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Agricultural Wages in Scotland

The Scottish Agricultural Wages Board Consultation

WRITTEN SUBMISSION BY THE ASSOCIATION OF LABOUR PROVIDERS

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The Association of Labour Providers (ALP)

The Association of Labour Providers (ALP) is a trade association supporting and representing those organisations that supply seasonal, agency and contingent labour into the UK food production, horticultural and agricultural sectors. The ALP has approximately 290 organisations that voluntarily choose to be members of the Association on payment of an annual subscription and commitment to abide by the ALP Constitution. ALP member organisations supply approximately 70% of the temporary workers into these sectors. All organisations that supply labour into these sectors are required to be licensed by the Gangmasters Licensing Authority (GLA). The ALP provides a range of services to help labour providers achieve labour standards compliance and good practice in the supply of workers.

Introduction

The terms of the Agricultural Wages (Scotland) Order (AWSO) are complicated. Some workers supplied by ALP members in Scotland may be subject to the AWSO regulations some of the time and some may be subject all of the time.

The consequences of labour providers' non-compliance with the AWSO regulations are significantly more severe than any other types of businesses operating in Scotland. The Gangmasters Licensing Authority (GLA) has confirmed that it "expects licence holders to pay the relevant agricultural rates in order to comply with the critical Licensing Standard 2.2." This means that any labour provider not paying in accordance with the AWSO will be regarded as non-compliant and which may, taking into account proportionality, result in a licence revocation without immediate effect.

ALP members have had to deal with the illogicalities and complexities of the AWSO for many years and therefore have a keen interest in the consultation.

Response

The view of the ALP is Option C – Remove all existing arrangements for agricultural workers and determine their pay and conditions under general employment law.

The reasons for this view are as follows:

The case for separate arrangements for agricultural workers

1. Historically, separate wages councils and boards existed for a number of sectors of the economy where it was considered that workers would not be sufficiently protected by normal market forces. Most of these arrangements were abolished in 1988. In 1998 the National Minimum Wage (NMW) was introduced. The reasons for retaining special arrangements for agriculture at that time are not clear and in any event are no longer relevant.
2. The only justification for retaining special arrangements can be that workers in agriculture “deserve” more generous arrangements than workers in other sectors. There are other sectors that are characterised by low pay and long hours, such as office cleaning, catering and hospitality, but where the workers are entitled to the minimum wage only. If the separate AWSO did not exist there would be no justification whatever for introducing it and there is no logical justification for maintaining this special arrangement for one sector.

The AWSO is complex with boundary / scope / border issues and distortions

3. “Agricultural work” is not something that is easy to define. Take for instance Defra’s previous advice as to whether packhouse workers are to be regarded as working in agriculture:
 - The packaging and processing of produce is deemed to be agricultural work if the produce has been grown on the farm (or enterprise, which could consist of more than one farm or unit in the same ownership or group) where the packing takes place and it is considered to be “first stage packaging” (in other words the last stage in the production process, before the produce is sold on).
 - Where the produce to be packaged / processed is bought in, either from farms in different ownership or imported, workers employed in any aspect of packing, processing or handling are not covered by the provisions of the Order.
 - On the processing side, it depends on whether the nature of the produce is substantially changed as to whether workers are covered by the Order. For example, turning potatoes into chips would be outside the scope of the Order, irrespective of whether the potatoes are bought in or home grown. Workers engaged in simple processing (for example, topping and tailing, to render vegetables into saleable condition) would be covered by the Order if they were dealing with produce which that had not been bought in.

- If the packaging is a very technical process or the goods have been extensively processed before the packing operation, workers could be considered to be employed in a separate industry from the farm.
- With regard to workers handling produce after it has been packed, these would be covered by the Order if the produce has not passed its first point of sale.

This usefully illustrates how difficult it is to construct a boundary, how complex the arrangements are and the scope for serious differences of view about what the Order means.

4. There are massive issues thrown up by the scope of the AWSO. AWSO applies to workers who are “employed in agriculture”. Employment means “employment under a contract of service or apprenticeship.”

Workers engaged by labour providers on contracts for services are not employees as defined under section 230(1) (a) the Employment Rights Act 1996 but are instead workers as defined under 230(3) (b) of this act.

Workers on contracts for services are therefore not covered by the AWSO and as such there is a requirement only to provide them with terms in accordance with national laws. However:

- Workers supplied by labour providers who are on contracts of employment are covered by the Orders.
- The provisions of the Agency Worker Regulations 2010 apply equally to agricultural workers as to any other sector.
- Where workers supplied are treated more like employees on a contract of employment than a worker on a contract for services then the GLA may determine that an employment relationship has been formed and therefore the terms of the relevant AWSO apply. The process that the GLA follows to determine employment status is outlined in [GLA Brief 18 – How the GLA tests Employment Status](#).

5. There are differences in view between administrations with regard to cross border working.

The policy of the Agriculture and Rural Affairs Division of the Welsh Government and Defra regarding the appropriate terms to apply are:

- A business based in England but whose workers may work in Wales on a limited ad hoc basis – National Minimum Wage (NMW) conditions will apply
- A business based in Wales but whose workers may work in England on a limited ad hoc basis – the rates applicable to Agricultural Wages in Wales apply.

However, the policy of the Rural Business Development department of the Scottish Government and the Department of Rural Development in Northern Ireland is that, while cross-border working will be

considered on a case by case basis, it is where the worker is actually working at any given time that determines the appropriate minimum wage regime and not where the employer is based.

Enforcement is minimal

6. The practical experience of labour providers is that enforcement of the AWSO is virtually non-existent outside the sector regulated by the Gangmasters Licensing Authority. This is not surprising. The nature of agricultural work is such that it is largely below the radar of enforcement agencies, and also it lends itself to cash payments which benefit both workers and agricultural businesses at the expense of the rest of the community. It is the experience of labour providers that in practice many directly employed workers do not receive what they are entitled to under the AWSO.
7. Labour providers are large businesses in the formal economy, licensed by the Gangmasters Licensing Authority, with records that can be easily expected, which makes them the prime target for compliance action. This means that labour providers are at a competitive disadvantage compared with non-regulated agricultural businesses, which are more able to conceal cash payments.

The arrangements disadvantage workers

8. The AWSO rates for each year are invariably decided at the last minute, in marked contrast to the efficient and orderly way in which changes to the NMW are made.

The Low Pay Commission does extensive research on the impact of the minimum wage and in making its recommendations is conscious of the need to balance protecting jobs and paying more to lower paid workers. The NMW is not distortionary. With the exception of lower rates for younger workers there is a single rate applying across the board. Employers are free to offer more than the minimum wage, either in basic rates or through overtime, holiday entitlement or other benefits, that is the same factors that apply elsewhere in the economy. In agriculture and food production in particular employers find it difficult to pay more than the minimum wage because the market power of the supermarkets holds down the price that they can get for their produce.

9. By contrast the AWSO results in serious distortions that work to the disbenefit of workers. The major one is the requirement that overtime must be paid after eight hours a day and 39 hours a week. The minimum overtime rate is 50% more than the basic rate. Many agricultural businesses simply could not recover from their customer's labour costs that are 50% above the minimum wage. The result is that most agricultural businesses that take labour from labour providers stipulate that workers can work no more than eight hours a day and 39 hours a week. Many, if not most, agricultural workers want to work longer hours than these and have no expectation of being able to be paid 50% more than the minimum wage. They are denied the opportunity of working longer hours and earning more money. In reality this gives further encouragement to the "informal economy", as if workers want to work 60 hours a week they will do so; if they are subject to the AWSO then 39 hours will be at the AWSO and 21 hours will be at whatever is on offer in the thriving cash economy.

Reducing administrative burdens

10. The differences between AWSO terms and general employment law create other problems:

- The accommodation offset arrangements are different between the two regimes in a significant way.
- Agricultural holiday pay arrangements require special calculations that most payroll systems cannot deal with
- Agricultural sick pay arrangements are complex

The AWSO is unnecessarily complicated which makes it difficult to understand and to operate. This is particularly the case when the same workers may be subject to AWSO and general employment law in the same working period or when working in the same place.

11. The Scottish government is committed to reducing the administrative burdens on business. The AWSO arrangements are in themselves a huge administrative burden. For labour providers, and to a lesser extent agricultural businesses, this burden is accentuated because they are subject to both AWSO and NMW rules often for the same workers doing the same job in the same place. It would be a welcome simplification of a complex regulatory regime to have a single set of minimum wage rules for all workers.

The removal of existing arrangements for agricultural workers should be timed with the introduction of the National Living Wage in April 2015.