

Which measures can you lawfully
adopt to ensure business
continuity through a strike, such
as taking on agency workers?

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Continuity

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Agency workers

Employment Agencies Act 1973 s 5(2) criminal offence

Agencies and Employment Businesses Regulations 2003 (“2003 Regulations”) reg 7 restriction on employment businesses

Reg 7

7.— Restriction on providing work-seekers in industrial disputes

(1) Subject to paragraph (2) an employment business shall not introduce or supply a work-seeker to a hirer to perform—

- (a) the duties normally performed by a worker who is taking part in a strike or other industrial action (“the first worker”), or*
- (b) the duties normally performed by any other worker employed by the hirer and who is assigned by the hirer to perform the duties normally performed by the first worker,*

unless in either case the employment business does not know, and has no reasonable grounds for knowing, that the first worker is taking part in a strike or other industrial action.

(2) Paragraph (1) shall not apply if, in relation to the first worker, the strike or other industrial action in question is an unofficial strike or other unofficial industrial action for the purposes of section 237 of the Trade Union and Labour Relations (Consolidation) Act 1992 1.

Reg 7: elements

1. Is there an **EB**?
2. **Introduction or supply** by the **EB**?
3. **Substitution** of worker who is taking part in strike or ind action or their internal replacement
4. Does the EB **lack knowledge or a reasonable grounds for knowledge** that the worker is taking part in strike or ind action?

Relevance of criminal offence under s 5

- Harvey at 4536. 3 risks
- **Common law:** Aiding, abetting, counselling or procuring
 - But negated by lack of knowledge by EB
- **Statutory: Part 2 of the Serious Crime Act 2007**
 - S 44 encouraging or assisting
 - S 45 encouraging or assisting believing it will be committed (R v Watling [2012] EWCA Crim 2894)
 - = belief or reckless to whether EB would have knowledge.
 - Defence: “acted reasonably in the circumstances”

Conspiracy

- S 7 Criminal Law Act 1977

if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either—

(a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or

(b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible, he is guilty of conspiracy to commit the offence or offences in question

- Agreement need not be contract (*R v Austin* [2015] EWCA Crim 349)

Identifying an “employment business” (EB)

- S 13(3)

For the purposes of this Act “employment business” means the business (whether or not carried on with a view to profit and whether or not carried on in conjunction with any other business) of supplying persons in the employment of the person carrying on the business, to act for, and under the control of, other persons in any capacity

Elements

1. **Supplying persons** (not services)
2. In the **employment of the EB**
3. To **act for another** person
4. To act under the **control of that other** person (but not so that they ceased to be the EB's employee).
5. Can have one person who is both an agency and an EB (reg 2(3)).

Cases

- *Eden Brown Ltd v Office of Fair Trading*
[2011] CAT 8
- *Accenture Services Ltd v Revenue and Customs Commissioners* [2009] EWHC 857
(Admin) **predominant power of control**
- *Legends Live Limited v Harrison* [2016]
EWHC 1938 (QB): reality not contract

Tricky issues

- The alleged supply of services
- On the ground control
- The document trail
- Call off contracts
- Criminal liability and the privilege against self incrimination
- What else is there?

Washing up



END

- If you have any further questions or comments please feel free to contact me on kapps@39essex.com

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