Temporary Agency Work: Labour Leasing or Temping?

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Introduction

The word 'temping' conjures up an era when young secretarial workers moved from assignment to assignment, almost like a rite of passage, until it was time to take up a desirable employment opportunity and settle down. Nowadays, people in skilled occupations such as nursing and information technology often avail of the services of temping agencies as a way 'to see the world'.

'Temping' has benign associations of opportunity for the 'subject of work' – the worker.[1] 'Labour leasing' refers to the same practice but looks at it from the point of view of the labour market. Now known as 'temporary agency working', it is the practice whereby an employment agency engages workers and leases them to a user company. It is a practice that is growing in frequency and in acceptability but at the same time carries a serious risk of giving rise to employment conditions that fall far short of the standards prevailing for non-agency workers.

In the debate surrounding temporary agency working, it is argued, on the one hand, that this practice is a freedom of business that should not be interfered with because it serves to increase efficiency in the labour market and, on the other hand, that it is potentially exploitative of workers and should be regulated.

The issue then comes down to the extent and type of regulation. It is increasingly evident that the complexities of concrete situations pose problems for regulation but as the debate continues the issues that are in contention are becoming clearer. In this article, I will try to bring together some strands of the issue that have emerged in recent years, including specific examples and the legal and political responses to them.

Rationale for Agency Working

Agency working on a large scale is a relatively new phenomenon. It arises out of capital's ongoing search for flexibility and competitiveness based on its 'transaction cost' approach to human resource recruitment. In other words, capitalism wants cheap labour.

In the search for cheaper labour, the increase in the number of atypical contracts of employment is such that now more than 10 per cent of the Irish labour force come under the heading 'non-permanent employees' – temporary, fixed-term contract, and casual workers. A further step in this trend is the use of agency workers who are in abundant supply because of a lack of employment opportunities in failed economies.

Employers believe that agency working contributes to flexibility in the labour market. The practice works for individual employers in some circumstances but many find that the fees charged by employment agencies can be prohibitive if there is not sufficient competition or economies of scale among the agencies. It works quite differently for people employed in construction, agriculture, hotels and restaurants than it does for people qualified in IT, finance or nursing. When agency working is combined with the organisational model of 'core' and 'peripheral' workforces, numerical and financial flexibilities can be achieved.

In many European countries, temporary agency working began as a policy tool for integrating marginalised groups into the labour market. Groups that typically have difficulty in getting back to work – for example, the long-term unemployed, disadvantaged people, older workers, ethnic minorities – were placed, usually by non-profit organisations, in temporary jobs with the ultimate aim of achieving full-time permanent employment. This practice was seen to be compatible with social goals and lent a positive image to temporary agency working.

In a context where the EU, in 2000, set itself the target of becoming the most competitive and dynamic economy in the world by 2010,[2] successful models of temporary agency working were seen by many as providing a means of achieving a balance between flexibility and protection at work.

Dedicated Legislation

Most EU countries counteract the obvious risk of

exploitation in agency working by enacting and enforcing dedicated legislation in this area. They regulate the agency business with commercial legislation and the assignment of workers to user companies with employment legislation.

Those countries with the most comprehensive legislation regulate the relationship between the agency, the user company and the worker and define a specific status for temporary agency workers. Recognising the potential of agency working for displacing direct employment, they have legislated for a limited duration of temporary employment, after which the worker becomes permanent.[3]

Irish business is in danger of espousing an exploitative approach to agency working

Only Ireland, the UK and Denmark do not have a clear definition and regulation of temporary agency working as a separate type of employment relationship. Lacking the European social and legislative constraints, and open to the neo-liberal free market ideologies of the Anglo-Saxon model of political economy, Irish business is in danger of espousing an exploitative approach to agency working.

Employment Agency Act, 1971

The only piece of Irish legislation which deals specifically with agency working is the Employment Agency Act, 1971. This is concerned with the regulation of agencies and provides for the *commercial* aspects of labour leasing, but it is not concerned with the responsibilities of agencies to workers.

The Act was passed at a time when permanent full-time employment was the norm. Although its definition of the business of employment agencies covers temping, the growth of agency working requires further legislation. This was proposed in the White Paper, *Review of the Employment Agency Act 1971*, published in June 2005.[4]

The White Paper puts forward a series of recommendations for amendments to extend and update the regulations, most notably the drawing up of a Code of Practice for the employment agency sector which would be put on a statutory basis.[5] It was proposed that this Code would include a section on the rights of workers recruited by employment agencies or businesses.[6] One wonders how this proposed reform will be affected by the Directive on agency work being prepared by the EU, which will be discussed below.

GAMA Construction in Clondalkin

The danger that, in the absence of dedicated legislation, agency employment can lead to exploitation was highlighted in two cases involving agency workers employed by the GAMA Group which came into the public domain in recent years.

The multinational GAMA Group was invited to Ireland by a government delegation in 1998. It was claimed that GAMA could deliver major construction projects in a shorter time and at a better price than other companies. GAMA Construction Ireland Limited was contracted for a number of projects being undertaken by local authorities. GAMA Endustri, an employment agency in the GAMA Group, supplied up to 1,000 employees, mainly Turkish nationals, to GAMA Construction.

The first issue with GAMA that came to public notice was the sacking of three workers at a County Council construction site in Clondalkin in 2004. At the time they were employed, the workers were informed that they would work on a PAYE basis. Since they were to work on a local authority site, they assumed that their conditions of employment would be secure. Soon after commencing employment, however, they were informed by GAMA Construction that they were working on a sub-contract basis. They rejected this and were sacked.

During an application by the company for an injunction, the High Court ruled that the workers were not employees of GAMA Construction. The Labour Court dealt with some of the employment issues that had arisen and recommended that GAMA Construction pay the workers for the work they had already done; however, it was not able to recommend that they be re-employed by the company, because of the High Court ruling.[7] The case illustrates, among many other things, the fact that in practice there is often confusion as to whether it is the employment agency or the company using the agency which carries the responsibility of being the employer.

Who is the Employer?

The question as to who is the responsible employer can be answered in terms of employment legislation which says in different ways, in different statutes, that the one who pays the wages is the employer. Where the agency pays the worker, the agency is the employer. Where the user company pays the wages, the user company is the employer. The legislation on unfair dismissals is the only exception in that under its provisions the user company carries the responsibility of the employer.

Case law in the UK and Labour Court rulings in Ireland show, however, that the question is more complex. This was illustrated in a case determined by the Labour Court in January 2004 concerning a registered general nurse who was recruited via an employment agency to work part-time with Diageo Global Supply in Dublin. The nurse provided cover for other nurses during sick leave, absences and holidays, and was called into work as she was required. Her union claimed that Diageo was in breach of the Protection of Employees (Part-Time Work) Act, 2001 by treating the claimant in an unfair manner when she was selected for a reduction to her hours of work and a change in her pattern of attendance, because of her part-time status.[8]

Diageo maintained that the claimant was not an employee of the company, but of the agency, because the agency paid the nurse's wages and the definition of 'employer' in Section 3 of the Act includes reference to the employer being the person 'liable to pay the wages'. It asserted that the only contract that existed was that between the company and the agency. The claim of unfair treatment should rest, therefore, with the agency. The nurse contended that she had never entered into any contractual arrangements with the agency and that it had merely acted as the paying agent for Diageo. She further contended that she worked under the direction and control of Diageo and was, therefore, its employee. The Court concluded its investigation by concurring with the nurse.

Confusion as to who is the employer does not arise in the two-way employment relationship that exists in the case of a directly employed worker. Temporary agency working, on the other hand, involves three parties: worker, agency and user company. This relationship is based on two contracts – a business contract between the agency and the user company, and a contract of employment with the worker. The three-way relationship is a significant departure from the two-way relationship: the contracts involved clearly need more regulation if only to avoid confusion.

Vulnerability to Exploitation

According to the Oxford Dictionary, to 'exploit' is 'to utilise for one's own ends'. The traditional employer–employee relationship has an inherent vulnerability to exploitation, which experience has shown can be overcome only by negotiation and mutual accommodation. The triangular relationship that arises in the case of agency working is even more vulnerable to conflict and therefore demands considered regulation. This was highlighted in a second case involving GAMA Construction, which came into the public domain in 2005.

GAMA workers protesting outside Leinster House
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GAMA Construction in Ennis

The second GAMA case concerned Turkish building workers supplied by GAMA Endustri to the Ennis site of GAMA Construction. There they worked in excess of 80 hours per week for a basic rate of €2 to €3.30 per hour. These conditions were in contravention of minimum wage and maximum hours legislation. Moreover, for periods of up to three years, the Turkish workers worked overtime for which they were not paid. In addition, while the Irish workers on the site had a clock-in system and received normal payslips, the Turkish workers were not provided with any proper time-recording or payslip system.

The workers were isolated and cut off from others and did not know how to go about changing their conditions. They were members of the trade

union, SIPTU,[9] but because of language difficulties and a lack of understanding of collective organisation they were unable to voice their grievances and so SIPTU officials were unaware of their situation. When Mick Murphy, a Socialist Party Councillor, approached them they withdrew and told him nothing. He decided to find out what was going on and had prepared a leaflet in Turkish explaining their entitlement to legal rates of pay. He got around the efforts of the company's security employees to prevent access to the workers by throwing the leaflets over the fence.

Thus, with the help of Murphy and of Joe Higgins, who was then a member of the Dáil, there began the process of the workers finding their voice, resulting in meetings, protests and a long strike. What emerged into public view was scandalous exploitation involving not just low pay and no payslips but workers being housed in sub-standard accommodation, intimidation, and the misplacing of wages by paying them into bank accounts in Holland, which were in the workers' names but of which the workers knew nothing.

'Legitimate' Discrimination

Individual examples, then, clearly highlight the fact that the present situation allows for exploitation, manipulation and illegal practice. Perhaps even more disturbing is the realisation that, according to the rules of the system, agency workers can be subject to pay and conditions quite different from those of non-agency colleagues doing the same work. This 'legitimate' discrimination facilitates the emergence of illegal exploitation.

Union officials report on the difficulties encountered in trying to respond in cases where employers use labour leasing as a means to exploit. Workers are contracted through complex supply chains of agencies. Employees in the same workplace may have different employers – that is, have been supplied by different agencies – and may well have different pay and conditions. The agencies can bypass industry-agreed pay rates by using cheap and temporary labour from poorer countries.

More and more migrant workers in the hospitality, food processing, and agriculture sectors are hired on these short-term contracts. A hotel, for example, may use several different agencies to supply its catering staff, waiting staff, and cleaning staff. Employees and their representative who want to pursue a grievance can find it difficult to identify someone who will take responsibility for dealing with the issue. In this way, employment agencies and the employers using them can circumvent employment rights that are available to directly employed workers.

All Workers are Equal before Protective Legislation?

Mainly thanks to our participation in the European Union, the Irish labour market is not unrelievedly in the Anglo-Saxon model but does enjoy extensive protective legislation. Employers and government insist that all workers are protected equally under employment law. However, as many of the protective measures do not kick in for six to twelve months of employment they do not apply to short-term temporary workers. For instance, the question of whether a dismissal is unfair does not arise in the first twelve months of employment.

A crucial issue concerns the principle of non-discrimination. All categories of workers are protected by the Employment Equality Act,1998, which provides that there should be no discrimination in pay and conditions between workers doing like work. But government and employers gloss over the small print of Section 7 (2) of the Act. This says that for an agency worker 'the comparator' can only ever be another agency worker and never a non-agency worker:

In relation to the work which an agency worker is employed to do, no person except another agency worker may be regarded ... as employed to do like work (and, accordingly, in relation to the work which a non-agency worker is employed to do, an agency worker may not be regarded as employed to do like work).

This is the loophole which allows the difference in pay and conditions between directly employed and agency workers. As a result, two colleagues may work side by side in the same company doing the same work for different wages and with different conditions of employment. Furthermore, since Ireland, unlike several EU countries, does not have legislation placing a limit on the duration of agency working, this situation may continue indefinitely. Effectively, two tiers of employee are being created. To the extent that directly employed workers tend to be Irish, and the agency workers foreign, this practice is at odds with national policies on integration.

EU Directive on Agency Work

It was this gap in the defence against exploitation that the EU wanted to close through the formulation of a Directive on Temporary Agency Work.[10] This proposed Directive was, however, held up for years by Ireland, the UK and Germany.[11]

The UK Government overtly disagreed with the requirement for equal pay and conditions for agency workers and was strongly supported by employer bodies. Ireland couched its objections in terms of the advantage that would accrue to other countries which would be permitted to deviate from equality requirements by means of national, legally binding, collective agreements. The weakness of this argument was that it overlooked the fact that Ireland had the facility to make collective agreements binding, as in the case of the Labour Court's Registered Employment Agreements and Employment Regulation Orders.

Eventually, however, in light of the reality that the other EU countries might reach agreement imposing even more demanding conditions, the UK and Ireland gave way. On 9 June 2008, the European Council finally achieved 'political agreement' on a common position regarding the proposed Directive.[12] It was agreed that 'the principle of equal treatment from day one will be the general rule' – with the qualification that:

... Article 5(3) will allow Member States to give the social partners the option of upholding or concluding collective agreements which, while respecting the overall protection of temporary agency workers, establish working and employment conditions which may differ from the principle of equal treatment.

This means that Ireland may deviate from equality by means of a social partnership agreement. This surely is the only way of balancing efficiency with fairness – that is, as long as trade unions have bargaining power.

The Directive on temporary agency work will have to be transposed into Irish law. This should provide an opportunity for Ireland to look comprehensively at the whole question of agency working and to develop dedicated legislation to address the problems it can generate. Given our previous experience of formulating legislation on foot of EU Directives, one can expect lobbying that will result in a whittling down of the provisions of the Directive as it is transformed into Irish law.

Already ISME (Irish Small and Medium Enterprises Association) has said the Directive would do 'extreme damage' to small business flexibility and 'would not be acting in the interests of agency workers themselves'. It has claimed that the requirements imposed by the Directive could 'lead to the demise of the agency worker concept'.[13]

Protesting in support of Irish Ferry workers *© D.Speirs*

Displacement of Directly Employed Workers by Agency Workers

As well as the issue of providing protection for the agency worker, there is also the question of protecting the directly employed worker from losing his or her job to a cheaper agency worker. The process by which cheaper agency workers can replace permanent workers is illustrated by the Irish Ferries dispute.

In 2004, Irish Ferries made a collective agreement with its employees on pay and conditions for the following three years. By mid-2005, the company had come to believe that it needed to make savings of €15 million if it was to survive on its Irish Sea and continental routes. Outsourcing had become an established practice in competitor companies, giving them lower pay costs. Irish Ferries took the position that outsourcing was its only option and therefore it would have to get out of the collective agreement.

The Labour Court required the company to observe the agreement until its expiry date. In the meantime, however, the company was able to offer redundancy deals to its own workers and

replace them with cheaper agency workers. During the course of the dispute, a protest march by 100,000 people underlined public repugnance towards replacing good jobs with ones paying lower wages.

In the context of international competition, which includes the widespread use of cheap labour, and from the perspective of the individual company, the rationale behind the action of Irish Ferries is obvious. However, international competition in the absence of international regulation, especially in countries where labour standards are low, tends to generate a 'race to the bottom'. It *is* possible to run a sustainable economy without the necessity of maintaining a tier of workers who are poorly paid and badly treated, but international regulation and governance are required to enable this.

The Services Directive

Issues that are distinct from but related to the question of agency working arise as a consequence of the EU Directive on 'Services in the Internal Market'.[14] The Services Directive reflects the EU's concern to facilitate competition and allow service providers to act beyond national boundaries. The question that arises is whether the Polish plumbing contractor undertaking work in France should pay his employees at the 'country of origin' rate or the 'host country' rate. The principle of competition would suggest that the 'country of origin' rate should prevail, subject to the statutory requirements of the host country – for example, its minimum wage legislation. The right to collective bargaining should allow employees to act collectively to improve their wages.

The celebrated case of the Latvian construction company, Laval, which was engaged to refurbish a school in the Swedish town of Vaxholm, is relevant. Laval refused to sign a collective agreement, and proposed to pay the Latvian labourers well below Sweden's minimum wage. Swedish trade unions initiated industrial action at the workplace.

The case ended up at the European Court of Justice which ruled, in December 2007, that the right to strike is a fundamental right, but not as fundamental as the right of businesses to supply services across borders and that the Swedish workers were within their rights to take industrial action, but such action should be in pursuit of an overall social good and not just to safeguard their own privileged positions.

The Court's findings would suggest that the local agreements of countries can be superseded by EU provisions for free movement: this opens the way for social dumping.

The more recent Rueffert case, decided in April 2008, focused on whether public authorities, when awarding contracts for work, have the right to demand that tendering companies commit themselves to pay wages that are in line with the collective agreement in the place where the work is done, or whether this amounts to a restriction on the freedom to provide services which is enshrined in EU treaties.

The European Court of Justice found that the freedom to provide services prohibits the imposition of a requirement to pay collective agreement rates, given that most likely these will be higher than the applicable minimum wage. A public procurement obligation of this kind would prevent foreign service providers from competing on the basis of lower wages. Such a restriction on the freedom to provide services is not justified by the objective of ensuring the protection of workers.

Without a balance between union freedoms and the freedom of capital, the dynamic of 'a race to the bottom' is envitable

It would appear, then, that case law is interpreting the EU treaties as according secondary importance to the rights of workers, including the right to strike, when these rights clash with the freedom of the market.

This dilemma echoes the centuries-long struggle about the right to strike in the UK, which was resolved by the concept of immunity in the pursuit of a trades dispute. Without a balance between union freedoms and the freedom of capital, the dynamic of 'a race to the bottom' is inevitable.

Employment agencies are, of course, service providers. They provide ready-made human resources for user companies. However, in

response to trade union protests, the EU decided in 2006 to exempt employment agencies from the provisions of the Services Directive – much to the chagrin of employer bodies, and of the International Confederation of Private Employment Agencies which declared that this was a betrayal of the ideals of the EU.

Conclusion

In the area of labour market regulation, the Irish Government and Irish employers appear to take a stance similar to that of the UK Government and UK employers – that is, a preference for low levels of regulation in a free market.

The EU, with its traditions of social integration and partnership, is the source of most of the protective employment legislation operative in the UK and Ireland. Irish social partnership has been a good mediator between the Anglo-Saxon and the European industrial relations styles. On the issue of agency working, it seems as if the EU Directive will come just in time to rescue us from Victorian-style exploitation – having been delayed long enough to allow us extract as much as possible from the receding Celtic Tiger. The transposing of the Directive into Irish law provides an opportunity to deal specifically with the relatively new phenomenon of a triangular employment relationship and to try to reconcile the tension between efficiency and fairness in the labour market in a way that brings its functioning to a new level of integration.

The EU itself is also being driven towards market liberalism by the forces of globalisation and its own competition strategy. The European Court of Justice is increasingly leaning in favour of the rights of business, although its approach is counterbalanced by the European Commission in its role as the proposer of legislation.

The protests during the Irish Ferries dispute show that people's embedded values do not favour the excesses of neo-liberal business practices that try to replace decent jobs with cheaper ways of using human resources. It is up to the Government and to the EU to reconcile the contradictions between efficiency and social protection by rising above fundamentalist economics to a viewpoint based on political economy in the service of the public good.

Notes

1. In his 1981 encyclical letter on work, Pope John Paul speaks of the human person being the 'subject of work' and strongly asserts that 'the primary basis of the value of work' is the human person, 'who is its subject'. This, he says, 'leads immediately to a very important conclusion of an ethical nature' – work is, in the first place, 'for' the human person, rather than the person being 'for work'. See *Laborem Exercens* (on Human Work), Encyclical Letter of Pope John Paul II, issued 14 September 1981, n. 6. (www.vatican.va)
2. The 'Lisbon Strategy', adopted by the Heads of State or Government during the European Council meeting in March 2000, set as the 'strategic goal' for the EU that it would become 'the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion'. (Presidency Conclusions, Lisbon European Council, 23–24 March 2000)
3. European Foundation for the Improvement of Living and Working Conditions, *Temporary Agency Work in an Enlarged European Union*, Luxembourg: Office for Official Publications of the European Communities, 2006.
4. Department of Enterprise, Trade and Employment, *Review of the Employment Agency Act 1971: White Paper*, Dublin: Department of Enterprise, Trade and Employment, 2005 (www.entemp.ie/publications). The White Paper proposed that in updated legislation the definition of 'employment agency' would be revised in line with the ILO definition (ILO Convention No. 181). Under this definition, an employment agency is 'any natural or legal person' which provides one or more of the following types of service: (a) introduces suitable candidates to an employer for direct employment, (b) employs workers and supplies them to a user company which assigns and supervises their work, and (c) assists individuals looking for either permanent or temporary work – in other words, provides 'work-finding services'. (pp. 4–5)
5. *Ibid*., p. 8.
6. *Ibid*., pp. 15–16.
7. Labour Court Recommendations, Determination No. LCR18070. (www.labourcourt.ie)
8. Labour Court Recommendations, Determination No. PTD042. (www.labourcourt.ie)
9. The SIPTU website includes a podcast: 'The Agency Experience from the Worker's Perspective'. (www.siptu.ie/agency)
10. Commission of the European Communities, *Proposal for a Directive of The European Parliament and The Council on Working Conditions for Temporary Workers*, Brussels, 20.3.2002, COM(2002) 149 final, 2002/0072(COD). In November 2002, the Commission published an *Amended Proposal* (Brussels, 28.11.2002, COM(2002) 701 final, 2002/0072 (COD).
11. The European Parliament delivered its first-reading opinion on the draft Directive six years ago, on 21 November 2002.
12. Council of the European Union, Press Release, 2876th Council meeting, Employment, Social Policy, Health and Consumer Affairs, Luxembourg, 9–10 June 2008, pp. 11–12.
13. 'ISME Concerned by Temporary Workers Directive', Press Release, 10 June 2008. (www.isme.ie/press)
14. 'Directive 2006/123/EC of The European Parliament and of The Council of 12 December 2006 on Services in the Internal Market', *Official Journal of the European Union*, 27.12.2006.

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