

When the boss won't cough up

Essential to any employment relationship is the employer's duty to the worker to pay agreed wages and pay them on time. Yet in all too many cases, workers find that employers have left them short, as Nick Clark, researcher at the Unpaid Britain project reports.

Companies playing fast and loose on pay have been in the news of late – from unpaid time for security checks at Sports Direct to taxi drivers contesting Uber's classification of them as "self-employed", thus paying below the minimum wage and giving no holiday pay.

But this is not a novel phenomenon. And at Middlesex University we have been looking into the extent and causes of unpaid wages, and the remedies available to unpaid workers.

Unpaid labour can take many forms: forced labour; "workfare"; unpaid internships; cessation of pay in company insolvency; or unwaged domestic work and childcare. Each of these these have been the subject of extensive study (if not of effective restitution) with the probable exception of insolvency.

There is a body of work examining unpaid wages ("wage theft") in the United States, post-Soviet Russia and, recently, China. But there has been almost none in Britain. This is curious, since claims for unpaid wages are near the top of the list of issues before Employment Tribunals (ETs). In 2012-13 (the last year before the introduction of tribunal fees), official statistics from HM Courts and Tribunal Service (HMCTS) identified 53,581 "unau-



Sports Direct where staff were effectively paid less than the minimum wage

thorised deductions" (also known as *Wages Act* claims), although following the introduction of tribunal fees (in 2014-15) this had fallen to 28,701.

Only Working Time Directive claims are more numerous – 99,627 in 2013-13 (which includes an estimated 10,000 which were submitted on behalf of airline staff involved in a multiple claim), down to 31,451 in 2014-15. However, most of these relate to failure to provide holiday pay, and are therefore also for unpaid wages. So almost half (46%) of the issues complained of to ETs in 2014-15 were for unpaid wages or holiday pay.

It's difficult to be certain how many cases there may be in total. In addition to cases which reach the ET stage, many arise through employers' insolvency. In

■ DEFINING UNPAID WAGES

The Unpaid Britain project's working definition of unpaid wages is non-payment or delay of all or some of the promised wage (or legal minimum where higher) for work which has been done (including time during which the worker was

exclusively available to work).

The wage includes all wages, fees for work, holiday pay and statutory pay (such as sick pay or maternity pay).

For the purposes of this study, we will not be investigating work

for which no payment has been promised (even if it ought to have been) such as unpaid internships or volunteering.

We will, however, include freelance or self-employed earnings where there is an identifiable employer.



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be raised through the Acas employment advisory and conciliation body (now a prerequisite for an ET claim), or brought to the attention of Citizens Advice Bureaux (CAB), or the dwindling band of law centres.

We have tried to draw these together (see table). Unfortunately, we cannot simply add the figures together, since, to some extent, they may overlap. Some insolvency cases go first to an ET, for example, and may also have been raised with a CAB or Acas.

Frequent problem

Most data will exclude non-payment of wages to “self-employed” workers, although many working time claims at ET are for holiday pay denied by employers claiming their workforce is self-employed. We can say, however, that unpaid wages is probably the most frequently encountered problem at work.

We hope to make a credible estimate of the extent of non-payment later in the year, although this will tell us only a limited amount about the types of non-payment, the motivations of employers and workers’ decision-making process regarding whether to pursue money that may be owed.

Research commissioned by Acas in 2013, as well as a study of “unrepresented” workers conducted by academic Anna Pollert in 2005, suggests that only a minority of cases reach the stage of any steps being taken to recover owed sums because the workers cease to pursue them.

These and other studies suggest that (particularly where there is no union) either the wronged worker will do nothing or, having taken advice or begun proceedings, will give up.

To try to understand better what is happening, we will be conducting a number of detailed case studies. We have also been interviewing (in confidence) inspectors, trade unions, employers, legal and other advisors – some sample quotes are shown in the box at the top of page 18. And we have an active project advisory group of both practitioners and academics (see the project blog at www.unpaidbritain.org.uk). What they have been telling us is worrying.

Wilful underpayment

They all accept that mistakes can sometimes happen and that workers may not be paid the correct amount, or be paid at the correct time due to error, misunderstanding, or events beyond employers’ control. But there are also employers who wilfully underpay, or fail repeatedly to pay their workers.

some (but not all) circumstances, workers can claim up to eight weeks unpaid wages and outstanding holiday pay (subject to a weekly cap – currently £479) via the Insolvency Service. There are between 35,000 and 40,000 of these cases per year (see table below). The National Minimum Wage Inspectorate records

detected underpayment of the NMW, and may require restitution of such “arrears” – another 26,000 cases in 2014-15.

Workers who are not paid Statutory Sick Pay, Maternity or Paternity Pay can complain to HMRC who may advise employers or make a declaration requiring them to pay. Cases may also

Unpaid wages as measured by official (or administrative) data

Source	Description	Period	Number of cases
Insolvency Service Freedom of Information (FOI) request	Wage arrears	2014-15	38,949
Insolvency Service (FOI)	Unpaid holiday pay	2014-15	35,547
Department for Business Innovation and Skills evidence to 2016 Low Pay Commission	National Minimum Wage enforcement	2014-15	26,000
HMRC management information (FOI)	Statutory pay disputes received ¹	2014-15	5,991
Citizens Advice data (<i>Advice Trends</i> , Q3, 2015-16)	Clients advised on unauthorised deductions from wages	2015	9,000
Acas (annual report 2014-15)	Early conciliation notifications received “fast track” ²	2014-15	36,499
HM Courts & Tribunals Service quarterly statistics main tables	Employment Tribunal claims accepted for “unauthorised deductions”	2014-15	28,701
HM Courts & Tribunals Service quarterly statistics main tables	Employment Tribunal claims accepted for “Working Time Directive”	2014-15	31,451

¹ Mostly Statutory Sick Pay and Statutory Maternity Pay cases. ² These are for so-called “simple” cases such as unpaid wages and holiday pay. This is the first full year for obligatory conciliation before ET claims.

INSIGHT FROM INTERVIEWEES

HOLIDAY PAY

Interview with public sector advisory body: "They [the employer] said 'no we don't owe anything, go back to him'. The guy was very smart, the claimant, he had his wage slips, he had proof, he scanned them and he sent them to me.

"He said: 'Look this is what I was paid and this is what it states is outstanding' [in holiday pay]. I go back to the company and tell them that and

actually say to them 'he will be using this as evidence if he decides to take it further'. Hey ho, he gets paid."

ENFORCEMENT IN REALITY

Interview with public sector regulator: "... If they [employers] are unscrupulous, the moment that I mention that worker is owed £2 an hour for the last eight hours, therefore he's owed £16, that's enough to identify them for £16 and the

chances are they will not be there the next time."

RECOVERY OF WAGES

Interview with workers' organisation: "... nine times out of 10, if a member gets a judgment against somebody, it doesn't end there. We then have to instruct bailiffs, which [costs] £100 regardless of whether the [member's] claim was for £45 or £500."

This might take the form of a couple of hours' pay going missing, or it might take the form of unpaid induction shifts for new starters, or outstanding holiday pay not being paid when a worker leaves.

Where this happens frequently, our interviewees ascribed it to employers understanding that as long as they pay out to the most persistent, there will be no repercussions, and almost no official record. This was described variously as "a numbers game" or a "don't ask, don't get" policy.

Risk

With the advent of ET fees, frequent offenders have an additional string to their bow: they can wait to see if the claimant is prepared (or able) to pay the additional hearing fee before they offer to settle, knowing that many workers cannot afford to take the risk of not recovering the money.

Other strategies include requiring workers to set up "umbrella" companies so that there is not a direct employment relationship between the employer (often an agency) and the worker.

This can result in costs such as employers' National Insurance and administration fees being met by the worker themselves.

Determining the extent to which the accounts given by our interviewees reflect a significant phenomenon can be problematic, since there are few statistics to which we could turn for verification. However, the government's Labour Force Survey asks those in employment about paid holiday entitlements. In 2013, 14.8% did not know theirs, with a further 5% reporting that they received none.

There are big differences between sectors, with well union-organised sectors like manufacture of transport equipment reporting only 2.5% with no holidays, contrasting with less well-organised ones like sports, amusement and recreation (18.4%).

Using measures like this from official data (we have also looked at unpaid overtime, zero hours contracts, low-paid self-employment and employer failure to provide payslips), we are able to identify sectors most prone to abuse and will be using these to guide our choice of case study. Most of these cases will be located in London as half of our funding comes from the Trust for London charity.

We are also studying London ET judgments on unpaid wages and holiday pay claims. We are not only looking at who loses from unpaid wages, but who gains, too. This involves linking ET cases with

Companies House records, and may help us to see which employers are using limited liability to evade their obligations to their workers.

Given the extent of non-payment, even in the limited official data we have listed, it may come as a surprise to learn that: "The UK has a strong legal framework in place to ensure that minimum standards are met for workers," as the Home Office claims in its factsheet on the labour market enforcement sections of the 2016 *Immigration Act*.

Nevertheless, the government recognises that there is a problem, albeit they suggest that this is to do with "criminal gangs". A proposal to establish a director of Labour Market Enforcement was included in the *Immigration Act*, although the director's role is said to be to deal with "labour market breaches, not immigration offences" (see *Labour Research*, March 2016, pages 16-18). It is claimed that this will coordinate efforts against worker exploitation.

Restricted powers

Unfortunately, the government's approach in words is not matched by deeds. The Gangmasters Licensing Authority, the body that licences the supply of temporary labour and protects workers from exploitation, has had staffing frozen to the extent that Yorkshire and the South West are now without locally-based inspectors. Meanwhile, the Employment Agencies Standards Inspectorate is tiny, with a mere nine inspectors for the whole country, and has restricted powers that are rarely-used.

Companies House records of failed companies may also be erased after six years, reducing the chances of identifying repeat offenders, according to reports in the *Financial Times* and *The Times* in July 2016.

One of the key aspects of our research will therefore be an evaluation of methods used to recover unpaid wages, looking at case studies which illustrate successes as well as failures. *Labour Research* readers with relevant cases are invited to contact me at: n.clark@mdx.ac.uk.

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