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Response to consultation on "Hiring agency staff to cover industrial action"

Blackburn and District Trades Union Council is a local Trade Union body, registered with the Trades Union Congress, comprising delegates from Trade Unions with members working or living in the Boroughs of Blackburn with Darwen and the Ribble Valley.

We write to respond to this consultation, which seeks views on whether the government should repeal regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003. This regulation provides that:

"an employment business shall not introduce or supply a work-seeker to a hirer to perform—
(a)the duties normally performed by a worker who is taking part in a strike or other industrial action ("the first worker"), or
(b)the duties normally performed by any other worker employed by the hirer and who is assigned by the hirer to perform the duties normally performed by the first worker".

There are four areas of concern we wish to raise in relation to this proposal.

1)
This provision under threat was imported from "The Conduct of Employment Agencies and Employment Businesses Regulations 1976", and the first thing we note is that the fundamental purpose of these Regulations was *"to secure that such" (employment agencies) "and businesses are properly conducted, and to protect the interests of persons using their services"*.

In other words, they had to some extent in mind the position, and vulnerabilities, of those who depended for their livelihoods on securing assignments from such businesses, and the idea that they should not be used in ways that would put them in harm's way.

This is an aspect that the Government's current proposal fails entirely to consider. Whilst a strike-breaker may not these days face the same jeopardy to person or property as may have been the case in the 1970s, work-seekers put into such a position still face the prospect of social opprobrium, personal shame, and exposure to the hostility of those whose position they would be being used to undermine.

The Recruitment & Employment Confederation says it finds it: *"puzzling that the government assumes agency staff will choose a role that requires them to cross a picket line versus one that doesn't, when we have two million job postings in the UK"*, and this will no doubt often be the case in the current labour market. But the potential position of the individual agency worker should still be considered within an understanding that the economic environment might change. Under UK law, agency workers are not protected from suffering a detriment if they refuse an assignment because they do not wish to replace striking workers. Given the precarious nature of agency work, it is not impossible to imagine work-seekers being faced with an unacceptable dilemma - either accept an assignment as a strike-breaker or face the prospect of other assignments "drying up". Whilst it may be the case that they cannot be compelled to take such an assignment, the pressure they might feel to do so could be both significant and unconscionable. The Government's proposal risks placing individuals in a position where they would come under duress to act in ways they would wish not to on a question of principle that still remains important in working class communities.

2)
The current consultation takes place in the context of a decision of the High Court that the previously enacted "Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2022" were unlawful. A Judicial Review of these sought by a group of Trade Unions had been pursued on two grounds - insufficient consultation and breach of trade union members' rights to freedom of association under Article 11 of the European Convention on Human Rights. As the judicial review could be, and was, decided on the

basis of the first ground alone, the High Court made no findings in respect of the second ground - and this remains a pertinent concern.

We still see the proposed move as intended to weaken workers' rights.

Writing in "The Jacobin" in December 2018, Alex Gourevich argued that if "the right to strike is something that we should defend, then it also has to be **meaningful**. The right loses its connection to workers' freedom if they have little chance of exercising it effectively. Otherwise they're simply engaging in a symbolic act of defiance — laudable, perhaps, but not a tangible means of fighting oppression."

Concern for the welfare of workers, and how they are impacted by the imbalance of bargaining power between themselves and employers, leads to the conclusion that industrial action is one of the few effective tools workers have to counterbalance the disparity. Jorge Andre Leyton Garcia (in "The Right to Strike as a Fundamental Human Right" <Revista Chilena de Dereche – vol44 – 2017>) points out that the right to strike has consequently been widely accepted as a fundamental human right and essential element of Freedom of Association.

Professor Keith Ewing - "Agency Workers as Strike-Breakers: ILO Convention 87, and the EU-UK Trade and Cooperation Agreement"- has argued that that repealing regulation 7 would breach UK obligations under the International Labour Organisation Convention 87, which has been interpreted by the ILO Committee of Experts to include protection for the right to strike, The ILO Committee of Experts concluded in 2012 that *"provisions allowing employers to dismiss strikers or replace them temporarily or for an indeterminate period are a serious impediment to the exercise of the right to strike".*

The International Labour Organisation (ILO) Private Employment Agencies Recommendation, 1997 (No. 188) (discussed and adopted at the 85th Session of the International Labour Conference) clearly says (para. 6) that *"Private employment agencies should not make workers available to a user enterprise to replace workers of that enterprise who are on strike"*. Where internationally respected guidance is so specific the British Government should surely not be so out of step with it? As "Staffing Industry Analysis" dryly commented in its "Daily News" on 21/06/2022 *"The provision of temporary agency workers to replace strikers has long been illegal in most developed economies, as well as many undeveloped ones"*.

3)
There would appear to be no appetite for the proposed changes from Employment Agencies and Employment Businesses themselves. On the whole, they seem to feel the best policy is to keep well clear of other peoples' disputes as a third party that might suffer reputational damage whilst gaining little. The sticky point for them would be where they already had some relationship with a company and feared for their future prospects of work if they declined to furnish strike-breakers. Under such circumstances, it is arguably in their best interests also that they should be protected by regulation from having to make a decision.

Neil Carberry, Chief Executive of the Recruitment & Employment Confederation has said: *"Agencies want the ban to stay to avoid them being pressured by clients into supplying staff in hostile and potentially dangerous situations. Earlier this year, we saw the effect on agencies who inadvertently got drawn into the P&O dispute. That offers a salutary lesson. In all disputes, our aim should be to resolve conflict, not to prolong it. Inserting a different firm's workers into the middle of a dispute can only ever inflame tensions. We urge ministers to re-consider this wrong-headed approach, which runs counter to the standards adopted by the employment industry globally*".

The World Employment Confederation-Europe (WEC), the voice of the recruitment and employment industry at European level, has a Code of Conduct which says *"In accordance with national law and practice, private employment agencies shall not make workers available to a user company to replace workers of that company who are legally on strike".*

In a statement in 2022, when the first attempt was made to remove regulation 7, the WEC said: *"Respect for the Worker's Rights is one of the ten pillars in WEC's Code of Conduct. This principle includes the requirement for private employment agencies to not make agency workers available to a user company with the aim to replace workers of that company who are legally on strike. Corporate members of the WEC that are obliged to support the Code include many of the world's largest staffing firms including Randatd, The Adecco Group, ManpowerGroup, Recruit, Kelly, Gi Group and House of HR"*.

4)

Speaking to the original removal of regulation 7 a BEIS Press Release pointed out that *"businesses will still need to comply with broader health and safety rules that keep both employees and the public safe. It would be their responsibility to hire cover workers with the necessary skills and/or qualifications to meet those obligations"*. It seems to us, however, that it oversimplifies the situation to think that the Health and Safety and public safety considerations are concerns that the contracting employers only need worry about. The Government's proposal opens up a risk recklessly and needlessly. Those unused to manual occupations classed as unskilled often fail to grasp, in particular, the importance of experience for competence and dependability. Agency workers face specific health and safety problems due to unfamiliarity with the company they are working in and the particular hazards of a site or environment, and the absence of established staff would only add to the implausibility of providing them with sufficient induction.

The "Impact Assessment" notes the difficulty Agencies would face in having the right staff available at the points required: *"the vast majority of temporary agency workers are on assignment at any one time, so only a low proportion would be available at any one time to provide replacement labour for workers who are on strike. Agency workers would also have to have the right skills, experience and training to be able to replace workers on strike. Most union members work in occupations that require some skills or training to be considered competent to do their job. If it would take an agency worker some time to get up to speed with an employer's work processes, then only agency workers with some existing familiarity with these processes would be suitable as most strikes are short"*.

The danger remains though that employers will cut corners to address these limitations. They will be tempted to take Agencies at their word that the staff available have adequate knowledge, skills and experience - but even the most diligent Agency will be unlikely to have adequate knowledge of both a work-seeker's actual capacities and the processes they will be expected to complete.

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