) equality law, in particular, a 'no gold-plating' principle on implementation of EU law and an apparent self-imposed 'parity principle' with legislation in Great Britain.**

**1.3.7 We appreciate that a lot of work went into the Preliminary Equality Impact Assessment but do not consider it to be in conformity with the processes set out in the Department's equality scheme.**

## 2 Adequate implementation of the Directive

### 2.1 Are all agency workers covered by the draft Regulations?

Our reservations about the scope of the definition of 'agency worker' in the draft Regulations stem from disturbing case law in both the English[8] and now the Northern Irish[9] courts. Our immediate concern is to receive clarification from the Department as to whether all agency workers are protected by the draft Regulations.[10]

The Directive appears to be clear on this issue. Article 3(1)(c) provides:-

" 'temporary agency worker' means a worker with a contract of employment or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction;" (emphasis added.)

Much of recent case law seems to be based on the proposition that even an 'employment relationship' must involve a contract of employment or some other contract to provide services, as provided in the definition of 'agency worker' in draft Regulation 3(1). In another area of EU employment law, within the Department's remit, the European Court of Justice (ECJ) has recently made clear that this is not the case.[11]

[8] Muschett v HM Prison Service [2010] EWCA Civ 25 (02 February 2010).
[9] Bohill v Police Service of Northern Ireland [2011] NICA 2 (13 January 2011).
[10] We note that the Law Centre response states, at p 17, "However, the Law Centre is concerned that these proposed Regulations simply will not deliver the protections offered by the Directive. This is because, in our view, the proposed definition of an agency worker will exclude all but a handful of agency workers."
[11] Traditionally, many EU labour law systems have been based on collective agreements, and consequent statutory regulation, rather than contracts of employment.

In the Albron Catering case,[12] the Court was considering Article 3.1 of Directive 2001/23 ('the Acquired Rights Directive') which provides:-

"1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee." (emphasis added.)[13]

This was a complicated transfer of undertakings case but the key issue was whether a company which had a contractual link with transferred employees should be the transferee for the purposes of the Directive or whether it should be the company to which they had been assigned even though they had no contractual link with that company. The Court commented, at §24:-

"The requirement under Article 3(1) of Directive 2001/23 that there be either an employment contract, or, in the alternative and thus as an equivalent, an employment relationship at the date of the transfer suggests that, in the mind of the Union legislature, a contractual link with the transferor is not required in all circumstances for employees to be able to benefit from the protection conferred by Directive 2001/23."

The key conclusion in the case was that you can have an 'employment relationship' with a party without having a contract of employment, or necessarily any contract at all, with that party.[14]

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[12] Case C-242/09, Albron Catering BV v FNV Bondgenoten [2010] EUECJ C-242/09 (21 October 2010) (http://www.bailii.org/eu/cases/EUECJ/2010/C24209.html).

[13] This formulation was first used in Article 3.1 of the original Acquired Rights Directive (Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses). It is repeated in Article 3.1 of the 2000 Directive.

[14] It might appear that the TAW Directive gives Member States considerable discretion as to the definition of 'employment relationship'. Article 3.2 provides:- "2. This Directive shall be without prejudice to national law as regards the definition of pay, contract of employment, employment relationship or worker." However, the 2nd paragraph of Article

We now turn to the disturbing case law on the status of agency workers. In Muschett v HM Prison Service, the applicant was claiming breach of a range of employment rights and also breaches of a number of equality statutes. For example, as with the Race Relations Order (NI) 1997, section 78(1) of the Race Relations Act 1976 provided:-

' "employment" means employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and related expressions shall be construed accordingly;' (emphasis added.)

Here, the applicant had a 'contract for services' with an agency but no contract of any form with the Prison Service to which he was assigned.[15] The Employment Tribunal, the Employment Appeal Tribunal and the English Court of Appeal therefore denied him access to the tribunal system to challenge what he considered to be discriminatory actions by the Prison Service, the hirer for whom he was working.

A commentator[16] makes the point that Mr Muschett was prevented, in the higher courts, from arguing that he was a 'contract worker',[17] as defined in Article 9 of the RRO, which provides:-

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3.2 goes on say "Member States shall not exclude from the scope of this Directive workers, contracts of employment or employment relationships solely because they relate to … persons with a contract of employment or employment relationship with a temporary-work agency." In any event, the Acquired Rights Directive contains a similar provision (Article 2.2) to Article 3.2 of the TAW Directive and this did not deter the ECJ from reaching its conclusions in Albron Catering.

[15] It should also be noted that a complaint can be made under the RRO, and other equality statutes, against a party "in relation to employment by him" (see Article 6(1) of the RRO).

[16] Royston T, 'Agency Workers and Discrimination Law', (2011) 40.1 Industrial Law Journal 92-102.

[17] The employment judge had found that Mr Muschett was not a 'contract worker' and he was not allowed to appeal on that point.

"(1) This Article applies to any work for a person ("the principal ") which is available for doing by individuals ("contract workers ") who are employed not by the principal himself but by another person, who supplies them under a contract made with the principal.
(2) It is unlawful for the principal, in relation to work to which this Article applies, to discriminate against a contract worker—
(a) in the terms on which he allows him to do that work; or
(b) by not allowing him to do it or continue to do it; or
(c) in the way he affords him access to any benefits, facilities or services or by refusing or deliberately omitting to afford him access to them; or
(d) by subjecting him to any other detriment."

Therefore, so long as Article 9 does not require that the worker is obliged to work personally for the agency (which would make a nonsense of the provision in the case of 'placement' agencies), Mr Muschett should have been able to bring a discrimination case against the hirer.[18]

More fundamentally, it appears, from first impressions, that Muschett-type agency workers *may* also be agency workers within the meaning of the draft Regulations. But this impression is called into question by a closer analysis of the definition of 'agency worker' in the draft Regulations.

Draft Regulation 3(1) provides:-

"In these Regulations "agency worker" means an individual who—
(a) is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer; and
(b) has a contract with the temporary work agency which is—
(i) a contract of employment with the agency; or
(ii) any other contract to perform work and services personally for the agency." (emphasis added.)

If the Employment Tribunal found that Mr Muschett was not a 'contract worker', on the basis that he was not 'employed' by the agency, it is

[18] Nonetheless, both the employment judge and the EAT found against Mr Muschett on this point.

arguable that he would not have come within the provisions of draft regulation 3(1)(b)(ii), namely, "any other contract to perform work and services personally for the agency".

It may well be the case that most agency arrangements are of the 'placement' variety rather than the position where, for example, a catering or security company sends its workers to provide a service in an establishment. It is certainly the case that agencies outside the UK 'provide' agency workers to hirers in NI. These workers are not, in any sense, 'performing work and services personally for the agency'.[19]

A more disturbing scenario has emerged in the NI Court of Appeal case of Bohill v Police Service of Northern Ireland.[20] Here the (unrepresented) applicant had an 'arrangement' with an agency but was consistently not 'taken on' by the Police Service. Until he was 'assigned' to an 'employer', he had no contract with the agency either.

The Court of Appeal reluctantly felt obliged to follow Muschett, having considered some other arguments based on the EU Race Directive

[19] We have considered here the applicability of other EU legislation on provision of services, including Directive 96/71/EC (of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services). Article 1.3(c) includes within the scope of the Posted Workers Directive, where "(c) [...] a temporary employment undertaking or placement agency [...] hire out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting." However many migrant agency workers will not satisfy the definition of `posted workers' in Article 2.1, "For the purposes of this Directive, 'posted worker` means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works." In any event, the Posted Workers Directive cannot be seen, in any event, as an alternative source of protection to that in the TAW Directive.

[20] [2011] NICA 2 (13 January 2011).

(discussed below). Once again, the 'agency worker' had no protection, this time under the Fair Employment and Treatment Order (NI) 1998. Mr Justice Coghlin, speaking on behalf of the Court, stated, at §14:-

"We have arrived at this conclusion with some degree of anxiety since, in doing so, the apprehension expressed by Smith LJ [in Muschett] that a gap might exist in the remedies available to workers in the appellant's position would appear to be confirmed."

In conclusion, at §18, the judge states:-

"For the reasons set out above this appeal must be dismissed but the case does seem to illustrate how an agency arrangement may deprive potential employees of important protections against discrimination. 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 OFM/DFM 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."

We will return to this request in due course but our first concern is whether some Bohill-type agency workers are not caught by the draft Regulations at all. Regulation 3(1) requires that the worker has a contract with the agency. At least between assignments, a Bohill-type agency worker does not have any contract with the agency and so falls outside the RRO definition, but also the draft Regulations' definition of an 'agency worker'.

Returning to the point that the Directive covers an 'employment relationship' as well as a 'contract of employment',[21] **there are serious doubts as to whether Muschett-type agency workers, who have a contract with the agency, but not a contract personally to provide**

[21] It is important to recall that the ECJ in Albron Catering described an 'employment relationship' to be an 'alternative and thus as an equivalent' relationship to that of a contract of employment.

**services to it, and Bohill-type agency workers, who, at some periods do not have a contract with the agency at all, are governed by the definition of 'agency worker' in the draft Regulations.**

Draft regulation 3(5)(c)[22] provides:-

"(5) An individual is not prevented from being an agency worker because—

(c) the individual is supplied pursuant to any contract or other arrangement between the temporary work agency, one or more intermediaries and the hirer;" (emphasis added.)

We remain unsure whether, as a matter of principle, this draft Regulation catches those agency workers in an 'employment relationship' with a temporary work agency which may not amount to a contractual relationship personally to provide services to the agency – or any contractual relationship at all.

W**e are of the view that the Regulations should, for the avoidance of doubt, clearly cover all possible employment relationships, including non-contractual ones, with temporary work agencies and hirers.** The preferable solution would involve adding a draft regulation 3(1)(b)(iii) to read:-

"(iii) any other contract or other arrangement with the agency to perform work and services personally for a hirer." (emphasis added.)[23]

We consider that both amendments are necessary to make clear that 'arrangements' which are not contractual are covered and also that the

[22] Reading draft regulation 3(3) and (4) together, they seem to provide that agency workers will be treated as having a contract with the temporary work agency if they are assigned to the hirer through intermediaries.

[23] We note the similarities between our proposed definition and that of the Law Centre (at p 6 of its response). The Law Centre response also alerts to the wider definition of 'worker' in regulation 2 of the Working Time Regulations (NI) 1998.

contract or arrangement can be to perform work and services personally for the hirer and not necessarily for the agency.[24]

### 2.2 Are all agency workers protected in the draft Regulations under the equality provisions of the Directive?

The relevant provisions of the Directive, in Article 5.1, state:-

"1. 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 that undertaking to occupy the same job.

For the purposes of the application of the first subparagraph, the rules in force in the user undertaking on:
(a) protection of pregnant women and nursing mothers and protection of children and young people; and

(b) equal treatment for men and women and any action to combat any discrimination based on sex, race or ethnic origin, religion, beliefs, disabilities, age or sexual orientation;

must be complied with as established by legislation, regulations, administrative provisions, collective agreements and/or any other general provisions."

In the Consultation Document, the Department only refers to protection of pregnant women in Article 5.1. It seeks to explain why there is no need for inclusion of this protection explicitly in the draft Regulations by reference to the applicability of sex discrimination legislation. At §4.50, it is explains, "The Sex Discrimination (Northern Ireland) Order 1976 as amended prohibits discrimination in the workplace and provides that less favourable treatment on grounds of pregnancy and maternity leave is sex

[24] We have also considered possible amendments to draft regulation 3(5). However, although we have adopted the term 'arrangement' to bring the definition in draft regulation 3(1) into line with the concept of 'employment relationship', we consider it necessary to provide amendments to draft regulation 3(1) itself.

discrimination.

This would mean, for example, that it would be discriminatory if an agency refused to place a worker, or if a hirer refused to accept a worker, because she was pregnant. Similarly, it would be discrimination if a placement were terminated because of pregnancy or if the worker was subjected to a detriment because of her pregnancy."

However, it is clear from Bohill that some pregnant agency workers are not protected by the Sex Discrimination Order (SDO). Depending on the interpretation of 'contract personally to perform work and services', Muschett-type pregnant agency workers may not be protected either. If they had an appropriate contract with the agency, they might have an action for refusal to place but they may not be protected against a refusal to hire. If, as in Bohill, they only get a contract on assignment to a hirer, it looks to be the case that they would not have a case against the agency either, for a refusal to place the agency worker.

The Court in Bohill appeared to be alert to this problem. Mr Justice Coghlin commented, in his concluding remarks:-

"Those [the GB] Regulations apply to 'agency workers' who are defined in reg. 3 in a way which does not depend directly on general definitions of 'employment' although they do require such workers to have a contract with an agency which is – "(i) a contract of employment with the agency, or (ii) any other contract to perform work and services personally for the agency." (emphasis added.)

We are concerned that the Department has not addressed directly the applicability of discrimination law to agency workers as required by Article 5.1(b), relying instead on reasoning, on the applicability of the SDO to pregnant agency workers, which has not taken into account the Muschett

and Bohill judgments.

It is not clear from Muschett as to whether there are situations in which agency workers will not be protected against racial and religious discrimination and harassment by hirers (or agencies). In Bohill scenarios, they may not even be protected against some discrimination or harassment by the agency.

We accept that the Bohill judgment was delivered in January 2011 after the launch of this consultation.[25] However the Department must take urgent advice on the implications of the Bohill (and Muschett) judgments in relation to implementation of Article 5.1(b) and indeed Article 5.1(a). **In our view, it is essential for the adequate implementation of the Directive that the Regulations explicitly apply the proposed revised definition in draft regulation 3(1)**, namely "(iii) any other contract or other arrangement with the agency to perform work and services personally for a hirer" **to all of the relevant equality statutes**, including the Race Relations Order, to protect ethnic minority agency workers, and the Fair Employment and Treatment Order, to protect religious minority agency workers.

It will be recalled that the judge in Bohill stated:-

"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 OFM/DFM concerned with legislative reform.

**It is our contention that it is the Department's responsibility to rectify this situation, at least in so far as the implementation of the Agency Workers' Directive is concerned.**

[25] We also accept that the bulk of the GB consultation was completed prior to the Muschett judgment.

## 2.3 Liability and enforcement

### 2.3.1 Introduction

The equal treatment principle lies at the heart of the Directive and therefore the provisions on liability for breaches of the principle, and its enforcement, are central to the effectiveness of the draft Regulations. **On the particular point of liability of, and enforcement against, non-UK agencies, we have grave reservations about the effectiveness of the liability and enforcement provisions in the draft Regulations.**

Article 5 refers to 'arrangements' in relation to the equal treatment principle without indicating whether the agency or the hirer should be liable for breaches of the principle. The second paragraph of Article 5.4, however, states:-

"The arrangements referred to in this paragraph shall be in conformity with Community legislation and shall be sufficiently precise and accessible to allow the sectors and firms concerned to identify and comply with their obligations."

Article 10 of the Directive states:-

"1. Member States shall provide for appropriate measures in the event of non-compliance with this Directive by temporary-work agencies or user undertakings. In particular, they shall ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced.
2. Member States shall lay down rules on penalties applicable in the event of infringements of national provisions implementing this Directive and shall take all necessary measures to ensure that they are applied. The penalties provided for must be effective, proportionate and dissuasive. Member States shall notify these provisions to the Commission by 5 December 2011. Member States shall notify to the Commission any subsequent amendments to those provisions in good time.
They shall, in particular, ensure that workers and/or their representatives

have adequate means of enforcing the obligations under this Directive. The methods of making such reference shall be laid down by Member States." (emphasis added.)

All such enforcement issues in EU directives, and EU law more generally, are subject to Community 'principles of law'. One of the most important cases ever to be heard by the European Court of Justice (ECJ) came from Northern Ireland, namely Johnston v Chief Constable of the Royal Ulster Constabulary,[26] supported by the then Equal Opportunities Commission for NI. In Johnston, the Court established that Community law includes a fundamental principle of 'effective judicial protection' that is applicable to all Community law (and not just the Equal Treatment Directive 1976 at issue in that case).[27]

**We have serious reservations as to whether the apportionment of liability between the agency and the hirer, as proposed in the draft Regulations, meets these requirements.**

### 2.3.2 Liability of non-UK agencies

The Department takes the view on liability that the agency should be

[26] Case 222/84 Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary, [1986] ECR 1651 (15 May 1986).

[27] §18 of the judgment, "The requirement of judicial protection stipulated by that Article reflects a general principle of law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950."
§19 of the judgment, "By virtue of Article 6 of Directive no 76/207, interpreted in the light of the general principle stated above, all persons have the right to obtain an effective remedy in a competent court against measures which they consider to be contrary to the principle of equal treatment for men and women laid down in the Directive. It is for the Member States to ensure effective judicial protection as regards compliance with the applicable provisions of Community Law and of national legislation intended to give effect to the rights for which the Directive provides."

primarily responsible. It states, at §8.15:-

"Our preferred approach would be to place primary liability with the agency, but acknowledge the fact that the agency will inevitably be reliant on information from the hirer in deciding on a worker's equal treatment 'package'. This would be done by providing an agency with a reliable defence in the event that they have taken "reasonable steps" or "best endeavours" to obtain accurate and relevant information from the hirer regarding the equal treatment package."

This approach is expressed in regulation 14 as follows:-

"(1) A temporary work agency shall be liable for any breach of regulation 5, to the extent that it is responsible for the breach.

(2) Subject to paragraph (3) the hirer shall be liable for any breach of regulation 5, to the extent that it is responsible for the breach."

In our view, obligations on the agency will be virtually impossible to enforce if the agency is based in a jurisdiction outside the UK, with the possible exception of the Republic of Ireland. This would be a breach of the requirements of Article 10 of the Directive and, more generally, of the 'principle of effective judicial protection' in Community law.

In NICEM's research report, 'Za Chlebem', in relation to EU/EEA migrant workers, we state:-

"A significant concern to be raised during this consultation process is the need to protect those workers who register with agencies in another country to work in the UK, for example a Polish construction worker who registers with an agency in Poland to work in Northern Ireland."[28]

[28] In The Guardian's summing up of a series on 'New Europe", a poignant comment is made by a Polish worker returning to Poland after a period of work in the UK. "Poles did the same, of course, throughout the past decade. Amelia Gentleman found that many are now returning, and not always with good stories. One migrant, Jan Pomorski, said: "I was one of those migrants myself, came back after two years … I was just another Pole living in the ghetto (Stratford, London) for 900 pounds/month, in overcrowded place, struggling to save some money. As for the promised land, I can say just one thing: agencies. Some work agencies are advertising, hiring, and even training in

As can be seen, in the distressing evidence we have produced to the Advisory Committee, in relation to non-EU/EEA migrant workers, the treatment of agency workers, at least in the fishing industry, where the agency is based outside the EU/EEA, can be appalling.

Even without these concerns, it would be virtually impossible for EU/EEA agency workers, let alone non-EU/EEA agency workers, to enforce the principle of equal treatment against agencies based outside the UK (and possibly Ireland).

**We therefore strongly propose that a locally based hirer should be jointly liable for breaches of the equal treatment principle <u>from which the hirer has benefited</u>.**

The Department has rejected joint liability, at §8.14:-

"We have considered the possibility of making provision for joint and several liability between agencies and hirers but concluded that this would not be in the interests of either of those parties or the worker. There would be a lack of clarity as to respective responsibilities, greater uncertainty regarding avenues of redress and the potential for one or other of the hirer and agency to be held partially liable for the other's failures."

We are not commenting upon how appropriate this approach is in relation to locally based agencies[29] but it is totally unrealistic in relation to non-UK based agencies.[30] **The only 'clarity' about the proposed arrangements**

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Poland (like I was trained) and as soon as you start working they don't give a […] about you any more." 'New Europe: what we've learned', <u>The Guardian</u>, 8 April 2011 (http://www.guardian.co.uk/world/2011/apr/08/new-europe-what-we-learned).

[29] The TAW Directive is not totally neutral on the apportioning of liability between the agency and the hirer. In Article 2, one of the aims of the Directive is set out as being "recognising temporary-work agencies as employers".

[30] We note that the Joint Declaration between the Government in GB, the TUC and the CBI refers, at (c)(i), to "mechanisms for resolving disputes regarding the definition of equal treatment and compliance with the new rules that avoid undue delays for workers

**is that workers with an employment relationship with a non-UK agency would have little or no protection and this must be a serious failure to implement the Directive adequately.**

In Albron Catering, the ECJ made some interesting observations, in circumstances in which a choice had to be made between a contractual and non-contractual 'employer' as the appropriate transferee under the Acquired Rights Directive:-

"28 Thus, the transfer of an undertaking, within the meaning of Directive 2001/23, presupposes, in particular, a change in the legal or natural person who is responsible for the economic activity of the entity transferred and who, in that capacity, establishes working relations as employer with the staff of that entity, in some cases despite the absence of contractual relations with those employees.

29 It follows that the position of a contractual employer, who is not responsible for the economic activity of the economic entity transferred, cannot systematically take precedence, for the purposes of determining the identity of the transferor, over the position of a non-contractual employer who is responsible for that activity."

**The Court was looking at the practical realities of the different employment relationships** and chose to treat the non-contractual party as the transferee. We are not in this position here. We are not saying that the hirer should always be liable, or jointly liable, for any breaches of the principle of equal treatment. Under our proposed version of joint liability, the hirer would only become liable for breaches of the principle where it has benefited from the breach. What seems certain is that agencies and hirers

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and unnecessary administrative burdens for business" but we cannot see how this denial of joint liability, in some circumstances, can do anything but create immense barriers to the enforcement of these provisions against non-UK agencies. The only burden placed on a hirer, which has benefitted from a breach of the equal treatment principle, is the proper one of being liable for its improper benefit.

should not be permitted to construct contractual and other arrangements to deprive agency workers of their rights.

**We cannot see how Article 10 is satisfied in relation to non-UK agencies, based either in other parts of the EU/EEA, or outside the EU/EEA. This would only be achieved if local hirers were made jointly liable for the acts of non-UK agencies, from which they derived a benefit.**

## 3 Compliance with other Community Law obligations

Both Article 5.4 of the Directive, and other EU obligations, require that the draft Regulations must satisfy other Community Law obligations. We have concerns that two fundamental pieces of Community Law may be contravened by these proposals.

### 3.1 Regulation 1612/68/EEC

#### 3.1.1 Introduction

Regulation 1612/68/EC (on freedom of movement for workers within the Community)[31] underpins what is now Article 45 of the Treaty on the functioning of the European Union (TFEU), which states:-

"1. Freedom of movement for workers shall be secured within the Community.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment."

Although now recognised as being directly enforceable in national courts by

[31] Regulation (EEC) No 1612/68 Of The Council of 15 October 1968 on Freedom of Movement for Workers within the Community (OJ L 257, 19.10.1968, p. 2).

individuals ('direct effect') against both public and private bodies ('horizontal direct effect'), much of the case law on free movement of workers is based on a comprehensive Regulation enacted in 1968.

Paradoxically, although Regulations in GB&NI law are a subsidiary form of legislation, in what is now EU law, they are (supposed to be) very powerful instruments:-

"Regulations are in some sense equivalent to "Acts of Parliament", in the sense that what they say is law and do not need to be mediated into national law by means of implementing measures. As such, regulations constitute one of the most powerful forms of European Union law and a great deal of care is required in their drafting and formulation.

When a regulation comes into force, it overrides all national laws dealing with the same subject matter and subsequent national legislation must be consistent with and made in the light of the regulation. While member states are prohibited from obscuring the direct effect of regulations, it is common practice to pass legislation dealing with consequential matters arising from the coming into force of a regulation."[32]

Partly because it was enacted before the UK joined the then European Economic Community, partly because it is most unusual to have a Regulation in either employment or equality law and partly, perhaps, because of issues as to the court or tribunal system in which it can be enforced,[33] it has never received much attention in relation to employment

[32] Wikipedia, 'Regulation (European Union)' (http://en.wikipedia.org/wiki/Regulation_(European Union)).

[33] A recent judgment of the European Court of Justice, IMPACT v Department of Agriculture & Others, judgement of 15 April 2008, makes clear that all directly enforceable EU law must be adjudicated upon in the most appropriate court or tribunal in the national legal systems (see Fitzpatrick B, 'An in-depth analysis of the remedies that will achieve protection and equality for migrant workers' (2010) 2 (Spring 2010) Minority Rights Now! pp 30-33).

and equality law.[34]

**However, the provisions of the 1968 Regulation override pre-existing and subsequent national legislation**. The final Article of the Regulation, Article 48, states:-

"This Regulation shall be binding in its entirety and directly applicable in all Member States."

This is 'Euro-speak' for over-riding effect and direct enforceability through national administrations and in the courts.[35]

### 3.1.2 Do the provisions of the draft Regulations contravene the 1968 Regulation?

The 1968 Regulation concerns free movement of EU workers. It ensures that EU workers who move to another Member State are not discriminated against, compared with national workers, across a range of employment and non-employment issues.

The Regulation has its own principle of equal treatment, in Regulation 7.[36] Paragraph 1 states:-

"1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re- employment;"[37]

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[34] The 1968 Regulation was considered in Zalewska v Department for Social Development (Northern Ireland) [2008] UKHL 67 (12 November 2008), on appeal from the ruling of the NI Court of Appeal [2007] NICA 17, a social security, rather than an employment, case.

[35] This is provided for, in very convoluted language, in section 2(1) of the European Communities Act 1972.

[36] Regulation 7 was considered in Zalewska.

[37] Incidentally, paragraph 2 goes on to provide, "He shall enjoy the same social and tax

It was in relation to paragraph 2 that the ECJ developed a comprehensive definition of indirect discrimination, which later became the basis for the definition of indirect discrimination in the Race Directive 2000 or other EU equality laws.

O'Flynn v Adjudication Officer[38] was a case about a refusal of payment of a death grant to the family of an Irish citizen who had died in the UK. The applicant was arguing that the death grant was a 'social advantage' within the meaning of Article 7.2. It is worth quoting extensively from the judgment of the Court, at §§17 – 21:-

"17 The Court has consistently held that the equal treatment rule laid down in Article 48 of the Treaty and in Article 7 of Regulation No 1612/68 prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead in fact to the same result […] .

18 Accordingly, conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers […] or the great majority of those affected are migrant workers […], where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers […] or where there is a risk that they may operate to the particular detriment of migrant workers […].

19 It is otherwise only if those provisions are justified by objective considerations independent of the nationality of the workers concerned, and if they are proportionate to the legitimate aim pursued by the national law […].

20 It follows from all the foregoing case-law that, unless objectively justified and proportionate to its aim, a provision of national law must be regarded

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advantages as national workers."

[38] Case C-237/94, O'Flynn v Adjudication Officer (Freedom of movement for persons) [1996] EUECJ (23 May 1996).
URL: *http://www.bailii.org/eu/cases/EUECJ/1996/C23794.html*
Cite as: [1996] ECR I-2617, [1996] EUECJ C-237/94

as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage.

21 It is not necessary in this respect to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect. Further, the reasons why a migrant worker chooses to make use of his freedom of movement within the Community are not to be taken into account in assessing whether a national provision is discriminatory. The possibility of exercising so fundamental a freedom as the freedom of movement of persons cannot be limited by such considerations, which are purely subjective." (emphasis added.)

### 3.1.2.1 Is the definition of 'agency worker' in the draft Regulations capable of being indirectly discriminatory against EU migrant agency workers?

In our view, the answer to this question is 'yes'.

The first point is that the ECJ applies a very wide definition of 'worker' in relation to both Article 45 TFEU and the 1968 Regulation. Any form of economic activity, other than self-employment, will satisfy the test.[39] We doubt whether there would be much argument before the ECJ that economic entities could construct agency arrangements so as to deny an agency worker the protection of Article 45 and the 1968 Regulation.[40]

It is true that the Department's own research indicates that relatively few migrant workers have a job through an agency. The paper commissioned by DEL entitled 'A Report on the Experiences of Migrant Workers in Northern Ireland' includes the following extract:-

[39] In Case C-66/85, Lawrie-Blum v Land Baden Wurttemberg (1986), the Court stated, at §17, 'the essential feature of an employment relationship … is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.'

[40] For example, a requirement that the remuneration has to be received from the party to which the services are provided.

"It is interesting to note that, unlike in some other regions of the UK (see for example: Green et al. in relation to West Midlands), the largest group of respondents to the current survey found their jobs through applying directly to an employer in Northern Ireland, and only 17% were recruited by an agency while here."

What this extract does not disclose is what percentage of EU migrant workers found their first work here in NI through an agency, be it locally based or based in their own Member State. While we doubt that many EU migrant agency workers are in Bohill-type arrangements, we suspect that many workers find their first work in NI through Muschett-type arrangements with placement agencies either here or, particularly, in their own Member State.

In our view, the uncertainty over the status of agency workers with contracts or arrangements with placement agencies is "intrinsically liable to affect migrant workers more than national workers and [therefore] there is a consequent risk that it will place the former at a particular disadvantage". Thus this uncertainty is sufficient to satisfy the tests of indirect discrimination in O'Flynn and provides an obstacle to free movement of EU agency workers. It is difficult to see how this 'particular disadvantage' could be objectively justified as we cannot see any rational basis for these distinctions, particularly when the Directive's definition includes the term 'employment relationship' which has been interpreted by the ECJ to include non-contractual relationships.

### 3.1.2.2 Are the liability and enforcement provisions in the draft Regulations capable of being directly or indirectly discriminatory against EU migrant agency workers?

In our view, these questions can be answered in the affirmative.

It is difficult to imagine any UK citizen entering into an agency arrangement with an agency outside the UK (with the possible exception of some NI citizens contracting with an Irish agency[41]). Inevitably all agency workers who have arrangements with agencies based in other EU Member States will themselves be EU migrant agency workers.

**In this context, we would argue that the unenforceability of the enforcement provisions of the draft Regulations against EU/EEA based agencies outside the UK could be direct discrimination contrary to both Article 45 TFEU and Article 7.1 of the 1968 Regulation.**

We would also argue that the failure to provide joint liability between locally-based hirers and non-UK EU/EEA agencies, at least where the hirer has benefited from any breach of the Regulations, also amounts to direct discrimination against EU migrant agency workers.

**If the enforcement and liability provisions in the draft Regulations are not directly discriminatory, they must be an obvious case of unjustifiable indirect discrimination according to the O'Flynn principles. Similarly the failure to provide joint liability, in some circumstances, between the agency and the hirer must also amount to unjustifiable indirect discrimination.**

[41] In fact, citizens of NI are technically capable of being citizens of Ireland also and so this point is not even an exception to the otherwise universal position.

### 3.1.3 Conclusion

**We therefore invite the Department urgently to take advice on whether, under EU free movement of workers law, the definition of 'agency worker' in the draft Regulations is indirectly discriminatory and whether the liability and enforcement provisions are directly or indirectly discriminatory.**

## 3.2 EU equality law directives

### 3.2.1 Introduction

The question of whether EU equality law directives can apply to some or all agency workers has been raised in the Bohill case.[42]

### 3.2.2 The scope of the Race Directive

Article 3.1 of the Race Directive sets out the scope of the Directive and includes:-

**"**1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

[…]

(c) employment and working conditions, including dismissals and pay;"

[42] Mr Bohill was unrepresented but it may be that Counsel for the Police Service directed their lordships to relevant case law developments in the ECJ.

In our view, there is some unnecessary controversy over the meaning of 'occupation' in Article 3.1(a) and also whether "employment and working conditions" in Article 3.1(c) only apply to 'employees' and 'workers'.

We are once again caught up in largely British (and Irish) presumptions that 'employment' in EU legislation must refer to a contract of employment or some contractual arrangement. This emphasis on particular forms of contractual relationships is a 'common law' phenomenon. Most European labour law systems are based on collective agreements (frequently extended across a sector or entire labour market by statutory regulations) or Works Council systems. Therefore it is hardly surprising that EU statutes, such as the Acquired Rights Directive and the TAW Directive refer to both 'contract of employment' and the 'alternative and equivalent' 'employment relationship'.[43] Nor is it surprising that the ECJ, in Albron Catering, interpreted 'employment relationship' to include non-contractual relationships.

We are of the view that the ECJ would consider the concept of 'employment' to include 'employment relationships', as interpreted by the Court in Albron Catering.

We do not consider it necessary to speculate on whether agency workers can be covered by 'self employment' or 'occupation' as they are clearly in 'employment relationships' with both the agency and the hirer. So also the concept of 'employment and working conditions' must be interpreted to include the terms and conditions of agency workers.

[43] The Posted Workers Directive only refers to 'employment relationships'.

The Race, and other EU equality, Directives are based upon a fundamental principle of equal treatment in EU law. The Race Directive was enacted to meet a perceived increase in racism and xenophobia in parts of the EU in the late 1990s. It seems inconceivable that the EU legislator intended to exclude highly vulnerable workers, many of whom could be migrant workers, from this fundamental protection, on the basis of contractual (and non-contractual) arrangements constructed by hirers and agencies.[44]

The NI Court of Appeal did not hear this analysis on behalf of an unrepresented applicant in Bohill. The Court directed itself towards the interpretation of 'occupation', primarily in relation to the controversy over whether 'volunteers' are protected under EU equality law and also in relation to some professional situations which might amount to an 'occupation'. The Court did not have the opportunity to consider whether 'employment' includes 'employment relationships' outside a contract of employment, or any contract at all.

It is therefore suggested that the equality provisions in the Temporary Agency Worker Directive are 'for the avoidance of doubt'. Article 5.1(b) of the Directive applies equality provisions in the 'user undertaking' to agency workers. But the Race Directive already applies to "all persons, as regards both the public and private sectors …" This includes therefore agencies, to whom the equality provisions are not specifically applied in the TAW

[44] To paraphrase the ECJ in Albron Catering:-
""The requirement under Article 3(1) of Directive 2000/43 that there be 'employment, self employment or occupation' presupposes that 'employment' should include either an employment contract, or, in the alternative and thus as an equivalent, an employment relationship … This suggests that, in the mind of the Union legislature, a contractual link with the agency or hirer is not required in all circumstances for workers to be able to benefit from the protection conferred by Directive 2000/43."

Directive, because they are already covered by the Race Directive. But is also appears to cover the hirers even without the provisions of Article 5.1(b) of the TAW Directive.

### 3.2.3 Coverage of the RRO

It has already been stated above that NI equality statutes, including the RRO and FETO, require amendment in the draft Regulations in order to satisfy the equality provisions of the TAW Directive. However, perhaps in conjunction with the OFMDFM, the equality statutes themselves require amendment to ensure that they cover all 'employment relationships' including all temporary agency work arrangements. Therefore, if there are some agency work relationships that for some reason are not covered by the TAW Directive, or any employment scenarios which, for some reason, are not covered by the TAW Directive, we consider it highly likely that they are covered by the Race Directive (and other EU equality directives).

To the extent that the draft Regulations (and NI equality statutes) do not cover 'employment relationships' outside of the appropriate contractual (and non-contractual) relationships, both the draft Regulations and the NI equality statutes need to be amended to bring them into line with the Race Directive.

**We suggest below that, whether a direct obligation under the TAW Directive or an obligation under the Race Directive, these draft Regulations are the appropriate vehicle to bring about these changes.**

### 3.2.4 Direct and indirect discrimination under the Race Directive

We are also of view that the liability and enforcement provisions of the TAW Directive may be either directly or indirectly discriminatory towards **EU/EEA, and also non-EU/EEA, agency workers** on similar grounds to the analysis under Article 7.1 of the 1968 Regulation.

It should be immediately stated that Article 3.2 of the Race Directive does exclude discrimination based on nationality from the scope of the Directive. It states:-

"2. This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third- country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned."

However the Race Directive does cover discrimination on grounds of racial and ethnic origins and there may well be scenarios in which the liability and enforcement provisions of the draft Regulations will give rise to direct and indirect discrimination issues.

Article 2.2(a) covers direct discrimination, as follows:-

"direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;"

Taking the earlier analysis of direct discrimination under the 1968 Regulation, it could be argued that only migrant agency workers will have an agency arrangement with an agency outside the UK (and possibly Ireland). Many migrant agency workers, both EU/EEA and non-EU/EEA, are likely have an arrangement with an agency outside the UK (and

Ireland), at least for their first job in NI. Many will be of a different racial or ethnic origin to those workers in NI who will have an arrangement with a locally based agency.

It is therefore arguable that the liability and enforcement provisions in the draft Regulations treat migrant agency workers from various ethnic minority communities, for example, the Filipino and Polish communities, less favourably than agency workers in the two majority communities in NI.

In any event, Article 2.2(b) covers indirect discrimination, as follows:-

"indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."

It can be seen that this definition is 'inspired' by the case law of the ECJ on indirect discrimination under the 1968 Regulation. We argue that similar considerations apply under the Race Directive. On the issues surrounding the liability and enforcement provisions, we submit that, if they are not directly discriminatory, they are indirectly discriminatory. Given that agency arrangements with agencies outside the UK (and possibly Ireland) will exclusively involve migrant agency workers, they will self-evidently be placed 'at a particular disadvantage' compared to locally based workers.

We cannot see a 'legitimate aim' in placing liability primarily on the agency, irrespective of its location. The only 'clarity' in these proposals is to make clear that enforcement by many migrant agency workers against a non-UK agency, will be virtually impossible. Nor is this allocation of liability on non-UK agencies 'appropriate and necessary' (or 'proportionate') as joint liability

in some circumstances would be a fairer response, more compatible with fundamental principles of EU law.

In relation to the definition of 'agency worker', we suggest that it is more likely that migrant agency workers will be in a 'placement' agency arrangement with an agency outside the UK (and possibly Ireland). The greatest doubt about arrangements that may fall outside the definition of 'agency worker' in the draft Regulations surrounds those arrangements in which the workers are not providing any services to the agency but are being placed with a hirer so that they can provide services to the hirer.

We therefore consider that the uncertainties surrounding the scope of the definition of 'agency worker' may place migrant agency workers at a 'particular disadvantage' compared with agency workers who are based in NI. As with the analysis under the 1968 Regulation, we argue that there is no 'legitimate aim' in potentially excluding a wide range of agency workers from the definition of 'agency worker and that, in any event, a straightforward amendment to the definition can include 'agency arrangements' that would deal with the problem.

### 3.3 Conclusion

We therefore have grave concerns that two aspects of the draft Regulations, on the definition of 'agency worker' and on the liability and enforcement provisions, contravene both the 1968 Regulation and the Race Directive. As far as compliance is concerned, the Regulation is restricted in its scope to EU migrant workers. It is 'directly applicable' and overrides any national legislation whether before or after it. It is not

permissible to have, on the statute book, NI legislation which is directly or indirectly discriminatory towards EU migrant workers

As far as the Race Directive is concerned, **it also applies non-EU/EEA workers working in NI**. Its compliance provisions are set out in Article 14, which provides:-

"Member States shall take the necessary measures to ensure that:
(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;"

This pre-supposes that discriminatory provisions, such as those we have identified in the draft Regulations, should not be enacted in the first place.

We have sought to show that aspects of the draft Regulations are not 'in conformity with Community obligations', as set out in Article 5.4 of the TAW Directive. We have also sought to show that hey are also not in conformity with the 1968 Regulation and the Race Directive, alongside principles of Community law, such as the 'principle of effective judicial protection'. **In these circumstances we recommend that the Department takes legal advice on these issues before enacting the draft Regulations into law.**

**4 Perceived limitations of devolved legislative competence in NI**

We now wish to address two controversies over perceived limitations on the competence of the devolved institutions to legislate on matters of employment law and, to some extent, equality law. One perceived limitation is an assumption that legislatures in GB and NI are somehow limited to legislating at the minimum permissible standards set in EU Directives, at

least where regulations under the European Communities Act 1972 are employed. This is sometimes known as the 'no gold-plating' principle.

A second perceived limitation appears to be what we consider some form of self-imposed 'parity principle' between NI employment law, and, indeed many aspects of equality law, outside NI-specific laws such as fair employment and section 75 (of the NI Act 1998).

In our view, there is no constitutional, or other, basis for these two perceived limitations.

### 4.1 The inappropriateness of a 'no-gold-plating' approach

The first general point that we wish to make is that the 'bare minimum' ('no gold-plating') approach adopted here and elsewhere is not justifiable in Community law and is, we believe, contrary to the spirit of our Community obligations.

We are disappointed, on page 3 of the 'Impact Assessment' document, to find a question, "Will implementation go beyond minimum EU requirements?", to which the answer is 'No'. Has this template been adopted from the practice of the Government in Great Britain?[45] **When did the Northern Ireland Executive, or any of its constituent Departments, make a policy decision on keeping to the minimum standards of directives, or 'no gold-plating'?**

There are some who seek to justify this 'no-plating' approach on an

[45] We note that the Impact Assessment is adapted from the Impact Assessment by the GB Government during its consultation on the equivalent draft Regulations (January 2010) (http://www.bis.gov.uk/assets/biscore/employment-matters/docs/10-582-agency-workers-directive-impact-assessment.pdf).

interpretation of the wording of the European Communities Act 1972. Section 2(2) of the Act 1972 allows for the implementation of "Community obligations" and also enactments concerning "related matters' by means of Regulations.

We are aware of a controversy over the Transfer of Undertakings Regulations, in which some commentators were attempting to argue that, if the standards of the Regulations were higher than those of the Acquired Rights Directive, following a judgment of the ECJ, the Regulations might even be unlawful (or *ultra vires*) as going beyond the minimum requirements of the Directive. This issue was considered in a transfers case, Brintel Helicopters Ltd v KLM Era Helicopters (UK) Ltd[46] but the Court refused to examine the issue.

There is no constitutional basis for the proposition that 'Community obligations' in section 2(2) of the 1972 Act could have such a restrictive meaning. In any event, as decided in R v Secretary for Trade and Industry ex parte Unison, 'related matters' in section 2(2) can cover a wide range of matters.

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[46] [1997] EWCA Civ 1340. In section 10 of his judgment, Lord Justice Kennedy stated:- "But, as Mr Goudie points out, Suzen is a decision of the European Court in relation to the Directive. It is not a decision of an English court in relation to the 1981 Regulations which, Mr Goudie submits, may go beyond the Directive. I can find no basis upon which to conclude that they do. If I were not of that opinion then it would be necessary to consider Mr Carr's submission that in so far as the regulations exceed the requirements of the Directive they are *ultra vires* the enabling legislation, namely section 2 of the European Communities Act 1972 . Mr Goudie submitted that the words "related to" in section 2(2)(b) of the 1972 Act give the Secretary of State a wide measure of discretion, as found by the Divisional Court in R v Secretary for Trade and Industry ex parte Unison (1996) IRLR 438, but he acknowledges that the decision in the Unison case was not followed by the Employment Appeal Tribunal in Scotland which, in Addison v Denholm Ship Management 24.1.97 unreported, expressed the view that if the 1981 Regulations went beyond the requirements of the Directive they would be *ultra vires*. In my judgment it is unnecessary in this case to resolve that conflict and I say no more about it."

Ethnic minorities in Northern Ireland have had particularly unhappy experiences of this 'no gold-plating' minimalism. Two significant deficiencies in the RRO can be traced back to this approach. First, the many changes to the Order made by the 2003 Amendment Regulations only apply to race, ethnic and national origins and not the two other 'racial grounds', colour and nationality. The EU Race Directive 2000 explicitly applies to racial and ethnic origins. It was concluded that 'national origins' could be a 'related matter' but that 'nationality' and 'colour' could not.

This minimalist approach to the implementation of the Race Directive has resulted in a wide range of anomalies in the RRO.[47]

OFMDFM was confronted with the same dilemma in relation to amendments to the Fair Employment and Treatment (NI) Order 1998 (FETO), which covers both discrimination on grounds of 'religious belief' and 'political opinion'. The Framework Directive covers equal treatment on grounds of 'religion or belief', which is understood to cover some 'philosophical' beliefs but not political beliefs. However OFMDFM sensibly amended FETO to cover both 'religious belief' and 'political opinion'. Otherwise FETO would have been split into two sets of laws, one for 'religious belief' cases and one for 'political opinion' cases.

[47] This strange anomaly was considered by the Employment Appeal Tribunal (EAT) in the case of Abbey National Plc v Chagger ([2008] UKEAT 0606_07_1610 (16 October 2008), where a worker of 'Asian race' and 'Indian origins' appeared to base his case on his colour and that of another worker not chosen for redundancy. He won very substantial compensation after the Employment Tribunal 'reversed the burden of proof' in deciding whether Abbey National had discriminated against him. The EAT could not make much sense of the exclusion of 'colour' from the list of 'racial grounds' covered by the amendments in the 2003 Regulations, particularly since 'national origins' had been included. In the end, the EAT concluded that 'colour' is a visible manifestation of 'race' and 'ethnic origins' and that this was so self-evidently that the Race Directive must, implicitly, cover 'colour' as well.

A second significant deficiency in the RRO is in relation to discrimination and harassment in performance of public functions. As a result of the Macpherson Inquiry, the Race Relations Act 1976 in Great Britain was amended by the Race Relations Amendment Act 2000 to allow for discrimination cases in performance of public functions, particularly as the original Act was perceived not to cover most policing functions, along with many other public functions.

It was accepted that the Race Directive covers discrimination and harassment in some public functions. Instead of using the 'related matters' provision in section 2(2) to legislate for discrimination and harassment in all public functions, the RRO (Amendment) Regulations (NI) only cover those public functions considered to be governed by the Race Directive. We are therefore left in NI with a range of public functions, of a purely public nature, which may not be covered by the RRO even though they have been covered in GB since 2000.

One advantage of the Equality Act 2010 in Great Britain is that it has swept these anomalies away, both in relation to 'racial grounds' and discrimination and harassment in performance of public functions. But these debilitating anomalies continue to apply in NI, because of this unsustainable 'no gold-plating' approach to Regulations enacted under section 2(2) of the 1972 Act.

NICEM is therefore concerned that this question, "Will implementation go beyond minimum EU requirements?", is even being asked. The objective of a directive is to integrate the minimum standards of a directive into national law, not to create a wide range of anomalies and otherwise irrational

distinctions. Therefore the invocation of a wide range of exceptions, and the exploitation of every element of national discretion, in the TAW Directive cannot be justified on the basis of some 'no gold-plating' policy,[48] which has not, to the best of our knowledge, been formally adopted by the NI Executive.

**We recommend that this matter be brought to the attention of the Committee for the Office of the First Minister and deputy First Minister and/or the Committee for Employment and Learning so that a debate on effective implementation of Community obligations can be commenced.**

We submit, as set out above, that aspects of the draft Regulations do not, in any event, meet the minimum standards of the TAW Directive, in the context of the Directive itself and wider (and over-riding) principles of Community law. However, we also suggest that the exercise of discretion in the implementation of the Directive has been heavily constrained by this perceived, and inappropriate, constraint of devolved legislative functions.

### 4.2 The inappropriateness of a self-imposed 'parity principle' in NI employment law

The second general point which we wish to make is that, as a devolved matters, employment law and equality law should not necessarily be subject to a self-imposed 'parity principle' on substantive employment rights, whether in relation to satisfying EU obligations or anywhere else.

It appears to be the case that the Department is content to have genuine

[48] We note some points in the Law Centre response where discretion could have been exercised more generously.

devolution on procedural matters in employment law. For example, the Department conducted an impressive review of dispute resolution[49] on the basis that GB solutions might not be appropriate in NI.[50] As a result, there continue to be statutory disciplinary procedures in the Employment Act (NI) 2011 although they have been repealed in GB.

Although there is a 'parity principle' in relation to social security in the Northern Ireland Act 1998,[51] no such principle applies to employment law. Nonetheless, a self-imposed parity principle appears to be in operation. For example, Article 253 (2) of the Employment Rights (NI) Order 1996, which would have been proposed by 'direct rule' Ministers, provides:-

"(2) Accordingly, the Department may, with the consent of the Department of Finance and Personnel, make reciprocal arrangements with the Secretary of State for co-ordinating the relevant provisions of this Order with the corresponding provisions of the Act of 1996 so as to ensure that they operate, to such extent as may be provided by the arrangements, as a single system."

NICEM believes that the "energy for regional solutions",[52] so eloquently expressed in the Dispute Resolution Consultation Document, should apply to substantive employment rights as well as employment protection procedures. We accept that employment rights with social security

[49] DEL, 'Disputes in the workplace: a systems review Public consultation' (2009).
[50] At §4.1 of the Consultation Document, it is stated, "Although the framework of employment law in Northern Ireland resembles very closely that in Great Britain, employment law is a devolved matter and, therefore, Northern Ireland is not required to simply follow suit with GB."
[51] Section 87(1) of the Act provides:-
"The Secretary of State and the Northern Ireland Minister having responsibility for social security ("the Northern Ireland Minister") shall from time to time consult one another with a view to securing that, to the extent agreed between them, the legislation to which this section applies provides single systems of social security, child support and pensions for the United Kingdom."
[52] Dispute Resolution Consultation Document, §4.2.

implications may be governed by the parity principle in the Northern Ireland Act but other employment rights are a purely devolved matter.[53] In our view, a heavily constraining 'parity principle' in NI employment law, and those parts of equality law that are not specific to NI, should only be applied after an extensive debate both inside the Assembly and with the wider society. **We recommend that this matter be brought to the attention of the Committee on Employment and Learning so that this debate can be commenced.**

Therefore, in our view, it is inappropriate to rely on a 'no gold-plating' principle or a self-imposed 'parity principle' in employment law to repeat word-for-word what has already been enacted in GB. We do not accept that the Department should take a minimalist approach to the implementation of this Directive either on grounds that only minimalist implementation is permissible or advisable, or on grounds that GB has already legislated in such a fashion.[54]

To return to the issue of compliance with the Department's equality scheme, we cannot see how this could have been a meaningful

[53] We note that the Department considers itself bound by the agreement between the Government in Great Britain, Trades Union Congress (TUC) and the Confederation of British Industry (CBI) ('Agency Workers: Joint Declaration by Government, The CBI and The TUC", (May 2008). However, this Declaration is largely concerned with a 12-week qualifying period for the protection of rights. It also concerns "mechanisms for resolving disputes" the provisions for which in the draft Regulation we consider are incompatible with the TAW Directive and wider EU law principles.
However, we also wish to point out that this Declaration, to which the Department and Irish Congress of Trade Unions are not parties, has no legal or constitutional status in the devolved labour law system of NI and, in any event, cannot be used to justify some form of 'parity principle' in relation to the draft Regulations.

[54] Once again, we note some points in the Law Centre response where discretion could have been exercised more generously.

consultation, even if screening and a full EQIA had occurred, if the Department is wedded to both a no gold-plating' principle and a self-imposed 'parity principle' in relation to the implementation of EU social rights.

We have already expressed our grave concerns at the effectiveness of the draft Regulations in relation to non-UK temporary work agencies and concerns that some aspects of 'pay' have not been included in the definition of 'pay' in draft regulation 5. Although we wish to see these Regulations brought into effect as soon as possible, we still consider that there is time, before the final implementation deadline of the Directive, for the Department to consider amendments to the draft Regulations.

**5 Equality impact assessment**

We now wish to address the equality impact assessment process undertaken in Annex B of the Impact Assessment, 'Preliminary Equality Impact Assessment', as part of this consultation process. First we should say that a significant amount of work has gone into developing the BIS Impact Assessment to address the NI context. Unfortunately it does not seem to us to satisfy the requirements of the Department's equality scheme.[55]

We note the provisions on what is now being described as 'Preliminary Equality Impact Assessment' (PEQIA), set out in §§4.2.3-4.2.8 of the Department's equality scheme and in Annex D of the scheme. At first glance, PEQIA might appear to be an innovative approach towards

[55] We have located the Department's equality scheme on its website at http://www.delni.gov.uk/index/publications/equality-good-relations/equality-booklets.htm.

screening with even some of the elements of mitigation and alternatives at the PEQIA stage. However, whatever the original intentions, we are satisfied that the approach taken, modelled on the BIS 'Equality Impact Assessment', is inappropriate for NI and is inadequate compliance with the Department's existing scheme.

The starting point for PEQIA is §4.2.3 of the Department scheme, which states:-

"When considering options for a new policy, service or programme, or for changing an existing service or programme, the Department will at the earliest opportunity carry out a preliminary Section 75 assessment (see Annex D). This will involve assessing whether the option is likely to impact on equality of opportunity or good relations, and seeking to identify which Section 75 groups (as indicated in Annex A), if any, would be adversely affected. (emphasis added.)

In the Impact Assessment generally, the only 'options' considered appear to be 'do nothing', introduce a 12 week qualifying period or have a qualifying period from 'day one'. But the Consultation Document asks 40 questions, each of which involves an 'option choice' for the Department. We accept that some concerns may be being brought to the Department's attention in this response but we do not consider that an assessment of the 'general benefit' of the draft Regulations under various equality headings involves a PEQIA at all. Take Q1 in the Consultation Document:-

"Do you consider that using a definition for agency workers based on that of a "worker" under regulation 2 of the Working Time Regulations (Northern Ireland) 1988, but in the context of the triangular relationship with the employment business and the hirer, provides the most appropriate coverage for the legislation to implement the Directive?

Applying the approach in Annex D of the Department's equality scheme, the two questions should have been posed:-

“5 Would this option promote equality of opportunity between people of different racial groups?

6 Could this option adversely affect equality of opportunity between people of different racial groups?”

The answer to ‘5’ is ‘yes’ because some migrant agency workers will receive protection that they previously lacked. But the answer to ‘6’ is ‘yes’ also. Many migrant agency workers may not be covered by the definition of ‘agency worker’, whether of the Muschett-type or the Bohill-type. By basing this definition on a contractual model, including one of providing services to the agency, this option has the potential to bring about very significant adverse impact on many migrant agency workers.

Can this adverse impact be mitigated or is there an alternative option which will alleviate the adverse impact? We propose a definition of ‘agency worker’ which includes, in draft Regulation 3(1), “(ii) any other contract or other arrangement with the agency to perform work and services personally for a hirer”, to ensure that all possible agency arrangements are covered by the Regulations.

Similarly Q34 asks:-

“What is your view of the proposed approach to liability, as set out above?”

It is clear from §§8.14 and 8.15 of the Consultation Document that an option choice is being made between joint liability and primary liability on the agency with some liability resting with the hirer.

The two questions to be posed are again:-

“5 Would this option promote equality of opportunity between people of different racial groups?

6 Could this option adversely affect equality of opportunity between people of different racial groups?”

Again, the answer to ‘5’ is ‘Yes’ in that fresh rights are being given to migrant agency workers but the answer to ‘6’ is also ‘yes’, in that many migrant agency workers are adversely affected by the rejection of joint liability, at least where the agency is based outside the UK and the hirer has benefited from the breach of the principle of equal treatment.

Can this adverse impact be mitigated or is there an alternative option which will alleviate the adverse impact? We propose a system of joint liability, at least where the agency is based outside the UK and where the hirer has benefited from the breach of the principle of equal treatment.

These are significant new rights for ethnic minority agency workers. But it is not enough to say that the overall package leaves ethnic minority, particularly migrant, agency workers ‘better off’. Each proposal should be subject to screening (or PEQIA) to see if adverse impact can be identified.

So the opportunities to consider mitigation and alternatives, which would have occurred had proper screening/PEQIA and an EQIA taken place, have not been taken up.

We are also concerned that apparent adherence to a ‘no gold-plating’ principle and a self-imposed ‘parity principle’ may neutralise the effectiveness of consultations on draft employment legislation during the course of a PEQIA or a full EQIA. These principles, which do not appear to

have ever been formally adopted by the Department or the NI Executive, have no statutory, even constitutional, basis and certainly cannot constrain the Department's responsibilities under its equality scheme or under section 75 more generally.

Although we wish to see these Regulations brought into effect as soon as possible, we still consider that there is time, before the final implementation deadline of the Directive, for the Department to consider these amendments to the draft Regulations.

**6 A serious gap in protection for many agency workers**

We have already discussed serious deficiencies in the protection of agency workers in light of the Muschett and Bohill judgments. It is our contention that the draft Regulations require amendment to address these deficiencies. We are also contending that all the employment equality legislation in NI requires amendment to satisfy the provisions of Article 5.1(b) of the TAW Directive, in cases against the hirer, and also to ensure that cases can be taken against agencies.

At this point, we also propose that, if a conclusion is reached that some or all of these amendments are not strictly required under the Directive, they are required under the 1968 Regulation and the Race Directive. These amendments could sit comfortably within the category of 'related matters' in section 2(2) of the European Communities Act 1972. Indeed, in light of the remarks of the NI Court of Appeal in Bohill, the opportunity to remove these deficiencies should be taken as a 'related matter', even if it is considered that there is no legal obligation to do so.

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# Appendix 1

## Filipino fishermen suffer abuse

By Andy Martin

Good Morning Ulster

**A BBC investigation has found evidence of physical and racial abuse of Filipino nationals in Northern Ireland's fishing industry.**

While the abuse is not widespread in the industry, evidence was found of horrendous working hours and pay and intimidation.

The local fleet relies on a steady stream of men from Manila due to the extreme shortage of available local labour.

The main complaint is the working hours. One crew told how they were forced to work seven days in a row, and up to 34 hours without sleep.

When not fishing they said they were given other jobs such as painting and collecting shell-fish from the shore. They said they could be paid as little as £20 for five days work.

One man broke down as he explained that this meant he was unable to send money back to his family in the Philippines.

The £20 is quickly used up in mobile phone credit, the only means by which he can keep in touch with his wife and children.

The skipper or boat owner is supposed to send a fee to an agent in Manila, who takes a cut and sends the rest on to their families.

But some fishermen were put on a share system, similar to the conditions of local fishermen, as soon as they arrived.

This system works by giving a fisherman a cut of whatever price the catch fetches.

If the boat cannot go out because of storms, there is no money, and their families get nothing.

Mark Palmer owns a number of boats and manages 23 others in Portavogie and Ardglass, indirectly employing 41 Filipinos.

He said that they are treated better than the local fishermen in Portavogie, given that they have a contract awarding a monthly fee, where fishermen in Northern Ireland are only entitled to a share of the price of the catch.

These contracts are still well below the minimum wage, amounting to pay of $515 per month.

Mr Palmer said he also pays a bonus, depending on the size of the catch. This means they are getting paid about £1.20 an hour.

The BBC spoke to a Filipino last week who got just £100 for working the previous two weeks, but he was extremely happy with his lot.

“ **I couldn't believe the violence and the rage the man was in. He was out of control** ”

Man who overheard row between skipper and Filipino fisherman

According to the Department of Employment and Learning, all those working predominantly in UK waters are entitled to minimum wage regardless of their nationality.

So some Filipinos are getting four and a half times less than they should.

During this investigation we found evidence of more extreme maltreatment. One man described how he was kicked and a colleague punched and had his head hit off a wall.

The crew later left for the Philippines. An affidavit from another member of the crew said: "When he's drunk he used to punch or hit one of us.

"We also saw one of our co-workers who was strangled by him causing an injury on his neck."

**'Made to be afraid'**

Fr Donal Bennett is a priest in Omagh who worked in Manila as a missionary for forty years. He has helped some of those in distress.

"These men are made to be afraid. They do endure all of this mistreatment

because of their family at home," said Fr Bennett.

"Most of them are married with children, whom they miss. They also have a huge debt at home to the gent in Manila in order to get here".

A flight to Manila costs £1,000, the price of a house on a Philippine island.

Those that do complain have no legal status. One couple, a local man and his Filipino wife, described what happened after an assembly member called the police with concerns about the treatment of one fisherman.

They were speaking to the man on the phone when he was approached by the skipper.

They described hearing the skipper swearing at the man and said the man sounded "very, very scared".

"I was continuously listening," said the local man.

"I couldn't believe the violence and the rage the man was in. He was out of control and shouting 'I'm going to deport you tonight. You're going tonight before you talk to anybody'."

The local man said he made a complaint to the police. It was later learned the Filipino man was deported by immigration.

Story from BBC NEWS:

http://news.bbc.co.uk/go/pr/fr/-/1/hi/northern_ireland/7773255.stm

Published: 2008/12/09 12:15:52 GMT

## Appendix 2

## Mr. Adeliga

Mr. Adeliga, a Filipino seafarer, was working for a local skipper in Kilkeel. He had been sick since 23 November 2010 and no arrangements had been made for him to see a GP until a colleague called NICEM's local contact in Kilkeel for help on 28 November. Our local contact got in touch with the Fishermen Mission in Kilkeel, who has authority to go on board the vessel. When the Mission's representatives got on the boat and witnessed how ill Mr Adeliga was, they arranged for him to see the on duty GP. After examination, the GP urged them to send him to the hospital and he was taken to Daisy Hill Hospital in Newry; early in the morning of 29 November 2010, he was transferred to the Regional Intensive Care Unit of the Royal Victoria Hospital. He contracted pneumonia with Type 1 respiratory failure and was in a coma from then on until he woke up on 9 December 2010. He was then discharged on 16 December 2010, a day when it snowed very heavily. The employer arranged for a taxi to bring Mr. Adeliga to a hotel in Kilkeel.

On Thursday evening of 16 December (at about 8pm) the Fishermen Mission's staff phoned the Executive Director of NICEM to inform him of the boat owner's decision to send back Mr Adeliga home to the Philippines immediately and give him two months salary (November and December). They arranged for a taxi to bring him to Belfast on Friday and to stay at the Premier Inn Titanic overnight with 6:30am in the morning. Mr. Adeliga was never consulted on the arrangements but was informed on Friday morning.

The whole issue is the breaking of the health and safety regulation and neglect by his skipper and boat owner. As per health and safety law, a vessel becomes inhabitable once the engine is switched off. The issue in this case is that Mr. Adeliga would not have contracted pneumonia with Type 1 respiratory failure but for the negligence of the skipper and boat owner. Pneumonia is a fatal disease and he is lucky that he survived the painful ordeal of being in a coma for a week. The owner of the boat also tried to exploit his vulnerability by sending him back home immediately, on the basis of a medical certificate stating that he was fit to travel, although serious questions should have been raised as to the contents and validity

of the certificate. The dumping approach by the boat owner aims to eradicate their legal and moral responsibility.

Moreover the so-called two months salaries as compensation demonstrated the kind of exploitation of the industry. Mr Adeliga had already worked three quarters of the month of November when he got sick.