NICEM Briefing Paper

to the Committee for Employment & Learning

On the Protection of Agency Workers in NI

1. Introduction

This paper aims to supplement our previous paper NICEM Briefing on "Bayanhihan!: The Filipino Community in Northern Ireland Research Report" and the issue of Agency Worker to the Committee in May. We are specific focus on the current deficiencies of employment law on agency workers, including the recent introduction of the Agency Workers Regulations (Northern Ireland) 2011.

2. Agency Contract

Unlike the Great Britain[1], we do not have any official figures on the number of agency workers being employed in Northern Ireland. DEL estimates between 3-4.5% of the workforce.[2] Brown in 2009 indicated that there were 270 recruitment agencies with 22,000 individuals were employed on a temporary basis in Northern Ireland.[3] These estimations are in the middle of the economic downturn (in mid-2009) and include local indigenous population, as well as the new migrant communities.

There are two types of agency contract: contract of service and contract for service. The first type of agency contract creates the employment relationship between the job seekers and the recruitment agency. They are employed solely by the agency in which assigns job or jobs to different end-users (could be the same end-user or different end-users in the hiring period). The second type is simply the job seekers are declared themselves as self-employed and provide her or his skills and labour to the agency in which assigns job or jobs to different end-users.

The former one is now, more or less, being replaced by the latter one. The latter is common to serve the industries which require a lot of manual and cheap labour force. It is where the majority of the migrants are working in Northern Ireland. But there are exceptions of the high skills of the Filipino Seafarers and Nurses who are working in our fishing industry and the private nursing home. Their pay is not necessarily reflected their skills but served for the purpose of exploitation between the wage differentials in their home country and the host country.

3. Agency Workers' legal status

Agency Worker as defined in the Working Time Regulations (NI) Order 1998 as "….where an individual ("the agency worker") –

[1] It estimates around 1.3 million agency workers and with the agency industry 27 billion Pounds turn over in 2009. (see Department for Business, Enterprise and Regulatory Reform, Implementation of the Agency Workers Directive: A Consultation Paper (May 2009)4)

[2] DEL Communication, COR/160/12, 16 May 2012

(a) Is supplied by a person ("the agent") to do work for another ("the principal") under a contract or other arrangements made between the agent and the principal; but
(b) Is not, as respects that work, a worker, because of the absence of a worker's contract between the individual and the agent or the principal; and
(c) Is not a party to a contract under which he undertakes to do the work for another party to the contract whose status is, by virtue of the contract, that of a client or customer of any profession or business undertaking carried on by the individual.

Our Belfast Migrant Centre providing employment advice has given us considerable familiarity with agency workers. We have serious concern that agency workers' intermediate legal status (lack of employment contract) can result in vulnerability, exploitation and injustice.

Under the Employment Rights (Northern Ireland) Order 1996 this gives rights to 'employees'. 'Employee' has a common law meaning, so the self-employed do not benefit from minimum, mandatory rights. These include the right to a written statement of one's contract (Art. 3), to request flexible working time (Art. 70E), etc. Take the example of job security. After one month employees have the right to one week's notice before dismissal. After one year employees have a right to be dismissed fairly. After two years employees have the right to two week's notice and redundancy pay. The notice period (always substitutable with a payment reflecting wages, in lieu of notice) and the right to redundancy increase according to the number of years in employment. But these basic protections will not apply to any agency worker, whether they are local indigenous people or migrants (EU and non-EU nationals). This is, in particular, true that agency workers could not enjoy equal pay of equal value of works.

The need for legislative reform to protect vulnerable agency workers has been the subject of recurrent judicial comment in the appellate courts, which find themselves, bound to apply the existing principles of the law of contract to limit agency workers' right, but can see all too clearly the unfairness that can result.

In the leading case of *James –v- Greenwich Council (2007) IRLR 168*[4], the President of the Employment Appeal Tribunal, Elias J, made the following observation.

"We should not leave this case without repeating the observations made by many courts in the past that many agency workers are highly vulnerable and need to be protected from the abuse of economic power by the end users. The common law can only tinker with the problem on the margins. That is not to say that all agency relationships simply have as their objective to defeat the rights of the workers. There are obvious benefits in flexibility for employers in hiring agency staff, and many employees, particularly those with specialist skills, may also benefit from the

[4] Incidentally, this judgement actually made it much more difficult for agency workers to acquire employment rights

flexibility as well as giving tax and fiscal advantages. A careful analysis of both the problems and the solutions, with legislative protection where necessary, is urgently required."

In Bohill—v- Police Service of Northern Ireland, the Court found that:

"In the event that the appellant had been selected as a temporary worker by the respondent he would have signed a document constituting a contract for service between himself and Grafton limited to the period during which whose services supplied to the respondent. At no time would he have been employed under a contract of service either by the respondent or by Grafton."

Recognising that such an arrangement with an agency did not come within the jurisdiction of the Fair Employment Tribunal, Coughlin LJ in the Court of Appeal suggested a need for legislative change[5]:

"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 might well benefit from the attention of the section of the OFMDFM concerned with legislative reform."

This case highlights anti-discrimination law will not apply to agency worker and this issue is not confined to agency workers from outside the UK, applying to all agency workers who are subject to discrimination on any ground. Similar case law recently raised the same issue in England and Wales[6].

For those agency workers, whose agency is outside the UK, they have no legal protection under both the employment and the equality law.

Moreover, both Bohii and Muschett were decided before the consultation of the Agency Worker Regulations 2011, it illustrates the fact that the government in England and Wales, Scotland and Northern Ireland are intended to exclude the protection of the Agency Worker for the protection of the 27 billion business of employment agency in Great Britain. It is in the opposite direction of the purpose of the EU Agency Worker Directive.

4. Recommendations:

- **Rectify the current legal deficiencies by using the same method as in the Working Time Regulations 2008 to put agency workers the same equal**

[5] Bohill v PSNI [2011]NICA 2 (13 January 2011)
[6] Muschett v HM Prison Service [2010] UKEAT/0132/08/LA

footing as an "employees" or "workers"[7] under the Employment Rights (Northern Ireland) Order 1998 and the Agency Workers Regulations 2011;

- **Review the current regulatory regime on employment agency under the Employment (Miscellaneous Provisions) (Northern Ireland) Order 1981 and the Conduct of Employment Agencies and Employment Business Regulations (Northern Ireland) 2005, as amended.[8]**
- **Merge the current two tier regulatory bodies into one[9] and introduce mandatory licensing system to all employment agencies.**

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[7] Art. 35(2) provided that "In a case where this regulation applies, the other provisions of these Regulations shall have effect as if there were a worker's contract for the doing of the work by the agency worker made between the agency worker and –

(a) Whichever of the agent and the principal is responsible for paying the agency worker in respect of the work; or

(b) If neither the agent nor the principal is so responsible, whichever of them pays the agency worker in respect of the work,

And as if that person were the agency worker's employer.

[8] It would be desirable that fees that are charged by agencies to clients are disclosed to the parties involved. The Equality Act 2010 in GB prohibits confidentiality, or 'gagging clauses' to increase the efficacy of equal pay rules (s.77). This is a good model. Without transparency, it is difficult for workers to know that they are being unequally paid. Another aspect is that neither the client nor worker may realize that the agency takes home more than the worker herself. Many clients will want to know how much of their money is going to the worker, so the worker does not feel like an undervalued and demotivated 'temp'. So it would be desirable that the contracts between each of the three parties disclose who gets what.

[9] It is unclear why two bodies, the Employment Agency Standards Inspectorate and the Gangmasters Licensing Authority (agricultural, shellfish and packing industries), are needed for essentially the same employment agency. Given the agency industry turns over 27 billion and there are around 1.3 million agency workers (England and Wales), a combination of such government bodies and their expert staff doing similar work may be desirable from an efficiency standpoint. Moreover, it is unclear why licensing is not mandatory across the board. The threat of license revocation would make the regulations real. Inconsistent enforcement is unfair on law abiding agencies. Licensing is necessary for a properly functioning labour market.