

Who is responsible for health and safety of temporary workers? EU and UK Perspectives.

Victoria Howes¹

Abstract

There have been several attempts to provide certain protection to temporary agency workers at the EU level by Directive 91/383/EEC in respect of health and safety and most recently by Directive 2008/104/EC in respect of other working conditions. However, the precarious employment status of temporary workers has been a stumbling block in clear understanding of who owes duties and responsibilities for health and safe of these workers.

By seeking to address this issue, the paper analyses the existing legal provisions relating to health and safety of temporary agency workers at the EU and UK levels in the context of a more general problem associated with the employment status of such workers, and suggests a number of alternatives to the existing legal regime which could potentially clarify the situation.

Health and Safety of temporary workers: Recognition of a problem and the need for special protection.

Labour market relationships have gone through a number of changes in the presence of atypical forms of employment in the last few decades and these forms of employment have become a common feature of labour markets in all EU Member States.

The term ‘atypical worker’ is still used, but it has been accepted as almost a norm in the context of employment relationships. The term usually applies to workers working from home, on short-term employment contracts, or on a temporary basis. Workers who are employed on a temporary basis are commonly called temporary workers and are usually hired by an employment ‘business’, which is often, albeit incorrectly, referred to as an employment ‘agency’², that finds work with a third party company, the end-user³, thus creating so-called triangular relationships between the parties.⁴

Employment of temporary workers has been a well-accepted trend in all EU Member States with its clear advantages. The benefits of employing temporary workers have been recognised by both employers and workers alike. They are associated with

¹ Senior Lecturer in Law, Salford Law School, University of Salford v.s.howes@salford.ac.uk

² There is a difference between employment business and agencies in that the ‘employment business’ provides its own workers on a contract basis to third party employers, whereas the ‘employment agency’ introduces staff to an employer for employment by that employer. The ‘employment business’ makes an agreement with workers. Workers of the ‘employment business’ are employed under contracts for services, which govern assignments undertaken by the temporary worker who is engaged as a self-employed worker. Employment agencies do not usually issue contracts with their workers. They make agreements with end-users (client employers).

³ Also referred to as a hirer or a client company

⁴ See, for example, the UK Conduct of Employment Agencies and Employment Businesses Regulations 2003

flexibility of arrangements, where, for example, an agency worker can be engaged in a relatively short-term project, and with being a 'route into employment for those previously excluded from it or economically inactive'.⁵ However, at the same time these workers are often seen as vulnerable. Although vulnerability is largely associated with limitations imposed on employment rights, it also relates to certain risks to health and safety of atypical workers.

In the draft report on the Community Strategy 2007-2012 on health and safety at work the European Parliament stated: 'A worrying statistic is that the cases of occupational accidents and work-related illnesses have not been evenly spread among all workers. Groups of workers such as migrant workers, temporary agency workers, young and ageing workers all present rates of occupational accidents and diseases which are much higher than the EU average.'⁶ 'The changed composition of the workforce is having an effect on safety and health levels in Member States.'⁷

According to national statistics 'the number of temporary employees (full - or part-time) in the UK over the period 1992 - 2001 showed an increase of 430,000 (26%)'^{8,9}. Since then the number of temporary employees has not changed dramatically, the increase is only about 0.6%.¹⁰ However, there is a clear indication that at least 6% of all employees, that is about 1.5 - 1.6 million people, have been engaged on a temporary contractual basis over the period of 2001-2010, and this number should not be neglected.¹¹ Studies also show that 'flexible forms of employment have spread through all sectors of economy and all kinds of jobs, even the highly qualified ones.'¹² There is also evidence that young workers, who have little experience and are more likely to accept worse working conditions, are typically engaged in temporary work, and this can have effects in issues of health and safety.¹³

Although there is no direct evidence that the risk of workplace injury is significantly higher to temporary workers than to permanent workers, there is 'a higher rate of risk and injury to new workers and, because nearly 3 in 5 (57%) of temporary workers have been with their employer for less than 12 months, the risks to temporary workers

⁵ The Department of Trade and Industry, 'Success at Work, Consultation on measures to protect vulnerable agency workers' Consultation document (2007) DTI, see also M. Wynn, 'Regulating Rogues? Employment Agency Enforcement and Sections 15-18 of the Employment Act 2008' (2009) 38(1) *Industrial Law Journal*, 64, where he refers to reports on vulnerability of agency workers.

⁶ 2007/2146(INI)

⁷ 'Study to analyse and assess the impact of the practical implementation of national legislation of safety and health at work relating to Council Directive 91/383/EEC' Final Report, (2006) *Labour Asociados SLL*, Madrid.

⁸ M. Wynn, 'Regulating Rogues? Employment Agency Enforcement and Sections 15-18 of the Employment Act 2008', *supra* n 1.

⁹ Temporary employees (workers) include those hired from employment businesses and employment agencies as defined above.

¹⁰ Labour Force Survey, Office for National Statistics (www.statistics.gov.uk).

¹¹ Labour Force Survey Quarterly Supplements, 2002-2005 and Labour Force Employment Status 1971-2010 (www.statistics.gov.uk) accessed on 13 January 2011.

¹² Report, Labour Asociados SLL, 'Study to analyse and assess the impact of the practical implementation of national legislation of safety and health at work relating to Council Directive 91/383/EEC', *supra* n 3.

¹³ *ibid*

are associated with the high risks to workers new to their employer'¹⁴.

It is important therefore to ensure that temporary workers have sufficient protection when they are expected to work in a new workplace, which may be changed on a frequent basis, as they require time to become familiar with its particular demands, culture, organisation, people and not least, health and safety. Temporary agency workers are often young and inexperienced, and many accidents happen on the first day of work.

In the tragic English case of *R v DPP ex parte Jones*¹⁵ a young man, Simon Jones, was killed by jaws of a grab bucket at the dockside of the hirer. It was his first day of work. The evidence showed that he had no training from either the agency or the company and the only contact made with him was an instruction to 'go down to the quayside where the rest of the men would be and they would sort out who would do what...' (para 6). In another case¹⁶ Vitalijus Orlovas, 29, an agency worker originally from Lithuania, died on his first day of work from crush injuries while unloading sheets of glass from a shipping container, when they fell on him. The investigation by the UK Health and Safety Executive (HSE) found that the company, which hired him, did not have adequate arrangements in place to unload the glass safely when the incident happened and no information or training was given to Mr Orlovas that would be necessary for this work.

Following an explosion in October 2002, which led to the death of two temporary agency workers, and seriously injured more than 20 other workers, at Cockerill Sambre iron and steel plant in Belgium, the Confederation of Christian Trade Unions (CSC/ACV) highlighted a number of contributory factors, such as: poor selection of temporary agency workers; unsatisfactory communication of information from the user company to the employment agency and agency workers; lack of training; absence of safety instructions; unsuitable protective equipment; a poor standard of medical supervision; problems associated with induction; and the transfer of dangerous jobs to temporary agency workers¹⁷. This accident has revived the issue of workplace accidents among temporary agency workers, who, as it was stated, are much more likely than average to be affected by accidents.¹⁸ The temporary work agency employers' federation, Federgon¹⁹ also added that 'as long as we are dealing with inexperienced workers performing jobs with which they are not familiar, it stands to reason that the risks are higher than for employees who are experienced and used to

¹⁴ Health and Safety Commission, 'Report by the United Kingdom on the 2nd five years of practical implementation of Directive 91/383/EEC' (1997) *HSC*, Annex 1.

¹⁵ [2000] IRLR 373

¹⁶ 'St Neots death on first day at work costs firm almost £100,000', 20 December 2010, *Hunts Post* 24.

¹⁷ H Fonck, 'Note aux membres de la commission paritaire 'travail intérimaire' et du groupe de travail 'travail intérimaire', (1998) CSC/ACV, Brussels.

¹⁸ C. Delbar, 'Fatal Accident revives debate on safety standards for subcontractors', (2002) *European Industrial Relations Observatory on-line*,

(<https://eurofound.europa.eu/eiro/2002/11/feature/be0211305f.htm>).

¹⁹ Fédération des Partenaires de l'Emploi/Federatie van Partners voor Werk

the work'.²⁰

It has become clear therefore that temporary workers need to be provided with special health and safety protection and the EU attempted to address this problem back in 1991.

An attempt to provide protection of health and safety of temporary workers: the EU initiative and UK response.

Duties to protect health and safety of temporary workers have been in the statute books for almost twenty years. The key regulatory intervention came with the European Directive 91/383/EEC (often referred to as the Temporary Workers Directive.) It was introduced soon after the Framework Directive 89/391/EEC and commonly Member States have implemented both Directives by means of the same pieces of legislation. However, the Temporary Workers Directive is not to be treated as one of the 'specific directives'. 'Directive 91/383/EEC operates, in practice, as a complementary framework directive for a special group of workers, completing and adapting the regulation of Directive 89/391/EEC to the special circumstances of these atypical workers.'²¹

The main thrust of Directive 91/383/EEC is to guarantee an equal treatment in the field of health and safety for those workers with fixed-term contracts and temporary employment relationships. As Article 2.1 states: 'The purpose of this Directive is to ensure that workers with an employment relationship as referred to in Article 1²² are afforded, as regards safety and health at work, the same level of protection as that of other workers in the user undertaking and/or establishment.'

Directive 91/383/EEC then sets out various duties to fixed-term and temporary workers, the performance of which, at least in theory, would achieve the above principle of equal treatment, the key ones being the provision of information, which is seen as central element of the protection against work-related hazards (Art 3), and training, which is seen as a basic element for any policy on health and safety in the workplace (Art 4)²³. However, the Directive does not state which party to the triangular relationship is responsible for ensuring that agency workers are treated equally in respect of health and safety.

In a number of Member States, Directive 91/383/EEC was implemented by adding legal provisions to already existing pieces of legislation. For example, in Sweden, the Directive was implemented in the Work Environment Act (1977:1160) by adding an additional section, which states that 'a person contracting hired labour to work in their

²⁰ C. Delbar, 'Fatal Accident revives debate on safety standards for subcontractors', *supra* 36, quoted in *Le travail intérimaire en Belgique*, E Léonard and C Delbar, CRISP report, forthcoming

²¹ 'Study to analyse and assess the impact of the practical implementation of national legislation of safety and health at work relating to Council Directive 91/383/EEC', *supra* n 3.

²² i.e. fixed-term contracts and temporary employments

²³ Others include: use of workers' services and medical surveillance of workers (Art 5.1), under which Member States have the option of prohibiting temporary workers from being used for certain work as defined in national legislation, which would be particularly dangerous to their safety or health; and protection and prevention services (Art 6).

activity shall take the safety measures which are needed in that work' (section 3.12). Similarly in Denmark the existing Danish Working Environment legislation was amended to give effect to the Directive. In other Member States, the implementation of the Directive was more complicated. In France, the implementation of Directive 91/383/EEC was undertaken through a number of pieces of legislation and collective agreements. In Italy agency work used to be illegal until 1997 when as a result of the European Court of Justice ruling in *Job Centre II*²⁴ that this was contrary to freedom of competition, Italy made some changes by enacting Law No. 196 of 1997 with final approval of agency work in 2003 by virtue of the Law No. 276/03.²⁵ Directive 91/383/EEC was implemented in the Law No. 196 and Legislative Decree 626/94 as well as in some specific regulations and collective agreements.

In the UK both, Directive 89/391 and Directive 91/383, have been implemented via the Management of Health and Safety at Work Regulations 1999 (MHSWR) (as amended²⁶), which has the specific provisions for temporary workers²⁷. Duties owed to temporary workers under MHSWR 1999 supplement the general duties stated in the Health and Safety at Work Act 1974.

However, there are certain discrepancies so far as the UK's implementation is concerned: there are no specific provisions for fixed-term workers, who in practice are 'covered just by general declarations of equal treatment in the field'²⁸, and there is only partial coverage of temporary workers. Apparently, the only provision directly linked to temporary workers in MHSWR 1999 is the provision relating to information²⁹, which is arguably the most important one since the majority of accidents involving temporary workers happen because of failure to provide information relating to health and safety risks and other relevant matters. It has been established that a failure to provide such information to non-employees who are involved in the employer's undertaking can lead to disastrous outcomes.³⁰

So far as training is concerned, MSHWR 1999 only imposes an obligation on employers to train their employees^{31, 32}. Thus, a temporary worker must be an employee in order to be trained under this provision, which poses a particular problem connected to the employment status of such a worker.

The English law approach to the employment status of temporary agency workers

²⁴ C-55/96, *Job Centre Coop*, 1997 ECR I-7110

²⁵ See further Ratti, L., 'Agency Work and the Idea of Dual Employership: a Comparative Perspective', (2009) *Comparative Labour Law and Policy Journal*, Vol. 30:835

²⁶ MHSWR 1999 did not affect the provisions relating to temporary workers.

²⁷ Reg 15 of MHSWR 1999.

²⁸ 'Study to analyse and assess the impact of the practical implementation of national legislation of safety and health at work relating to Council Directive 91/383/EEC', *supra* n 3 at 20.

²⁹ MHSWR 1999 regulations 12(3) and 15

³⁰ *R v Swan Hunter Shipbuilders Ltd* [1982] 1 All ER 264

³¹ MHSWR 1999 regulation 13

³² The UK has not made use of the option provided by Article 5.1 of the Directive. Finally, Article 6 of the 1991 Directive is reflected in regulation 7 of MSHWR 1999.

The employment status of temporary workers has over time created a long and profound debate in English judiciary. In the Final Report on the practical implementation of Directive 91/383, it was noted that ‘United Kingdom shows a particular problem regarding the distribution of responsibilities in this field. The health and safety of some temporary agency workers is affected by their ambiguous employment status. Some agency workers are not employees of the client employer, or of the agency, nor are they self-employed.’³³ In fact, they may simply not be employees at all as was established in the case of *Muschett v HM Prison Service*³⁴, where the Court of Appeal held that a temporary worker supplied by the employment agency (namely the employment business Brook Street’s ‘Temporaries Controller’) may be in a position where he has neither an employment contract nor a contract for services for either the end user or the agency. And, ‘by the Court of Appeal’s own admission, the British legal system has so far failed to clarify the complexities of triangular work relationships, effectively determining an “absence of job protection for agency workers”^{35,36}.

When looking more closely at the triangular relationship between an agency workers, an agency and a client employer, a starting point should be whether there is a contract of employment between a temporary worker and an agency as there is, by definition, an express contract between these parties. The courts have not been particularly consistent on this point, distinguishing between a possibility of existence of a contract of employment for the duration of an assignment, as was established in *McMeechan v Secretary of State for Employment*³⁷, and difficulties of finding a global contract of employment between the worker and the agency. The Court of Appeal held that an individual could be an employee for the purposes of each engagement entered to, but he could not acquire such status for the purposes of the general terms of engagement between the individual and the agency.

Subsequent cases³⁸ have demonstrated that because of a ‘loose’ relationship between the agency and the individual where in practice the actual supervision and organisation of the individual’s work is done by the client employer, an employment contract with the agency is often diminished by lack of mutuality of obligations and/or lack of control, which are perceived by law as an ‘irreducible minimum’ for the contract of employment to exist³⁹. However, in *James v Greenwich Council*⁴⁰ the Court of Appeal emphasised the importance of the continuance of agency ‘arrangements’ (especially as the channel for payment), albeit mainly for the purposes of negating the necessity of finding an employment contract with the client employer.

³³ ‘Study to analyse and assess the impact of the practical implementation of national legislation of safety and health at work relating to Council Directive 91/383/EEC’, *supra* n 3.

³⁴ [2010] IRLR 451

³⁵ *James v Greenwich* [2008] EWCA Civ 35, para 57, Mummery LJ

³⁶ N. Countouris, R. Horton, ‘The Temporary Agency Work Directive: Another Broken Promise?’ (2009) 38 *Industrial Law Journal*, 329.

³⁷ [1997] IRLR 353

³⁸ *Montgomery v Johnson Underwood Ltd* [2001] IRLR 269; *Brook Street Bureau (UK) Ltd v Dacas* [2004] EWCA Civ 217 and *Bunce v Postworth Ltd* [2005] IRLE 557.

³⁹ MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pension and National Insurance* [1968] 2QB 497.

⁴⁰ [2008] IRLR CA

The legal position between a temporary agency worker and the end-user or the client employer has been even more debatable and complicated. By definition, because of the peculiar triangular arrangement between the parties, there is no express contract between the agency worker and the client employer. However, this has not stopped the courts to imply such a contract and to hold it to be the contract of employment, the inference, which albeit *obiter*, was made in *Dacas v Brook Street Bureau (UK) Ltd*⁴¹. The courts then had to define the circumstances where this would be appropriate to do in subsequent decisions. The theoretical possibility has not, however, found much application in practice and apart from one successful case of *Cable & Wireless plc v Muscat*⁴², which was easily distinguishable on its unusual facts, there have been no further success stories for temporary workers vis-à-vis client employers.

The last glimpse of hope in this direction seems to be completely taken away by the Court of Appeal in *James v Greenwich LBC*⁴³ which upheld the decision and guidance of Elias P in the EAT. Although the Court reaffirmed that it was still possible to imply a contract between the worker and the client employer, notwithstanding the absence of any express contract between them as established in *Dacas v Brook Street Bureau*⁴⁴, the fundamental question in such cases is whether 'it is necessary to imply the contract to give business reality to what is actually happening' and 'such a necessity arises only if there is conduct which is inconsistent with there not being such a contract.'⁴⁵ Two situations were identified where it would be legitimate to imply a contract of employment: firstly, where the formal written contract is a sham; and secondly, where it will be appropriate to imply a contract if in fact the express contracts no longer adequately reflect what is actually happening, and it is necessary to imply a contract to provide a proper explanation⁴⁶.

Depending on a particular factual situation and agreement there will continue to be arguments for temporary workers to have an employment status and respective rights against the client employer. The most recent example where it was legitimate to imply a contract of employment is the Supreme Court's case of *Autoclenz Ltd v Belcher & Ors*⁴⁷. Despite the fact that the contract in this case between car valets and the company described car valets as self-employed, the Court held that express contractual terms may be disregarded where they do not reflect the true relationship between the parties. Moreover, the intention to deceive a third party is not required.⁴⁸ Therefore, the outcome of each case will depend on the actual agreement between the parties and as the Court stated the true agreement will often have to be gleaned from

⁴¹ [2004] IRLR 358

⁴² [2006] IRLR 354 CA

⁴³ [2008] IRLR 302

⁴⁴ [2004] EWCA Civ 217

⁴⁵ The Court of Appeal referred to the observations of Bingham LJ in the *Aramis case* [1989] 1 Lloyd's Reports 213, 224, an approach approved by the Court both in *Dacas* and in the later decision of the Court of Appeal which followed *Dacas*, *Cable & Wireless PLC v Muscat* [2006] IRLR 354.

⁴⁶ The Court of Appeal referred to the observations of Elias P in *James v London Borough of Greenwich* [2007] IRLR 168 para 58.

⁴⁷ [2011] UKSC 41

⁴⁸ See 'Supreme Court - written terms that do not reflect the parties' actual agreement may be disregarded', (July 2011) *IDS Employment Law Brief*

all the circumstances of the case, not just written agreements. In this respect it appears that the case reaffirmed the existing legal position.

However, although on some occasions it can be held that agency workers are employees of the agency or the client employer, more likely this will not be the case, and it is not therefore surprising that the parties to the triangular relationship are often confused as to who owes duties to such workers and who is consequently responsible.

The unsatisfactory position with agency workers have been known for years with an expectation that the problem would be dealt with at the European level.

The Temporary Agency Work Directive 2008⁴⁹: Does it resolve the problem of status?

The long-awaited EU initiative came in the form of the Council Directive 2008/104/EC (the Temporary Agency Work Directive), which was approved by the European Parliament in October 2008 after years of failed attempts at regulating this area of law.

The purpose of this Directive is to ensure the protection of temporary agency workers and to improve the quality of temporary work by ensuring that the principle of equal treatment is applied to such workers, whereas 'equal treatment' relates to 'the basic working and employment conditions of temporary agency workers for the duration of their assignment at a user undertaking', such as working time (including holidays), and pay. In addition the Directive stated that Member States may make arrangements for equal treatment provisions to be applied after a qualifying period, which is not specified in the Directive.

Arguably, Directive 2008/104 extended the rights of agency workers given by Directive 91/383. The allowance of having the same working time as employees of the hirer, for example, from a statutory 20-minute break after six or more hours, to something more advantageous, would benefit the health and safety of agency workers.

However, in a way analogous to Directive 91/383 the Temporary Agency Work Directive does not affect the employment status of temporary workers. Article 1(1) states that the Directive 2008/104/EC applies 'to workers with a contract of employment or employment relationship with a temporary-work agency who are assigned to user undertakings'. The definitions of the terms 'worker', 'temporary-work agency', 'temporary agency worker' and 'user undertaking' are contained in Article 3(1). However, they are 'addressed rather superficially and are effectively referred back to the existing national definitions of these terms, a point further highlighted by Article 3(2)^{50,51}. Thus, the Temporary Agency Work Directive does not solve the issues that underlie the problems of acquiring employment status for agency workers.

⁴⁹ Please see Anne Davies, 'The Implementation of the Directive on Temporary Agency Work in the UK: A Missed Opportunity', (2010) 1(3) *European Labour Law Journal*, 307 for a detailed analysis of the scope of the Directive and its implementation in the UK

⁵⁰ Art 3(2) states: This Directive shall be without prejudice to national law as regards the definition of pay, contract of employment, employment relationship or worker.

⁵¹ See also N. Countouris, R. Horton 'The Temporary Agency Work Directive: Another Broken Promise?', *supra* n 18.

Likewise the Agency Workers Regulations 2010, which implemented the Temporary Agency Work Directive in the UK and came in force on 1st October 2011, do not deal directly with the issues of employment status of temporary workers. Moreover, the Regulations provide that agency workers can only acquire basic rights afforded in the Directive after a qualifying period of 12 weeks working for a client employer in the same role. It is provided, however, that some breaks do not stop the accrual of the qualifying period. For example, if the worker breaks for any reason for not more than six weeks, or is absent because of her or his sickness or injury, the continuity of the period will simply be paused and will recommence after she or he returns to work in the same job for the same hirer. Regulations also allow for some breaks to be disregarded in the sense that the clock will keep ticking during the worker's absence. This was specifically made to accommodate workers for reasons related to pregnancy, childbirth or maternity, or where the agency worker is away from work on statutory or contractual maternity, adoption or paternity leave. Regulations also afford some rights from day one of the agency worker's assignment, namely the rights to access the hirer's collective facilities and amenities, such as canteens, childcare facilities and transport services, and the right to be informed of any vacant posts with the hirer.

In order to ensure that hirers who try to circumvent the acquisition of the rights after the qualifying period of 12 weeks, the Regulations provides that an agency worker will be treated as having satisfied the 12-week qualifying period if he or she is prevented from doing so only by a relevant 'structure of assignments'. However, the onus of showing that the structure of assignments is in breach of the Regulations is on the agency worker who will need to provide sufficient evidence of the hirer's or agency's motive, which can arguably be a difficult task.

The most interesting question in respect of the new equal treatment provisions is who will be liable for non-compliance: the temporary work agency or the hirer? The Regulations state that an agency will be liable for any breach of the main provision of the Regulations, namely Regulation 5, which entitles an agency worker, after completing a qualifying period of 12 weeks in a given role, to the same basic working and employment conditions as he or she would be entitled to for doing the same job had he or she been recruited by the hirer other than through a temporary work agency and at the time the qualifying period commenced.⁵² However, the agency can have a defence if it can show that it has obtained, or has taken reasonable steps to obtain, relevant information from the hirer about the basic working and employment conditions in force at the hirer; where it has received this information, it has acted reasonably in determining the basic working and employment conditions to which the agency worker would be entitled at the end of the qualifying period, and where it has responsibility for applying those basic working and employment conditions to the agency worker, it has ensured that the agency worker has been treated accordingly.⁵³ Regulations also provide that the hirer shall also be responsible for any breach of Regulation 5 to the degree that it is responsible for the infringement.

Therefore after a qualifying period of 12 weeks the agency workers will be able to seek redress against either the temporary work agency or the hirer, or both, as far as

⁵² Regulation 5(1)(a) and (b)

⁵³ Regulation 14(3)

their basic employment rights provided by the Regulations, are concerned, which arguably include some health and safety protection, namely working time rights. However, it is well known that the working time provisions are quite weak on their own and in health and safety cases they are only used as ancillary issues.

Thus, as far as the general health and safety duties are concerned, the problem with the employment status still remains.

Is there a particular approach to the employment status of temporary workers in respect of health and safety?

It appears that courts tend to apply a less stringent approach to the issues of the employment status when establishing the employment status of a temporary worker in the context of health and safety. Health and safety is seen as a right more worthy of protection than an employment right, such as the right to claim unfair dismissal or a redundancy payment. The courts' approach, however, slightly differs depending on whether they deal with civil or criminal liability.

Employment status in civil health and safety cases

In considering the employment status in health and safety civil cases, the courts tend to mainly concentrate on the level of control over an individual's work and respective actions and on whether the individual is truly skilled to do the required job, or whether he is simply hired on a labour-only basis requiring control and supervision. The Court of Appeal held in *Roles v Nathan*⁵⁴ that in the case of skilled workers liability lay with the workers themselves.⁵⁵ The emphasis on 'who had control' was placed in the case of *Jennings v Forestry Commission*⁵⁶ where the Court of Appeal found that 'the claimant had been in charge of the work and of when to carry it out within the overall contractual timescale, and was not subject to supervision. He had quoted a price, decided whether and on what terms to employ an assistant, provided the materials, and used his own Land Rover.'⁵⁷ The Court held in this case that the injured worker was an independent contractor and hence liable for his injuries.

If, however, the case involves an unskilled worker, who is merely hired on a labour-only basis, the situation is different.

In *Lane v Shire Roofing*⁵⁸ a claimant, who was contracted by the defendant company as self-employed fell from a roof while working for the defendant and was seriously injured. In this case the Court of Appeal considered an issue of safety at work in the context of the public interest and gauged the claimant's employment status in relation to the single engagement only. Henry LJ stated: 'When it comes to the question of safety at work, there is a real public interest in recognising the employer/employee

⁵⁴ [1963] 1 ELR 1117

⁵⁵ D. Branson, 'Agency Workers – Tempting Fate' (2010)

(http://www.shponline.co.uk/features-content/full/id/30136/pop_up?_content_viewMode=print&_content_print=true) accessed on 19 January 2011

⁵⁶ [2008] ICR 988

⁵⁷ [2008] ICR 988

⁵⁸ [1995] IRLR 493

relationship when it exists, because of the responsibilities that the common law and statutes... places on the employer.’⁵⁹ The distinction had been made between men on ‘the lump’ doing labouring work and specialist sub-contractors and the judge considered the claimant to be closer to the former than the latter⁶⁰. The defendant therefore was held liable.

Thus, if it is established on the facts that a temporary worker is an employee of either the temporary agency or the end-user, as in the case of *Lane v Shire Roofing*⁶¹ the long-established common law rules of employers’ liability apply⁶². In addition a plethora of health and safety regulations give employees a right to bring civil actions against employers for breaches of statutory duties. The MHSWR 1999 is an example of regulations, where this right is expressly stated⁶³.

If a temporary worker is not an employee of either the agency or the end-user, which means that he or she may be self-employed, common law rules of employers’ liability do not apply, though a common law duty of care may be established under the rules of common law of negligence. In addition health and safety regulations will have only limited application to the extent as they apply to non-employees. In relation to the former a likely negligence may be found when some risks, which are unknown to the worker, but foreseeable to the client employer, for example, lead to an accident resulting from hazards created by those risks because of the failure to carry out risk assessments.

In addition non-employees can seek protection under some health and safety regulations. The positive duty to carry out risk assessments in relation to non-employees was explicitly approved by courts in the context of the MHSWR 1999. It was held that the duties to carry out risk assessments ‘should cover the risk to persons who are not employees of the employer but whose health and safety is at risk owing to the conduct of employer’s undertaking’⁶⁴. The judge in this case referred to *Munkman on Employers Liability* where it stated that ‘an employer who uses self-employed workers or employees from an outside undertaking is obliged to supply those persons with appropriate instructions and comprehensive information regarding risks to their health and safety if they are “working in his undertaking”’. *Munkman* indicates that the relevant risks for those purposes would be those arising from the use of the employer’s workplace rather than any risk associated with the work of the worker. The duty under the regulations is to make an assessment of the risks to the health and safety of persons not in his employment arising out of or in connection with “the conduct by him of his undertaking” so the statement in *Munkman* seems justified.⁶⁵ The judge also pointed out that the wording of Regulation 10 of the MHSWR 1999 which is concerned with information for employees, likewise ‘supports that view since the host employer’s duty to the employer from outside the undertaking has a duty to provide information on the risk to employees health and

⁵⁹ [1995] PIQR 421

⁶⁰ (<http://www.hmrc.gov.uk/manuals/esmmanual/ESM7165.htm>) 10 January 2011

⁶¹ [1995] IRLR 493

⁶² *Wilsons & Clyde Coal v English* [1938] AC 57; [1937] 3 All ER 628 HL.

⁶³ Reg. 22 of the MHSWR 1999.

⁶⁴ [2003] NIQB 41 para [10]

⁶⁵ J. Hendy, M. Ford, ‘Munkman on Employers Liability’, (2001) Butterworths Law, 13th Edition, para 11.31.

safety arising out of or in connection with the conduct by the host employer of his undertaking.⁶⁶

However, although the courts established that the duties to non-employees under the MHSWR 1999 are owed, non-employees cannot seek damages under the regulations. As it stands the MHSWR 1999 excludes civil liability for non-employees⁶⁷ and although it has been strongly argued that such by making such exclusion the regulations fail to meet the terms of the Directive 91/383/EEC that requires equal treatment of temporary workers⁶⁸, no amendments have been made in this respect.

Other health and safety regulations, which apply not just to employees, but to a wider class of persons who may be affected by work equipment include the Provision and Use of Work Equipment Regulations 1993⁶⁹. However, the Personal Protective Equipment at Work Regulations 1993 imposes duties only on the direct employer of an employee. An undertaking using independent contractors is not obliged to ensure that those workers are supplied with personal protective equipment.⁷⁰

It follows that the end-user is under a legal obligation with respect to all workers working on his undertaking, no matter what kind of contract they have. ‘The consequences of this approach are that an agency worker injured while working for a user might sue for damages at common law for negligence or breach of a statutory duty against the user.’⁷¹

It seems that as a norm the end-user will be directly liable for health and safety of temporary workers. However, it has been established by the courts⁷² that both the end-user and temporary work agency can be held vicariously liable, that is liable without personal fault, to others for careless acts of temporary workers.

Traditionally the courts had to make a choice between the agency and the end-user and decide whether to place responsibility on the agency ‘who is able to choose the most suitable worker to be supplied’⁷³ or on the end user ‘who in most cases exercises the day-to-day control’⁷⁴, or even on both the agency and the user. In *Mersey Docks and Harbour Bd v Coggins and Criffith (Liverpool) Ltd*⁷⁵ the agency was held responsible, and in *Denham v Midland Employers’ Mutual Assurance Ltd*⁷⁶, it was the end-user

⁶⁶ *Paul McDonnell v Harry Henry* [2003] NIQB 41, para 10.

⁶⁷ Reg. 22 as amended by Management of Health and Safety (Amendment) Regulations 2006.

⁶⁸ ‘Proposals for new Regulations amending the Management of Health and Safety at Work Regulations 1999 and the Health and Safety (Consultations with Employees) Regulations 1996’, (2005) *A response by the Association of Personal Injury Lawyers* (APIL06/05).

⁶⁹ See in particular regulations 4, 5, 8, 9 and 12

⁷⁰ J. Henty, M. Ford, ‘Munkman on Employers Liability’, *supra* n 42, at para 16.10.

⁷¹ Ratti, L., ‘Agency Work and the Idea of Dual Employership: a Comparative Perspective’, (2009) *Comparative Labour Law and Policy Journal*, Vol. 30:835 at 856

⁷² *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] IRLR 983 (CA)

⁷³ Ratti, L., ‘Agency Work and the Idea of Dual Employership: a Comparative Perspective’, (2009) *Comparative Labour Law and Policy Journal*, Vol. 30:835 at 862

⁷⁴ See *supra* no. 74 at 863

⁷⁵ [1947] AC 1, 61

⁷⁶ [1955] 2 QB 437

who was held responsible. In both cases the courts' emphasis was on the control test as 'an ultimate resort without looking at the contractual operation between the parties as a whole.'⁷⁷

Dual vicarious liability was first established in the case of *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*⁷⁸. Accordingly both parties were regarded as joint tortfeasors and the claimant could recover in full from either of them.⁷⁹ The question of 'who is in control' was very much part of the discussion in defining the principle of dual vicarious liability, which was further explained in *Hawley v Lumina Leisure Ltd*⁸⁰. The Court of Appeal referred to *Viasystems* and held: '*Viasystems* had established that the assumption that dual vicarious liability was a legal impossibility was wrong. May LJ focused the court's attention on the question of control and did not envisage a finding of dual vicarious liability in many factual situations. Rix L.J., however, doubted that the doctrine of vicarious liability should depend solely on the question of control and suggested a broader test of whether or not the employee in question is so much part of the work, business, or organisation of both employers that it is just to make both employers answer for his negligence. Rix LJ's broader approach in *Viasystems* still treated the degree of control as relevant and important. The question of control may not be wholly determinative, but, on the present authorities on vicarious liability for temporary deemed employees, the question of control remains at the heart of the test to be applied.'⁸¹

So, the courts' approach to the employment status of the temporary worker and focus on the issue of control for the purposes of vicarious liability was similar to the approach adopted in the context of the employer's liability. The court added that 'control, however, need not take the form of a legal right' and in practice 'more than one employer may possess sufficient control so as to warrant the imposition of responsibility. Regulation three of PUWER, for instance, imposes obligations on not only the employer but also any other person who has control, to any extent, of a person at work who uses work equipment.'⁸² And although holding of dual control will be 'an uncommon occurrence', the possibility now exists.

The facts that agency workers are liable to pay national insurance contributions as if they were considered to be employees, and that both the temporary work agency and the end-user must comply with the Employers' Liability (Compulsory Insurance) Act 1969 and insure their workers, may also be relevant in the context of health and safety liability and to some extent to dual liability. If it is found that a temporary agency worker is an employee of the agency, a contractual relationship between the temporary agency and the end-user may affect the outcome of the claim in negligence and/or breach of statutory duty. The court in such cases will consider contractual clauses, which may lead to the agency obtaining a contribution from the contractor (end-user).

⁷⁷ See *supra* no 74 at 863

⁷⁸ [2005] IRLR 983 (CA)

⁷⁹ See D. Brodie, 'The Enterprise and the Borrowed Worker', (2006) 35 *Industrial Law Journal*, 87.

⁸⁰ [2005] IRLR 983

⁸¹ *ibid*

⁸² *ibid*

Employment status in criminal health and safety cases

The situation with criminal liability, which is governed by legislation, namely, the Health and Safety at Work Act 1974 and MHSWR 1999, is slightly different in the sense that criminal law is even less generous towards employers (and in particular, client employers) than civil law. Finding criminal liability on the part of the client employer in cases involving skilled or unskilled workers is common. Criminal liability is considered from a perspective of discharging specific duties and meeting certain standards that are imposed by health and safety legislation. Exceptions are rare as the legislation requires employers to perform their duties to the standard of 'so far as is reasonably practicable', which is higher than the standard of a 'reasonable employer' required by the common law of employers' liability or negligence.

As stated above duties towards temporary agency workers are set out in the MHSWR 1999, which implemented the Directive 91/383/EEC, and are based on the Health and Safety at Work Act 1974. Failure to comply with MHSWR 1999 would lead to criminal liability towards temporary workers which is directly linked to liability under the Health and Safety at Work Act 1974.

In the situation where it is clear that either the client employer or the agency is an employer of the temporary worker the health and safety duties are specified as follows. The employer owes duties under section 2 of the Health and Safety at Work Act 1974 to ensure so far as is reasonably practicable the health and safety of his employees. The section, inter alia, requires the employer to provide information, instructions, training and supervision, which are supported by obligations under the MHSWR 1999 to carry out risk assessments and implement protective and preventive measures. As a whole the law creates a comprehensive set of duties owed by employers to their employees.

It has been held that duties under section 2 are strict subject to the qualifying phrase of 'so far as is reasonably practicable' which allows some minor moderation where risks to health and safety were not foreseeable in the sense that 'it was not reasonably practicable for him [employer], in the circumstances, to eliminate the relevant risk'. In considering this question the likelihood of that risk eventuating must be taken into account. It was held by the Court of Appeal in *R v HTM*⁸³ that 'it follows that the effect is to bring into play foreseeability in the sense of likelihood of the incidence of the relevant risk, and that the likelihood of such risk eventuating has to be weighed against the means, including cost, necessary to eliminate it.'⁸⁴

The onus on the employer is high. It can only be discharged when, for example, an employee evidently ignores employer's health and safety information, instructions, training and necessary preventive and protective measures which are duly provided to the employee, as it was in the case of *R v HTM*⁸⁵.

⁸³ [2007] 2 ALL ER 665

⁸⁴ Asquith LJ in *Edwards v National Coal Board* [1949] 1 All ER 743 at 747, [1949] 1 KB 704 at 712, speeches of Lord Oaksey and Lord Reid in *Marshall v Gotham Co Ltd* [1954] 1 All ER 937, [1954] AC 360. Per Lord Goff in *Austin Rover Group Ltd v HM Inspector of Factories* [1990] 1 AC 619 at 626, per Latham LJ in *R v HTM Ltd* [2007] 2 ALL ER 665 at paras 17-18.

⁸⁵ [2007] 2 ALL ER 665

If it is found that a temporary worker is either a self-employed or an employee of the other party, which is comparable to the status of an employee of a contractor who is sent to work for the client employer for a certain period of time, then in this case it is more likely that an individual would be treated as non-employee or a third party for the purposes of health and safety legislation and section 3 of the Health and Safety at Work Act 1974 will apply.

The section requires the employer (i.e. the client employer) to ensure so far as is reasonably practicable that his undertaking is conducted in such a way as not to expose non-employees to risks to their health and safety. The section further requires that the employer must provide non-employees with information, which relates to the conduct of the undertaking and which may affect their health and safety.

Similarly to section 2, section 3 of the Act 1974 has been interpreted strictly by the courts. Furthermore, the courts have also established that the employer can have a stricter duty to non-employees, for example members of the public, than to employees since a number of factors can apply to employees but not to non-employees. The position of employees can be more advantageous because of their level of familiarity with the job, training, instruction and supervision. This point was discussed and established in the case of *R v B&Q plc*⁸⁶, which to some extent is consistent with the decision in *R v Swan Hunter Shipbuilders Ltd*⁸⁷ in which shipbuilders gave instructions to their own employees for the safe use of oxygen equipment but gave no instructions to employees of subcontractors and this resulted in a fire which killed eight of the subcontractors' employees.⁸⁸

Thus additional legal requirements in relation to specified information to workers with temporary employment relationships were included in the MSHWR 1999 as a result of the Directive 91/383/EEC, to underpin duties required by the Health and Safety at Work Act 1974. However, as the requirements do not go far enough, it may be argued, that the Directive, or at least, its subsequent implementation, did not add anything new to the existing duties of employers required by sections 2 and 3 of the Health and Safety at Work Act 1974 and further obligations such as training, specific risk assessments, suitable personal protective equipment and consultation must be legally required from the client employer as a logical extension of duties under section 3 of the 1974 Act and MSHWR 1999.

Overall, it appears that there is a less stringent approach to the employment status of temporary workers as far as their health and safety is concerned. There is, however, some imbalance as to the apportionment of health and safety liabilities between the agency and the end-user, both civil and criminal. It appears that the higher burden falls on the end-user, who is most likely to be responsible for assessing health and safety risks, which can lead to personal injuries of these workers.

⁸⁶ [2005] EWCA Crim 2297

⁸⁷ [1982] 1 All ER 264

⁸⁸ See V. Howes, 'Duties and Liabilities under the Health and Safety at Work Act 1974: A Step Forward?' (2009) 38(3) *Industrial Law Journal*, 306.

By and large, however, the legal picture is blurred and there is still some legal uncertainty as to who should be responsible for health and safety of temporary workers, especially taking into account a possibility of dual vicarious liability. This means that temporary workers often lack sufficient health and safety protection at work and suffer from accidents, which could be avoided.

It can be argued that whatever the state of the law, common sense should prevail and assumption of sensible responsibilities should be taken. 'Changing people's attitudes to health and safety issues at work involves, among other things, raising the awareness of those involved in companies and ensuring that the rules relating to the information, training and participation of workers are applied fully and effectively, enabling them to acquire adequate professional knowledge, develop preventive reflexes and perform their tasks safely.'⁸⁹ It does not help that the UK Health and Safety Executive (HSE), which tasks are to disseminate information and promote health and safety regulation, does not pay particular attention to the information relating specifically to temporary workers. For example, so far there has been no separate statistical data relating directly to temporary agency workers. This should be changed as the number of temporary workers is likely to grow in the future, especially taking into account continuing changes in the labour market.

Without proper guidance the reliance on common sense has its obvious limitations and it is important that the law is clear in relation to health and safety duties and liabilities to temporary workers.

How can the law be clarified?

It may be argued that both the agency and the hirer should be responsible for health and safety of temporary workers. As noted above a possibility of dual liability has been established in relation to vicarious liability. The question then arises as to whether the same principle of dual liability can apply directly in respect of temporary workers themselves. This approach would not necessarily be unreasonable as such possibility already exists in relation to criminal liability towards contractors. In their guidance 'Use of contractors: a joint responsibility'⁹⁰ the HSE acknowledged that the extent and responsibilities of each party will depend on the circumstances and the terms of the contract but ultimately they stated that both parties will be liable under health and safety law if an individual gets injured, or has a fatal accident in the workplace. Although the guidance was issued for the use of contractors, it may still be argued that it is relevant to temporary workers as and when they are contracted from the agency.

The solution can be to legally affirm functions which arguably exist between the client employer and the agency. Simon Deakin considered the question of the identity of the employer on the basis of three criteria 'which can be characterised in terms of 'co-

⁸⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Improving quality and productivity at work: *Community strategy 2007-2012 on health and safety at work*, (http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007_0062en01.pdf).

⁹⁰ <http://www.hse.gov.uk/pubns/indg368.pdf>

ordination', 'risk' and 'equity'⁹¹. He explains that 'the criterion of co-ordination associates the concept of the employer with the exercise of powers of centralised management' and that 'the reach of health and safety laws, and of laws governing employee representation, are also to a certain extent defined by this idea.' 'The criterion of 'risk' forms a complementary basis for identifying the enterprise. The underlying idea is that the enterprise operates as a mechanism for absorbing and spreading certain economic and social risks, including the risks of unemployment, interruption to income, and work-related injury and disease.' Accordingly the dichotomy with agency work and with the supply of labour through intermediaries is that the 'co-ordination' and 'risk' functions of the employer are now split between different entities: the 'co-ordination' function vests in the end user of labour, while the residual 'risk' function is left with the agency or with the individual worker.'⁹²

In order to avoid this problem he suggests two possible alternatives: firstly, ban the use of agency labour completely, or very severely restrict its use; or secondly, for the legislator to ensure that the obligations related to the 'risk' and 'co-ordination' respectively, are properly split between the relevant parties in each case. The first option was immediately unsupported by the author. The second option seems to be quite workable and according to it, the user would 'assume normal protective functions of the employer with regard to the co-ordination of work' including 'the maintenance of health and safety'.⁹³

Dual responsibility in temporary employment relationship is not unusual for legal systems of EU Member States, such as Finland, Germany, the Netherlands, Spain and Italy, although not without some peculiar problems. For example, in the Netherlands there is a lack of clarity in the provision at company level and some attempts to shift responsibilities from companies to agencies. Finland also encounters an insufficiently clear demarcation of responsibilities between temporary employment agencies and user companies. In Germany the problems are reduced by contractual responsibilities between the agency and the user company which, among others, requires a written contract, and in Italy the law clearly splits responsibilities between the agency and the user company where the agency must provide appropriate information about the general risks and specific training concerning the work assignment, whereas, the end user must give workers all information about specific risks related to the enterprise, ensure medical support and surveillance and be responsible for all protection duties provided by law or collective agreements.⁹⁴

As an alternative to dual liability, it may be argued that all responsibilities for health and safety should be placed with the agency, which instead of mere payments and finding temporary jobs, would play a much bigger role in the working life of temporary workers, making sure that workers are competent and suitable for the work assignment, are well trained and skilled to carry out the required job, provided with necessarily personal protective equipment and so on. The Employment Agency

⁹¹ S. Deakin, 'The Changing Concept of the 'Employer' in Labour Law', (2001) 30 *Industrial Law Journal*, 72.

⁹² *ibid*

⁹³ *ibid*, p. 78

⁹⁴ See *supra* no 3 and *supra* no 74 at 855

Standards Inspectorate, for example, supports this idea⁹⁵. The agency could be forced to incorporate a series of safety monitoring and preventive measures and safety constraints. For example, in Belgium the temporary agency work sector has developed prevention tools designed to limit the risks of accidents occurring: an instance of this is a compulsory 'file' system which was introduced in 1997, and is used to give as clear a description as possible of the working conditions in which agency workers will be expected to perform their duties. According to Prévention et Intérim/Preventie en interim 2000 (P&I): 'This information tells temporary agency workers about the content of their work, the tasks to be carried out, the work hazards and the precautions to be taken, and also the work clothes and individual safety equipment that they will be supplied with. In the event of any questions or problems, or if there is an accident, this information is the reference that has to be examined to make sure that agreements have been complied with, that the allocated task matches the agreed job exactly, and that the information and necessary equipment are available.'⁹⁶

However, at least in practice, it is often the end-user who is responsible for temporary workers on a day-to-day basis and although without specific theoretical affirmation, it is evident from the above analysis of civil and criminal liability in relation to health and safety in the UK. This is also a normal practice in a number of EU Member States, including, Denmark, Portugal and Sweden.

An option for solving the problem with the employment status of temporary agency workers could be to borrow a definition of the employer of the temporary agency workers from the Working Time Regulations 1998 (WTR). Regulation 36 specifically addresses the situation where the worker has no contract (or at least no express contract) either with the agency or with the party to whom the services are provided (the end-user). In such cases it simply states that whichever of the agency or the end-user is responsible for paying the individual will be the worker's employer for purposes of the WTR. If neither is responsible, whichever actually pays the worker will be treated as the employer. However, in line with general principles of labour law, the Regulations do not apply to truly self-employed persons (regulation 36(1)(c)). In order to circumvent this problem the notion of the 'personal employment contract' suggested by Mark Freedland⁹⁷, which would be covering both employees and the dependent self-employed would be, as stated by Simon Deakin, 'both feasible and desirable'.⁹⁸

However, a problem with allocating responsibilities *per se* with either the temporary work agency or end-user is the creation of unbalanced and arguable unworkable legal and practical position. Therefore, there is a strong argument in favour of dual responsibilities between two parties.

Conclusion

⁹⁵ 'Agencies failing to protect asbestos workers', (2009) *Safety and Health Practitioner*, News, 8. See also D. Branson, 'Agency Workers – Tempting Fate', *supra* 25.

⁹⁶ C. Delbar, 'Fatal Accident revives debate on safety standards for subcontractors', *supra* 36

⁹⁷ M. Freedland, *The Personal Contract*, (2003) Oxford University Press.

⁹⁸ S. Deakin, 'Does the "Personal Employment Contract" provide a basis for the reunification of employment law?', (2007) 36(1) *Industrial Law Journal*, 68.

Problems associated with health and safety of temporary workers were recognised at the time of drafting the original Directive 91/383/EEC. In its preamble the Directive states that ‘research has shown that in general workers... with temporary employment relationship are, in certain sectors, more exposed to the risk of accidents at work and occupational diseases than other workers’ and ‘these additional risks in certain sectors are in part linked to certain particular modes of integrating new workers into the undertaking’.

Despite attempts to set out responsibilities for health and safety of temporary agency workers, there is still a lack of clarity as to who owes such responsibility, the agency or the end-user, because of the unresolved legal issues relating to the employment status of these workers. And as long as the employment status of these workers is not properly defined, the problem will remain and temporary workers will continue to be victims of accidents at work. The long-anticipated Directive 2008/104/EC does not deal with the issue of status. Arguably an opportunity to define the status of a temporary worker has been missed in the context of Directive 2008/104/EC, which merely provides agency workers with a limited number of employment rights, such as working time and pay, leaving to the domestic law to define the employment status of these workers. The question of the status has been left to Member to deal with in accordance with their law and practice.

If there is such a reluctance to define the employment status of temporary agency workers in general terms, there is a strong case that such a definition should be provided in relation to health and safety of such workers taking into account the seriousness of the failure to absorb relevant duties. Two things could be done in order to improve the situation: health and safety duties and liabilities of the parties should be clearly defined and apportioned between the parties in respect of both criminal and civil law; and parties should be well aware of their respective duties and liabilities. The allocation of health and safety duties between the agency and the end-user can be done in various ways, including a possibility of creating a dual liability as discussed in this paper.

The intervention should come from a legislator and it would be more appropriate if the issue were decided at the EU level as it has been recognised that Directive 91/383/EC is outdated and does not fit with the current labour market situation anymore. Most importantly ‘the Directive has failed in reaching its ultimate goal, equal exposure to work-related risks for temporary workers’. It should be revised. One of the proposals unequivocally states: ‘The Directive must eliminate the lack of clarity concerning the division of responsibilities between the temporary employment agencies and the user undertaking.’⁹⁹

Meanwhile, lobbying at the EU level should not stop the UK legislature from streamlining the issue relating to the employment status of temporary workers both generally and in respect of health and safety. One of the possibilities considered above, including legal models adopted in other Member States, could be considered and utilised for these purposes.

⁹⁹ ‘Study to analyse and assess the impact of the practical implementation of national legislation of safety and health at work relating to Council Directive 91/383/EEC’, *supra* n 3.