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May 16 2017

Employment Practices in the Modern Economy Independent Review
Association of Labour Providers – Written Submission

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Scope of the review

In October 2016, the Prime Minister commissioned Matthew Taylor, the Chief Executive of the Royal Society of Arts, to conduct an independent review of how employment practices need to change in order to keep pace with modern business models. The review will consider the implications of new forms of work, driven by digital platforms, for employee rights and responsibilities, employer freedoms and obligations, and our existing regulatory framework surrounding employment.

Introduction

The Association of Labour Providers (ALP) was set up in 2004 at the instigation of Department for Environment, Food and Rural Affairs as a trade association representing labour providers and promoting responsible recruitment practices for organisations that supply the workforce to the consumer goods supply chain across the food processing, horticultural and wider manufacturing, industrial, warehousing and distribution sectors. The ALP has approximately 330 organisations that voluntarily choose to be members of the Association on payment of an annual subscription and commitment to abide by the membership regulations.

ALP member organisations supply approximately 70% of the temporary contingent workforce into the food growing and manufacturing supply chain. Many of these workers progress to form the permanent workforce for UK industry. All organisations that supply labour into these sectors are required to be licensed by the Gangmasters and Labour Abuse Authority (GLAA).

ALP's members predominantly supply lower skilled workers. Market pressures mean that this work is either at, or very close to, national minimum wage (NMW). These irregular low-paid jobs are largely filled by migrant workers, able to earn more than they can in their home country.

Labour providers operate in a very competitive market resulting from the downward pressure on costs exerted by the consumer goods supply chain. It follows that margins are thin, although just adequate to allow efficient businesses to continue.

Albeit that the workers are usually engaged contractually by the labour providers, pay rates and terms of employment for temporary agency workers are set by the hiring client in compliance with the Agency Workers Regulations 2010. As such, pay and benefits of temporary agency workers is a cost passed on to the labour user. Hirers of temporary labour that pay unrealistically low rates are knowingly or recklessly conniving in illegality as these rates can only be achieved either through worker exploitation or tax evasion or both.

ALP, with NSF International and many retailers and brands is currently developing Clearview (www.clearviewassurance.com), a global labour provider social compliance certification scheme.

The ALP is the lead development partner of "Stronger Together", launched in October 2013 as a business led multi-stakeholder collaborative initiative to equip UK employers and recruiters with the practical knowledge and resources to tackle modern slavery in their business and supply chains by providing free good practice guidance and tools through www.stronger2gether.org. The other development partners are the GLA and Migrant Help. The project sponsors are all the main UK supermarkets Aldi, Asda, Co-operative food, Lidl, Marks & Spencer, Morrisons, Sainsbury's, Tesco and Waitrose. Within Stronger Together, in three years:

- Over 4200 industry representatives have registered with www.stronger2gether.org to access the resources for use within their organisations.

- Over 2400 individuals from 1250 businesses have attended a "Tackling Modern Slavery in Business" workshop and committed to take the tackling slavery message back to over 790,000 workers.

ALP Submission Summary

- The State must foster a thriving, entrepreneurial, job and wealth creating private sector whilst defining a fair base floor of rights and entitlements, protecting the most vulnerable and providing access to remedy for those denied their rights
- There is limited access to knowledge of rights or access to remedy for the most vulnerable in work in the UK. Significant steps need to be taken by Government in order to: Signpost workers to advice; provide advice and provide access to remedy to vulnerable workers.
- The time for a legal redefinition of employment status is long overdue. The objective must be to create a clear definition, understandable to the ordinary working person, between self-employment/being truly in business on one's own account; and employment / dependent work. There should be a separate category of agency worker.
- There are many and significant areas where the rights of agency workers and those who are not employees need to be redefined.
- There should be an examination of the role of intermediaries, umbrella companies and managed service providers (MSPs) that interpose themselves in the labour supply relationship between the worker and the employment business.
- Steps to constrain the use by businesses of agency workers would be counterproductive.

1. Preamble

1.1. Challenge around the definition and governance of relationships between those requiring services to be performed and those offering to perform those services in return for remuneration is not a new matter. From the Masters and Servants Acts of the 18th and 19th centuries through the seminal 1968 Ready Mixed Concrete case, the Employment Rights Act 1996 and on, this has been a responsibility of our State and lawmakers. A review of the definition and governance of relationships is long overdue and is welcomed.

1.2. There is little new in so-called "gig" economy jobs which impact on how businesses define employment relationships. There is a heightened degree of flexibility required in such jobs to satisfy the immediate gratification of consumer need driven by these new models. The review should not limit itself to looking at the rights of these "gig" workers but should seek to protect and provide access to remedy to those most vulnerable in our society.

1.3. There are many sectors and businesses in an economy that require a stable, loyal, skilled and experienced workforce. For these types of work the psychological contract between an employer and an employee with the unwritten mutual expectations such as respect,

compassion, objectivity, and trust in the employment relationship hold true. There are sound business objectives in these cases for employers to appropriately reward and invest in their workforce in return for loyalty and increased productivity.

1.4. However, in certain employment sectors and types of work this is not so. In these sectors, there is an absence of the psychological contract. Workers may not be valued for their personal contribution but be regarded as a replaceable commodity. This is exacerbated where there is a ready supply of workers to replace those who move on. For businesses in these sectors the key features sought from such a workforce are reliability, hard work and compliance. From a workers' perspective, the work, being in ready supply and with low barriers to entry, is often seen as a stop gap or a stepping stone to other or permanent work.

1.5. In these employment sectors the work is often characterised by being at or around minimum wage, being irregular or unstable, being unpredictable or precarious, being performed by a higher proportion of migrant workers and with an absence of trade union representation. This work is lower skilled and takes little time and training to make a contribution or get up to speed. Sectors include some horticultural and land work, picking in warehouses, packing and other light duties in factories, delivery work whether by van or bike, hospitality, cleaning, labouring and agency work.

1.6. In the exemplary July 2014 Home Office Migration Advisory Committee (MAC) report, Migrants in low-skilled work, the report concludes:

> "The counter-balance to a flexible labour market is to ensure that employers comply with the minimum protections for workers and that these are enforced. MAC found that the incentives to comply are weak. There are some serious gaps in protection, especially for migrant workers. There exist real disincentives for individuals to challenge poor employment practices and to raise grievances.
>
> UK labour law is not providing a minimum level of protection in all cases resulting in a playing field that is not level. There is the risk of a continuum of exploitation starting with failure to pay minimum wages and ensure decent working conditions, leading to workers being forced to accept sub-standard accommodation, being forced to pay for things that they do not need through deductions from their wages, having their passport retained, and losing both work and accommodation with no prior notice.
>
> The evidence is consistent with increasing migrant exploitation enabled by insufficient regulation of recruitment."

1.7. In such sectors, which tend to be irregular, competitive and price responsive, business aligns its workforce strategy with its business strategy and so its objectives are:

- Sourcing and retaining a ready supply of reliable, hardworking and flexible workers
- Minimising the employment tax burden
- Minimising employment costs which means:
    - workers work quickly and without error
    - the workforce is restricted each and every workshift to that absolutely required by the work needing to be with the ability to switch workers on and off with the minimum of notice as required
    - workers' rights are limited to not impede on their flexibility or their ability to be replaced with ease

1.8. The role of the state is to:

- Foster a thriving, entrepreneurial, job and wealth creating private sector

- Enable a workforce supply in appropriate numbers and skills to meet needs
- Operate and enforce a fair employment tax regime

Whilst upholding its responsibility defined in the United Nations Guiding Principles on Business and Human Rights as the "State Duty to Protect" to:

- Define and deliver a base floor of rights and entitlements
- Protect those most vulnerable in our State from exploitative employers who abuse an imbalance of power
- Provide a voice and access to remedy for those denied their rights

1.9. It is worth reflecting briefly on the Government's review of its own performance in regard to employment strategy over the last few years. The 2016 Autumn Statement opens by saying that "Since 2010, the government has made huge progress in turning the economy around following the Great Recession. The employment rate is at a record high and the deficit has fallen by almost two thirds. But more needs to be done. The deficit remains too high and productivity too low. In addition, the government wants to see more people sharing in the UK's prosperity and ensure that the tax system is one where everyone plays by the same rules."

1.10. Whilst the motivations for this review are in part politically driven following the referendum result, to a certain extent the Government is holding this review because it can afford to. The coalition and Cameron/Osborne era employment strategy was to get people (particularly young people) back into work after the 2008 crash and in the "age of austerity" to reduce the cost of the public sector and generate private sector growth. The watchwords were "growth and deregulation". To a great extent this was successfully delivered.

1.11. Theresa May has opened her tenure by promising "Responsible Capitalism" where Government will be a "force for good" to help working people; to protect jobs and "repair" free markets. This review is part of her strategy to deliver this commitment.

2. Enforcement of Employment Rights and Access to Remedy

2.1. The UK National Action Plan (Good Business: Implementing the UN Guiding Principles on Business and Human Rights) updated in May 2016 acknowledges the State duty to protect human rights. However significant steps need to be taken by Government in order to:

- Signpost workers to advice
- Provide advice
- Provide access to remedy to vulnerable workers

2.2. Workplace Health, Safety and Employment Rights poster - Employers have a current legal duty under the Health and Safety Information for Employees Regulations to display the 2009 approved poster in a prominent position in each workplace or to provide each worker with a copy of the approved leaflet.

Recommendation 1. This poster should have key employment rights added to it; how to access further information and how to report labour abuses up to and including modern slavery should be simplified, made more eye catching, be available in multi-language versions. There should be a civil penalty for not displaying the poster which may be applied by a wide variety of enforcement bodies including those within local authorities.

2.3. Recommendation 2. Renaming of Acas – Acas provides a valuable and needed service but how many migrant or vulnerable workers actually know of its existence or purpose? Its name, an acronym for the Advisory, Conciliation and Arbitration Service is a throwback to the industrial relations regime of the 1970s.

Acas should be renamed and rebranded with a name that is clear to all such as "The Employment Helpline". This would be a renaming and rebranding exercise and no legal or structural changes should be required. The emphasis should remain on this body providing advice and signposting and resolving matters before they reach Employment Tribunal. Resources may need to be enhanced to cope with the additional reach.

2.4. Recommendation 3. Redirection of Acas calls – Call handling protocols should be introduced for calls to Acas (as renamed) to be redirected as required to the GLAA; the HMRC NMW Enforcement Team; the Modern Slavery Helpline. Information should feed into the office of the Director of Labour Market Enforcement Intelligence Hub.

2.5. Recommendation 4. Minimum Wage Enforcement – This is currently ineffective. There needs to be a root and branch re-evaluation of the strategy and effectiveness of national minimum wage enforcement in the UK. This should be conducted by the Low Pay Commission in association with the office of the Director of Labour Market Enforcement.

2.6. Recommendation 5. Access to Employment Tribunals - The Justice Committee report on employment tribunal fees concluded that fees had "an unacceptable impact on access to justice". In the year to March 2016, 83,031 tribunal applications were made compared to 61,308 the previous year, 105,803 in 2013/14 and 191,541 in 2012/13, the last full year prior to fees being introduced.

Whilst seeking to limit "scandalous, unreasonable or vexatious" claims, there should be a full review of access to remedy through the UK justice system, particularly for the most vulnerable workers to include the potential for:

- Free conciliation, mediation and arbitration services
- Speedy dispute resolution – perhaps by a 'fast track' employment tribunal with increased use of phone and Skype/Facetime meetings

3. Status of Employment

3.1. Businesses seek to categorise their workforce as "workers" or "self-employed" rather than as employees to:

- Ensure flexibility for either or both parties
- Lower employment tax and national insurance costs
- Minimise employment costs with regard to guaranteed hours, national minimum wage, holiday pay, sickness and other social costs
- Reduce employment rights and the employment responsibility

3.2. The Employment Rights Act S230 (1) defines an "employee" as "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment" and (3) a "worker" as "an individual who works or worked under "any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual".

"Agency workers" are undefined in various pieces of legislation including the Employment Agencies Act 1973, The Conduct of Employment Agencies and Employment Business Regulations 2003 and the Gangmasters Licensing Act 2004 but are defined in the Agency Workers Regulations 2010 as an individual who is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer; and has a contract with the temporary work agency which is a contract of employment with the agency, or any other contract to perform work and services personally for the agency

"Casual workers" are not defined in legislation but the common understanding is explained at https://www.gov.uk/employment-status/worker.

3.3. The fact that interpretation of what constitutes employment status varies for various employment laws, tax law, health & safety law, insurance law, pensions law and so on is unsatisfactory and burdensome.

The fact that employment status between employee, worker and self-employment may be defined by cleverly constructed contracts (challengeable only through employment tribunals) means that less scrupulous businesses may gain unfair competitive advantage against those seeking to offer more secure regular employment.

The fact that employment status between employee, worker and self-employed must be determined by the employment tribunal on a detailed analysis of the facts means that it is not understood by the ordinary working person or small employers.

3.4. Recommendation 6. The time for a legal redefinition of employment status is long overdue. The objective is to create a clear definition, understandable to the ordinary working person between:

- Self-employment/being in business on one's own account; and
- Employment / dependent work

The statement by Chancellor of the Exchequer, Phillip Hammond that "People doing similar work for similar wages and enjoying similar state benefits [should] pay similar levels of tax" is not unreasonable in its ambition.

3.5. There are a number of questions to be considered when re-evaluating employment status:

- What is "dependent work" – in this regard it will be instructive to look at the models in other countries including Germany and the new sec. 611a German Civil Code (*Bürgerliches Gesetzbuch*)?
- Whether work allocated by schedules or an app is dependent work?
- Whether there is the need for the categorisation status of a "worker" or whether indeed the flexibility required can be achieved through flexible assignment based overarching contracts of employment?
- Whether there are benefits in the categorisation status of "agency worker"?
- In what arrangements should National Insurance and PAYE be calculated and deducted at source?
- How to make such arrangements simple so that they are not open to abuse, are understandable to small employers and the ordinary working person, may not be defeated by sophisticated contractual forms or each case need to be defined on its own merits?
- How will compliance and enforcement be achieved and what are the appropriate penalties for non-compliance?

- How not to stifle a thriving, entrepreneurial, job and wealth creating private sector but also to ensure that "the tax system is one where everyone plays by the same rules" and responsible business is not prevented from competing on a level playing field by ones that undercut the rights of their workforce or do not pay their taxes.

4. Rights of agency workers and those who are not employees

4.1. The difference in workplace rights between employees and workers is extensive and not commonly understood by ordinary working people and employers. In many cases there appears to be no logical reason for the difference. The review will no doubt examine all these differences in detail when considering their recommendations but for the sake of this submission we shall focus on the key rights. if the review were to recommend that there were no longer a place for the status of "worker" within today's employment law framework the following analyses of differences and recommendations would not be relevant.

4.2. Recommendation 7. Annual Employment Bill – There are dozens of areas in everyday work matters from holiday to sickness to working time to maternity and so on where the law is unclear, conflicting or deficient. An annual Employment Bill addressing these with a comprehensive logical, straightforward Employment Rights Act updated each year which draws together a wide range of existing statute into one place.

4.3. National Minimum Wage – Rights extend equally to employees and workers but not to the self-employed/those in business on their own account. The ALP has seen no evidence that workers are denied the minimum wage any more than employees.

However certain businesses in a wide variety of sectors, often through complex business structures, seek to categorise their workforce as self-employed/working in business on their own account contractually citing an unfettered "right of substitution" to override the statutory requirement "to do or perform personally any work or services for another party to the contract". In a substantial number of cases this is a contractual sham or in practice does not reflect the reality of the situation.

Recommendation 8. Guidance available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/555400/beis-16-30-calculating-minimum-wage.pdf should be made accessible at https://www.gov.uk/national-minimum-wage.

Recommendation 9. There should be a legal requirement for hours worked in the pay reference period to be printed on payslips.

4.4. Discrimination - Rights and protection from discrimination on the basis of protected characteristics as defined in the Equality Act 2010 extend equally to employees and workers and in certain circumstances to the self-employed/those in business on their own account.

Recommendation 10. The right to equal pay for work of equal value does not extend fully to agency workers. The right to equal pay under the Agency Workers Regulations 2010 does not exist for the first twelve weeks of an assignment nor where there is a Section 10 compliant permanent contract providing for pay between assignments (the so called Swedish Derogation) imposed. This should be re-examined.

4.5. Right to natural justice in disputes at work - The Acas Code of Practice on disciplinary and grievance procedures applies to employees but not to workers. To apply the Acas Code of Practice is to infer the status of employee onto workers which acts contrary to the status of worker that the business is seeking to maintain.

Workers, including agency workers, should have a right to natural justice in disputes at work and specifically:

- The right to know the allegations against them
- The right to make their case on these allegations
- The right to a fair and unbiased hearing
- The right to appeal

Recommendation 11. There should be a separate Acas Code of Practice which relates to dealing with disciplinary and grievance matters with workers.

4.6. Paid holidays - Rights extend equally to employees and workers under the Working Time Regulations but not to the self-employed/those in business on their own account. Methods of calculation vary as dependent on the definition of a week's pay as defined in the Employment Rights Act 1996.

Holiday pay constitutes a significant expense to business, the statutory minimum adding over 12% to employment costs. Non or underpayment of holiday pay appears to be widespread. The Gangmasters and Labour Abuse Authority report non or underpayment of holiday pay as a significant area of non-compliance. Where this non-compliance occurs in a licensed sector one may reasonably assume that avoidance in unlicensed sectors is rife. The Give us a break!* report, based on evidence from Citizens Advice Bureaux across England and Wales, reveals that denial of paid holiday entitlement is widespread, especially among small employers in low-profitability sectors of the economy.

Whilst this is predominantly a matter of enforcement there are significant areas of complexity in calculating holiday pay and areas where the law is not clear, particularly for agency workers, which has the consequence that:

- Workers do not understand their entitlement or their rights
- Employers and labour providers do not understand how to calculate holiday pay correctly
- There is underpayment and incorrect payment

Recommendation 12. – The law on accrual, calculation, booking and payment of holiday is in serious need of overhaul. There are at least twenty areas where the law on holiday needs to be amended. This is particularly so for workers without normal working hours.

Recommendation 13. - There should be collaboration to develop straightforward guidance for employers / employees / workers and agency workers and to make this readily available on GOV.UK.

Recommendation 14. There should be a legal requirement for hours of holiday accrued / owing to be printed on payslips.

4.7. Statutory Social Payments - Rights extend equally to employees and workers but not to the self-employed/those in business on their own account for Pension Auto Enrolment, Statutory Sick/Maternity/Paternity/Adoption Pay but not for Statutory Maternity/Paternity/Adoption/Emergency Dependent leave.

Recommendation 15. There are numerous areas where the law is not clear, particularly for agency workers such as entitlement to SSP between assignments, and it is recommended that there is collaboration to improve the guidance for employers / employees / workers and agency workers and to make this readily available on GOV.UK.

5. Specific considerations with regard to agency workers

5.1. Hiring agency staff during strike action - Regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (the 'Conduct Regulations') prohibits employment businesses from supplying temporary staff during industrial action to perform duties normally performed by workers taking part in industrial action or other workers covering for their colleagues taking part. Between 15 July and 9 September 2015 the Government consulted on its proposal to remove Regulation 7. The consultation website states the Government is still analysing the feedback.

Recommendation 16. The potential for negative impacts outweighs any potential benefit in the proposal to remove Regulation 7 from the Conduct Regulations and this proposal should be scrapped.

5.2. Apprenticeship Levy – The CIPD has highlighted that "The UK is in the bottom four OECD countries for literacy and numeracy among 16–24-year-olds, and lagging well behind Europe and most of the OECD on learning and development and digital skills - employers train less, and invest less in skills, than most other EU countries." The Apprenticeship Levy applies for all workers supplied on a temporary basis by recruitment agencies. However due the very nature of temporary agency work the levy cannot be used for these workers. The Apprenticeship Levy therefore, more than for any other type of business, is an additional employment tax.

Recommendation 17. The Apprenticeship Levy that a hiring client pays for agency workers used at its own sites should be added to its own pot to be used for appropriate training purposes as the law dictates.

5.3. Ban on chain leasing – In German legislation there must not be more than one supplier between the worker and the end-hirer – a so-called ban on chain leasing.

Whilst such intermediaries do not operate in the sector licensed by the Gangmasters and Labour Abuse Authority due to the enforcement regime, in the UK there are a plethora of intermediaries, umbrella companies and managed service providers (MSPs) that interpose themselves in the labour supply relationship between the worker and the employment business in order to deliver tax advantages.

Recommendation 18. - The role of such intermediaries (and artificial constructs which seek to achieve the same effect) and their position in the future world of work and impact on the rights of workers should be a matter for detailed consideration during the review.

5.4. Steps to constrain the use by businesses of agency workers – Businesses use agency workers for wide and varied reasons.

Constraining the use of agency workers by thresholds is too interventionist, potentially damaging to business flexibility and with undoubted unintended consequences for agency workers affected. Enforcement mechanisms will be difficult to define and apply.

Limiting assignments of temporary workers to a period (such as 18 months in Germany) will lead to loyal workers being replaced just to meet the statutory requirement and widespread avoidance mechanisms.

5.5. Recommendation 19. - Securing agency workers' wages in event of bankruptcy - In the event of bankruptcy of an end-user client, the outstanding payment due for agency workers' wages should become a secured/preferential debt against the end-user client (as are the wages of their own staff). This would not extend to the employment business margin which would be as per unsecured creditor. This would protect the wages of agency workers in such situations.

5.6. Recommendation 20. – Achieve a level playing field in the tax treatment of agency workers
Myriad schemes exist to reduce PAYE and NI due to HMRC through travel and subsistence or allowable expenses schemes. These schemes are operated by an industry of intermediaries and service providers. Some schemes are tax evasion contrary to law, some are aggressive tax avoidance where the law is unclear, some are legal tax avoidance loopholes. Competitive advantage is achieved and the prospect of great profit is tempting. Indemnity is offered to recruitment agencies. Barriers to entry are minimised. Enforcement outside of the GLAA sector is non-existent and use of such schemes is endemic.