Enforcing Employment Rights: The Employment Act 2008

1: Enforcing employment law is important – but the UK regime is often too weak

Improving the compliance regimes in order to ensure that workers are properly protected is a vital part of ensuring that employment law protects workers effectively.

We can sometimes forget this, because honing the mechanisms of enforcement is not as glamorous as creating new rights.

Unfortunately it is a sad fact that all laws are broken on a regular basis, including employment laws. Where enforcement regimes are very weak, the law is seriously undermined and workers cannot access their rights.

The TUC's Commission Vulnerable Employment (CoVE) found that few workers knew their employment rights in detail. Workers were also hampered by lack of easy access to advice on their rights, with large areas of the UK being classified as "advice deserts" where there were no independent sources of help to be found. CoVE also found that workers reporting multiple problems with employment law quickly became disheartened by the labyrinth of different agencies responsible for dealing with specific aspects of employment rights.

These effects were compounded by the fact that all the government departments involved in enforcing employment rights have different service standards, opening hours and so on.

Furthermore, these enforcement agencies generally find it very hard to communicate with each other. So, for example, minimum wage inspectors discovering prima facia breeches of other employment rights have been specifically prohibited from reporting them to other agencies by HM Revenue and Customs' (HMRC) confidentiality rules.

The Government intends to address some of these issues and is working with the social partners through the Fair Employment Enforcement Board. One of the first initiatives has been to create a single gateway to employment rights advice in order to guide complainants through the various enforcement agency processes.

This first step has itself engendered some controversy, since then government intends to

place the new employment rights advice gateway with a third sector organisation.

The Working Time Regulations 1998 (WTR) are a textbook example of a complex piece of employment law with a weak enforcement regime. The Health and Safety Executive only investigates breaches of the 48 hour average limit on weekly working time "on complaint" and many local authorities do not even know that they have responsibility for enforcing this law in shops and offices. The net result is that 50 per cent of the long hours workers who have either raised issues about the 48 hour week say that the issue was not resolved. In other words, 1.6 million employees were unable to access their rights[1].

The regulation of employment agencies has been very weak indeed during the past decade. The government has put more resources into the Inspectorate in recent years, and the 2008 Act is an attempt to move enforcement up a gear, but the outcome is still unlikely to be strong enough to deal with the breadth of problems that have developed in this sector.

The TUC's CoVE report[2] found agency work was a common source of complaint. For example, 81 per cent of law centres report that they frequently see agency workers with problems, and there are many reports of underpayment, including an undercover reporter from Sky News taking a hotel cleaning job who was paid just £1.50 per hour.

CoVE was not alone in finding that following breeches of the law were widespread amongst the less reputable agencies. The main offences were charging for giving workers assignments, charging for services provided to workers, not providing wage slips, late payment and underpayment.

A relatively recent development has been the introduction of the Gang masters Licensing Agency. The GLA has been able to bring some order to one of the most exploitative sectors of UK employment.

Given its success, there is a strong case for giving the GLA responsibility for agencies in the sectors with the most "cowboy" operators, such as construction and secondary food processing.

More broadly, given the scale of the problem, there is also a very strong case indeed

[1] Source: A Survey of Workers Experiences of the Working Time Regulations, DTI Employment Relation Series No 31, 2004, pps 8 and 25.
[2] http://www.vulnerableworkers.org.uk/cove-report/

for simply reviving the pre-Thatcher practice of licensing employment agencies.

In contrast, HM Revenue and Customs (HMRC) have been operating a tougher regime that has been able to recover more than £3 million pounds per year in minimum wage underpayment for low paid workers. The budget for NMW enforcement and awareness has been increased by 50 per cent since 2007, and the new penalties should help to deter rogue employers.

Our conclusions are simply that the strength of the enforcement regime has a big impact on the success of employment rights, and that we therefore want the best enforcement regime possible.

The 2008 Employment Act takes us a good way down the right road when it comes to enforcing the minimum wage, and a little way down the road towards regulating employment agencies, but of course there is still a lot more to be done before we can be certain that all workers will be able to enforce their rights.

2: The Employment Act 2008 moves enforcement forward – especially for the minimum wage.

The TUC thinks that the Employment Act will deliver some useful improvements to enforcement for the minimum wage. Indeed, higher fines, penalties for all cheating employers and fair arrears for workers are a good reflection of our own long-standing policy goals.

The changes to the enforcement agency regime are also useful, but are likely to be too modest to make more than a small dent in the problem.

3: Improvements to the minimum wage enforcement regime in the 2008 Act – fair arrears, civil penalties, higher fines and new powers for inspectors.

The act introduces a number of improvements to the minimum wage enforcement regime. The main thrust is to create a new fair arrears system; tougher civil and criminal penalties for those caught underpaying their workers and some new powers to help HMRC inspectors to carry out their investigations.

3.1: Fair arrears

Section 8 of the act introduces the new "fair arrears" policy. In short, this means that the arrears owed to a worker will be payable at the current NMW rate rather than the rate that applied when the arrears accrued. This will provide a modest financial benefit to workers in long running cases that is analogous to making the employer pay interest on the money owed. This is a welcome change, since low paid workers often suffer considerable inconvenience and hardship when they are paid less than the minimum wage.

These provisions will also apply to workers covered by the Agricultural Minimum Wage Act.

The Government has argued that the main advantages of introducing the concept of Fair Arrears rather than interest payments is that it enables the law to include periods of underpayment that predate the introduction of the current Employment Act. It is also a formulation that is relatively easy to understand and to calculate.

The formula for calculating arrears can be found in section 8 (5) of the act, and DBERR will shortly launch its "National Minimum Wage Decision Making Tool", which is an on-line calculator that can be used for identifying the amount of arrears owing to workers.

3.2: The new civil penalty regime

Section 9 of the act introduces a new civil penalty regime, which will see all employers caught failing to pay the minimum wage charged an automatic penalty that is set at half of the money owing to their workers, subject to minimum and maximum limits of £100 and £5,000 respectively.

Note that the penalty is reduced to one quarter of the arrears if the employer pays up within 14 days of receiving the penalty notice.

The new principle that every underpaying employer must pay a penalty to the government (into HMRC's consolidated fund) as well as paying back the arrears to the worker is a good one. Under the old regime, employers were initially issued with an Enforcement Notice demanding that they pay the workers what they were owed. If they failed to comply with the Enforcement notice, HMRC could then issue the recalcitrant employer with a penalty notice. However, once identified by HMRC, 99 per cent of employers readily agreed to pay up, so these employers did not face any penalty at

all. Clearly the financial incentive in the old regime was not to pay the minimum wage until caught.

Another consideration is that the use of the old penalty regime has tailed off in recent years as HMRC's lawyers have increasing fretted about whether the legal basis of the NMW penalty regime, which involved a reverse burden of proof, was still defensible. The Government issued a policy statement on the NMW penalty regime in 2007 with the aim of dispelling these doubts. However despite these legal reassurances the civil penalties have rarely been invoked. Last year there were just two cases where penalties were applied.

The new rules also allow HMRC inspectors to withdraw and replace faulty penalty notices. This is a useful amendment, since the drafting of the original act made this process difficult, with the result that HMRC have sometimes been compelled to pursue flawed penalty notices just to allow the way to be cleared for an accurate replacement notice to be issued.

Penalty notices will be suspended pending an appeal by the employer to an Employment Tribunal over the details of the notice. They are also suspended in cases where the employer is awaiting the outcome of a prosecution for a more serious offence under the National Minimum Wage Act

3.3: New powers for HM Revenue and Customs NMW compliance officers

HMRC enforces the NMW under contract from DBERR. To that end they employ more than 130 NMW compliance officers who are deployed in teams around the country.
The 2008 Act gives HMRC the power to use the *search and seize* powers in the Police and Criminal Evidence Act 1984 when investigating criminal offences under the National Minimum Wage Act 1998.

Section 10 of the new act allows HM Revenue and Customs NMW compliance officers to remove complete minimum records as part of an investigation. Until now they have been forced to carry out investigations on site, which has made the process unnecessarily cumbersome.

3.4: Mode of trial and the possibility of higher maximum fines

Section 11 introduces the possibility of higher fines by allowing NMWA offences to be triable "each way" – either by magistrates or Crown Court.

This section also changes the maximum fine in summary cases to "the statutory maximum". This has no immediate effect in England and Wales where the existing level five fine of £5,000 continues to be the statutory maximum, but allows for higher fines in Scotland where the statutory maximum in summary cases has been increased to £10,000.

The existing maximum fines were certainly not proportionate with the penalties for other offences. For example, a sweatshop producing counterfeit shirts could be fined up to £75,000 or even sent to prison for 6 months under The Copyright Etc, and Trade Marks (Enforcement) Act 2002.

In contrast, the maximum penalty for cheating workers out of the minimum wage was only £5,000 in the magistrates courts.

It seems unlikely that there will ever be massive numbers of NMW prosecutions, as the Governments strategy is to rely mainly on civil penalties.

The main reason for this is the amount of officer time needed to pursue prosecutions. HMRC's NMW prosecution strategy budgets for 6 prosecutions per year. It has so far delivered half a dozen convictions for offences under the NMW Act – refusal to pay the minimum wage, obstructing investigations, keeping or producing false records, or commissioning another person to do any of the above.

There are merits in HMRC's approach, since it is likely to deliver arrears to the worker more quickly than could be achieved through prosecutions.

In addition, the fines imposed for minimum wage offences have been modest. For example, a care home in London that would not allow HMRC to enter the premises was fined £2,500, whilst a Sheffield butcher who owed workers £10,000 in arrears was fined just £800 for keeping false records.

The main problem with relying too much on civil penalties as a deterrent is details remain confidential, with the result that HMRC can only publish aggregate figures.

In contrast, prosecution allows rogue employers to be "named and shamed". Arguably, more high profile prosecutions will be needed in order to make clear to bad employers the risk of being caught.

3.5: Voluntary workers

Section 13 of the act exempts adult volunteers in the army, air and sea cadet forces from the NMW Section 14 clarifies the expenses that can be paid to a voluntary worker. The term "voluntary worker" has a specific meaning under the NMWA – basically a worker in the third sector or public sector with an unpaid job. The term is used to distinguish unpaid jobs from casual volunteers.

Voluntary workers can only work for a charity, voluntary organisation, associated fund raising body such as a charity shop or a statutory body such as a school or hospital.

The purpose of excluding volunteer instructor in the cadet forces is to allow them to be paid a stipend without triggering full entitlement to the minimum wage.

The government has argued that the clarification of what constitutes legitimate expenses for voluntary workers will for the first time allow payment for childcare, which would be welcome.

One note of concern is that the minimum wage settlement in the voluntary sector was hard won. Some vigilance is now needed, because a number of major organisations in the third sector would like to unpick the settlement in order to create halfway-house jobs that can be paid on the basis of a small allowance – typically about £60 per week.

The TUC opposed last year's government decision to exempt voluntary worker posts in the National Youth Volunteering Framework from the minimum wage because of the "me too" pressures to create other new exemptions that it generated.

4: Improvements to the Employment agency enforcement regime in the 2008 act – higher fines and new powers for inspectors.

Employment agencies can perform a useful function in helping people to find short-term work or to return to work after a period out of the labour market. However, the ambiguous nature of the employment relationship and the ease with which workers can be withdrawn from placements and simply not offered any more work makes this area very fertile ground for exploitation.

In recent years there is even some evidence that gang masters are moving into the sector in order to involve the tougher strictures of the Gang Masters Licensing authority.

The breadth of exploitation in the sector means that better rights and tougher enforcement are needed as soon as possible.

For now, the Employment Act 2008 brings some further improvements to the powers available to the Employment Agency Standards Inspectorate (EASI). These measures are welcome but they will certainly not be the last word that is needed this subject.

A few years ago critics would have said that EASI was very ineffective. It had just three staff with which to regulate the employment agency sector, and managed to prohibit just 5 people from running agencies in a whole decade.

The government has now increased the staffing to 27 employees. Although this is still a very modest number, it has led to some improvements, as EASI managed to disqualify 4 employment agency owners in 2007.

It is to be hoped that the new powers in the 2008 Act will help EASI to continue to develop its teeth.

4.1: Mode of trial and higher maximum fines

Section 15 of the Employment Act make a number of offences under the Employment Agencies Act 1973 triable "either way". This allows for much higher fines at Crown Court in the most serious cases.

This section also changes the maximum fine in summary cases to "the statutory maximum". This has no immediate effect in England and Wales where the existing level five fine of £5,000 continues to be the statutory maximum, but allows for higher fines in Scotland where the statutory maximum in summary cases has been increased to £10,000.

The offences that are now triable either way are:

- Breaking the regulations made under the 1973 act (which are expressed in the Conduct of Employment agencies and Employment Business Regulations 2003, as amended 2007).
- Requesting or receiving a fee for work finding services
- Failure to comply with a prohibition order

4.2: New powers to prosecute offences by partnerships in Scotland

Section 17 of the Act aims to tighten the enforcement regime for employment agencies in Scotland.

Under Scottish law a partnership is a separate legal entity. This is not the case in England. This makes it harder to prove offences against employment agencies run by partnerships in Scotland.

The purpose of section17 is to rectify this situation by allowing EASI the choice of pursuing either the partnership or the partners as individuals.

4.3: Strengthening the power of EASI inspectors.

Section 16 of the act gives EASI inspectors some modest but useful extra powers that are intended to make it easier for them to catch rogue employers:

- To inspect "financial records and documents that are held on the inspected premises which he may reasonably require to inspect in order to ensure compliance with EAA 1973." This is broader than the existing right to inspect the records and documents *specified* in the 1973 act and the 2003 regulations.
- To give an employment agency written notice that their records will be inspected at a specified time and place. This replaces the old power to make an *arrangement with any person on the inspected premises* to inspect records, which allowed owners to avoid inspection simply by removing key records and staying away from the premises for a few days. The new rules should remove the need for multiple visits by EASI by compelling the owner to turn up and present all the relevant records at a set time and place.
- This power also covers instances where employers fail to produce the documents required that they are required to make available under the 1973 act, and to records held by banks.
- Inspectors will be able to remove records in order to take copies rather than having to copy them on the employer's premises.
- Perhaps most importantly, the act creates the new offence of obstructing an EASI inspector, which attracts a maximum summary fine of up to £1,000 (a "level three" fine).

5: Information sharing between the NMW and the employment agency standards inspectorate.

Section 18 of the act allows HMRC NMW compliance officers and EASI officials to share information for the purpose of carrying out their respective enforcement functions.

This is a welcome step. As indentified in section 1, workers with multiple employment law problems are often hampered by the silo nature of government enforcement agencies. Of course confidential data must always be properly protected, but it is also vital that barriers to sharing data for genuine enforcement purposes must be removed.

For example, the Commissioners for Revenue and Customs Act 2005 (CRCA) provides a maximum penalty of two years in prison for any officer who discloses data in a way that is not covered by the legal "information gateways" specified in the act. The 2008 Act creates a new gateway so that HMRC can speak to EASI. However, the CRCA still absolutely prohibits sharing prima facie evidence of breaking employment laws with other government enforcement agencies.

Nevertheless, the 2008 Act provides a useful first step towards "joined-up" enforcement. This model must be developed further in future legislation