

THE CONDUCT OF EMPLOYMENT AGENCIES AND
EMPLOYMENT BUSINESS REGULATIONS 2003

1. Figures from the Department of Trade and Industry suggest that there are about 700,000 people working on “temporary” basis (*ie* through employment businesses) at any given point in time.
2. Employment agencies/businesses have been subject to a degree of regulation for some time; see Employment Agencies Act 1973, and historic regulations made there-under.
3. The Conduct of Employment Agencies and Employment Business Regulations 2003 (“the Regulations”) follow calls for greater regulation of the sector. The majority of the regulations came into force on the 6th April 2004. **Regulations 26 (7)** and **32** came into force on the 6th July 2004.

The Regulations

4. I propose to give an overview of the following aspects of the Regulations:
 - (a) Suitability;
 - (b) Written contracts;
 - (c) Transfer fees;
 - (d) General provisions that introduce further protection for work-seekers;
 - (e) Position of company contractors;
 - (f) Penalties/consequences of non-compliance

Definitions

5. Before turning to the detail, it is important to look at some of the definitions that are used throughout the Regulations.
6. First, there are “employment *agencies*”. Broadly speaking, these organisations introduce work-seekers to employers for direct employment by those employers.
7. Secondly, there are “employment *businesses*”. These organisations supply workers to end-users in circumstances where the worker does not become an employee of the end-user at all. The worker is either an employee of the employment business itself or, more usually, is engaged *by the employment business* on a contract *for services*. The worker is usually supplied (at least initially) on a temporary basis.
8. This latter arrangement gives rise to a triangular set up (As an aside, the Court of Appeal has adverted recently to a somewhat imaginative approach to such triangular arrangements by suggesting that after a lengthy period working for a particular hirer a work-seeker might actually be seen as working under *an implied contract of service* with the hirer – notwithstanding (a) apparent inconsistency with the express terms of the written agreements (b) there being no suggestion the written agreements are a sham and (c) the employment business being the party paying the wages; see the *obiter dicta* of Mummery LJ and Sedley LJ in Brook Street Bureau (UK) Limited v Patricia Dacas [2004] EWCA Civ 217).
9. In the Regulations, the person seeking work is called a work-seeker. The end-user is called the “hirer”.
10. Often a particular organisation operates both as an employment agency and an employment business, and there is nothing in the Regulations to prevent this (although see provisions detailed below requiring basis of operation to be made clear).

(a) Suitability of work-seeker

11. **Regulations 18-22** introduce a mixture of provisions designed to prevent the supply of unsuitable workers. The provisions apply to both employment agencies and employment businesses.

12. **Regulation 18** prevents an employment agency or business from introducing or supplying a work-seeker unless it has obtained sufficient information from the hirer to select a suitable work-seeker, including:

- (a) The identity of the hirer and, if applicable, the nature of the hirer's business. Particular care will be needed, therefore, if the agency/business is dealing with a group of companies to ensure that the correct company is identified;
- (b) The date on which the worker is required to start and the likely duration of the work;
- (c) The position the hirer wishes to fill, including the type of work the work-seeker will be required to perform, the location at which he will have to work and the hours that will be worked. There is also an obligation to obtain information about any health and safety risks known to the hirer. Effectively the agency/business must ensure that the hirer has carried out a sufficient risk assessment of its site, equipment and working conditions. It will be important therefore for the agency/business to ensure that any necessary risk assessments have been carried out and obtain copies.
- (d) The experience, training, qualifications and any authorisation which the hirer considers are necessary, or are required by law or by any professional body, for the work-seeker to possess to fill the position.
- (e) Details of any expenses paid by or to the work-seeker
- (f) In the case of an employment agency there is also a further obligation to find out (i) the minimum rate of remuneration and other benefits and intervals at which the worker would be paid, and (ii) where applicable the length of notice the worker would have to give and be entitled to.

13. The agency/business is also required to obtain confirmation of certain matters from the work-seeker before making an introduction. The matters that must be dealt with (see **Regulation 19**) are:
- (a) Confirmation of the identity of work-seeker. The agency/business should seek proof of identification, such as a passport, driving licence, birth certificate etc;
 - (b) Confirmation that the work-seeker has the experience, training, qualifications and any authorisation which the hirer considers are necessary, or which are required by law or any professional body, to work in the position (*ie* need to see /obtain copies of relevant certificates);
 - (c) Confirmation that the work-seeker is willing to fill the position.
14. **Regulation 21** contains provisions to ensure that the information gathered by the above process is passed over to the other party. So, when a position is put forward to a work-seeker, the agency/business shall provide the information it has obtained from the hirer under **Regulation 18** (and *vice versa* regarding passing information to the hirer obtained from the work-seeker). Further, in the case of employment *businesses*, at this point (*ie* time of introduction) they must (a) tell the hirer whether the work-seeker to be supplied will be employed by the employment business under a contract *of* services or apprenticeship or engaged under a contract *for* services; and (b) inform the work-seeker of the rate of pay if this had not already been fixed. This exchange of information can take place orally initially, but if so it must be confirmed in paper (or “by electronic form”) as soon as possible and in any event no later than the end of the third business day. There is an exception if the work-seeker has worked for the same hirer in the same position within the last 5 business days and the information to be exchanged would be the same.

15. **Regulation 20** goes on to place further duties on the agency/business by providing for steps to be taken for the protection of work-seekers and hirers:
- (a) An agency/business may not introduce or supply a work-seeker unless it has taken all steps as are reasonably practicable to ensure that the work-seeker and hirer are each aware of any requirements imposed by law, or any professional body which must be satisfied (whether by the hirer or the worker) to enable the work-seeker to work in the position; and
 - (b) Further (over and above any additional duties might also be owed), an agency/business cannot introduce or supply a work-seeker unless it has made all enquiries as are reasonably practicable to ensure that it would not be detrimental to the interests of the work-seeker or hirer for the work-seeker to fill the position.
16. These provisions will inevitably mean that the agency/business will need to know its chosen field well.
17. If the agency/business has complied with all the other regulations concerning information and professional requirements, what else is it expected to do to ensure the interests of the work-seeker and/or hirer are not detrimentally affected?
18. More onerously for employment businesses, the duties that are created in relation to suitability are not confined to the initial introduction. There are ongoing responsibilities (see **Regulation 20 (2) –(4)**) as follows:
- (a) If (during a placement) an employment business obtains information which gives it reasonable grounds to suspect a work-seeker is unsuitable it must inform the hirer and end the supply “without delay” [“Without delay” means on the same day or, where not reasonably practicable, the next day – see **Regulation 20 (7)**] ;
 - (b) If (during a placement) an employment business obtains information which suggests a worker *may* be unsuitable it has to tell the hirer, start to investigate and keep the hirer informed. Again this must be done without

delay and if the investigation results in the business then having reasonable grounds for suspicion it must inform the hirer and end the supply.

19. Further, if within 3 months of introduction an employment agency receives or obtains information to suggest a work-seeker it has introduced is *or may be* unsuitable, it must inform the hirer without delay – see **Regulation 20 (5-7)**
20. The Regulations does not define “unsuitable”, nor do they give details of the type of information that would need to come to light to trigger these obligations (save by reference to the information suggesting the worker is “unsuitable”).
21. There are additional requirements that need to be adhered to where professional qualifications are required, or where the work-seeker will be working with vulnerable persons (see **Regulation 22**). Vulnerable persons are involved where the position to be filled involves (a) working with or caring for or attending person(s) under 18, or (b) caring for or attending any person who by reason of age, infirmity or any other circumstance is in need of care or attention.
22. In these cases, the additional requirements to be met before an agency/business can put forward a work-seeker are (see **Regulation 22 (2)**):
 - (a) Copies of qualifications/authorisations have been obtained and agency/business has offered to supply same to hirer;
 - (b) 2 references (from non-family members) have been obtained and the agency/business has offered to supply same to hirer [There are further provisions regulating the situation where this is not reasonably practicable – see **Regulation 22 (3)**]
 - (c) In the case of a position that involves working with vulnerable people, the agency/business has taken all reasonably practicable steps to ensure the work-seeker is not unsuitable for position concerned.

23. Generally these provisions are to be welcomed – certainly from the point of view of hirers and their clients in terms of ensuring that only suitably qualified people are put forward.

(b) Written Contracts

24. There is a general requirement that the contractual arrangements be reduced to writing, and certain mandatory requirements as their contents.

25. This should assist workers, hirers and the Courts in ascertaining precisely what arrangements are in place and assist in determining the worker's status.

26. Before looking at the requirements, certain other features of the 1973 Act and Regulations should be borne in mind.

27. First, by section 6 of the 1973 Act it is unlawful for an agency/business to charge a work-seeker a fee for finding him work. There is an exception, however, maintained by Regulation 26 to enable *an agency* to charge fees in certain circumstances to classes of worker specified in Schedule 3 (namely models, professional sportsmen and those involved in the entertainment industry).

28. Secondly, although it is generally unlawful to charge a work-seeker for finding him work certain agencies/businesses charge for “ancillary services” (such as C.V. writing). It is not unlawful to charge for these services – but **Regulation 5** now makes it unlawful for an agency/business to make their work-finding services conditional upon a work-seekers acceptance of such services (*ie* charging by the back door is closed off).

29. Turning to the provisions that deal with notification of terms, **Regulation 13** requires (*inter alia*) an agency/business on the 1st occasion it offers to provide a service to a work-seeker to “give notice” to the work-seeker stating:
- (a) whether the service to be provided is a work-finding service for which the 1973 Act prohibits the charging of a fee;
 - (b) whether any other services (*eg* CV writing) or goods which may be provided will or may attract a fee (if so, specified details of the fee need to be given – (1) amount of fee (2) to whom payable (3) details of service/goods to be provided (3) circumstances, if any, in which rebates/refunds would be available)
30. Accordingly, where services (such as training, CV writing, photographic services *etc*) are to be charged for, the agency/business has to be upfront right at the start and give full details of the fee structure.
31. **Regulations 14 -16** then set out the terms which must be included in contracts between employment agencies/businesses and work-seekers. These must be agreed and reduced to writing before the agency/business first provides the work-finding services. The terms are required to be set out in one document, unless this is not possible in which case more than one document can be used, and a copy must be provided to the work-seeker before the agency/business provides any services (see **Regulation 14 (2)**). There is an exception in favour of an employment business where the work-seeker is an employee. Further, the provisions don’t apply where the only service being provided is by an agency giving a work seeker information by way of sending him a publication (see **Regulation 14 (7)**).
32. The agreed terms cannot be varied save by agreement (if a variation is agreed the varied terms need to be set out in writing within 5 working days) – and the agency/business cannot make the provision of its services conditional upon the acceptance of a variation of the contract (see **Regulation 14 (5/6)**).

33. In respect of both agencies and businesses the matters to be included (see **Regulation 14 (1)**) are:
- (a) whether the organisation will be acting as an employment agency or employment business;
 - (b) the type of work the agency/business will find or seek to find;
34. Employment *businesses* also have to set-out the following (see **Regulation 15**):
- (a) Whether the work-seeker will be employed by the employment business under a contract of service or apprenticeship, or will be engaged under a contract for services. In either case the terms that will apply or will apply need setting out;
 - (b) An undertaking to pay the work-seeker irrespective of whether the employment business is paid by the hirer;
 - (c) The length of notice a worker has to give, and to which he is entitled, in respect of particular assignments;
 - (d) Either (a) the rate of remuneration, or (b) the minimum rate the business reasonably expects to achieve
 - (e) Details of the intervals at which remuneration will be paid; and
 - (f) Details of any entitlement to holidays and holiday pay.
35. Employment *agencies* which are providing work-finding services where a fee can be charged (*ie* to models, professional sportsmen, entertainers *etc*), need to set out the following (see **Regulation 16**)
- (a) details of the work-finding services provided;
 - (b) details of the agency's authority, if any, to act on behalf of work-seeker including whether it is authorised to enter into any contract with a hirer on behalf of the work-seeker;
 - (c) details of any fee which may be payable by the work-seeker (including (1) the amount and calculation of fee (2) the services to which fee relates (3) the circumstances in which refund/rebate payable – or a statement saying

no rebate/refund if that be case (4) the method of payment of the fee and if it is to be deducted from work-seeker's earnings received by agency the circumstances in which it is to be deducted);

- (d) Details of any notice (including length) required to be given by/to the work-seeker to terminate the relationship.

36. **Regulation 17** then provides for the position between the agency/business and the hirer. Again, the contract needs agreeing and documenting before the services are provided and the hirer needs to be given a copy as soon as is “reasonably practicable” – unless the hirer already has a copy. Provision is again made regarding documentation of variations.

37. The contract must deal with the following (**Regulation 17 (1)**):

- (a) There must be a statement as to whether the organisation will be acting as an employment *agency* or an employment *business*. [**Regulation 9** precludes an organisation from holding itself out to the hirer and work-seeker on different bases];
- (b) Details must be given of any fee payable by the hirer to the agency/business including (1) the amount and method of calculation (2) the circumstances (if any) in which refunds/rebates payable and if no refunds/rebates a statement to that effect;
- (c) In the case of an employment *business*, details of procedure to be followed if work-seeker supplied is unsatisfactory;
- (d) In the case of an employment *agency*, details of agency's authority if any to act for hirer including whether and on what terms the agency is authorised to enter into contracts with work seekers.

(c) Transfer fees (**Regulation 10**)

38. It is not uncommon to find that an employment business places a term in its contract with the hirer requiring the hirer to pay a transfer fee in the event that the hirer decides either to take on the worker direct, or to engage his/her services through a competing employment business.
39. The unchecked imposition of such transfer fees could act as an undesirable break on workers obtaining permanent employment.
40. That said, the employment business clearly needs to be afforded some scope for charging a transfer fee otherwise it could be unfairly cut out of the chain at a very early stage without being (sufficiently) remunerated.
41. The Regulations, therefore, seek to ensure that employment businesses do not use transfer fees as a means of discouraging hirers from offering permanent work, whilst at the same time seeking to strike a balance with the employment businesses desire to protect its legitimate business interests.
42. The provisions are contained in **Regulation 10** and deal with 3 scenarios:
- (a) Where a hirer wishes to employ the work-seeker direct;
 - (b) Where the hirer wishes to enjoy the work-seeker's services through another employment agency (often following competitive tendering); and
 - (c) Where the hirer introduces the work-seeker to a third party who employs the worker direct.
43. A distinction is drawn a situation where there has and has not been a supply by the employment business.
44. Where there has been an introduction but no supply, a transfer fee which is conditional upon the hirer taking the worker on direct, or enjoying his/her services through another employment business, will not be enforceable unless the contract

gives the hirer the option, on giving notice, to enjoy an extended period of hire on terms specified in the contract (see **Regulation 10 (1) (a)**). The employment business is obliged to provide the worker throughout the extended period unless it is unable to do so as a result of matters which are not its fault (see **Regulation 10 (3)**). If it fails to supply during the extended period the transfer fee is unenforceable). Three points are worth noting:

- (1) Where there has been *no supply* (ie only an introduction) there is *no restriction* on charging a transfer fee contingent upon the hirer introducing the work-seeker to a 3rd party;
- (2) There are no stated restrictions on the extent of the transfer fee; and
- (3) The length of the extended period is not regulated. These are matters for agreement therefore.

45. Where there has been a supply, the position is broadly similar where the hirer wishes to engage/employ the worker direct or through another employment business (see **Regulation 10 (1) (b)**). The hirer must be afforded the opportunity, on giving notice, of taking an extended period of hire, and the worker must be provided on terms no less favourable to the hirer than the worker was being supplied under previously. Again, the size of transfer fee and length of extended hire period are not regulated, but the business must provide the work-seeker throughout the extended period unless unable to do so through no fault of its own.

46. Time-limits also apply here to render a transfer-fee unenforceable in any event in certain circumstances. Accordingly, **Regulation 10 (4)** provides that where the worker begins employment or begins working through another agency after a “relevant period” any transfer fee shall be unenforceable.

47. The “relevant period” is the later of:

- (a) 8 weeks commencing on 1st day after the day the work-seeker last worked for the hirer through the employment business; and

(b) 14 weeks commencing with the date the work-seeker first worked for the hirer through the employment business [However, it is often the case that temporary workers are supplied intermittently and there are breaks when no supply is taking place. Therefore, to protect an employment business in this situation, a placement is disregarded if there has been a break of more than 42 days – *ie* 6 weeks]

48. The time-limits just dealt with also apply to transfer fees that are conditional upon the worker taking up employment with a 3rd party (see **Regulation 10 (4)(b)**) - however, an extended period of hire does not need to be provided for here.

(d) General Protective Provisions

49. A number of Regulations provide further protection for work-seekers and hirers. Below is a sample of the more important provisions.

50. As explained above (save in certain limited circumstances) it was (and remains) unlawful for employment agencies/businesses to charge a work-seeker for finding work. Certain ancillary services (eg CV writing) can be charged for, however. **Regulation 5** precludes an agency/business from making the acceptance of its work-finding services conditional upon a work-finder also accepting ancillary services. Accordingly a “back door” means of charging for finding work has now been closed off.

51. By **Regulation 6**, an employment agency/business is now precluded (whether by contractual term or otherwise) from subjecting or threatening to subject a work-seeker to any detriment on the ground that:

- (a) the work-seeker has terminated or given notice to terminate any contract with the business/agency; or
- (b) in the case of an employment business, he has taken up or proposes to take up employment with any other person.

Agencies/businesses are also prevented from requiring worker to inform them (or any connected person) of the identity of any future employer.

52. These provisions are designed to limit employment agencies/businesses from locking a work-seeker in (they do not apply where the work-seeker is an *employee* or apprentice of the employment business –see **Regulation 6 (3)**).

53. “Detriment” does not include:

- (a) loss of any benefit to which the worker would have been entitled had he not terminated the contract;
- (b) requiring work-seeker to give a reasonable period of notice; and
- (c) recovering losses arising as a result of the work-seeker failing to carry out work he had agreed to carry out.

54. There is also an embargo on an employment business supplying work-seekers to cover the work of people who are taking part in an official strike or other industrial action. There is a defence here for an employment business if it breaches the embargo if it did not know, and had no reasonable grounds to know, that the worker was being supplied in breach of the embargo (see **Regulation 7**).

55. **Regulation 8** precludes an *employment agency* from paying (directly or indirectly) the remuneration of a work-seeker he has introduced to a hirer.

56. It was apparently common practice for *agencies* to act, effectively, as payroll agents for hirers in certain circumstances where the hirer had taken the worker on as a result of an introduction. The agency simply charged VAT on its margin, rather than on the full cost of the services provided. This was particularly attractive to end-users who could not re-claim V.A.T.

57. Now the position will be that the worker will need to be engaged through an *employment business* (and VAT charged on the full charge being made to the hirer) or the hirer will need to settle the pay-roll direct.

(There is an exception in the case of agencies involved in providing workers in the modelling/entertainment/sporting spheres).

58. **Regulation 11**, precludes an employment *business* from contracting on behalf of a work-seeker and regulates the circumstances in which an employment *agency* may contract on behalf of a work-seeker with a hirer and *vice versa* (There is a complete embargo on the agency entering into a contract for both work-seeker and hirer).

59. **Regulation 12**, precludes an employment business from withholding or threatening to withhold (by means of a term in a contract or otherwise) the whole or any part of payment in respect of work done by the work-seeker on certain grounds, namely:

- (a) That the employment business has not been paid;
- (b) Work-seeker's failure to produce documentary evidence authenticated by hirer of the fact that the work-seeker has worked for a particular period (*ie* signed timesheets). Note, however, that the Regulation specifically provides that this shall not prevent the employment business from satisfying itself *by other means* (*ie* other than mere non-production of time sheet) that the work-seeker worked for the period in question.
- (c) The work-seeker not having worked during any period other than the specific period to which the payment relates.
- (d) Any matter within the control of the employment business.

60. **Regulation 24** contains a series of protective provisions dealing with travel expenses and cases where a work-seeker is required to live away from home as a result of taking up work with/for the hirer.

(e) Position of Company Contractors

61. It is not uncommon to find that a worker's services are provided through a corporate vehicle.

62. **Regulation 32** deals with this situation, by providing that any reference to "work-seeker" includes a work-seeker which is a company. **Regulation 32 (2 to 8)** contain a variety of amendments to a large number of the provisions within the Regulations to tailor them to the situation where a company is involved. For example, **Regulation 5** (which deals with "additional services", such as CV writing) is altered by **Regulation 32 (2)** so that there is an embargo on making work-finding services conditional upon "...the work-seeker, *or the person who is or would be supplied by the work-seeker* to carry out the work (a) using other services for which the Act does not prohibit the charging of a fee."

63. **Regulation 32 (9)**, enables a corporate work-seeker to opt-out of the Regulations. Where the company and the person who is to provide the services agree, they can give notice to the agency/business for their desire to opt-out. The notice has to be given before the introduction/supply of the company/worker to the hirer.

64. **Regulation 32 (10)** allows the person who is to carry out the work to change his mind and opt back in by giving notice to the agency/business but this cannot be done part way through an assignment (see **Regulation 32 (11)**).

65. The opt-out is not available where the person who is or would be supplied by the company is or would be involved in working with or attending any person under 18 or who by reason of age, infirmity or any other circumstance is in need of care and attention [see **Regulation 32 (12)**].

66. Work-finding services cannot be made conditional upon a corporate provider opting out (see **Regulation 32 (13)**)

(f) Consequences of non-compliance

67. The Regulations have teeth.

68. First of all, there are criminal sanctions (£5,000 max fine plus possible ban from business for up to 10 years).

69. Secondly, **Regulation 30 (1)** provides for civil liability if loss or damage is suffered as a result of an employment agency/business breaching the terms of the Regulations. This expressly extends to death/personal injury (including disease and any impairment of a person's physical or mental condition).

70. Where certain terms are rendered unenforceable (or are prohibited) by the Regulations, the contract shall continue to bind the parties if it is capable of continuing without that term (see **Regulation 31 (1)**).

71. **Regulation 31 (2)** enables a hirer to recover any money paid by way of an unenforceable transfer fee (*ie* in breach of the provisions of **Regulation 10**).

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