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Migrant Worker Recruitment in an Era of Globalisation: Lessons for the Legal Regulation of Recruitment Agencies in Ireland

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Introduction

While there are many different routes through which migrant workers can seek, locate and take up employment in another state¹, one of the most popular and yet most problematic is the utilisation of recruitment agencies. The international regulation of recruitment agencies by the International Labour Organisation² has had a major influence on the national regulation of matters relating to the recruitment of migrant workers. The international regulation of fee-charging recruitment agencies was and still is based upon a firm conviction that the business of recruitment agencies is “subject to grave abuses; involving frauds and impositions upon a peculiarly helpless class; among which the exaction of exorbitant fees [is] perhaps the least offensive”.³ This has also been reflected at a national level.

Firstly, this paper will examine the recruitment agency sector, as one of the most popular forms of recruitment for migrant workers in Ireland and the method of recruitment that presents the greatest potential for exploitation. The paper will identify the three forms of recruitment agency

¹ The most common four methods of recruitment in Ireland are government sponsored migration, recruitment through a recruitment agency, direct recruitment by the employer and chain migration. See Zegers de Beijl (ed.), *Documenting Discrimination Against Migrant Workers in the Labour Market: A Comparative Study of Four European Countries* 31-32 (2000).

² Hereinafter referred to as the “ILO”.

³ *Ribnik v. McBride* 277 U.S. 350 (1928) (*per* Mr. Justice Stone (*dissenting*)), 361. This case concerned the constitutionality of a Statute, which regulated the fees, which could be charged by an employment agency. It was held that under the due process clause of the fourteenth amendment a State could not fix the fees, which an agency may charge for its services. This decision was, however, overturned in the case of *Olsen v. Nebraska* 9 U.S. Law Weekly 4291 (1941). As Mr. Justice Brandeis commented there are many evils associated with private recruitment agencies which include:

“1. Charging a fee and failing to make any effort to find work for the applicant.

2. Sending applicants where no work exists.

3. Sending applicants to distant points where no work or where unsatisfactory work exists, but whence the applicant will not return on account of the expense involved.

4. Collusion between the agent and the employer, whereby the applicant is given a few days work and then discharged to make way for a new workman, the agent and employer dividing the fee.

5. Charging exorbitant fees, or giving jobs to such applicants as contribute extra fees, presents, etc.

6. Inducing workers, particularly girls, who have been placed, to leave, pay another fee and get a “better job”.”

Adams v. Tanner 244 U.S. 590 (1917) (*per* Mr. Justice Brandeis), 601 quoting a 1912 U.S. Bureau of Labor Report entitled *United States Bureau of Labor Bulletin No. 109*, 36.

currently operating in Ireland and will briefly identify the imbalance of power and the lack of transparency in the recruitment process as central to the issue of migrant worker exploitation in Ireland.

Secondly, the paper will examine the current regulation of recruitment agencies in Ireland and the attempts that have been made to balance the interests of the migrant worker, the recruitment agency and the employer/user-enterprise. However, the globalised nature of migration and the increased mobility of corporate enterprises means that the current national regulations are no longer effective in protecting migrant workers during the recruitment process. Migrant workers are increasingly utilising recruitment agencies in sending states or recruitment agencies operating over the Internet. The greatest issue with regulation in such circumstances is finding an appropriate way to regulate all recruitment agencies sending migrant workers to Ireland, even if such agencies are not physically located in the State.

The paper continues with an analysis of how states can extend the regulation of recruitment agencies beyond the borders of the state to include recruitment agencies supplying migrant workers to the state. Three potential models for dealing with this issue of globalisation and regulation are identified: the extended jurisdiction model, the domestic agency responsibility model and the user-enterprise responsibility model. The paper concludes that the extended jurisdiction model could be successfully adopted in Ireland and outlines measures that could be taken to introduce legislation on the issue taking into account Ireland's responsibilities to protect the free movement of services under the TFEU. The model advocated in this paper attempts to

strike a fair balance between the freedom of corporations to move and make a profit and the right of migrant workers to be protected against exploitation.

1. A Case Study of Recruitment Agencies in Ireland

1.1. The Use of Recruitment Agencies in Ireland

The use of third-party intermediaries, known as recruitment agencies, has always been one of the most popular choices for all parties in the recruitment process⁴ and the continued use of recruitment agencies directly by both EU and third country nationals means that this form of recruitment maintains its attractiveness to migrant workers. Workers, states and employers all enjoy the benefits of the range of services supplied by recruitment agencies including the reduction of cost, inconvenience and burdensome administrative practices involved in recruitment for employment. While there are no statistics which reveal the number of recruitment agencies currently licensed to operate in Ireland, the National Recruitment Federation, a voluntary regulatory body for recruitment agencies in Ireland, reports that there are 151 recruitment agencies registered as members in Ireland.⁵

⁴ A Report in 2004 (at the height of migrant worker recruitment to Ireland) suggested that recruitment agencies were one of the most popular choices for the recruitment of both EEA and non-EEA nationals. See Diversity At Work Network, Chambers of Commerce of Ireland, Institute of Technology, Blanchardstown and the National Consultative Committee on Racism and Interculturalism, *Managing Diversity in the Workplace Handbook: Focusing on the Employment of Migrant Workers* (2004) 7.

⁵ National Recruitment Federation – Members available at <http://www.nrf.ie/agencies.asp?c=Dublin> (last visited Nov. 21, 2010).

There is also a strong link between recruitment agencies and other forms of recruitment such as direct recruitment, chain migration and even government sponsored migration. Migrant workers recruited directly by employers may have utilised a recruitment agency over the internet, such as FÁS, or other information providing agencies to source potential employers. Indeed, even migrant workers who come to Ireland on foot of chain migration will often use the bulletin boards and chat rooms operated by recruitment agencies to source work prior to, or after, arrival in the State. In the case of government sponsored migration, state employers are encouraged to source potential migrant workers through recruitment agencies in Ireland. Therefore, while it may appear that recruitment agencies directly account for a small part of the recruitment of migrant workers in Ireland, there is a large percentage of migrant workers who utilise recruitment agencies more informally or indirectly in seeking employment in Ireland.

1.2. The Potential for Exploitation inherent in Recruitment Agencies

Recruitment agencies are the most regulated form of recruitment in Ireland due almost exclusively to their reputation for recruitment malpractices and the potential for exploitation that may arise as a result. This section identifies distinct issues in the Irish recruitment agency landscape that migrant workers have encountered in dealing with recruitment agencies.

One of the most important aspects of any recruitment process is that the process itself does not burden any of the parties to the relationship to such an extent that it leaves one party in a vulnerable position vis-à-vis the other party. A practice often used in the recruitment of migrant workers and which can burden migrant workers considerably is the practice of fee-charging.

Where a migrant worker is charged excessive fees during the recruitment process, the potential for exploitation is very high due to the fact that the migrant worker will be working merely to pay back the fees and not for their own benefit. This issue has been raised by numerous international conventions dealing specifically with recruitment agencies.⁶ However, a more general analysis of the phenomenon of fee-charging in other recruitment models has not been widely addressed since 1949 and the introduction of the ILO's Migration for Employment Recommendation (Revised).⁷

Secondly, there are administrative burdens facing migrant workers where recruitment agency personnel are not adequately qualified to provide migrant workers with information about the recruitment process and the job for which the migrant worker has applied. This can lead to problems for migrant workers where the information is misleading, inadequate or in many cases false. This misinformation increases the vulnerability of migrant workers during the recruitment process and exposes them to potential exploitation.

Thirdly, in order to ensure that migrant workers can “take full advantage of their rights and opportunities in employment and occupation”⁸ a migrant worker should always be informed of all the relevant information in relation to their employment during the recruitment process.

⁶ ILO Convention No. 181, Article 7; ILO Convention No. 96, Article 6. Cf: O' Donnell and Mitchell, *Employment Agencies: The Regulation of Public and Private Employment Agencies in Australia: A Historical Approach* 23 *Comparative Labour Law and Policy Journal* 7, 8 (2001).

⁷ This Recommendation (No. 86) states that the administrative costs of recruitment, introduction and placing shall not be borne by the migrants. See Model Agreement on Temporary and Permanent Migration for Employment, including Migration of Refugees and Displaced Persons at Article 6(4) (ILO).

⁸ ILO Recommendation No. 151 Migrant Worker Recommendation 1975 at Article 7 (ILO). See also the Department of Health (UK), *Code of Practice for the International Recruitment of Healthcare Professionals* (2004), 11 which states that the migrant worker should receive information on the job description, person specification, grading structure and salary. See the Irish Department of Health and Children, *The Nursing and Midwifery Resource: Guidance for Best Practice on the Recruitment of Overseas Nurses and Midwives* (2001), 22 which also refers to the importance of giving the migrant worker a job description.

Relevant information includes information relating to the remunerated activity in which they may engage⁹ and the location of their employment and the authority to which they must address themselves for any modifications in their conditions of employment.¹⁰ This latter point is especially important in the case of workers employed as contractors or subcontractors or by recruitment agencies as leased workers. Such workers often have difficulty enforcing their employment rights, as they cannot identify their legal employer. Other information in relation to the employment is also relevant particularly as migrant workers in Ireland are often faced by the possibility of contract substitution, which means that their terms and conditions of employment are substantially different to those that they agreed prior to migration. Therefore, when one considers the potential for exploitation, which may occur when incomplete information is made available to migrant workers, the provision of accurate and honest information is essential to a safe and effective recruitment process.

Finally, migrant workers also experience remedial burdens in seeking reparation from recruitment agencies for malpractices, misleading or inadequate information and the exploitation suffered as a result. Migrant workers have no specific right to reparation at present.¹¹ As a result, the potential deterrent effect of a right to reparation is eliminated.

⁹ United Nations Convention on the Rights of Migrant Workers and Members of their Families (hereinafter referred to as the “UNCMW”), Article 17. See also the Department of Health and Children (Ireland) *supra* n. 8, 23 which insists that the migrant worker be informed as the place of employment, whether that place be an organisation, a hospital or a health authority. The Recruitment and Employment Confederation, *REC Code of Professional Practice* (2007) Principle 7 also refer to the importance of supplying the migrant worker with full details of “*the work, conditions of employment, nature of the work to be undertaken, rates of pay, method and frequency of payment, and pay arrangements in accordance with requirements of current legislation*”.

¹⁰ See UNCMW at Article 17. The importance of knowing the role of the recruitment agency and the employer in the recruitment process was thought essential by the Department of Health and Children (Ireland) *supra* n. 8, 23. Reference to this is also made in the REC Guidelines *supra* n. 9 at Principle No. 7 which details the importance of the respect for the “*certainty of engagement*”.

¹¹ It should be noted that similar difficulties arise for national workers.

2. Types of Recruitment Agencies in Ireland

Recruitment agencies generally provide three different types of services, with the agency offering either one or all of these services. Depending on the type of services, which they provide, recruitment agencies are subject to certain forms of regulation at both a national and international level. This section will outline three particular forms of recruitment agencies and the services that they provide in Ireland.

2.1. Matching Agencies

Matching agencies provide migrant workers with “offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom”.¹² This is perhaps the most typical form of recruitment agency, providing potential migrant workers and employers with a medium through which they can both seek and advertise employment. Strict regulation of such agencies exists at both international and national levels due to the potential for exploitation, which may arise where such agencies do not accurately reveal the actual nature of the work advertised or the terms and conditions of employment offered. At an international level, the ILO has regulated such agencies since 1933 and continues to encourage strict regulation today.¹³ Most states that have ratified the ILO Conventions on fee-charging employment agencies will regulate this type of agency to some

¹² Private Employment Agencies Convention, ILO No. 181, Article 1(1)(a) which states that “*for the purpose of this Convention the term private employment agency means any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services:..(a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom*”.

¹³ See Fee-Charging Employment Agencies Convention, 1933 ILO No. 34, Article 1(1)(a); Fee-Charging Employment Agencies Convention (Revised), 1949 ILO No. 96, Article 1(1)(a) and the most recent Private Employment Agencies Convention, 1997 ILO No. 181, Article 1(1)(a).

extent.¹⁴ In Ireland, this is achieved by the introduction of the Employment Agency Act (Ireland) in 1971, although the age of the statute in itself suggests that amendments are now due to keep such agencies operating within the standards promoted at an international level.¹⁵

2.2. Leasing Agencies

The second type of recruitment agency operating in Ireland can be referred to as a leasing agency, because of the type of service it provides. This type of agency actually employs workers “with a view to making them available to a third party, who may be a natural or a legal person...which assigns their tasks and supervises the execution of these tasks”.¹⁶ A triangular relationship develops between the three parties to the agreement: the worker, the agency and the user-enterprise. In effect, what actually occurs is that the agency becomes the “surrogate employer” of the migrant worker.¹⁷ This has caused much controversy in common law jurisdictions where the dual concepts of the traditional employment relationship, which generally operates on the basis of privity of contract between the employer and the employee, and the free market concept of voluntarism have hampered judicial attempts to come to a definitive conclusion on the identity of the employer in these relationships and thus the person who can be held responsible for ensuring compliance with employment statutes governing the employment

¹⁴ Ireland ratified ILO Convention No. 96 in 1972 but has yet to ratify the new ILO Convention No. 181. The UK has never ratified any of the Conventions on private employment agencies. Despite the lack of ratification of the Conventions, both of these states have maintained some regulation of private recruitment agencies. In the UK, this type of recruitment agency is regulated by the Employment Agency Act 1973 (UK), section 13(2). It is described as the business “of providing services...for the purpose of finding persons employment with employers or of supplying employers with persons for employment by them”. See Deakin & Morris, *Labour Law* (2nd ed., 1998)179 n. 6.

¹⁵ Matching agencies are defined in section 2(a) of the Employment Agency Act 1971 (Ireland) as the business of “seeking...on behalf of others, persons who will give or accept employment”.

¹⁶ ILO Convention No. 181, Article 1(1)(b).

¹⁷ As described by Lobel, *Symposium: The Role of Contract in the Modern Employment Relationship: The Slipperiness of Stability: Contracting for Flexible and Triangular Employment Relationships in the New Economy* 10 Texas Wesleyan Law Review 109, 114 (1987).

rights of migrant workers.¹⁸ Given the potential for exploitation that may develop between the parties due to this anomaly in the law, this type of recruitment agency has been the subject of strict regulation at both international¹⁹ and domestic levels²⁰.

2.3. Information Agencies

Finally, some recruitment agencies seek only to provide services to the migrant worker, such as information provision. They do not become involved in any matching or leasing process.²¹ Due to the fact that these agencies are not directly involved in any placing process for migrant workers, international and national regulation of such agencies was initially scarce. In 1997, however, the ILO introduced a new Convention on Private Employment Agencies, which sought to impose certain regulations even on those agencies that were not involved in any placement services.²² In a similar manner, such agencies were also excluded from domestic regulation.²³

¹⁸ Lobel *supra* n. 17, 109. Lobel exemplifies, in her article, the role of recruitment agencies and leased workers in sourcing employment for contingent workers in the national work force. However, similar principles also apply to migrant workers who become leased workers.

¹⁹ See ILO Convention No. 34, Article 1(1)(a); Convention No. 96 Article 1(1)(a); Convention No. 181 Article 1(1)(b).

²⁰ Both Ireland and the UK regulate this type of agency. In Ireland, the Employment Agency Act 1971 (Ireland) section 2 (a) regulates agencies that are in the business of “*obtaining and supplying for reward persons who will accept employment from or render services to, others*”. Similarly, in the UK, the regulation of what are known as “*employment businesses*” is carried out under the Employment Agency Act 1973 (UK), section 13(3). The Irish Government is hoping to redefine this type of agency as an “*employment business*” as is the case in the UK. See Department of Enterprise, Trade and Employment, *Review of the Employment Agency Act, 1971*: White Paper, June 2005, 4-5. See Deakin & Morris, *Labour Law* (2nd ed., 1998) 179 n. 6.

²¹ These types of agencies are defined in ILO Convention No. 181, Article 1(1)(c).

²² There is no mention of this type of agency in either ILO Convention No. 34 or No. 96.

²³ In Ireland, no provision is made in the Employment Agency Act 1971 (Ireland) for the regulation of such agencies. The UK does include provision for the regulation of information-providing services in their legislation. See the Employment Agency Act 1973 (UK), section 13(2) (UK).

States now intending to ratify the most recent ILO Convention on recruitment agencies²⁴ will have to ensure national legislation regulates such recruitment agencies also.²⁵

3. The Effect of Globalisation on the Regulation of Recruitment

Agencies

3.1. The Regulation of Recruitment Agencies in Ireland

Ireland attempted to curb the exploitative practices of recruitment agencies operating within the jurisdiction of the State with the introduction of the Employment Agency Act (Ireland) in 1971.²⁶

The Act requires that persons carrying on the business of recruitment agencies operating within the State must obtain a licence.²⁷ Such licenses are only granted where the agency can show that they have satisfied certain prescribed conditions that are laid down by the Minister for Enterprise, Trade and Innovation. At present, these conditions specify that the premises upon

²⁴ ILO Convention No 181 of 1997 on Private Recruitment Agencies.

²⁵ In order for Ireland to ratify the most recent ILO Convention No. 181 it will need to revise its definition of recruitment agencies so as to include this type of agency within its parameters. The Department of Enterprise, Trade and Employment's White Paper on the reform of the Employment Agency Act 1971 (Ireland) proposed to include a new definition of "*work-finding services*" in any new legislation (4-5). However, the Employment Agency Regulation Bill 2009 does not include this type of recruitment agency in the definition of employment agency for the purposes of the Act.

²⁶ During the passing of the Employment Agency Bill (Ireland) through the Dáil Éireann, the Minister for Labour, Mr. J. Brennan noted that the "*provisions of this Bill then are such as to ensure I would hope that ultimately we will have none but genuine agents doing a good job so that people who seek advice or use these agencies for the purpose of seeking employment will know that they are being dealt with properly and that they are dealing with legitimate organisations*". Dáil Éireann, Volume 256, 17 November, 1971, Employment Agency Bill, 1971, [Seanad] Second Stage at column 2174.

²⁷ Employment Agency Act, 1971, section 2.

which the agency is operating must conform to a certain standard of accommodation,²⁸ the applicant for a licence must comply with a standard of suitability and fitness²⁹ and the applicant must not have been convicted of an offence under the Act in the preceding five years.³⁰ Revocation of the licence by the Minister for Enterprise, Trade and Innovation is permitted where the holder has given false information in an application for a licence or where the holder has been convicted of an offence under the Act.³¹

The adoption of a licensing system for the regulation of recruitment agencies by Ireland and the UK was preceded by International Labour Conventions on this subject. In fact, the enactment of the 1971 Employment Agency Act (Ireland) coincided with Ireland's signing of the ILO Convention No. 96 on Fee-Charging Employment Agencies.³²

A report of the ILO in 2007 advocated the approach currently utilised by Ireland for the regulation of recruitment agencies. The report highlighted the importance of proper enforcement, objectivity, transparency and providing assistance to recruitment agencies to deliver their services appropriately and adequately.³³ Thus it would appear that the present structure in Ireland, from an international standpoint, adequately regulates Irish recruitment agencies in

²⁸ Section 3 (3) (a). Under section 3(4) the Minister for Enterprise, Trade and Employment may prescribe by Regulation an appropriate standard of accommodation. These are laid out in the Employment Agency Regulations, 1972 (Ireland).

²⁹ Section 3(3) (b). These prescribed standards are also laid out in the Employment Agency Regulations, 1972 (Ireland). Regulation 8 provides that the applicant shall be the owner or the tenant of the premises in which he carries on business, shall not be an undischarged bankrupt, shall not in the preceding five years have been convicted of an offence under the Act and have never been the holder of a licence under the Act which was revoked or was refused a licence on grounds other than suitability of the premises. Under the Employment Agency Regulations 1978, Regulation 3 (Ireland) the applicant must also be, in the opinion of the Minister for Enterprise, Trade and Employment, "*a person of good character and repute*".

³⁰ Section 3(3) (c).

³¹ Section 4 Employment Agency Act 1971 (Ireland).

³² Ireland ratified this Convention in 1972. It chose to ratify Part III of the Convention, which allowed the State to continue the operation of private recruitment agencies as long as they were stringently regulated.

³³ ILO, *Guide to Private Employment Agencies: Regulation, Monitoring and Enforcement* (2007) 5.

accordance with the principles and practices as envisaged at an international level.³⁴ If recruitment agencies are subject to licence and certification, then it is considered that this will prevent the exploitation of workers during the recruitment process. However, this has not been the experience of many migrant workers in Ireland. The question must then be asked as to why migrant workers are subjected to exploitation by recruitment agencies in Ireland when sufficient regulation appears to exist?

3.2. The Problem with the Current Regulatory System

One of the biggest criticisms that can be made of the Irish recruitment landscape is the fact that the current regulations do not meet the needs of Ireland's diverse migrant population.

In Ireland, the regulation of recruitment agencies takes the form of a licensing procedure, the criteria for the grant of which are outmoded and inappropriate. The regulations, laws and systems that are currently in place were introduced at a time when immigration, as opposed to emigration, was not contemplated by the legislature. Before a licence will be granted, the recruitment agency must prove that they are operating from premises within the State, which conforms to certain prescribed regulations. When one considers that migrant workers are frequent users of recruitment agencies in Ireland and that most recruitment for employment of migrant workers occurs outside the State, it is clear that the present system is unreasonable, inappropriate and not designed to meet the needs of the migrant population. Migrant workers often utilise more intangible mediums, such as the internet, to source work through cyber

³⁴ This is a similar system to that which operates in Spain. Private recruitment agencies must obtain authorisation and register in a public register. See Royo, *Employment Agencies: Temporary work and employment agencies in Spain* 23 *Comparative Labor Law and Policy Journal* 129, 144 (2001).

recruitment agencies, the owners and operators of which may remain completely anonymous or act through recruitment agencies in their sending state. Therefore, the major omission from the Irish regulatory regime is the fact that it only applies to recruitment agencies that are registered in Ireland and have premises in the State.

This allows corporations to move freely to other states to establish themselves, subject to fewer regulations and to provide services to migrant workers coming to Ireland. States presume, somewhat incorrectly,³⁵ that as foreign agencies are operating outside their jurisdiction, such agencies cannot be regulated.³⁶ The full and complete regulation of recruitment agencies is therefore hampered in Ireland because of the failure of the State to regulate recruitment agencies operating overseas who are sending workers to Ireland. Without this form of regulation, there is a large quantity of migrant workers, both EU and third country nationals, who are being recruited to Ireland through unregulated recruitment agencies that can exploit migrant workers without consequence.

4. Regulating for the Global Nature of Recruitment

A reformed recruitment model must ensure that it has control over recruitment agencies recruiting migrant workers to Ireland regardless of their place of business. This section provides a detailed overview of how this might be achieved most effectively without imposing undue financial or other burdens on employers or recruitment agencies. In recent years, there have been many attempts by the Oireachtas to improve the situation of recruitment agency

³⁵ See section 4 *infra*.

³⁶ See the statement of Mr. J. Brennan, Minister for Labour during the discussion in the Seanad on the Second Stage of the Employment Agency Bill, 1971 Dáil Éireann, Volume 256, 17 November, 1971 at column 2161-“*There are obvious difficulties about dealing with this problem in legislation, because many of the actual abuses can take place outside the jurisdiction.*”

workers in Ireland. Each of these has been markedly different in their approach and it is interesting that none of them has ever reached the statute book. The regulatory models presented here have been gleaned from states where such solutions have been effective in reducing recruitment malpractices without significantly impacting on the labour market.

4.1. Jurisdiction over Recruitment Agencies

It is possible to stretch the concept of regulation far beyond the boundaries of the territory of a state. There are multiple ways in which this can be achieved and this section examines each of these in turn.

4.1.1. The User-Enterprise Responsibility Model

This model effectively provides that an employer (user-enterprise) recruiting migrant workers for employment in Ireland through a recruitment agency should provide the Department of Enterprise, Trade and Innovation with information of the recruitment agency used, including the location and registration details of that agency.

This model was considered and examined by the Irish Government in 2004. The Department of Enterprise, Trade and Innovation announced its intention to revise the current arrangements governing recruitment agencies under the Employment Agency Act 1971 (Ireland) so as to include regulation of those agencies operating outside the State. The solution arrived at by the reform proposals involved the placement of considerable responsibilities on the user-enterprise, to inform the Department of Enterprise, Trade and Innovation, or the equivalent authority, when a foreign recruitment agency was used and to provide them with documentary evidence of the method of recruitment used, the name of the recruitment agency, its location, contact details and its licence or registration number.³⁷

³⁷ Department of Enterprise, Trade and Employment, *Review of the Employment Agency Act 1971*, Discussion Paper, May 2004, 31-32. This has already been adopted in the voluntary code of practice of the Department of Health and Children entitled *Guidance for Best Practice on the Recruitment of Overseas Nurses and Midwives*. See Nursing Code of Practice, The Nursing and Midwifery Resource, *Guidance for Best Practice on the Recruitment of Overseas Nurses and Midwives* (2001).

The Government appeared to be committed to the possibility of monitoring the activities of overseas agencies which supply the Irish labour market with migrant workers. The only similar provision, which exists in Ireland, relates to the application for an employment permit³⁸, where the employer or employee must indicate the name, address and licence number (where appropriate) of any recruitment agency used.³⁹ A declaration must also be signed to the effect that the recruitment agency will not keep any personal document belonging to the holder of an employment permit.⁴⁰

The difficulties with this model arise in relation to the application, operation and monitoring of such a system. The scope of the model would have to be clearly defined and would have to include both EEA and non-EEA nationals who apply through recruitment agencies for employment in Ireland. Operation of the model would also have to be strictly defined and monitored to ensure compliance. Also the model would require significant resources to establish an effective enforcement mechanism that would monitor compliance, investigate deviance and enforce penalties on user-enterprises who do not comply with the information model.

4.1.2. The Domestic Agency Responsibility Model

This model places responsibility on domestic agencies to ensure that if they are dealing with a foreign recruitment agency, that the agency is adequately and appropriately licensed to act as a recruitment agency in their country of origin.

³⁸ See New Employment Permit Application Form, 4 available from www.entemp.ie [last checked 15th September 2010].

³⁹ See Employment permit Application Form available from the Department of Enterprise, Trade and Employment available at www.entemp.ie (last visited Sep. 15 2008).

⁴⁰ This was introduced into the most recent version of the Employment Permit Application Form in order to deal with the growing number of migrant workers who had their passports or personal documents taken from them by their employers.

This is currently the model adopted by the legislature in the UK. This model is not regulatory but places the responsibility on domestic recruitment agencies to ensure that any foreign agencies that domestic agencies deal with are *bona fides* and acting in the best interests of their client. Domestic recruitment agencies must be satisfied that any foreign agency that they deal with is suitable to act as a recruitment agency, which is usually proved by evidence that the recruitment agency is registered by the corresponding authority.⁴¹

What is commendable about the approach in the UK is the responsibility it places on the domestic agencies to utilize legitimate recruitment agencies abroad in sourcing workers. It recognises the fact that the domestic recruitment agencies often have the greatest finances and know-how to seek information about the legality and conditions imposed by the recruitment agencies they are dealing with abroad and recognises further the growing responsibilities of user-enterprises and recruitment agencies to their workers and to society.

The only difficulty with this system is that if the user-enterprise does not use a domestic agency to source a migrant worker, they can recruit directly through a foreign agency that is unregulated and not *bona fides*. Indeed there is no means of ensuring that a domestic agency will ensure the *bona fides* of overseas recruitment agencies or that they will utilise overseas agencies at all in the recruitment of overseas workers. So while the Regulations do provide some limited protection, they are not satisfactory in their operation and leave potential gaps through which exploitation can take place.

⁴¹ Employment Agency Act, 1973 as amended by the Conduct of Employment Agencies and Employment Businesses Regulations, 2003 S.I. 3319/2003-Regulation 23(1)(a) (UK). This latter comment regarding registration is not in fact mentioned in the legislation itself. The regulation merely provides that the agency should be suitable to act. The latter formulation has come about through practice. However, there is no restriction on domestic agencies utilising those foreign agencies that are not licensed or registered as long as they are satisfied as to their *bona fides*.

4.1.3. The Extended Jurisdiction Model

This model is the most comprehensive model for ensuring the protection of migrant workers recruited through recruitment agencies. Any recruitment agency supplying migrant workers must either be licensed in the State or must produce evidence of a corresponding license in another State before being allowed to operate.

This is the current situation that operates in Germany by virtue of the Employee Leasing Law 1972 (Germany). Overseas agencies (and domestic agencies) that assist migrant workers in finding work in Germany should produce evidence of a licence to practice as a recruitment agency from the state in which they are ordinarily resident and also a licence from Germany.⁴² In order to protect against the undercutting of wages, and due to the practical and procedural difficulties involved in regulating service providers outside the jurisdiction of the state, the German Employee Leasing Law (Germany) provides that leasing agencies with a registered place of business outside the EU may not operate leasing companies that provide services within Germany.⁴³

If this approach were adopted in Ireland it would allow the Irish State to extend its jurisdiction over recruitment agencies operating outside the State.

5. The Extended Jurisdiction Model in Ireland

⁴² See the German Employee Leasing Law 1972 (Germany). This Law provides that foreign recruitment agencies that wish to lease employees to user-enterprises in Germany must produce evidence of a licence to practice as a recruitment agency from the native state and also from Germany (Employee Leasing Law 1972, §3, ¶ 2-5 (Germany)). For a full analysis of the German Employee Leasing Law see the excellent contribution of Schuren, *Employee Leasing in Germany: The Hiring Out of an Employee as a Temporary Worker* 23 *Comparative Labor Law and Policy Journal* 67 (2005).

⁴³ German Employee Leasing Law 1972 (Germany) at §3, ¶2.

In a more comprehensive review of the current legislation in 2005, again in 2008 (coinciding with the publication of the Protection of Employees (Agency Workers) Bill 2008) and culminating in the Employment Agency Regulation Bill 2009, the Irish Government proposed that all recruitment agencies, including those operating over the internet or in foreign jurisdictions, providing employment agency services in Ireland would be subject to Irish regulations relating to employment agencies.⁴⁴ This is similar to the position currently operating in Germany.

The Protection of Employees (Agency Workers) Bill 2008 (Ireland) introduced and published on the 18th of March 2008 was intended to be both a regulatory measure for recruitment agencies and a protective measure for recruitment agency workers. It placed the worker in a strong position by providing him/her with the tools to combat exploitation and discrimination. The reference to agencies established outside the jurisdiction of the State⁴⁵ was a departure from the approaches adopted in previous proposed legislation. However, the Bill did not go so far as to actually legislate for registration or licensing of all agencies supplying migrant workers to Ireland. The more recent Employment Agency Regulation Bill 2009 does attempt to make these commendable approaches.

5.1. The Application of the Law to All Types of Recruitment Agencies

One of the drawbacks of the German Employee Leasing Law 1972 is the fact that it is limited to migrant workers hired through leasing agencies. Only some migrant workers enter into leasing arrangements with recruitment agencies so as to become leased workers. Those workers who are not leased workers but who merely utilise a recruitment agency to match them to a particular employer or to provide them with information on particular employments in certain areas are not covered by such legislation. The German model effectively excludes a huge majority of migrant workers who utilise third party intermediaries in the recruitment stage of migration and leaves them open to potential exploitation.

An agency worker was defined in the Protection of Employees (Agency Workers) Bill 2008 (Ireland) as a person who works under an “agency work contract” whereby the agency worker agrees with a recruitment agency to work

⁴⁴ Department of Enterprise, Trade and Employment, *Review of the Employment Agency Act, 1971*: White Paper, (2005) 9-10; Employment Agency Regulation Bill 2009.

⁴⁵ Protection of Employees (Agency Workers) Bill 2009, section 2(1).

for a third party whether that person is a party to that contract.⁴⁶ The Bill covered a wide range of activities including “obtaining and supplying” for reward persons who will work for another person. It applied to matching, leasing and information providing recruitment agencies and this would be a novel and commendable approach to take in any legal initiatives in this area. It is notable that the 2009 Employment Agency Regulation Bill omits information providing recruitment agencies⁴⁷ and is not as inclusive as the 2008 Bill.

5.2. The Application of the Law to Agencies Outside Ireland

The German legislation excludes all recruitment leasing agencies that do not operate a registered place of business in the EU. This effectively excludes migrant workers from many states who will not be able to find a convenient agency that has such a registered place of business in the EU. This once again opens up the possibility of many migrant workers utilising unregulated recruitment channels.

The Protection of Employees (Agency Workers) Bill 2008 (Ireland) appeared to follow this approach and applied to any natural or legal person carrying on the business of obtaining or supplying for reward of persons who will, within the State, accept employment from or render services to others. It applied to agencies whether established in Ireland or another Member State or agencies whether a holder of a licence under the Employment Agency Act 1971 (Ireland) or not.⁴⁸

The 2009 Bill operates a similar but much clearer system. The Bill distinguishes between licensed employment agencies (those licensed in the State) and recognised employment agencies. Both licensed and recognised are entitled to provide employment agency services in Ireland and are subject to the Irish regulations as set out in the Bill.⁴⁹ The 2009 Bill provides that only employment agencies that have a place of business in the State or in the EEA can apply for a license to operate as an employment agency in Ireland.⁵⁰ Recognised agencies are those who, under the law of a designated state, carry on the business of an employment agency or provide employment agency

⁴⁶ Section 2, Protection of Employees (Agency Workers) Bill 2008 (Ireland).

⁴⁷ Section 2, Employment Agency Regulation Bill 2009.

⁴⁸ Section 2, Protection of Employees (Agency Workers) Bill 2008 (Ireland).

⁴⁹ This is implied from section 14(9), Employment Agency Regulations 2009.

⁵⁰ Section 10(3)(d-e), Employment Agency Regulation Bill 2009.

services in the state.⁵¹ While there is no direct statement to the effect that recognised employment agencies must have a place of business in an EEA state, it can be implied from section 14(3) which provides that where the recognised employment agency wants to be included on the Minister's list of licensed and recognised employment agencies, they must provide the address of their place of business in an EEA state.⁵²

Despite this shortcoming, it is a notable result of the 2008 and 2009 Bills that the recruitment agency does not have to be registered in Ireland. The 2009 Bill recognises the fact that often businesses fall outside the scope of the licensing requirements but still provide recruitment agency services. Secondly, and commendably, the 2009 Bill applies to recruitment agencies established in Ireland and in the EEA. This is similar to the position adopted in the Germany and while not totally inclusive will be an important step in the protection of migrant workers in Ireland.

6. Potential Obstacles to Regulating for Globalisation

6.1. The Potential Conflict with EU Law

The extended jurisdiction model, advocated as a potential approach for the improved protection of migrant workers, is novel and avoids many of the criticisms levelled at other forms of regulation. Increased regulation is often perceived as expensive and unnecessary and this approach appears to allay many of those fears. It provides workers with adequate protections without increasing substantially the administrative burden on recruitment agencies, as it does little to affect the position of national agencies.

It also avoids the possibility of falling foul of the potential conflict between the commitment of the State to the protection of migrant workers and the States' responsibilities within the EU. Any attempt to regulate recruitment agencies operating outside the domestic sphere of the State may be seen as a potential restriction on the free

⁵¹ Section 2, Employment Agency Regulation Bill 2009.

⁵² Section 14(3), Employment Agency Regulation Bill 2009.

movement of services within the EU.⁵³ According to Article 57TFEU the definition of “services” includes all services that are “normally provided for remuneration”.⁵⁴ What is important in this regard is that it is not essential that the remuneration be provided by the recipient of the service as long as the service is remunerated “one way or another”.⁵⁵ This is important because often recruitment agencies are paid not by the migrant worker but by the user-enterprises and any other definition could mean that such recruitment agencies would not be covered by Article 57TFEU.

It has been held that the provision of recruitment services constitutes a service under Article 57TFEU.⁵⁶ Further, it also covers any situation in which the service provider and the recipient are in different Member States and also situations where both parties are in one Member State but the provision of the service requires one of them to cross an internal Community border.⁵⁷

Article 56TFEU calls for the prohibition across the Community of restrictions on the free movement of such services. Any provisions which are directly or indirectly discriminatory, or which prohibit, impede or render less advantageous the activities of a service provider in another Member State will be in breach of this fundamental principle and will thus be prohibited.⁵⁸ While the regulation of agencies both within and outside of Ireland could not be described as either directly⁵⁹ or indirectly⁶⁰ discriminatory, it could constitute an impediment to the free movement of services by requiring recruitment agencies registered outside Ireland to meet criteria both within their home state and within Ireland in order to prove that they have been registered in another state by a corresponding authority.

⁵³ Title IV, Chapter 3, Articles 56-62.

⁵⁴ Arnall, Dashwood, Ross, Wyatt (eds.) *Wyatt and Dashwood's EU Law* (4th ed., 2000) 531.

⁵⁵ Lasok and Lasok, *Law and Institutions of the European Union* (7th ed., 2001) 533.

⁵⁶ Case 110/78 and 111/78 *Van Wesemael* [1979] ECR 35, 50; Case 279/80 *Re Alfred John Webb* [1982] 1 CMLR 719, 735.

⁵⁷ Wyatt and Dashwood *supra* n. 54, 532. This would occur where a migrant worker is recruited by a recruitment agency in another EU Member State for employment in Ireland.

⁵⁸ Lasok, *Law and Institutions of the European Union* (7th ed., 2001) 533. See also Wyatt and Dashwood *supra* n.54, 533.

⁵⁹ The restrictions would, in their current formulation, apply equally to national and non-national service providers.

⁶⁰ These apply equally to national and non-national service providers and would not require any extra efforts to be made by non-national service providers. See Wyatt and Dashwood, *European Community Law*, (3rd edition, 1993).

6.1.1. Is there an Impediment to the Free Movement of Services?

This situation was addressed specifically in the case of *van Wesemael*.⁶¹ The court here had to consider national rules of one Member State which imposed licensing requirements on recruitment agencies established in other states before it would allow them to pursue business in the former state. The ECJ held that a “state may not, ... impose on the persons providing the service who are established in another Member State any obligation either to satisfy such requirements or to act through the holder of a licence, except where such requirement is objectively justified by the need to ensure observance of the professional rules of conduct and to ensure the said protection”.⁶²

Whether an obligation was objectively justified depended on whether the recruitment agency had already been operating under the public administration of another Member State or had been granted a licence by the proper authorities in their own state? Of further relevance, was whether the recruitment agency had been subjected to comparable conditions and was being adequately supervised in another Member State.⁶³ In such cases it would not be appropriate to impose further conditions on the recruitment agency and would in fact amount to a restriction on the free movement of services. Despite arguments by the Belgian Government that the requirements of ILO Convention No. 96 on Fee-Charging Employment Agencies placed a requirement on states to adequately supervise the activities of recruitment agencies operating in their territory, the Court refused to consider this an adequate justification for restricting the free movement of services.⁶⁴

The court reconsidered its earlier position in the case of *Re Alfred John Webb*⁶⁵ in light of the “special nature of the employment relationships inherent in that kind of activity” and the fact that the “pursuit of such a business directly affects both relations on the labour market and the lawful interests of the workforce concerned”.⁶⁶ The court decided that “in view of the differences there may be in conditions on the labour market between one member state and

⁶¹ Case C-110/78 and 111/78 *Van Wesemael* [1979] ECR 35.

⁶² In *van Wesemael supra* n. 61, 29. (*Own emphasis added.*)

⁶³ In *van Wesemael supra* n. 61, 30.

⁶⁴ In *van Wesemael supra* n. 61, 35-36.

⁶⁵ Case 279/80 *Re Alfred John Webb* [1982] 1CMLR 719. This decision was followed in the case of *Commission v. Germany* [1988] E.C.R. 3755.

⁶⁶ In *Re Alfred John Webb supra* n. 65, 18.

another, on the one hand, and the diversity of the criteria which may be applied with regard to the pursuit of activities of that nature on the other hand, the Member State in which the services are to be supplied has unquestionably the right to require possession of a licence issued on the same conditions as in the case of its own nationals".⁶⁷

Therefore, in granting such licences two distinct requirements must be met. The first is that in granting the licence no distinction on grounds of nationality is made and the second is that the state granting the licence must take into account the evidence and guarantees already furnished to them by the provider of the service relating to the pursuit of such activities in the country of employment.⁶⁸ There will be no direct conflict with EU law if two conditions are met. Firstly, that the state pursues a policy of non-discrimination in relation to the distribution of recruitment agency licences and secondly, that the state ensures that it accepts evidence provided from other Member State applicants as evidence of the fitness to practice.

However, all of this can be avoided by the introduction of protections which will apply to all workers in Ireland and to all agencies throughout the EU. The adoption of such legislation into Irish law is awaited with much anticipation. There would not appear to be any obstacle from a European perspective and a comparison with other potential solutions to the issue of globalisation reveals that this is the most effective method of ensuring the protection of migrant workers by reducing the problems associated with poor regulation.

Conclusion

This paper considers the issue of globalisation and the effect that this has on the type of regulation that should be introduced in the recruitment sector in Ireland and, in particular, the recruitment agency sector. The paper focuses specifically on recruitment agencies because of their popularity as a recruitment method and because of the potential

⁶⁷ In *Re Alfred John Webb supra* n. 65, 19.

⁶⁸ In *Re Alfred John Webb supra* n. 65, 20.

for exploitation inherent in the use of such agencies for migrant workers. While the current Irish regulation of recruitment agencies conforms to international expectations, the paper identifies one specific problem related to the increased globalisation of the recruitment industry. The Irish regulations do not regulate recruitment agencies not licensed in Ireland but who are still involved in the recruitment of migrant workers to Ireland.

Three potential regulatory models are proffered. The first of these is the user-enterprise responsibility model advocated by the Irish Government in 2004 which involves placing a responsibility on employers/user-enterprises to provide the Department of Enterprise, Trade and Innovation with information on the recruitment agency used to recruit migrant workers to Ireland. The inherent lack of monitoring and enforcement mechanisms seriously undermines this model.

The second model examined is the domestic agency responsibility approach. However, this system places unfair responsibility on the recruitment agency sector and, similar to the user-enterprise responsibility model, would be difficult to monitor and enforce, thus reducing its effectiveness.

The final solution proffered is the extended jurisdiction model. This is currently the legal situation in Germany and is proposed to be adopted here in Ireland in the most recent Employment Agency Regulation Bill 2009 (Ireland). The paper examines the benefits and potential obstacles to this solution, in particular, the potential conflict with Ireland's responsibilities relating to the free movement of services under the TFEU. The paper concludes that this is the most effective method of protecting migrant workers, employers and recruitment agencies from the effects of globalisation. There are no obstacles to the introduction of this system in EU law and the author would advocate the adoption of this model into Irish law as providing the most balanced approach to both migrant worker protection and the effects of globalisation on corporate mobility.