

Agency worker cover during strikes

19 July 2023

Back in July 2022, regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 was revoked. This regulation had prohibited employment businesses from supplying temporary workers to cover for those taking part in official industrial action. The Government, at the time, stated that the reforms would “help ensure crucial public services and people’s daily lives remain uninterrupted by staff strikes”.

Thirteen trade unions sought judicial review of the amendment regulations (the “2022 Regulations”) which effected the revocation and the High Court has now upheld their challenge, quashing the 2022 Regulations with effect from 10 August 2023.

The High Court’s decision was based on the lack of consultation undertaken by the Secretary of State before making the 2022 Regulations. The Secretary of State had attempted to rely on a previous consultation carried out in 2015; however, even if it had been possible to rely on such a historic consultation, the High Court concluded that “the Secretary of State did not even consider the information available as to the responses to the 2015 Consultation”. The majority of the responses to the 2015 Consultation did not favour revoking regulation 7; further, advice provided to the Secretary of State in 2022 was that the revocation would be “of negligible short-term benefit and probably counterproductive”.

From 10 August 2023, employment businesses will once again be prohibited from supplying temporary workers to cover the duties of those taking part in official industrial action or to cover the duties of another worker of the hirer who in turn has been reallocated to cover the duties of those taking part in industrial action.

It remains to be seen whether the Government will choose to pursue this further through an appeal or, alternatively, elect to restart the consultation process. If it does, then the secondary argument pursued by the trade unions – that the revocation of regulation 7 breached the duty under Article 11 of the European Convention on Human Rights to prevent unlawful interference with the rights of trade unions and their members – would once again become live.

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