



Unpaid Britain: wage default in the British labour market

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Behold, the hire of the labourers who have reaped down your fields, which is of you kept back by fraud, crieth: and the cries of them which have reaped are entered into the ears of the Lord of sabaoth¹.

Introduction

The words above are thought to date back to the first century of the Common Era, and suggest that even in the earliest days of waged labour, default was a distinct possibility. No doubt they also rang true for the intended 17th century audience for the English translation of the Bible (or at least those more likely to work rather than offer to pay others to do so)².

But this is of more than historical interest. Despite the centrality of the contract between employer and worker to the world of work today, it seems that it may be a fragile construction. The Unpaid Britain project was established to investigate the extent to which wages currently go unpaid in Britain (particularly in London), identify the mechanisms and reasons for non-payment, to propose means for reducing the frequency of non-payment and improve the likelihood of workers recovering the owed wages.

This report describes our findings and conclusions, and builds on the earlier, interim report, “*The weighted scales of economic justice*”, which was published in June 2017, and a working paper “*Towards a typology of non-payment*” of April 2016. Some sections of this report appeared in these earlier papers, or in the Unpaid Britain blog (www.unpaidbritain.org).

Our research has been examining in detail the data sources which might help us to determine the frequency with which wages are unpaid, who might be affected, how much is involved, what form the non-payment takes, and why it has happened. However, we find that there is no source of data which can measure the incidence of non-payment. There are, however, several which can provide

Unpaid Wages - definition

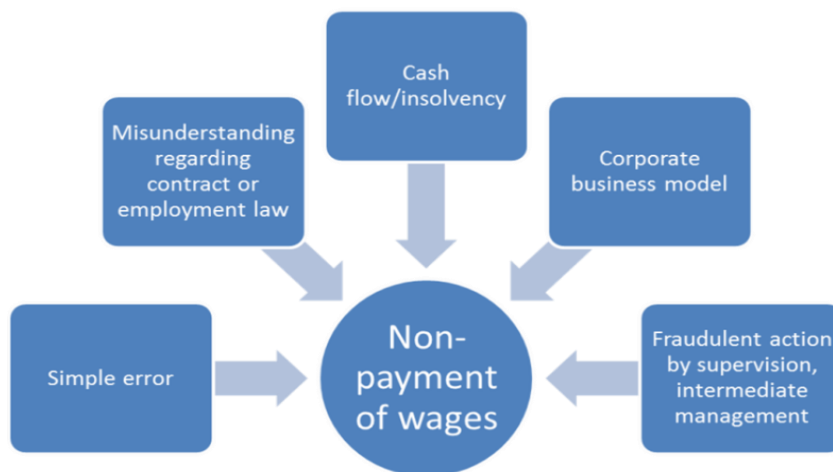
Our working definition is non-payment or delay of all or some of the promised wage (or legal minimum, where higher) for work which has been done (including time during which the worker was exclusively available to work). The wage includes all wages, fees for work, holiday pay and statutory pay (such as sick pay or maternity pay). We did not intend to investigate work for which no payment has been promised (even if it ought to have been) such as unpaid internships or volunteering, but we found it impossible to exclude them, as the blurred boundaries came up repeatedly in interviews.. Freelance or self-employed earnings were included where there was an identifiable employer.

¹ New Testament, James, 5: 4, King James Version

² Similar concerns can be found in the Old Testament (Deuteronomy 24:15, for example), and in the Hadith, perhaps the best known being the exhortation to “pay the labourer his wages before his sweat dries” cited by Abdullaah ibn ‘Umar.

some indication of its occurrence.

The causes for failure to pay can be various, and following chart shows the possible contributory factors identified in the early stages of the research. It should be pointed out that these categories are not mutually exclusive. For example planning for and repeating insolvencies may actually be a business model, as we show with one of our case studies later in the report. The generation of misunderstandings regarding the contract might also be the result of deliberate manipulation of categories to secure a financially favourable arrangement for the employer – such as the misclassification of workers as being self-employed to avoid holiday pay and employers’ National Insurance, for example.



There may also be cases where workers attribute deliberate motives to employers who are simply ill-informed or negligent, or mistake the actions of line managers for corporate policy. These interpretations will be discussed later in this report.

While forced labour will usually including an element of unpaid or underpaid wages, unpaid wages alone do not constitute forced labour. This does not exclude studies of forced labour from providing us with useful insights into models of non-payment, however.

Background

Our research is published at a time of considerable scrutiny of conditions of work, and the laws surrounding them. Key issues are being debated in the courts – over access to justice (Unison’s successful challenge to the imposition of Employment Tribunal fees); or employment status (court decisions over Uber and Pimlico Plumbers, for example). Meanwhile, concerns over workplace practices ranging from zero hours contracts to ‘modern slavery’ have prompted Matthew Taylor’s review of ‘modern’ working practices, the appointment of Kevin Hyland as Anti-Slavery Commissioner, and the establishment of the post of Director of Labour Market Enforcement (Sir David Metcalf) to oversee the now extended Gangmasters and Labour Abuse Authority, the enhanced National Minimum Wage Inspectorate and the Employment Agencies Standards Inspectorate.

The idea that employers might regularly underpay as a matter of policy has not seriously been considered, in the UK at least. It is in this context that we have undertaken to look at how and why workers might not receive pay in exchange for making their labour power available to an employer.

There is a body of research into this topic as it applies in other countries, most notably the USA, but also Australia, China and Russia. For example, activist Kim Bobo's book describes a variety of mechanisms by which workers are denied their entitlements to pay in the USA. While some of these (such as failing to pay enhanced overtime rates as required by the federal Fair Labor Standards Act) are specific to the US context, many (employers not paying for all hours worked, or not understanding their legal obligations, for example) could just as easily apply in UK (Bobo 2008).

Previous UK research

A historical study of withholding of wages in Britain examined the history of payment through "truck" (that is, payment with goods or credit in the employer's shop rather than cash) up to the nineteenth century (Hilton 1960). This practice often resulted in workers receiving less than was specified in law or agreements, and Hilton suggests several underlying reasons for this including "simple criminality" and circumvention of statutory pay rates.

A more recent study of experience in Britain was a survey of low paid workers conducted by Anna Pollert and others in 2004 (the Unrepresented Worker Survey). Based on an extensive telephone survey, this found that of work-related problems, those concerning pay had been experienced by 36% in the preceding three years (Pollert 2007). We have also seen occasional reports from Citizens Advice highlighting issues such as unpaid wages, holidays and false self-employment as they have presented through CA clients.

The Low Pay Commission focuses, of necessity, on "non-compliance" with the National Minimum Wage, so focus exclusively on low paid workers. They report (LPC 2016) that the government consider that the majority of non-compliance is "*made up of inadvertent and/or accidental mistakes*" (para 8.10). More recently, however, their approach seems to have shifted slightly, and more serious consideration has been given to deliberate non-compliance (LPC 2017).

London

Particular attention has been paid in our report to unpaid wages in the London labour market. This reflects the source of external funding (Trust for London), the location of our university, and as it turns out, the labour market in which many of our students attempt to support themselves during their studies.

Much of the data we consider is national in its scope, but we have drawn out some findings of particular significance for London. The ET cases examined were drawn from offices covering London (although there is some overlap of these with bordering regions), and the case studies are mostly London-based. We have also looked at London employers listed by HMRC as being non-compliant with the National Minimum Wage.

One reason that wage default is of particular importance in London is the growth of in-work poverty detectable here. According to the latest London Poverty Profile, 58% of Londoners in poverty are actually in a working household, a proportion which is described as "an all-time high" (Tinson et al

2017). For workers in these circumstances, even small reductions in what is paid to them can have catastrophic consequences.

Project funding and management

The project has been supported jointly by the Middlesex University Business School, and Trust for London. An Advisory Group consisting of academics and practitioners in the field has provided guidance and oversight, meeting six times over the course of the project. Some of the members have had to stand down during the project due to changes in their situation, but all have contributed significantly to the project.

Project Advisory Group (PAG) members

Prof. Bridget Anderson, Bristol University

Daniel Bamford, Head of Operations Citizens Advice Barnet

Michael Dooley, GMB Organiser (until 2016)

Carolina Gottardo, Latin American Women's Rights Service (LAWRS) (until early 2017)

Lucila Granada, Director of the Latin American Women's Rights Service (LAWRS) (from early 2017)

Mark Heath, Gangmasters and Labour Abuse Authority

Prof. Philip James, Professor of Employment Relations at Middlesex University

Megan Jarvey, CPAG

Jo Seery, Thompsons Solicitors

Dave Turnbull, Unite Regional Officer

Throughout the project, findings and observations have been published on the Unpaid Britain blog (www.unpaidbritain.org), including contributions from members of the PAG and invited guest contributors.

Anticipated use of results

Despite the support of our sponsoring organisations, the work of two individuals for two years can only hope to scratch at the surface of a subject which has not previously be subject to scrutiny.

Gaps in the data and methodological weaknesses are therefore inevitable. However the effects we show are of sufficient magnitude to warrant further research as well as policy responses. In meantime, we have secured the agreement of a small group of experts to form an Implementation Group who will oversee, for the next year, our efforts to translate our research and recommendations into practical policies. The deliberations and conclusions of this group will be published on the Unpaid Britain blog.

Methods

A summary of the methods used in the project follows, and further details are available from the authors.

Data sources

In the absence of specific data on unpaid wages, Unpaid Britain used a number of official data sources: the Labour Force and Family Resources Surveys to identify economic sectors with the highest tendency to abuse workers' rights, the periodic BEIS lists of National Minimum Wage offenders, Insolvency Service data (secured through FoI requests) on payments to workers affected by insolvency of their employer, HMCTS data on Employment Tribunal claims, the 2013 Survey of

Employment Tribunal Applications, and ACAS data on conciliation. In addition, the Gangmasters Licensing Authority, Barnet Citizens Advice Bureau, Lambeth Law Centre and the Chartered Institute of Payroll Professionals have all permitted access to survey, administrative or casework data. We have also used the Unrepresented Workers Survey data deposited at the ONS by Professor Anna Pollert.

The Labour Force Survey (LFS) asks if respondents were paid other than the normal amount on their most recent pay date, and if so seeks reasons for this. But only 4.0% say their pay was not normal, of which less than a third (31%) say they were paid less. The most common reasons for lower pay were maternity pay, “other reasons” or working fewer hours. This could mean that non-payment is rare, but it might also signify that some respondents regularly experience unpaid (or underpaid) wages, thus rendering the occurrence unremarkable; have earnings which are so variable as to make such a statement meaningless (such as agency or zero hours workers for example); or are categorised as self-employed and therefore not asked the question.

Two other forms of unpaid (or underpaid) wages are recorded in official survey data. Detected non-compliance with the minimum wage is reported by HMRC; and reports of unpaid overtime are recorded in the Labour Force Survey (LFS). The former has been considered in some detail in work commissioned by the Low Pay Commission and BIS. Evidence to the 2016 LPC said that £3.3m had been recovered on behalf of 26,000 workers in 2014/15 (BIS, 2015).

The latter has had considerably less attention outside of an annual press release from the Trades Union Congress on “work your proper hours day”, but Bell and Hart (1999) examined LFS data in detail, testing a number of scenarios to explain why workers might agree to work unpaid overtime, but in examining only the workers’ motivations, did not consider that employers’ deliberate failure to pay might be one of them.

LFS respondents who are employed are asked about holiday entitlement, and those reporting none are of particular interest to this project. Other indicators examined were the presence of zero hours contracts (ZHCs) in LFS responses, and from the Family Resource Survey, the non-provision of payslips, and the extent of low-paid self-employment.

Primary research

A sample of Employment Tribunal (ET) judgements from London tribunals relating to cases which included a claim under the jurisdiction for “unlawful deductions” was taken. We took every 10th case from 2012 and every 5th case from the much smaller 2014 cohort³.

The ET judgements register can only be accessed at Bury St Edmunds on computer terminals that do not have internet access or any way to download information.

Only cases which make it as far as the setting of a hearing date are included in the publicly accessible data. Claims registered but settled or withdrawn before that leave no record. The electronic record for each judgement shows where the paper copy of the judgement has been filed, and carries a summary of the decision (not always accurately, we found).

³ Cases with more than ten claimants were excluded, on the grounds that the chosen jurisdictions might reflect professional litigation strategies.

Cases were sought from three London ET offices (Central, East and South) and Watford (where claims from North London are heard). 2012 was chosen as this was the last full year before ET fees were introduced, while 2014 was the only year for which we could access full sets of judgements post-fees. Data was recorded regarding the number of cases, jurisdictions, location, date, claimant's name and respondent's name (later used to identify the company on CH) and outcomes. In all we identified 735 cases of which 494 were from 2012 and 241 were from 2014. Copies of the judgements were located and scanned.

The type of employer was recorded (public sector, private sector company, charity or third sector organisation, individual). The Companies House records for private companies were consulted, and the details of the company's status (live, dissolved, insolvent) recorded, as well as details of the directors and ultimate ownership.

Interviews

In all, 44 semi-structured interviews were conducted, with Key Informants, workers, employers, and third parties (union officers, lawyers). Key Informants were selected for their specialist knowledge regarding particular aspects of the issue (of specific sectors, or the operation of regulations, for example). Case study interviewees were located through direct approach based on certain sectors, via the project blog, or through other interviewees. Most were conducted face to face, though some took place over the phone. Three involved the use of consecutive interpreting from Spanish. All were recorded and transcribed, and identifiers removed to ensure anonymity.

Transcriptions were analysed using NVivo10 software. The factors used for this analysis are available from the authors.

Case studies

Data alone cannot reveal the underlying causes, responses, justifications and even shame that surround unpaid wages. A series of case studies (mostly from London), were chosen to illustrate the variety of ways in which wages come to be unpaid, and the sectors in which this is most likely. These combined interviews with documentary sources, including on occasion ET judgements and court papers, as well as contracts, correspondence and other research reports. Case studies were prepared with the use of a template to assist the collection of relevant background data relating to the sector or employer. Two of the case studies deal with specific aspects of unpaid wages which emerged during the research – National Minimum Wage enforcement, and the use of false self-employment. More detailed versions of these case studies will be published over the early months of 2018 on the project blog.

Legal rights and their enforcement

The right to be paid a wage arises through both contract and employment law. Contract terms can be enforced through the County Court system, but breaches of employment contracts can also be pursued through Employment Tribunals (ETs).

Employment law adds the right not to have unauthorised deductions made, and NMW regulations specify a minimum hourly rate of pay (as well as limits on the amount that can be deducted for rent). These cannot be undercut by contracts (unless the worker is genuinely self-employed). In addition

Working Time Regulations establish minimum rights for paid holidays (5.6 weeks per year, 12.07% of earnings where these are highly variable). Again these form a contractual floor for all workers⁴.

Workers who do not receive their wages or outstanding holiday pay because their employer has become insolvent are entitled to at least some of the outstanding sum from the National Insurance Fund, administered by the Insolvency Service⁵. Claims must be submitted through the Insolvency Practitioner (IP) appointed to wind up the employer's affairs (and if possible pay the creditors).

All of these rights depend on there being a lawful contract in place. This does not mean that the terms have to be written down in order for them to be enforceable, but it does require that the contract has not been designed for an unlawful purpose. One example would be to evade income tax or National Insurance; another would be to provide work for someone not entitled to work in the UK.

Where wages fall below the National Minimum Wage (NMW), the NMW Inspectorate, based in HMRC, can require the payment of any arrears (subject to certain time limits). This requires them to have carried out some investigation, usually based on individual complaints (made via ACAS) or on intelligence received. HMRC can also levy fines for non-payment of the minimum wage.

HMRC also handle complaints regarding non-payment of statutory payments (such as Statutory Sick Pay or Statutory Maternity Pay), and can order their payment.

Labour agencies operating in the sectors regulated by the Gangmasters and Labour Abuse Authority (GLAA) may be required to make good any underpayment as a condition of keeping their license to operate.

Apart from these routes, workers' and employees' principal route to enforcing their right to be paid (including their right to paid holidays) is via the Employment Tribunal (ET) system. Before any case can proceed to an ET, the complaint must first be subject to conciliation by ACAS. According to their statistics for 2015/16, ACAS brokered agreements in 13% out of 41,000 'fast track' cases⁶, which are mostly unpaid wage and holiday claims. This is not the same as securing the workers' full entitlements, since one of the incentives for employers to settle must be that it costs less than having judgement against them, although there is also the potential cost of legal representation and management time to be considered. However, the record of payment to workers of sums agreed in settlements is good. However, even where a worker obtains judgment in an ET, the likelihood of receiving all of any award is only about 50%.

The self-employed cannot use the ET system unless they can demonstrate that they are in fact employees or workers (for a temporary agency for example). If not, the only route for recovery of their unpaid wages is via the County Court system, where claims are classified as "money claims" and cannot (for the moment at least) be distinguished from other debts pursued in County Courts.

⁴ There are slightly different definitions of "worker" (as distinct from employee) applying to the Minimum Wage and Working Time Regulations.

⁵ Although there are some exceptions to this, where there have been Creditors Voluntary Arrangements (CVAs).

⁶ 12% proceeded to an ET claim while 75% did neither.

In work carried out by one of the authors some years ago (Clark 2013), estimates were reported that an employer could expect being visited by a minimum wage inspector once every 320 years, an employment agency being inspected by EASI once every 39 years. It was also pointed out that the chance of an employer being detected underpaying the NMW was about half the chance of being detected employing a worker who was not entitled to work under immigration rules.

However, there have been important changes since then. The NMW Inspectorate have had an increase in resources, and are now conducting targeted inspections; fees for ET claims and hearings have been ruled unlawful (at least for the present); and enforcement bodies have been brought together under the new Director of Labour Market Enforcement, Sir David Metcalf, who is shortly to announce his strategy for improving enforcement.

It is worth pointing out that our evaluation of enforcement methods is based on answering the simple question “did the worker actually receive the money they were owed?” Identifying outstanding sums, making awards in courts and tribunals, levying fines or even securing prison sentences in the most extreme cases do not in themselves give a positive response to this question. Indeed, from some of our interviews, it is a question seldom asked by the judiciary or regulators. We would argue that for the workers themselves, it is a crucial one. As one of our Key Informants (who works with trafficked people) said, “*human dignity involves getting paid.*”

Data analysis

Key Informant interviews and our examination of Employment Tribunal judgements suggest that unpaid wages may present in several forms simultaneously (combinations of deductions from wages, unpaid overtime, withholding holiday pay, failing to pay statutory pay, or paying allegedly “self-employed” workers below the NMW), and be accompanied by other abuses of workers’ rights such as failure to provide payslips or written terms of employment.

This is supported by data from the Unrepresented Workers Survey (Pollert, 2005), and from the Citizens Advice (CA) enquiries database. These confirm that problems at work, including those relating to pay, come in packs. The 2015 CA data, for example suggests that 57% of those clients raising wage and payslip problems with advisors had other employment concerns, including problems with holiday entitlements and unlawful deductions from wages.⁷ So in the absence of comprehensive data indicating non-payment, we have looked for related data which could indicate the likelihood of non-payment.

Labour Force Survey and Family Resource Survey data⁸

Both of these substantial government household surveys examine some elements of employment relationships. Three measures indicating breaches of employment rights have been identified – unpaid overtime, failure to provide payslips, and no provision of paid holidays. In the latter two cases, these are unlawful, while the former case might represent a breach of contract, but would only be automatically unlawful where the additional unpaid hours took the worker’s hourly pay below the NMW. A further two measures, while not formally representing a breach of contract or employment law, have been taken as indicative of intensified pressure: zero hours contracts, and

⁷ Author’s calculations from Citizens Advice administrative data.

⁸ Relating to low paid self-employment, non-provision of payslips, unpaid overtime, zero hours contracts, and failure to provide paid holidays.

high levels of low paid workers classified as self-employed. In the latter case, this has been assumed to be a likely accompaniment to false self-employment (this is discussed further below).

Payslips

The Family Resources Survey (FRS) is a continuous survey of 19,000 households which is published once a year. In 2011/12 it began distinguishing between respondents who did not have a payslip, because the employer provided one in an electronic form, and those whose employers did not provide one at all. This is the only available source of data regarding non-provision of payslips.

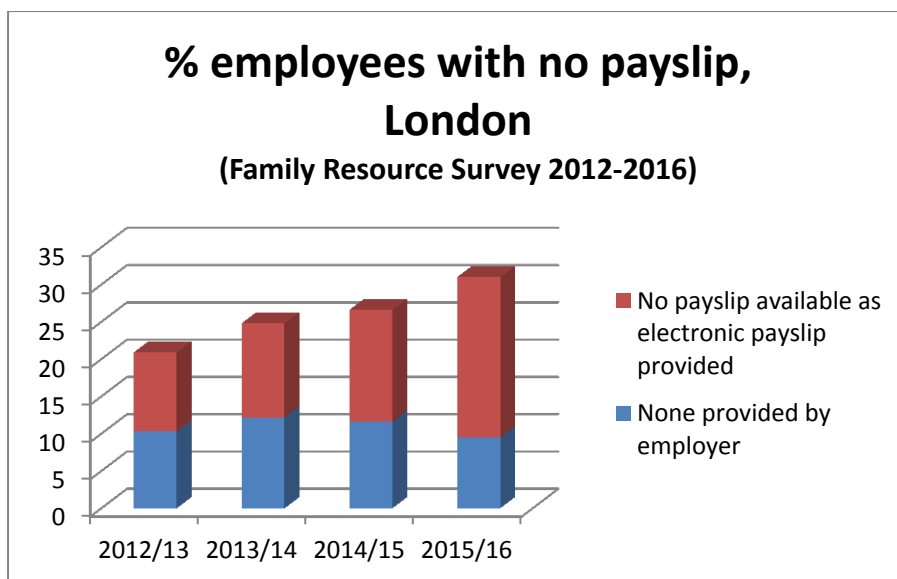
The law requires that employees receive a written statement of gross pay, deductions and the net amount. Where the payslip also includes details of hours worked, it can help workers to either verify their pay, or identify discrepancies between their employers' records and their own. However, this is not currently a requirement under the law. This has been identified by unions in particular as a shortcoming which can contribute to non-compliance with the National Minimum Wage, leading the Low Pay Commission to invite the government to review *"...the current obligations on employers regarding provision of payslips and consider[s] introducing a requirement that payslips of hourly-paid staff clearly state the hours they are being paid for"* (LPC 2016, para 8.77). It is also not a requirement for workers who are not employees, although the GLA licensing standards do include a requirement to do so:

"2.4 Payslips

A licence holder must provide workers with itemised payslips at or before the time when wages or salary is paid. Please note the payslip should contain the gross and net amount of wages or salary and the amounts and purposes of any deductions". GLA Licensing Standards

8% report that their employer does not provide a payslip, ranging from 0% in extraction of crude petroleum and natural gas up to 21.3% in domestic households.

In the context of London, the proportion reporting that they do not receive a physical payslip has risen rapidly of late and while the proportion receiving no payslip is higher than the national average at 9.5%, the driver of growth is the increase in electronic provision, which at 21.5% is the highest in the UK. This may also present a problem, as many claims for unpaid wages are presented after the employment relationship has ended, and along with it so will the workers' access to the employer's records of payslips. This necessitates the digital storage of the payslips.



However, one of our Key Informants pointed out some of the problems with this:

“not all employers have access to secure web portals so they would probably look to email payslips. Email isn't a secure method... if they don't store those payslips somewhere else and then they leave, then they haven't got access to those payslips and those payslips have gone... the obvious advantage for an employer is the savings..” KI07

Unpaid overtime

This may reflect a general level of pressure in the workplace, but also breaches of at least some workers' contractual entitlements. Many salaried workers have no strictly limited hours of work but some claim overtime pay in certain circumstances, even if they would not normally be classified as “hourly paid”.

A report of unpaid overtime suggests that workers perceive unfair treatment of some sort, although it might be argued that those whose pay is not calculated by the hour (that is, are salaried) have suffered no loss through working additional hours. However, low salaries and/or excessive hours can result in the effective hourly rate of pay falling below the National Minimum Wage. The Low Pay Commission's recent report on minimum wage non-compliance estimated that, based on ASHE⁹ data for 2016, 44% of those thought to be paid less than the NMW were salaried, rather than hourly paid, leading them to conclude that *“low-paid salaried workers are at particular risk of underpayment”* (LPC 2017).

Absence of paid holidays

The LFS questionnaire also asks workers how many days of paid annual leave they are entitled to. Since the number of days of entitlement per year might vary according to the number of days in a typical working week, or in line with work contracts, it is not possible to be certain if the precise number reported in the LFS matches each individual's legal or contractual entitlement. However, about 5% of respondents in employment report that they have no entitlement to paid holidays.

⁹ Annual Survey of Hours and Earnings

The Working Time Regulations (WTR) entitle all workers to 5.6 weeks paid holiday per year. It therefore follows that those workers reporting no entitlement to paid holidays have been denied a right. Some may not expect paid holidays, and then receive them, but one might expect most of these to fall in the “don’t know” category.

A significant group was recorded as “don’t know/refused”. There appears to be a correlation between sectors with a high proportion not knowing and those with relatively high proportions reporting no holidays, and this may merit further investigation. If we look at workers who are also full time students, for example, we find very levels of both ignorance and absence of paid holidays. These workers are concentrated in certain sectors, such as “food and beverage services”, but even here, the students know less of, and more often receive no, paid holidays than workers who are not students. In quarter 4 of 2014, 5% of employees reported receiving no paid holidays, ranging from 0% (in ‘Manufacture of electrical equipment’) up to 18.4% (in ‘Sports, amusements and recreation’). A further 15.4% reported that they did not know their entitlement (or failed to respond).

Zero hours contracts (ZHCs).

While ZHCs are not unlawful, by not committing the employer to provide a certain minimum level of payment per pay period they blur other entitlements such as that to holiday pay, and the variability of hours renders under-recording (and therefore underpaying) of hours more feasible. The LFS may undercount this - overall, only 1.8% of those in employment reported having a ZHC, but this ranged from 0% in mining support services, up to 9.2% in security and investigation activities. This practice is concentrated in just a few sectors.

Low paid self-employment.

Operating on the assumption that work falsely classified as self-employment by employers wishing to reduce labour costs (as opposed to genuine self-employment) is likely to be low paid, the FRS permits the identification of the extent of low-paid self-employment by sector, indicating the likely presence of “bogus” self-employment.

As long ago as 1999, ambiguity over employment status was reported as infecting the British labour market. A study conducted by Cambridge University academics with the DTI suggested that as much as 30% of the UK labour force “was employed under terms and conditions which created some degree of uncertainty over their employment status” (Burchell et al, 1999;). Recent high profile cases like the Uber employment tribunal claim on drivers’ employed status and the Appeal Court judgement on Pimlico Plumbers (discrimination on grounds of disability, holiday pay and deductions from wages) demonstrate that employers wishing to drive down labour costs can turn to employment disguised as “self-employment”. The EAT judgement in the Pimlico case (subsequently endorsed by the Appeal Court), for example pointed out:

“Pimlico Plumbers arranged a carefully choreographed set of procedures and contractual documents designed to negate the appearance given to the public at large and its customers and to present its operatives as self-employed in business on their own account...the Respondent saw that it was in its best commercial interests for its operatives to be treated as self-employed and in business on their own account for the purposes of its relations with HMRC and in relation to legal proceedings.”¹⁰

¹⁰ Pimlico Plumbers Ltd v G Smith UKEAT/0495/12/DM para 43

The extent to which each of these practices is detectable in the statistics is shown below, for the period 2012-2016. Two conclusions may be drawn from these figures. Firstly, while ZHCs have attracted a lot of attention, they are far less prevalent than the other practices, notably the arguably unlawful failure to provide payslips or paid holidays.

Secondly, the reported proportions are quite stable, with no marked trends discernible. While this means that the extent to which these practices are deployed is not increasing, they can also be seen as stable features of the British labour market.

It is also worth noting that sectors with a high propensity to use ZHCs displayed lower levels on low-paid self-employment, and *vice versa*. One hypothesis is that both strategies represent employers securing labour power while only paying for it when it is in use, and that use of one precludes the use of the other.

Table 1: Proportion of workforce¹¹ reporting specific employment practices				
Source: Author's calculations from Labour Force Survey ¹² , Family Resource Survey				
Variable	2012/3	2013/4	2014/5	2015/6
No payslip	6.9%	8.0%	8.6%	8.0%
Low-paid self-employment ¹³	7.1%	7.1%	6.1%	6.8%
Zero hours contract	0.8%	1.8%	2.2%	2.4%
Unpaid overtime	14.0%	14.1%	14.3%	14.3%
No paid holidays	5.6%	5.0%	4.9%	5.1%

An index of “employer delinquency”

These five indicators can shed some light onto the variety of practices which might be deployed to separate the worker from what they have rightfully earned. What they cannot do is give us a definite count of abuse, so we opted for a series of inter- sectoral comparisons, allowing us to identify those sectors most likely to display forms of abuse, and therefore the non-payment of wages.

Excluding sectors with too few cases, we scored each sector from 1-10 for each factor, with 10 representing the most abusive. Then we added them together to arrive at an overall “Index of Employer Delinquency”. The top (or perhaps bottom) ten for London are shown below.

Table 2: Top Sectors in London Index of Employer Delinquency	
1	Creative, arts and entertainment activities
2	Food and beverage service activities
3	Other personal service activities
4	Sports activities and amusement and recreation activities
5	Libraries, archives, museums and other cultural

¹¹ Whose employers' SIC is recorded

¹² Oct-Dec quarter in each case

¹³ Full time earnings below 67% of the national median for all full time employees

	activities
6	Other professional, scientific and technical activities
7	Education
8	Advertising and market research
9	Repair of computers and personal and household goods
10	Security and investigation activities

In one sense the overall outcome is probably unsurprising for those who are familiar with employment practices in Britain today. The Index shows service sectors predominating amongst those showing the highest tendency to abuse employment rights.

Pride of place, if that term can be applied in this context went to “Creative, arts and entertainment activities”, where substantial low paid self-employment exists alongside frequent failure to provide paid holidays (these two categories are unlikely to occur in the same individual cases, since the holiday question is posed only to those identifying themselves as employees).

Next, and perhaps most significantly in numerical terms, is “Food and beverage service activities” – restaurants, cafes and bars in other words. Here we see the use of ZHCs assume greater significance than low paid self-employment. Given the size of this sector and its recent growth in London (Keijonen 2015), we have devoted a case study to it, with some specific examples. The following two sectors are “other personal services” (which includes hairdressing and nail salons) and another cultural area – sports and entertainments.

ET judgements and Companies House data

HM Courts and Tribunals Service publish a count of the number of cases accepted by Employment Tribunals (ETs), and count these by the type of complaint (“jurisdiction”), and a separate count of tribunal outcomes by jurisdiction.

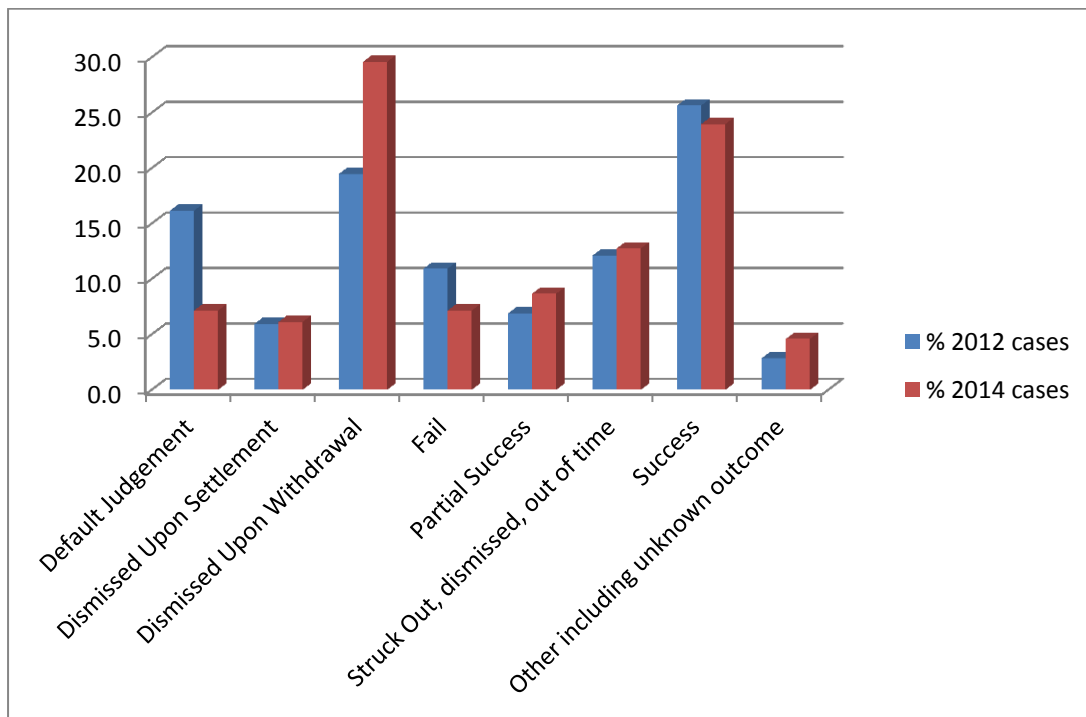
Our analysis of Employment Tribunal judgements was drawn from London tribunals only, and therefore gives us a handy comparison with the national index above. Where possible, we identified the employer’s economic sector (Table 3) which shows some overlap with those in Table 2 above. The most notable coincidence is ‘food and drink services’. This sector, which is a major employer in London, is clearly exhibiting a variety of practices which deprive the workforce of their rights. ‘Construction’ is more prominent in Table 3 than in the Index, but it is not clear that this represents a particular London issue – it may reflect the frequency with which challenges are made at ETs against workers’ alleged self-employed status (relating to holidays and minimum wage). ‘Other business services’ will include contract cleaning, but the category of ‘HQs and consultancy’ seems to be used by directors registering companies as something of a catch-all, perhaps to disguise actual activities

Sector	No cases
Food and drink services	51
Construction	40
Other business services n.e.c.	36
HQs and management consultancy	33
Transport	31
Retail	29
Education	24

Manufacturing	24
Wholesale	23
Employment activities	18
Professional & technical services	18
Facilities management	16
Investigation & security	16
Other services	15

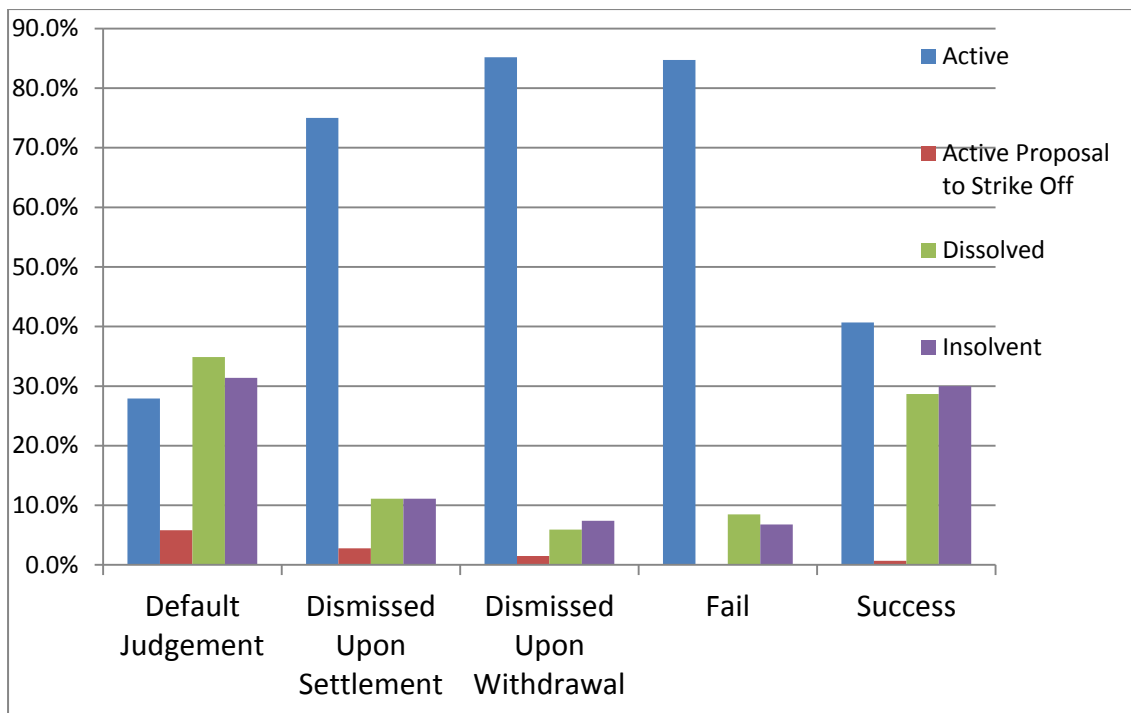
In our sample of London ET cases including “deductions from wages” and lodged in 2012 and 2014, only 36% of private sector employers remained active at the end of 2016.

The chart below shows the distribution of outcomes for the two years examined. In the context of this analysis, ‘failed’ means the claimant lost at a hearing, and ‘success’ indicates that they won, while partial success means they won at least some of their claim.



The one factor of note is the lower proportion of default judgments and higher proportion of withdrawals in 2014. We suggest that this reflects an increasing caution on the part of claimants reluctant to risk their fees on cases where the employer was unlikely to pay any award, and a greater tendency of employers to wait for the second stage of the fee to be paid before settling.

One of the important issues for us to resolve was the significance of the cases withdrawn. We had noticed that in a minority of these cases, the Employment Judge had noted that the case was withdrawn on settlement. The Companies House register might help us to determine which other groups of companies these cases most resembled based on their subsequent continuation in business. The chart below combines the results from the two years, and displays them by company status for each broad outcome (for the purposes of this analysis the partial successes have been combined with successes, and struck out, dismissed, out of time combined with the other fails).



Companies where there have been default judgements (i.e. the employer did not defend the case) are most like those where the hearing went in favour of the claimant, in that fewer of them are still trading than have ceased to do so. By contrast, those involved in cases where the claimant lost are overwhelmingly still in business, as are those where the case was withdrawn, whether we know this was due to settlement or not.

Our hypothesis is as follows. Companies which expect to meet the terms of any judgement in an ET will assess their prospects of success, and in the case of unpaid wages, this is relatively easy to do. Where they consider the case against from 2013 (just before ET fees) suggest that about 45% of cases lodged with ETs settled through ACAS, and a further 13% were settled privately. This suggests to us that far from being frivolous, insofar as claims for wages are concerned, most are well enough founded to secure a settlement before the hearing, the only question remaining why it was necessary for the matter to go that far in the first place.

Employers taking a less compliant approach to ET judgements may simply not bother to defend them, perhaps paying small sums, or ignoring judgements altogether and then winding the company up if the demands for payment are pursued (or they may already be insolvent). Those going to judgement and losing face the same choice, and clearly only a minority (40%) continue to trade afterwards. We suggest that the high levels of non-payment of judgements come largely from these two groups.

Insolvency Service data

The Insolvency Service administers payments from the National Insurance Fund which are due to workers in companies which become insolvent. These may cover legal minimum entitlements to redundancy pay, notice pay, outstanding wages (to a maximum of eight weeks) and holiday pay (to a maximum of six weeks). In all cases a weeks' pay is subject to the statutory maximum (currently £489, which represents 89% of median full time earnings). Following two EAT judgements in 2013,

payments will not be made to workers who were *not* owed money at the time of a Creditors Voluntary Arrangement (CVA), where the arrangement breaks down and workers are left owed wages some time after the CVA.

A series of Freedom of Information requests succeeded in collecting data on the number claims paid out for unpaid wages and holiday pay, and the total sums involved for 2006/7 to 2015/16. The details are set out in a table in the appendix, but in summary, over that period over half a million workers were paid outstanding wages, and roughly the same number outstanding holiday pay – some will be to the same individuals, but there is not a perfect overlap. The total paid out during this period was £321 million in wages and a further £164 million in holidays.). The peak number of pay-outs was in 2009/10 in the aftermath of the financial crash, when 98,000 holiday claims and 87,000 wages claims were paid.

In the most recent year (2015/16) 35,000 claims for holiday pay and 34,000 claims for wages were paid out, at an average per person of £366 and £761 respectively. To obtain an approximate idea of the amount of unpaid labour this represents, we have divided the average for each year by the statutory maximum for calculating a weeks’ pay in force for the relevant year. The result is remarkably stable at about 1.5 weeks’ wages, and .77 weeks’ holiday pay (just short of 4 days

Minimum Wage offenders in London

In October 2013, a new “name and shame” regime was introduced for employers who had been identified as breaching National Minimum Wage (NMW) regulations. Since then, BEIS has been publishing periodic lists of offenders, the latest of which came out in August 2017.

We have examined the details of the 124 London-based employers so far identified. According to our analysis, these London employers had deprived 16,258 workers of a total of £2,332,000 in minimum wages (an average of about £143 per worker). We have looked at what these cases can reveal about breaches of employment contracts, partly through categorising them by industrial sector, and partly by checking for indicators of company survival.

The offences can be measured on several different scales. The number of offending employers from each sector, the number of workers affected, and the sums of money involved reveal different pictures. If we count the named employers (see table 4), ‘other personal services’ is well ahead with 23, most of which are hairdressers, where there has been a particular focus of enforcement activity.

Table 4	No. employers
Other personal services	23
Food & bev services	18
Retail	11
Education	11
Employment activities	6

Table 5	workers affected
Retail	13307
Security & investigations	2519
Human health	177
Food & bev services	87
Other personal services	62

However, these are small workplaces, so those 17 employers were found to have underpaid only 62 workers. The largest numbers of underpaid workers were found in a largely different group of sectors, led by the retail industry (Table 5). Not surprisingly, it was these sectors which also showed the largest total sums identified as outstanding. The top two sectors are largely accounted for by large employers based in London (but whose affected workforce may be widely distributed).

Table 6	total owed
Security & investigations	£1,742,655.56
Retail	£244,302.49
Food & bev services	£162,039.32
Education	£64965.85
Other personal services	£29744.65

Table 7	av. owed per worker
Residential care	3170.09
Telecommunications	3004.67
Travel agency, tour operators	2732.09
Food & bev services	1862.52
Other wholesale	1585.57

A handful of cases dominate these last two tables: retailers Debenhams (thought to have underpaid workers by one day per year), and Monsoon (who had required staff to repay the company for clothes they were obliged to wear at work); Total Security Services (who claimed to have made “an inadvertent mistake” with a salary sacrifice scheme); and twice-featured San Lorenzo restaurant (who apparently were struggling with family crises).

The sectors showing the highest average sum per worker are again different, led by residential care and telecoms, but these represent only two cases per sector, each involving one worker. ‘Food and beverage services’ features in all the tables. However in this analysis the sector owes its place there to the double appearance of the upmarket San Lorenzo restaurant, found to have underpaid 30 workers in August 2016, and 29 again in February 2017. The retail sector, although showing the second highest total sum outstanding, showed only an average “take” per worker of only £18.36.

This is where the economies of scale come in. If we assume that an employer might want to boost their profits by depressing wages, and that for at least some workers this may involve breaches of employment regulation. For these breaches to be sustainable and substantial, they will ideally represent small sums at the individual worker level, but be widespread and continuous. They should also have a low chance of detection and (in the event of discovery) be plausibly deniable as a deliberate strategy, or incur only negligible penalties.

These figures suggest that the employer wanting to operate a sustainable system would do well to take little and often, since that is where the big money can be found. The exception to this seems to have been the case of TSS (Total Security Systems) Ltd of east London, who had both a large number of workers affected, and a relatively high sum per head (£691.80). This dealt with in a little more detail in the case study on National Minimum Wage recovery.

One other factor Unpaid Britain has been monitoring is the health of companies who have been pointed out by BEIS. Our work on Employment Tribunal (ET) judgements suggests that many of the companies who are judged to owe workers wages, become insolvent or are dissolved, possibly to

avoid payment. Research conducted by Ipsos Mori and Community Links (Ipsos Mori 2012) for the Low Pay Commission found that NMW offending employers were likely to cite affordability as one of the drivers of their failure to pay. Were this to be the case, one might expect a high level of company dissolution amongst employers on the list of NMW offenders. In fact we find that (amongst limited companies) 90% are still active. The comparison is somewhat crude, as it does not take account of time lags or other factors, but it suggests that the requirement on these firms to pay has not pushed them out of business.

The extent of non-payment

The 2013 Survey of Employment Tribunal Applicants (SETA) gives us a glimpse of the demography of those making claims to an ET. Most cases examined had male claimants (57%), but for jurisdictional issues involving unpaid wages, it was higher (62%), and slightly higher (59%) for holiday claims.

While the majority of claimants (52%) were aged over 45, 53% of wage claims were made by workers aged under 45. The vast majority of cases were presented by white claimants (82%), and this was reflected in the proportions claiming either unpaid wages or holidays (80:17 in both cases with the balance preferring not to say). However, bearing in mind that according to the 2011 LFS (DWP 2012), only a little over 10% of those in employment were from ethnic minorities, it seems that non-white workers have a higher likelihood of having wages or holidays unpaid (or at least of taking steps to recover them).

It would be surprising if those taking cases to an ET were truly representative of all those experiencing the breaches complained of. We also need to take into account the likelihood of complaints being made by specific groups. The LPC paper on NMW non-compliance points to a lower than expected frequency of complaints from women workers, given their over-representation in the lowest paid occupations (LPC 2017), which appears to tally with the SETA figures for claims of unpaid wages.

HMCTS

Figures published by HM Courts and Tribunals Service (HMCTS) show that in 2014/15, 28,000 claims were lodged for “unauthorised deductions from wages” – which generally equates to unpaid wages. There were a further 31,000 under the working time regulations, most of which will relate to unpaid holiday entitlement. While some of these figures (10,000 according to HMCTS) relate to group submissions which may reflect a litigation strategy rather than specific individual cases of non-payment, the data will under-count claims including unpaid wages, by counting each claim only once. So an unfair dismissal claim will be counted under that “jurisdiction” only, even if there are also claims for unpaid wages and holiday pay (this appears quite common according to our preliminary examination of Employment Tribunal judgements). It is almost certain that taking into account claims with more than one issue at dispute, unpaid wages is the issue most frequently raised in ETs.

Even if these figures for non-payments due to insolvency, and wage and holiday pay claims to ETs accurately represented the extent of unpaid wages, it would suggest a significant problem. The total of about 100,000 puts the offence on the same level as “robbery”, as reported in the Crime Survey for England and Wales, which registered 106,000 cases in 2014. They are likely to represent only a minority of cases, however due to legal barriers, low levels of enforcement by regulators, workers’ reluctance to pursue some cases and ignorance of their rights (particularly regarding holiday pay).

How much owed to how many?

In our interim report we made some rough estimates as to the size and value of the problem. Since then we have had access to more and better data, which we hope will permit us to make more credible estimates.

The easiest to estimate is probably holiday pay, since we have a consistent time series suggesting that the proportion of workers knowing that would receive no holiday pay is about 5%.

The tables in the appendix have calculated the amounts outstanding, taking into account the full-time/part-time breakdown and average earnings. This suggests that for those describing themselves as in employment, the outstanding holiday pay as at the end of 2015 was £1.2 billion. However, this does not take into account those who describe themselves as self-employed when they are not. Citizens Advice estimate the proportion of these workers falsely described as self-employed at 10%, meaning that another 460,000 workers are missing out on holiday pay, to the approximate value of £590 million. Both of these estimates take a conservative position on the qualifying earnings of the workers concerned, but even adopting the low end as both do, it suggest that £1.8 billion in holiday pay is going unpaid each year, to a total of about 1.8 million workers.

In our interim report, we estimated that the number of cases regarding unpaid wages reaching an ET was in all likelihood a very small proportion of all of those that had experienced it. This is certainly borne out by our interviews, although they are not able to give us a better indicator of precisely what proportion. We must therefore stay with our estimate that for every unpaid wage claim which is identified by HMCTS when lodged, there are another three which form part of a wider claim (for example for unfair dismissal or breach of contract). We also estimate that cases proceeding as far as an ET represent only one in 14 of all cases. This would have taken us to about 1.5 million workers who are owed £1.2 billion based on the median settlement recorded in SETA. However this will only include a minority of all insolvency cases, and we know that £26 million was paid out for unpaid wages in 2015/16. However, more significantly we also know that most NMW claims do not go through the ET process.

The Low Pay Commission, in their recent paper on non-compliance (LPC 2017) estimate that between 300,000 and 580,000 workers may not be paid the appropriate rate of NMW. Given that this is subject to seasonal variation, we should take the lower figure, and multiply it by the average 'arrears' identified by HMRC in their enforcement activity (£177 per worker). This gives us a low end figure of £53 million (the high end would be £100 million).

Putting these figures together, even if unpaid wages were concentrated in the lowest end of the pay spectrum (and we do not know to what extent this is true), somewhere in the region of £1.3 billion in wages is going unpaid each year to a total of 1.8 million workers. This excludes those falsely classified as self-employed and paid below the NMW, those in the informal economy who might not be paid what they were promised, and those who might be self-employed (such as freelancers) but not paid for their work.

From the insolvency Service from our examination of tribunal judgements, we see that there is an overlap between the two groups: most will have experienced both unpaid holidays and other unpaid wages, but the match is not exact. If we make the quite conservative estimate that 10% of those

with unpaid holidays do *not* also have unpaid wages, and *vice versa* we come very close to 2 million workers impacted each year.

Unpaid London

The London labour market has a much higher proportion of workers in financial services than the rest of the economy, and a correspondingly lower proportion of workers in production industries. The high costs of transport and housing tends to fragment the labour market between local jobs and those to which workers have to commute.

Growth of employment in some of those sectors exhibiting abuse of workers' rights suggests that the abuse is not driven by crisis in those sectors. However, for the most part these are not sectors with high GVA per head – except construction (Keijonen 2015).

Unpaid overtime as reported in the LFS is highest in central London – 24% of workers reported working at least some at the end of 2015, while it was above average in Inner London (excluding Central London) at 17% and slightly below in outer London at 12.8%.

Intriguingly, the picture for failure to provide paid holidays shows precisely the reverse: central London is substantially below the overall average at 3.1%, while Inner London (at 6.7%) and Outer London (at 7.5%) were both markedly above the national average of 5.1%. In fact the Inner and Outer London regions were the two highest scoring UK regions in this respect, while Central London was the lowest. We suspect that this reflects the differing industrial compositions, as well as regional as distinct from local labour markets. There is a higher component of migrant¹⁴ labour in London than the rest of the country, but many work in health, education and transport, where collective bargaining is still the rule rather than the exception.

We have seen nothing to suggest that unpaid wages may be more (or less) prevalent in London than elsewhere, but given that there are strong sectoral differences, it is likely that it will take forms which differ from areas with a differing industrial mix.

Summary of Case studies

The following summaries are drawn from longer reports which will be published on the Unpaid Britain blog (www.unpaidbritain.org). They are based on documentary sources (ET judgements, other court reports, Companies House documents, media reports and other research), information requests and interviews. Sources utilised are included in the more detailed reports online, unless they are directly referenced in the summary, in which case they will appear in the Bibliography.

In addition to the sectoral case studies, we have included two where we have examined a particular aspect of unpaid wages. One deals with recovery of unpaid NMW, the other with the construction of sham self-employment. One case study in professional sport has been omitted for reasons of time and space, although some of the content of interviews has been included in the analysis. It will be published in full early in 2018.

¹⁴ That is, born outside the UK

Fringe theatre

The performing arts in London account for over a third of the sector's jobs in Britain, giving the sector a high score on the GLA Economics 'index of specialisation' (Keijonen 2015). It is also in a sector which scores highly on our 'index of employer delinquency', with high levels of low-paid self-employment and a tendency not to provide holiday pay.

A report commissioned by theatre trade associations (Smith 2014) identified 241 "professional" theatres in London, of which 47 are considered to be fringe. At any one point there are 6,500 full time, over 5,000 part time and over 5,000 freelance workers, but only a minority are working in fringe. However many more will carry out some theatre work during a year. Box office takings in 2012/13 were estimated at (2012/13), and while fringe venues are small and account for only 3.6% of seats, London fringe attendances were 586,000 in 2012/13.

The authors of the report claim that fringe productions "*are not making much (if any) profit for anyone involved*" (p.22). However the way in which the authors came to this conclusion is not explained. They also argue "*a large chunk of the fringe theatre which...often doesn't 'employ' anyone in any real legal sense*" (p.10). Only one in five fringe performers on their survey date (5/7/13) was being paid at or above the NMW, but since absence of payment was one of the survey's criteria for inclusion as being fringe, this is scarcely surprising.

There has been an increasingly fierce debate over the issue of payment, with performers' union Equity mounting a campaign arguing for at least the minimum wage to apply¹⁵. Whether this is feasible is hotly contested, with arguments for and against appearing in trade newspaper *The Stage*, cases being taken to Employment Tribunals, and one producer claiming he had been put out of business by paying the NMW.¹⁶

Nevertheless, some companies have signed up to the Equity Fringe Agreement, apparently successfully. In interviews, however, it was argued that this might work with relatively small casts, but with musical theatre productions could not be made to work.

Central to the arguments appears to be whether or not there is an employer as such, particularly in the case of so-called 'profit share' productions. This is complicated by the lack of awareness of the issue on the part of some, as explained by a trade union official:

"many people who come into fringe theatre and end up in a position of being some sort of an employer who have, you know, no malicious intent at all, but are inadvertently contributing to a very serious problem." CSI 17

The notion that there were employers in profit shares was challenged by a theatre maker:

"...although it's convenient to think that there's an employer, kind of an evil Capitalist oppressor in a top hat, withholding your money, that isn't the case". CSI 24

He went on to argue that it was a mutually convenient arrangement for all the company, and that if some might expect to be paid, it was because they hadn't taken the trouble to examine the economic realities of the production they were joining. He was able to share a set of detailed

¹⁵ <https://www.equity.org.uk/campaigns/professionally-made-professionally-paid/>

¹⁶ <https://www.thestage.co.uk/news/2016/taylor-mills-i-went-bust-paying-minimum-wage-on-fringe/>

accounts for a recent production which had indeed shown a profit and therefore paid out several hundred pounds to those taking part.

In this sense, he was presenting something that differed from experiences reported by performers, who rarely saw accounts (and only then when they demanded them), and found them not to include much detail. It was also clear that they had little to do with making decisions about expenditure, ticket price, etc. This, for the union official would be a key test for whether a production would be truly collaborative and therefore appropriate for profit share. When asked how a production might fare if was successful enough to transfer to a larger venue, the theatre maker explained how the relationships might change:

“...in order to sell it that we would have to put a celebrity into the lead. So that would mean unfortunately ...the majority of the cast might be the original cast, but the economic realities would be that someone had to be replaced by a celeb” CSI 24

He considered that it was only at that point that an employer would emerge (a professional producer).

Performers were even more confused as to this point. They weighed up the potential benefits of working for little or no pay, in terms of what sort of exposure it might grant them. They heard the producers or company leadership claim to make no money, or even lose out on productions, but wondered how they could, financially, continue with more if this was the case. The performers themselves would have other, wage earning, work to sustain themselves, sometimes building up savings to take part in another unpaid production.

Mostly they justified the absence of pay in terms of their calling to the stage, even if they thought this was unfair, and made access to the London scene somewhat restricted. At the same time, they questioned their own complicity in it. One said in the space of a few minutes:

“It is totally ridiculous, especially as I've done it for six years now, so I've seen younger colleagues doing it and in some ways I'll say to them 'if you can afford it just do it because you may get more work, whereas if you sit at home waiting for the auditions you can be waiting for months and months.’

“...but I can see that other people have benefitted / are going to be benefitting more than me definitely, and I am being used...”

Performing basically gives me an opportunity to do something that I need to do, regardless of whether I get paid for it or not, and I think that's what gets exploited...” CSI 06

Another felt that even when she felt that she had been misled, she would carry on, because she felt *“you know, I try to be honourable”*.

Having to negotiate this terrain was clearly problematic, and on the occasions that they worked under a union agreement, they seemed to have been much more comfortable. All would have been concerned about the repercussions for their professional standing were they to have taken action to recover unpaid money, although one who had at least threatened recourse to the union and did get the outstanding fee as a result was *“very pleased”* CSI 18.

Food & drink services

In 2013, this sector accounted for 206,000 employee jobs in London – over 6% of jobs in the city, and this has been growing strongly, along with London jobs more generally (Keijonen 2015). The sector features prominently in the various measures we have examined, for example as one where a high proportion of workers report no paid holidays. We have therefore looked at two employers, as well as presenting interviews with chefs and waiting staff from a variety of employers.

Bombay Bicycle Club

Bombay Bicycle Club (BBC) was a chain of London takeaways and delivery kitchens, first established in the mid 1980's as a subsidiary of Clapham House Group. Since then, it has been owned by five different companies and has gone into administration four times. As a result of finding several ET claims against the company during our research, we took a closer look, discovering a complex network of UK and offshore companies, debts and changes of ownership, often accompanied by claims of unpaid wages.

In 2008 all BBC shares were bought by Gourmet Restaurants Ltd, which then went into administration on 16 January 2009. During the company's administration, V8 Gourmet (V8) acquired it for £1,753,969. All employees were supposedly transferred to V8 through TUPE¹⁷, but the administrators received a claim of £4,574.05 from the Redundancy Payments Office in respect of payments made to workers. The administrators were however unable to pay.

At its peak V8 had 370 employees, including 12 take-aways and delivery kitchens. In 2010 the company reported cash flow problems and a loss of 200,000 a month. A winding-up petition was served against the company at the end of February. Following this the company closed unprofitable sites (all the restaurants and half the take away kitchens) and made 100 workers redundant, who were owed arrears of wages and holiday pay. It is unclear whether these workers ever received what they were owed.

In May 2011 the administrators for V8 not having found a buyer for the company, Calleon Ltd came forward as a potential investor, leading to a bank debenture being assigned to them. Calleon appointed new administrators, who decided that the company would be sold to *"maximise realisation for creditors and reduce the level of preferential claims quite significantly as the jobs of over 250 staff could be saved."* In June 2011 BBC was bought by Teak Holdings for £1.5 million paid directly to Calleon Ltd.

Teak Holdings then changed its name to Bombay Bicycle Holdings, registered in the Seychelles. It is unclear who owned Bombay Bicycle Holdings; however a High Court judgement in another matter revealed that Syed Asalat Shabbir Jaffery and Pritpal Gill (Raj Gill) were to be the executive running BBC. In February 2013 Bombay Bicycle Holdings was again wound up in the High Court, following a petition by HMRC.

The administrator for this company noted that the company accounts indicated that no workers were owed money. However Unpaid Britain found seven successful ET claims against BBC in 2012. The workers were owed between 10 and 12 weeks of wages and between five days and 9 weeks of accrued leave each. The claims included failure to pay notice pay, unfair dismissal, and

¹⁷ Transfer of Undertakings (Protection of Employment) Regulations

compensatory award for loss of earnings (travel expenses, loss of wages and loss of stator rights). In 4,4741.13 was judged to be owed. It is however unclear whether these workers were paid what they owed as the administrator reported never receiving these claims.

In 2016 a new company was incorporated in Companies House (CH) under the name “The Bombay Bicycle Club Ltd”. The sole shareholder and director for this company is also the sole shareholder for Calleon Ltd. Documents held at Companies House suggest that the Calleon’s sole purpose is holding the debts of BBC. It must finally be noted that a High Court judgement suggests that the sole shareholder of V8 and the sole shareholder of Calleon are business partners. CH records for BBC and the judgment show that BBC was owned by these business partners, suggesting the directors recorded at CH were not really in control of the company’s activities, and acted as a front for these individuals.

Beach Blanket Babylon

Beach Blanket Babylon (BBB) operates two fashionable London restaurants, one in Shoreditch the other in Notting Hill, which are run by a number of associated companies. The restaurants are owned by Robert Newmark, who has twice been disqualified from being a director of a limited company. In 2015 he was banned for four years following the liquidation of Frontmirror Ltd, which traded as BBB from 2008 to 2012. He had taken out a £280,000 director’s loan from the company (which he did not repay) and the company owed HMRC over £1 million. Then in August 2016 he was again disqualified following the liquidation of Rosslyn Hill Ltd which took over the running of BBB in 2013. It was found that even though he had stopped being a director of this company in 2013 he was still acting as one. He was found to have received £267,463 in payments from the company since this time and that the company again owed almost £1.2 million to HMRC. Although disqualified as a director he remains the ‘person with significant control’ of all the companies that claim to be trading as BBB. He is also acting as sole trader under the Robert Newmark Restaurants, the name on the payslips of the restaurant staff.

Workers in Shoreditch started protesting in May 2017 over £10,000 of wages that they were owed. This however was not the first or only time BBB had not paid staff. During the protest ex-workers informed us that they had not been paid a few years previously. In 2017 alone six people have taken BBB to Employment tribunal who were owed in total £8689.95 in unpaid wages alone (this does not include those who were protesting).

Interviews with workers suggested that non-payment was systematic. Staff would work for 14 days and a payslip would arrive ten days later, noting the hours that they had worked in those 14days. These hours however were often incorrect. The arrival of the payslips did not correspond with the workers receiving the money. The worker would have to go to their managers and ask them for their money, following this a random amount of money would be sporadically paid into their accounts. This however would not equal the full amount that they were owed according to their payslips. By the time their next payslips arrived they would have received a series of small payments however this often did not equate to the full amount they were due according to the previous payslip. This carried on payslip after payslip and the money the company owed the workers would slowly add up.

When workers asked for their money they would often be told that they didn't have the money and they would have to wait. One worker noted:

“they'd say we are going to pay Wednesday and the Wednesday comes, okay fine guys just wait until Friday, [...] it's the weekend, we are going to have a lot of money, we are going to pay you. When Friday comes but yeah you know that [its] Friday, that money doesn't come straight into the account, it takes time, so the first working day is Monday, so you need to wait until next Wednesday. So we still wait for the Wednesday and then two days later it's already the new payslip coming”

Even though they were not being paid properly, workers would stay, in the hope of receiving the money they were owed.

“So [name] stayed,... wishing to get paid that's what happened to everyone, they always promised you that things were going to be better, just this month we are too tight, next month everything is going to be better.” CSI 26

When the workers pushed to be paid they would be told to leave. One worker who was owed over £2000 left the country and never received any of the money he was owed. Those protesting for their wages started after they were sacked after demanding their money. They staged a three-day protest, on the first day of the protest some of the workers were paid all the money the others received some of what they were owed. They were told that they would receive their money the next day, they did not. Following an article by [The Guardian](#) the workers received the majority of the money they were owed.

Chefs in high end restaurants

Two chefs who had worked in Michelin starred restaurants were interviewed and painted a picture of institutionalised abuse, in which a learned culture on the part of head chefs (effectively the manager in a kitchen) of long hours and aggression was combined with a view of professionalism which tolerated this in order to achieve career goals.

*“...did you ever bring it up to him about the non-payment or the underpayment?
Yeah and the answers were always ‘that's just how it is in kitchens’.* CSI 19

The long hours were often not paid, and in one case holidays were also a problem area. Both reported use of payments from the Tronc¹⁸ being used to compensate for overtime, rather than pay them as part of the salary – presumably to evade employer's National Insurance, but also to maintain managerial control over what was essentially a discretionary payment. One reported that excess kitchen wastage was deducted from their Tronc payments.

Both chefs had obviously given considerable thought to why their experiences had arisen. As we often found with other workers, they in part attributed it to themselves (and colleagues):

“I did exactly the same thing that I'm saying they are all idiots for doing, I worked in a place underpaid because I wanted to work in that restaurant” CSI 19

¹⁸ A fund accumulated from customers' tips

“...there is a lot of questioning about why is this happening, why won't anyone do anything about it? ... and then you're like we should do something and then it's like no, no I don't want to do that, you know.” CSI 21

Both had made some attempt to assert their rights, one successfully obtained back pay by writing to the HR department of the hotel where the restaurant had been located, but after he had left the job. He was paid, but received neither response nor payslip. He articulated the way in which he felt HR dealt with issues (such as paying overtime out of Tronc, and not meeting NMW levels):

“So when I told HR all of this stuff they were just like ‘oh we never realised any of this happens’, they just kind of feigned ignorance to the whole thing”. CSI 19

He considered that since pay was being dealt with by the hotel administration, and employment contracts were between kitchen staff and the hotel rather than the restaurant, this was not credible. He also knew (because staff kept a tally, as a form of black humour) that he was the 100th member of kitchen staff to leave over two and a half years – a clear indicator of problems.

Both had experienced the use of withholding pay or imposing extra shifts as means of discipline, with one commenting *“your wages seem to be used as a way of control, rather than trading your time for money”* (CSI 21).

Both expressed conflicting ideas about the inevitability of such treatment, citing their own professionalism as a reason for not having made more of underpayment in the past, and in one case claiming that very little profit was made in high end dining, so not all hours could be paid. To some extent his own actions contradicted this when he argued that a large international company such as the hotel chain should be able to pay at least in line with the law. CSI 21, though, questioned her past acquiescence:

“Why do young kids let people get away with that?...because they're naïve and they don't know their rights, you know. Like I'm older now and I regret all the time I spent inside working for nothing”.

Waiting staff

Several workers interviewed had previous experience of serving in bars and restaurants, but for three, this had been their most recent experience of non-payment. In one (CSI 12), it had been failure to pay holidays, which resulted from rather opaque processes relating to the way in which leave had to be requested. There was no written policy, and staff had zero hours contracts, so it was easy for managers to make the (convenient) assumption that time off requests were simply indicating workers' unavailability for shifts (and so not pay them). Accrued holiday pay was then said to have been surrendered by leave not having been taken before the end of the leave year.

The case of labour hoarding through wage retention is discussed regarding Beach Blanket Babylon above, but workers also reported that the way in which they were required to work was questionable, with breaches of hygiene regulations, and customers' bills being inflated.

Finally, a worker in a small business, a café, found herself working for the owner when she fell slightly behind with the rent in the flat above his café. Thinking she would simply be able to cover

her rent with a few hours work, she found herself working longer and longer hours, well beyond what would have been required to cover rent (even if that had not a breach of the NMW regulations). She was never paid, and when after several, months she pressed her case for the money, she was told to leave the accommodation.

“...when he saw the paper and how many hours I did, he was like oh I can’t afford you to work for me and I’m like you should know this before, you know you get employment of me... He told me you ...and your friend are going to leave this flat at the end of the month...” CSI

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This worker has followed the process of letter, ACAS and tribunal claim, but after being once postponed, the case will not be heard until January 2018. Meanwhile, the business has closed.

Temporary agencies

The agency sector is often regarded as particularly prone to problems for the workforce. Temporary agency workers have rights which are significantly different from employees. In the agriculture and food processing industries agencies (‘gangmasters’) are subject to a licensing regime under the Gangmasters and Labour Abuse Authority (GLAA), with powers of inspection and even arrest. Agencies operating in other sectors fall under the remit of the Employment Agencies Standards Inspectorate, who can also conduct inspections and may recommend prosecution. They also maintain a list of those prohibited from running and employment business. There are currently 14 names on the list.

We have examined two cases in detail. One examines a business which was operating both in and outside of the GLAA regulated sectors, while the other deals with the supply of support workers for students with disabilities by a major international business.

Company-L

Company-L is a temporary employment agency which operated both in the GLAA-regulated sector and unregulated sectors, advertising offices in the Midlands, Norfolk and one shortly to be opening in London. The agency provided staff to agriculture, manufacturing, warehousing and distribution, logistics, administration and hospitality. In 2016 the GLAA revoked Company L’s license to operate in the regulated sectors ‘with immediate effect’. The GLAA found that this company had *“systematically denied money due to their workers using a number of different methods”*, leading to many of their workers being paid less than the National Minimum Wage (NMW), and not receiving their holiday entitlements.

The following details have been drawn from a GLA press release, a Freedom of Information request to the GLAA, Employment Tribunal and Companies House documents, and an interview with a former member of staff.

Investigation

The GLAA investigated Company-L after workers had reported their hours “being chopped”. Payroll records supplied by the company were checked against those obtained from their payroll contractor. It was found that data provided by the company was for only 26% of the relevant workers – those whose records were the most compliant. Those from the payroll contractor showed widespread

underpayments, particularly when the records were compared with timesheets sued for charging the client (the labour user).

In one example these showed the systematic removal of 45 minutes from payroll records, so that workers completing 26.75 hours were paid for 26, while the client was billed for the full amount.

A similar picture was revealed for holiday pay. Records supplied by Company L related to one client only and even then only 20% of the workers on that contract. Examination of the labour user's records revealed over 60 of the workers were owed more than £150 and three workers owed over £500.

The GLAA also examined payroll records for other periods in the financial year 2015/16 and week 52 for workers both within and outside of the regulated sectors. This showed that the same practices were being used in the non-regulated sectors. Over a sample of four weeks, investigators found total underpayments of £941.85, £659.75, £700.37 and £609.37 respectively. If this pattern was to be repeated over the year it would amount to £37,847. The employer would also save 13% in employer's National Insurance contributions, adding a further £4,920.

When examining the leave year of January-December 2014, out of the 195 considered, 161 staff did not receive any holiday pay. Assuming (as the GLAA do) that these workers worked a 37 hour week, had an entitlement of 28 days of paid holiday, and earned the NMW as at October 2014 (£6.50 for over 21s), we calculate that that Company-L may have held back almost £217,000 in holiday pay.

In other words, based on a careful checking of records, this one company was taking from the workforce (most of whom were nominally paid the NMW) about £260,000 each year, quite apart from any surplus generated by lawful means.

Interview with a worker

Following the analysis of the GLAA report on Company-L, Unpaid Britain conducted an interview with a recruitment consultant for the company. This interview allowed us to gain a deeper understanding of the logistics that were behind the non-payment of wages. The interview revealed that the non-payment of wages was deliberate and formed part of the proprietors' business strategy. The worker stated that the proprietor conducted his business in an underhanded manner. The company advertised several different offices when in fact it only had one, where all calls were routed.

No electronic records of workers were maintained. All workers' details were placed on a two sided employee cards, these cards contained their contact details and shifts that they worked. Office staff were told not to place anything onto computers, they believed this was done "if anything went belly up" the proprietor "can shred, burn paper and there's nothing on file".

Like many agencies Company-L advertised for workers even when there were no jobs available. This was done to bank staff and to deal with high turnover. Workers registering with the agency were given a five minute interview in which they had to sign a blank contract, of which they were not given a copy. Recruitment staff were told that they were not allowed to tell the workers what they would be earning, partly because it wasn't known "*what contract [they] you are putting them into*". Recruitment staff were never told about the employment regulations applying to workers they hired.

Agency workers, he said, were not seen as people but numbers that were easily disposed of as soon as they were costing the proprietor too much money:

“It was sort of like in his eyes, it’s black and white you know, I’m here to earn my money and they’re going to earn money for me, so right I’ll get rid of him and get the next one in.”

The proprietor had direct control of everything, but would refuse to communicate with either the clients or the workers. He would hover around the staff and make sure they were doing everything as he wanted. The interviewee felt that he didn’t trust the staff and needed to be in direct control.

“But he would just not let the place run without him being there, he had to be there all the time, you know, to make sure that you’re not ripping him off, but make sure you’re doing everything how he wants.”

Agency drivers were told to send in the hours that they worked via text message by the Saturday of each week, time sheets were then faxed to the company’s clients on the Monday morning for confirmation. Once the client had confirmed the hours the worker had worked, the time sheets would be given to the proprietor, who would check them and make any alterations before they were sent to the payroll company.

If workers didn’t input their legally entitled rest breaks (drivers being entitled to a 45 minute rest break in a shift) and deduct them from the hours worked the proprietor would deduct an hour from their wages. Secondly, when workers did not complete a full week of work or refused a shift, the proprietor would not pay them for the whole week (but would still charge the client for all the hours on the original time sheet).

“he’d obviously charge the clients because they worked them shifts and then it goes into his bank and just keeps, well just keeps.. him happy”

The interviewee felt that the proprietor often used non-payment of wages as a way to punish his workers and noted that the proprietor would *“hold it [pay] back for basically as long as he could get away with it”*. One example he gave was of a worker who was owed £3000 in back pay and accrued leave. The worker wrote many letters to the proprietor to which he did not respond. The worker finally took the claim to ACAS, following which the proprietor paid him everything he owed over a six month period in *“drips and drabs”*. However, he noted that there were those who were discouraged from phoning the office and probably never received any of the money they were owed.

The interviewee noted that the proprietor made it especially difficult for workers to access their accrued annual leave. He noted that if the worker did not use the ‘right terminology’ the worker would be given a day off but not paid their leave. Accessing annual leave was made bureaucratic and workers were often told to contact the payroll company to enquire about leave as no records were kept at Company-L.

The evidence provided by the GLAA shows there to be systematic non-payment, which the employer attempts to disguise in order to avoid detection. This is confirmed by the interview with the worker, revealing deliberate mechanisms to avoid detection and avoid paying workers. On the surface Company-L look like a ‘good’ employer, placing great emphasis on their Corporate Social Responsibility, being accredited with Investors in People, positive about disabled people, and having

been shortlisted for or won awards for their social responsibility. However, Company-L appears to have been involved in strategic non-payment for many years. An ET claim was made against them regarding outstanding holiday pay of £116.88 from 2011 that they did not defend (we are not able to determine if it was paid).

Company B: Student support

This agency provides a service to a number of Universities, many of which are in London. Essentially, it matches students who have qualified for Disabled Student Allowance with non-medical helpers to provide, for example, basic physical assistance, transcription or note-taking or sign language.

While most agency work requires that there is some confirmation from the client of work done (such as signing timesheets), agencies are not supposed to withhold pay on the grounds that the client has not paid them. Ordinarily the client will be another commercial or public sector organisation, but in this case the clients are notionally the students. This can lead to occasional problems with payment being made late where the student either does to confirm that the assistance was provided, or that they had cancelled at short (or no) notice. Deciding to pursue these issues is not a simple matter for the workers:

“it was one person who I didn’t like to push too much because I was in a position that I was reliant on that person for all the work I got, so I couldn’t fall out with that person..” (CSI 10)

The use of an agency inevitably introduces some distance into employment relations, with the ‘triangular’ relationship between worker agency and user (client). In this case, there is the additional vagueness of the role of the host organisation who may not be the client, but was previously the employer. The allocation of helpers to students is notionally arranged by the agency who may not have any presence on campus, so much of the responsibility for liaison with the ‘client’ falls to the support worker (which was previously carried out by the university) – but this time goes unpaid.

A further complication in this case is that the ultimate funder is the state, who has recently reduced the sums made available to students (and thus to the agency and ultimately the workers).

One worker considered herself to be self-employed, even though she received payslips and holiday money, because of other activities she conducted outside of her work for the agency.

Company B was approached for an interview but did not respond

Contract cleaning

In 2014, the Equalities and Human Rights Commission published a report on employment practices in the cleaning sector (Sykes *et al* 2014). This had been prompted by concerns over a sector which employs a higher than average proportion of female, ethnic minority and migrant and older workers, and the disproportionate effect on these groups that poor employment practices might have.

The report noted segregation of workers by national origin (related to word of mouth recruitment practices), frequent reports of unpaid or underpaid wages, a lack of knowledge about companies’ grievance procedures, and a fear of complaining.

As a result, an industry taskforce was set up¹⁹, which in October 2015 launched a series of leaflets, posters and training materials on the theme of ‘know your rights’. In a later evaluation the EHRC pointed to the wide dissemination of the material as evidence of the campaign’s success.

As part of our fieldwork, three interviews were conducted with Latin American women working as cleaners in London. Each had worked for more than one contractor, either because of changes in the identity of a company delivering a contract, or as they sought improved conditions or lost previous post. Their previous and/or current engagement with unions and other advice was notable, but may be down to the fact that these were workers who were engaged enough and confident enough to be in contact with the gatekeeper organisation (LAWRS) and agree to take part in an interview.

Their interviews gave testament to their sense of the pressures they were exposed to as employers tried to cut corners, in National Insurance for example:

“That is the problem now, all company is two hour(s) to fifteen hours...they don’t pay tax” CSI 33

Various types of non-payment were identified: working one or two shifts for which no pay was forthcoming due to the employer not confirming appointment due to an unfavourable CRB report (for cleaning in schools); working additional hours for no pay; having pay stopped apparently as a punishment for whistleblowing and raising pay issues; non-payment of holidays (or national Insurance). Two had been employed by large contracting firms, one by a private household, where the employer’s husband was said to be a QC, but employer’s NI and holiday pay nevertheless went unpaid.

The companies themselves were a mixed bag. One had become insolvent and the contracts transferred to two other companies. However, details on Companies House do not reflect these events even though they took place (and were announced) in June 2016. This means that no insolvency report is available. The new parent was healthy enough to pay the directors over £500,000 in dividends in 2016.

Another had recently been taken over by a South African holding company, although nothing in the records suggested any financial difficulties. The company was rated too small to provide more than a balance sheet, so it was hard to know how much value was being extracted, but their client list included many high end companies, such as ‘blue chip’ companies and luxury brands.

One worker had obtained legal advice from an advice centre, and used ACAS, but also had approached HMRC regarding the PAYE deductions. She had clearly misunderstood the taxation system, and had heard of employers paying workers net of deductions. She had been offered a settlement regarding unpaid holiday pay, but was distrustful because of possible implications for HMRC, and declined it. She was currently guaranteed 20 hours per week, but at NMW this still left her short of the NI contribution threshold so is not building up pension entitlement, and fears she might have to leave the UK. Lengthy processes in obtaining advice had left her out of time to take a claim to an E.

Another had taken an active part in a union campaign which had obtained an increase for all workers on the contract. Through the union she was also able to successfully obtain four months’ pay held

¹⁹ <https://www.equalityhumanrights.com/en/cleaners-rights/cleaning-taskforce>

back (she believed) in response to her activities. Despite her experience, and great cynicism about the company's management and activities, she remained confident:

"The only thing that a person needs to do is to do their work and to not give reasons to be dismissed and have the support of a trade union." CSI 34

The third worker had also approached a union but did not take their recommended action (sending a letter) for fear of hostile response from employer, also sought assistance regarding her benefits. These had been severely cut from £1500 per month to £200 per week, and she feared becoming homeless again. Even a hostile work environment (she had experienced bullying from colleagues) was preferable to living on the streets, which she saw as a distinct possibility.

The lack of clarity as to who is in charge is tangible. This may be the result of extended chains of command, or a deliberate strategy of plausible deniability. One interviewee expressed her suspicions that supervisors had been able to maintain a number of "ghost" workers for whom time sheets were submitted and payment made into accounts controlled by the supervisors. This resulted in increased pressure on the remaining workers to complete tasks, on occasion by working longer hours for no additional pay.

The engagement with unions was notable, one had previously been a member of Unite (of whom she was critical), and was now in the IWGB. Another had approached CAIWU (a breakaway from the IWGB) for assistance. This is an area in which migrant-led organisations spring up in response to the apparent injustices in the sector, but have to rely on charitable funding or crowdfunding to survive.

Also notable was the absence of confidence in employers' internal systems, although one cited favourably the help she had from one manager in dealing with the hostility of another.

Health

The NHS is Britain's largest employer. It is heavily regulated, with almost total coverage by collective bargaining and Pay Review Bodies. It is, by comparison with other sectors, well unionised. This certainly must reduce the incidence of non-payment, and relatively few cases appear at ETs, and in most cases the unpaid wages element is added on to other, more serious issues such as discrimination or unfair dismissal.

However, the fracturing of employment relations through contracting out and privatisation problems can arise. The most striking was reported in the Guardian (2 November 2017) relating to trainee GP's salary payments which were not being made by payroll contractor Capita. In some cases this was causing such hardship that colleagues in GP practices were clubbing together to help pay bills, and some trainees were applying to a charity for emergency assistance. Given that this was a matter being raised with the NHS by the BMA over a year ago²⁰, the continuing failures begin to look like negligence.

Interviews with a healthcare assistant and an employment lawyer specialising in junior hospital doctors' contractual matters showed how even in such regulated environment, there was ample opportunity for at least some work to go unpaid or underpaid through other means.

²⁰ See for example <https://www.bma.org.uk/news/media-centre/press-releases/2016/august/bma-calls-on-capita-and-nhs-england-to-address-problems-with-gp-trainee-reimbursements-to-practices>

Amongst junior doctors, and even consultants, problems arose from a combination of complexity as to the provisions of contracts, and changes brought about by new contractual arrangements being brought in. This might simply lead to errors, but the legal professional when asked if it might also be taken as an opportunity to cut costs said:

“Having been on both sides of these issues, there are certainly considerable cost pressures on Trusts and they are obviously looking for ways to save money and the most obvious way to save money in the case of banding issues, is to not have your rota Band 3” CSI 28

These cost pressures might also lead to reluctance on the part of workers to enforce their rights, even where they are known:

“In an ideal world, um it would be as simple as ringing up the National Minimum Wage helpline for example and saying this is what’s happened, sending in your paperwork and then they’d come into the hospital and they’d go through the books and they’d go right you haven’t paid these, you know you need to give the money back. But then there’s the excuse that there’s no money and also the fact that they’ll get fined as well. So that is not very palatable for a lot of people, including, curiously, me” CSI 08

Another key aspect of the NHS systems was the reliance on software systems to determine appropriate rates of pay, and for the lawyer at least it was clear that on many occasions the health Trusts did not understand how the software worked.

For the healthcare assistant, at the other end of the scale, issues such as working 25 minutes over the end of a shift did not qualify for additional payment whereas 30 minutes would, simply struck her as arbitrary and unfair. Of greater significance was the failure to pay for training which she had to complete in order to be placed on her local Trust’s bank for filling temporary vacancies. It appeared clear that she should have been paid, but was advised both by her local union and by management not to pursue it.

National Minimum Wage recovery

In order to evaluate outcomes of NMW enforcement action, we have had to use documentary sources such as press releases, Companies House records and Insolvency Practitioner reports. This is because even when an employer who has been detected defaulting on the NMW has been publicly named, HMRC consider themselves to be bound by individual confidentiality. They will not, therefore, release further details, even in response to Freedom of Information requests.

In the section on London-based NMW defaulters, we pointed to the example of TSS (Total Security Services) who had been identified as owing £1.74 million to over 2,500 workers. TSS claimed to FM World²¹ that a salary sacrifice scheme was the cause of the underpayment, was aimed to increase workers’ take home pay, but was withdrawn in 2014. This scheme may have been related to the pension scheme, but further details were not available. Two approaches to the company secretary for information were unsuccessful, as no response was received.

The highest paid director of the company received a salary of £2.6m according to the 2014 accounts. These also tell us that at the end of October that year, provision was made for £1,736,000 of “payroll

²¹ <http://www.fm-world.co.uk/news/fm-industry-news/national-living-wage-employers-named-and-shamed/>

liabilities”, closely matching the sum owed to workers according to the NMW offenders list (£1,743,000). In the 2015 accounts, the provision was still there, suggesting that few payments had been made. The recently published 2016 accounts showed that £1.4m of the provision had been ‘utilised’ (although there had been further additions). This could mean that it was at least two years after the underpayment was identified that some of the workers received recompense, and that even then others still remain unpaid. It also suggests that it was not until the company was named that owed money was paid out.

Rather than rely on this one example to test the efficacy of NMW enforcement, we checked out another case in which minimum wage default had been made public. In March 2016, the Insolvency Service announced that Joanne Ward had been disqualified from being a director for six years²², after she was discovered in 2012 not to have paid 12 staff members at her ‘Cygnetts to Swans’ nursery the NMW, dating back to 2010. The company was fined £5,000, but this remained unpaid at the time the company went into liquidation. She was said to have benefitted from the company by £157,600 over the same period.

In September 2014, the owner had proposed a Company Voluntary Arrangement to creditors, which they rejected, following which the company was placed in liquidation. The Insolvency Practitioner (IP) appointed to handle this was not told by Ward of the NMW arrears, but was told instead by HMRC after his appointment. Twelve members of staff were owed a total of £11,800, but by October 2015, only two had made applications to the Insolvency Service for such payments as they might be entitled to. By the time of the IP’s next report (for the period up to October 2016), no preferential claim had been made on behalf of the Redundancy Payments Service (part of the Insolvency Service) for repayment of any funds paid out to former staff. He also reported that the workforce had not registered claims with him for the unpaid NMW, and that at the time there was insufficient money to pay the unsecured creditors (which would include the workers). So again, some three years after the breach was discovered, the outstanding wages remained unpaid.

At this point it is worth noting that in 2015 a “self-correcting mechanism” was introduced whereby employers could avoid being named by voluntarily paying outstanding NMW arrears. The Labour Pains blog²³ pointed out in September 2017 that of the 233 employers identified by HMRC in August, 48 had paid a further £1.27 m in arrears to 18,201 workers, substantially more than was mentioned in the press released details. This must by necessity include some, perhaps mostly, large employers, suggesting that a means has been invented of them keeping their reputations intact when detected in systematic default.

Self-employment and sham self-employment

The proportion of the workforce described as self-employed has been growing, going up by almost a quarter since 2000. This is particularly important in London, where over 20% of those in work are thought to be self-employed. It is estimated that about half of these are low paid, when earnings are calculated on an hourly basis (Broughton & Richards 2016).

²² <https://www.gov.uk/government/news/failure-to-pay-the-minimum-wage-sees-manchester-nursery-owner-banned-for-six-years>

²³ <https://labourpainsblog.com>

However, all is not as it might at first appear. Citizens Advice surveyed 491 clients who described themselves as being self-employed, and concluded that at least 10% were in fact workers or employees (Citizens Advice 2015). Recent ET and Employment Appeal Tribunal decisions (such as in the Uber and Pimlico Plumbers cases) have highlighted the contradictions between employment relations as described in written contracts and as performed in practice. This is not a new phenomenon. In conducting the research for this project we came across ET cases heard in 2011 which examined relationships purporting to be self-employment, concluding that the claimants were in fact workers. In the case of Guiri v. East of England Building Services Ltd (EEBS) and Howe Construction, heard at London South²⁴, the Tribunal decided that attempts to portray the claimant as a subcontractor working through EEBS were “a sham”. Paperwork relating to EEBS and its contract with the claimant “bore no relation whatsoever to the actual contractual terms and legal obligations”. The claimant was awarded £1,764 outstanding holiday pay against the second respondent.

The sham contract with EEBS had included a specific clause that services provided under it should not be subject to NMW or Working Time Regulations (WTR). EEBS were represented in the case by the Managing Director, Nick Pilgrim, who together with Mike Holmes had set up EEBS in 2001. They are still in business promoting “Bespoke Payroll Solutions” the value of which are set out explicitly on their website:

*“It is generally reckoned that the additional payroll burden for employing as opposed to contracting is an increase in payroll costs of between 28 -40%”.*²⁵

They listed National Insurance, holidays and maternity and paternity pay amongst the savings to be made.

Interestingly, also in 2011, one of Mr Holmes’ other enterprises (Reliance Employment Ltd) was also defending a case relating to employment status, this time in Bury St Edmunds²⁶. Again, it was determined that, for the purposes of the WTR, Mr Dakers was a worker, and was awarded £600.88 accrued holiday pay. The judge again suggested that the content of the contract might not reflect the “true intention of the parties or their relationship.” He went on to comment on a clause which required the Claimant to indemnify Reliance against any claim that the worker might make under employment law such as the NMW and WT Regulations. This suggests, he said, “very real ambivalence on the part of the Respondent as to whether this contract does reflect the true intentions of the Claimant.”

Similar clauses appear in the Pimlico case, and even more recently, in a contract provided to us by a worker from a major electrical and telecoms subcontractor, M J Quinn. Again the ‘contractor’ (i.e. worker) is required to indemnify the company against any claim that they might make to be an employee. Even if this is not legally supportable, most workers will not know this, and are likely to be deterred from making any challenge.

Even where workers are aware of the distinctions, they may feel at resolving it is beyond them.

²⁴ Case Number 2349916/2011, heard on 8 July 2011

²⁵ <https://eebs.co.uk/faq/are-there-any-risks-of-these-subcontractors-being-re-classified-as-my-employees/> accessed 17 November 2017

²⁶ Dakers v Reliance Employment Ltd, Case Number 15078/2010, heard 23 May 2011

“...if you were given those shifts could you say I don’t want those shifts...?”

R *In theory yeah you could but in reality you couldn’t, because the nature of being self-employed is that you are apparently able to substitute your own labour.*

INT *And could you substitute your own labour?*

R *No. [Laughs.]”* CSI 4

Discussion

“the idea of employers paying a fair day’s wage in return for a fair day’s work has been the basis of our economic system for generations” Sajid Javid MP²⁷, (BIS & Home Office 2016)

On the face of it, Mr Javid’s statement above simply repeats established common sense. But for many, the bargain he describes might more accurately be described as an aspiration which often remains unmet. Unpaid wages are something that can happen to anyone, though it may be more likely for some than for others. It may also be that certain sectors, or sizes or types of employer are more likely than others to fail to meet their obligations regarding pay. The manner in which wages are unpaid, the frequency and amount can all vary, as can the factors which lead to non-payment. Furthermore, the extent to which there is an effective means of recovering unpaid wages varies, depending on the circumstances, the most important of which are workers’ ability to pay fees, employers’ ability or willingness to pay, and regulators’ ability or willingness to ensure recovery.

Although there is considerable research still to be done on addressing these issues, some tendencies can be identified from our work.

Boundaries

Much in the interviewees’ contributions dealt with their uncertainty about definitions and boundaries, not so much as they might exist in the law and its interpretation, but in their own minds.

CSI05 for example spoke of working for a charity in the “trafficking” sector, with staff frequently going unpaid. The organisation’s CEO failed to see the parallel she attempted to make between the way in which staff went unpaid and the issues over which they were campaigning. A healthcare worker spoke about her belief that there was no distinction between on the job training and work which should be paid, but that workers felt disenfranchised, and as though they ought not to moan. She attributed them the attitude that *“it’s not fair but that’s how it is”* (CSI 08).

Some interviewees expressed uncertainty or doubt over the status of their work: *“it’s not regular work, it’s not really a proper job”* (CSI 13). For students, clashes with studies highlighted their twin and competing identities, one for example talking of their need to reduce working hours to accommodate course work in their final year, which would then inevitably lead to money problems (CSI 15).

One third party interviewee (CSI 17) spoke of their perception of a difference between wages promised and not delivered, or work for which there were no wages (a reference to the practices common in fringe theatre). He tried to draw a line between true collaboration (for which profit share might be appropriate) and professional productions for which pay ought to be available.

²⁷At the time, Secretary of State for Business, Innovation and Skills

Terminology becomes contested in such debates, for example the precise meanings of ‘producer’, ‘deviser’ or ‘theatre maker’. For him, collaboration would imply all the company determining how the money is spent. However, for one who described himself as a theatre maker (CSI 24), there was less clarity as to who might be an employer and who an employee. He considered the working together of actors and directors “*who nobody wants to employ*” as being a “*perfectly symbiotic relationship*”.

One final boundary for this interviewee was between teaching (for money) and performing (perhaps for money). This was also referred to by a union official of a different branch of the entertainment industry, whose members turned to teaching to support them between performances. This found another form of expression in a member of one an entertainment union, who also had a full time post in the public sector. Although there was a union at her workplace, she had not joined it because she had considered her employment there as short term (she had in fact worked for 15 years).

While the law might seek to make a distinction between earnings and fees, not all agree: “*whether it’s as a self-employed contractor or a freelance operative or whatever, it’s still my money for work that I’ve done*” (CSI 23).

CSI 23 (a supporters’ club official) also described his own experience of willingly giving time in an emergency, which similar in some ways to political activity described by one of the student support workers. But certainly each of these interviewees understood the need for their active consent for the work to be truly voluntary, and therefore not requiring payment, rather than an obligation which was much more what had been described in the voluntary sector by CSI 05.

Identifying the ultimate employer also posed problems. The role of the temporary agency, the university, and the student themselves as end user were not well defined for the support workers. The employment lawyer (CSI 27) highlighted the consequence of doctors in training moving from regional training organisations to Trusts in some cases, while others had more consistent arrangements (one trust taking the role of lead employer). This permitted a lot of buck-passing, but also great inconsistency to emerge, impacting on individuals’ earnings which were ostensibly determined by a national structure.

There is also some lack of clarity as to who is in charge, CSI 10 for example said that once hours are allocated via the agency, all chasing of the ultimate client (the student) is down to the worker, whereas once it was the university where the student was studying. The cleaners interviewed were also not always clear who was in charge, sometimes seeing formal supervision only rarely. This is complicated by the identity of their employer changing as contracts were transferred, while the nature and location of their work remained unaltered.

Workers might also face thresholds for specific rates of pay relating to the number of hours worked, such as doctors in training, or the health assistant’s 25 additional minutes of work not qualifying for an overtime payment, while 30 minutes would. One union representative spoke of regular additional work of 20 minutes at the end of the shift in retail, which formally qualified for payment, but was subject to “prior authorisation”.

Several spoke of having conflicted views of employers who they had thought of as friends. This was common in theatre, but also the voluntary sector and even in an agency. The consequences of this

were explained by CSI 06: *“there’s always that social awkwardness of where the line sits and what you’re agreeing to”*.

Consent

Workers, for a variety of reasons, may accept or agree below minimum wage pay and long, indeterminate hours, according to Ram *et al* (2007) in their examination of NMW non-compliance in SMEs (with a particular emphasis on BME-owned businesses). The researchers describe the arrangements they found between workers and their employers as *“a complex blend of co-option and coercion, voluntarism and arm twisting”* (p. 131). This is likely to lead to difficulties in identifying breaches of such contracts.

Some of the KIs mentioned that workers sometimes agreed to sub-legal terms, perhaps as part of avoiding tax, or disrupting benefit payments. Whether workers really have the freedom *not* to accept such terms is open to question, for example because of family obligations or immigration restrictions on working⁶ (see discussion of consent below). But the interviews show that, in the same way that the employment contract arises from an imbalance of economic power, the notion of consent needs to be considered through the same lens.

There is a continuum which begins with the fully informed and free participation of a worker in agreeing an employment contract. Since for most workers the alternative to participation in the labour market is not survival by some other means but destitution, this notion is somewhat idealised, but it is the working hypothesis of much labour market regulation. At the other end is the range of practices now labelled as *“modern slavery”*, such as debt bondage, indenture or forced labour where the worker is compelled by force or threat of force to accept the conditions of work. But in between there are other statuses. One is *“uninformed consent”*, where a worker might agree to terms below their legal entitlement as a consequence of them being unaware of that entitlement. An example would be part-time workers accepting that they do not receive holiday pay, or workers accepting their employers’ assertion that they are self-employed and therefore not entitled to the NMW. Another status might be *“coerced consent”* where a worker accepts terms they know to be below their entitlement because, for example, they face benefits sanctions for refusing an offer of employment, or they fear losing a much-needed job altogether if they complain. Then there is *“collusion”*, where the worker accepts sub-legal terms because they have concluded an unlawful contract in order to avoid PAYE, sustain levels of in-work benefits or evade immigration-related curbs on the right to work. Another form of collusion is the voluntary deferral of wages to help a business start-up, or get over a tough patch. As O’Connell-Davidson has pointed out *“The meaning of “consent” is not fixed. It is imagined in relation to wider ideas about free will, volition and responsibility...”* (O’Connell Davidson 2015)

However consent might have been given, the key consideration in this project is that where consent has freely been given to the non-payment, complaint on the part of the worker is unlikely. Restitution could still arise through the actions of regulators such as the NMWI or the GLA if the non-payment was detected by them (although the NMWI will not act in cases where they believe the contract to be unlawful). Similarly, if consent was uninformed, it is only in the event that the worker realises their entitlement that the possibility of complaint arises.

Features of non-payment

“The profit to be gained...appears to be, to many, a greater temptation than they can resist; they calculate upon the chance of not being found out; and when they see the small amount of penalty and costs, which those who have been convicted have had to pay, they find that if they should be detected there will still be a considerable balance of gain...”²⁸

There are clearly circumstances in which wages are not paid because of matters beyond the employer’s control. Catastrophic failure of a bank’s computer systems could result in wages being unpaid. The failure of a key customer could leave a business so overstretched financially as to lead to insolvency with wages outstanding.

There are also circumstances where wages are unpaid or underpaid as a result of error: the wrong figure entered in a wage run, or a bank account number being incorrectly entered, for example. Other errors might include failure to record birthdays and therefore not pay the correct age-related NMW. There could also be misunderstandings, such as not correctly reflecting bonus pay in holiday pay calculations or a worker not being clear about PAYE and pension deductions. These may be within the employer’s control, but are not the result of any malicious intent.

However, repeated errors or delays in payment say, related to IT or administrative systems for clearing payments to sessional staff (or for paying trainee GPs), indicate either deliberate policy, or negligence. From the point of view of the worker who is waiting for wages, the two are all but indistinguishable, but they might be considered differently from an enforcement perspective. From a health and safety point of view, the consequences of negligence may be fatal, and as Tombs & Whyte (2010) have pointed out “accident” is a term loaded with ideology. It implies that the event could have been neither foreseen nor avoided – which is questionable for both health and safety issues and non-payment of wages.

While we do not know the extent of deliberate non-payment, it certainly occurs, and our data analysis and interviews suggest that it may be widespread. Papers produced regarding NMW non-compliance (Patel 2011, BIS 2014) and reports from our interviewees suggest that deliberate non-payment may itself divide into two categories: one which is sustainable in the long term, the other less so, as it relies on non-payment of all or most of the wage.

The first, sustainable, model would be one that aims to underpay without either displacing the entire workforce or attracting unwanted regulatory attention. Failing to pay accrued holiday pay on workers’ departure or regularly “losing” an hour two per week, but resolving these deficiencies in the event of formal complaint, would fit this category. Interviews described this as a “don’t ask, don’t get” policy or “a numbers game”, but it might also be described as offering “plausible deniability” to the upper echelons of management.

“You know, there are chancers out there in the business where they will let it go to a tribunal or almost to a tribunal hearing and then maybe settle just before the hearing is due to start, so that never gets reported anywhere” KI09, public sector regulator

Employers disappearing while owing wages (known as “knocking” in the construction industry), or dissolving a company which owes wages in order to start up afresh with a new company (“phoenixing”) would fit into the second category, and was mentioned by several interviewees. It has also been suggested as a reason for non-payment of tribunal awards, which is supported by our examination of the fate of employers losing cases at ETs (see above).

²⁸ Factory inspectors’ report of 1856, quoted by Marx in Capital, Vol. 1, p.352.

“The most common reason for non-payment were that the employer against whom the claim was made was now insolvent (37%); however over half of claimants giving this as the reason believed that the company they had worked for was now trading again under a different name or at a different location.” (BIS 2013)

There may be a further dimension which is that of disputed interpretation of contract, agreement, law or indeed fact. This could include for example the payment of travelling time for care workers, which (at least up until there was a judgement on it) it could be argued is subject to interpretation. However, is it really credible that time so clearly devoted to work-related activities could be considered as other than working time? In a case supported by solicitors Leigh Day, a care worker settled for £1,250 for previously unpaid travel time, and withdrew her ET claim. But it was also reported that the parent company, MiHomecare, had estimated that up to £80,000 could be owed to care workers over the three preceding years in the Penarth branch alone.²⁹

Use of payroll contractors can add to the ease with which payment can be withheld, as it facilitates the shuttling of blame for inaccuracies between two entities, until the worker becomes discouraged (or leaves). Lack of facility with the English language, or access to online systems (such as electronic payslips) will exacerbate this. One of the cleaners told us how her lack of English left her reliant on others to know what terms applied (resulting for example in her being denied her taxi fares after late shifts). Similarly, changes in systems when an agency takes over the management of a service such as the provision of student support seem to lead to confusion over lines of command, and responsibility for rectifying errors or delays in payment. Some employers clearly recognise the need to have pay systems which respond rapidly to errors which disadvantage workers, such as those reported by a large temporary labour agency (KI 16) and a civil engineering contractor (CSI 09).

“...a wage query would be um, I worked Monday you’ve only got me down from Tuesday to Friday, so it would be picked apart to find out where. It might be that they were called in by the client. Maybe the client said on Sunday night, I know you’re not needed until Tuesday from the contract manager on site, but can I have you Monday.” KI 16

Genuine errors were thought by some to account for some complaints, and the payroll manager for the contractor (CSI 09) explained that the complexity of their payment system with differing rates and additions depending on the task and contract, made errors inevitable. The key, he said, was to have a system which could respond rapidly to ensure that the worker did not suffer damaging consequences as a result.

Other interviewees reported the practice of making penalty deductions, for example for late arrival, or more often as revenge for leaving or complaining, as well as charges set out in the contracts of the allegedly self-employed who failed to accept assignments.

In the case of Beach Blanket Babylon, it can be credibly suggested that building up arrears in pay may keep workers in place when they might otherwise move on to other jobs, so the practice was effectively labour hoarding (also a feature of some cases of forced labour). It was certainly suggested

²⁹ See: <https://www.leighday.co.uk/News/News-2016/March-2016/Settlement-for-carer-in-legal-action-over-national> accessed 19 November 2017

by some of the workers that they had stayed on in the hope of receiving their outstanding money, although they might not have seen this as a deliberate ploy on the part of their employer.

Most of the interviewees who expressed a view of the motivations of delinquent employers mentioned “greed”, “profit” or just “money”, although they might also mention other factors such as a lack of respect or plain incompetence. However, in terms of measured profits, the industries where the practice seems most prevalent are those where margins are thought to be slim. In the London context, they have also been identified as those with low levels of GVA³⁰ per head (Keijonen 2015). If the aim is the enrichment of a few, having large numbers of workers making a relatively small contribution each would work as well as fewer workers making a larger one.

The various leaks of documents from offshore over the last few years display increasingly complex structures of ownership and intercompany loans designed to obscure ultimate beneficiaries, avoid taxes and ensure that insolvency events do not disrupt the business unduly. While the cases we have examined cannot be claimed as representative (relating as they do to examples of breaches of workers’ rights), it has been notable how often such arrangements have appeared in the companies we have examined, Bombay Bicycle being a case in point.

The linking of managers’ bonuses to the maintenance of pay in a unit or contract to a certain proportion of the income generated can lead to practices which deny workers some of their pay. While work intensification might sometimes achieve this, the practice of extending the working day without paying for that extension is simpler to implement, and probably more measurable – as long as the workers do not object or resist.

Cash flow problems have featured, as in the case of the football club, when the owner ‘turned off the tap’ resulting in there being insufficient funds to pay salaries. We have also heard of start-up funds not being available in the voluntary sector, but staff working on out of commitment to the aims of the organisation. Similar sacrifice has been mentioned with commercial start-ups, but usually in the expectation of payment later on. There was a hint of the same reluctance to demand payment expressed by a health worker painfully aware of the NHS funding crisis. Meanwhile in the case of fringe theatre and profit share, CSI 24 expressed his attitude to performers who don’t understand what is going on regarding the likelihood of having any profit to share: *“they are either lazy or a bit thick”*.

Studies in the US have pointed to dishonesty on the part of supervisors or middle managers which deprived workers of income. The cleaners we spoke to reported some such practices – the retention by a more senior colleague of late night taxi fares provided by the cleaning company, for example, or in another case ‘ghost’ workers kept on the payroll for the benefit of supervisors, with the consequence that real staff had to work harder or longer for the same money.

Attitudes of workers to work and to seeking to enforce rights

The interviews reveal several aspects of the motivations and influences regarding work and the propensity to enforce rights.

³⁰ Gross Value Added

One is associated with identity. This may be self-assigned, workers not seeing their own experience of abuse as valid, their paid work as secondary to other chosen activities (“to pay the bills” CSI 11; “being a performer, it’s so integral to who you are” CSI 18). They may also have competing roles – students for example (“I’d rather obviously do my studies instead of work” CSI 15). Their commitment to the service/product, and feeling a sense of responsibility (e.g. at sports club, junior doctors, and similar approaches reported by Lydia Hayes in her study of care workers (Hayes 2017)) can restrict their sense of justification in pursuing owed money.

Identity can also be assigned by others, as with outsourced workers feeling that they are of less concern to employers (and other workers); or that they are competing with others (*‘apprentices are getting paid far less’*, for example). They feel conflict between their desire to gain experience and references, and their need to be paid. Agencies (or contract cleaners) might promote the idea that many want the work, so temps accept abuse because they fear repercussions.

Another factor is the workers’ attitudes to the process in which they find themselves: *“it’s basically grooming, you are priming people for a life of shit”* CSI 21, but wants nevertheless to run own restaurant, and says even though want to make money, wouldn’t dock wages. CSI 06 speaks of own contrasting attitudes to performing and to promotional work, but goes on to reflect on younger people’s experience of entering labour market, and the extent to which she has become part of the process encouraging non-payment to be accepted. KI13: non-payment is “going to happen at some point”, but again adopts differing approaches to the bread and butter work of teaching, than to the less certain performing where insisting on a contract might their diminish chances of working.

Others displayed very low expectations, with CSI 05 saying *“I am fortunate in that I don’t really get underpaid that much”*. The same interviewee did not at first report prior experience of unpaid work during the interview, until she began to describe work in village shops and pubs where extending the shift beyond the contracted hours did not result in additional pay. She likened this, however, to her partner’s work at a bank where staff were expected to stay late. *“I see that as part and parcel of work and if you have a job you should work hard.”*

Use of advice, advocacy and enforcement

“if there was someone there that could say what you’re doing is illegal, what you’re doing ... Because I used to go down the moral route, but if there had been something there saying like a legality behind it and you could say you know if you don’t pay me this, x, y and z will happen and you will lose your charitable status etc., it would have been helpful.” CSI 05

Unions

Given the strength of the sectoral effect, it is no surprise to see the strong correlation between collective bargaining and lower levels of non-provision of holidays. In 2015, only 2.7% of workers covered by a collective agreement reported no paid holiday entitlement, compared with 6.1% of those who were not covered. Separating cause from effect here is difficult. And there is a directly opposite effect for unpaid overtime, where the proportion reporting it is higher in bargained areas than not. -greater awareness, provision of OT provisions which are not implemented, public service ethos (e.g. NHS, education). Trade union members were much less likely to report having zero hours

contracts – 0.8% of members said they had one, compared with 3.3% of non-members. Again there may be a defensive value in having trade union membership, but it may also be that those with zero hours contracts see less potential value in trade union membership. To some extent this is reflected in the comments made by interviewees when they talked about union membership. Past experience of membership when disciplined (poor), feeling that joining at time of crisis would not result in support being provided, being in “occupational” union (performers) but not in another for their money-making work – even where recognised for bargaining.

Some were unaware of the existence of unions of relevance, or perhaps viewed general unions as too distant:

“A chef’s union. A union I would be on, I would have joined, there is no union for a chef. I would have done it privately, I wouldn’t have put it on my payslip and got it paid out of my payslip at all” CSI 21

Another (CSI 12), however, had experienced the difference of being in a unionised workplace, where failure to pay for time spent on union training was resolved speedily by trade union intervention, where her previous experience had been of powerlessness.

ACAS & CABx

Only a few interviewees referred to experience with CABx, although two had referred to their website for advice. Others knew of ACAS (one as a result of becoming a union rep after her experience of unpaid wages), although they could not always recall the precise name of the organisation, and were vague as to its function, some seeing it as a form of enforcement.

“...he kept on writing nice letters... Then he threatened with the ACAS because he had all the information”. CSI 32

Knowing where to go did not always reassure workers enough to use the mechanisms, though:

“no one wants to bring up the word legislation, no one wants to say oh I spoke to ACAS or I spoke to so and so about my salary”. CSI 21

Unions and legal advisors, however, could see the value of ACAS’s conciliation role in achieving settlements that they considered likely to be paid.

Courts and tribunals

While the professional advisers and representatives were familiar with the procedures and use of ETs, very few of our worker interviewees were. The possibility of making a claim to either Tribunal or County Court was viewed on the whole with great caution. A worker from a professional sports club explained their attempts to use the formal procedures:

“The next step was to write to the Chairman and that was ignored. It basically ended with the final step being taking them to court for a tribunal, which a lot of people were very scared of doing because we all kind of knew that that would mean you were waving goodbye to your job if you were to take them to court”. CSI 20

Similarly a trade union official spoke of the problem posed by workers having to identify themselves in order to take cases to tribunal and more particularly how he was hampered by the “inability of

trade unions to prosecute claims on behalf of groups of workers with any sort of anonymity on these issues” (CSI 17).

One third party interviewee had previously taken a case against a major retailer (‘Retailer S’) for unfair dismissal and failure to pay the last months’ pay. He had lost the claim for dismissal, and was directed back to the ET for the other matters, but personal issues had intervened and he had let the matter drop, but took it up later (and succeeded) in the County Court. His owed wages remained unpaid, however, until he paid the fees to send a bailiff round to the HR department.

Winning a case is sometimes not enough. We pointed to the use of insolvency in the section on ETs, and the complexity of evasive measures sued in the Bombay Bicycle case. A legal professional primarily dealing with the NHS also had an experience with a Tier 2 worker taking a case against a restaurant which summed up much of what we found:

“She’s brought the claim, got the judgement, got her costs and then it comes to enforcement, you’ve got 14 days to pay the judgement. In that 14 days a limited company vanished into smoke.” CSI 28

Fees were mentioned as a disincentive to taking up cases, and the cost of pursuing debts through the county court, too, might be prohibitive:

“a lot of our members fall in the bracket of the case is maybe £600 or £700, and the court fees are probably £100 or so, and any enforcement is £100, so if you need.. I’d say nine times out of ten, if a member gets a judgement against somebody it doesn’t end there. We then have to instruct bailiffs, which is £100 regardless of whether the claim was for £45 or £500” KI 13

However, for the advisors (and perhaps for employers too according to our analysis of ET judgements and the SETA data), proceeding to ET was seen as a precursor to a settlement. A further concern was the stress involved even in simple cases, as one advisor from an NGO put it:

“the employment tribunal is a first tier tribunal, so it’s geared up so that essentially it should be - on paper - accessible for everybody and people should be able to represent themselves. To be honest if I was Joe Public, I don’t know that I would have the confidence to represent myself”. KI 18

Action to recover pay

Despite the fears and concerns expressed over the legitimacy or advisability of pursuing claims for owed wages, there were examples of both individual and collective action to do so. It is worth pointing out that effective action can sometimes be as simple as speaking up (although this might be more likely after that employment has ceased):

“after that I didn’t kind of seek compensation from them or demand it from them, I simply wrote them a letter which outlined how much money, the gap between my amount and their amount was and they paid it without any question”. CSI 19

Similarly an adviser gave us the example of a worker demanding his outstanding holiday pay, which at first the employer’s representative resisted when spoken to on the telephone. But when they

learnt that the worker had kept all documentation to support an ET claim, he was paid (apparently with ill grace).

This is entirely consistent with the 'don't ask, don't get' strategy, which relies on only a minority ever seeking to enforce their rights.

The delays (and failures) inherent in the official routes (procedures, tribunals, Minimum Wage Inspectors) might well act as a disincentive – word of mouth pessimism had clearly reached a few of those workers we interviewed, as had experience:

“It’s so longwinded, like why is it so difficult? ...for me to get my unpaid holiday pay even if I left it you know a month too late, how did they still get away with not paying it?” CSI 12

But there was also a sense of the potential for a better way. One or two had had poor experiences of unions, but seemed to have persisted by trying another. Others felt that 'next time' they would be organised before a problem arose.

Others had pursued cases with the support of a union, like the cleaner who had taken four months to reclaim wages which had been mysteriously unpaid after she was 'accidentally' sent her P45. Four months is still much quicker than an ET or County Court procedure.

Others, like the workers at Beach Blanket Babylon, had taken their case to the street, and while it had taken time for all of them to be paid off, this was measured in weeks, rather than the years identified in the NMW cases above.

Another aspect of collectivism was the development of ideas of solidarity. A worker from the sports club spoke of the way in which those who had been unpaid pulled together in order to get through the tough patch by giving each other moral support – pointing out that even the best paid players tended to commit most of their salary each month, so its absence was as noticeable to them as to the less well paid. One of the cleaners spoke of campaigning with her union to ensure that all workers were paid a higher hourly rate (which had been withheld), even though some of them never knew why the pay had been increased. A waitress spoke of colleagues telling her *“check your ages, check then and check them”* because of the frequency of hours going unpaid (CSI 12). And restaurant workers demonstrating for unpaid wages learnt as they went:

“we were not really that organised and then we started to be organised step by step because we found it’s really effective. So then a lot of people started to show up, to trying to help us”
CSI 26

Finally, one of the performers spoke of examining her own practice of not pursuing pay for her work when she began working with young people who might face the same pressures, and concluded that her continuing such practices might well contribute to their mistreatment in the labour market continuing. Another former bar worker had taken from her own poor experiences the need to resist, and had become active in a local campaign against zero hours contracts in retail.

Conclusions

“We have, in short, been very much in the world of Volume 1 over the past thirty years”³¹

We have avoided being too drawn into a discussion of the novelty of unpaid wages, as them being somehow related to development of a precariat or of the gig-economy. The tendency not to pay has been around for a long time, and without better data, we cannot say that it is getting worse, or indeed, better. We can say, however, that for many workers, it remains unresolved.

Some studies consider the topic of low paid and otherwise poor quality work in terms of personal life trajectories – does the individual move ‘up’ after a period of such work? The implication is that if individuals can escape from ultra-exploitation at some time later in their lives, this work is not problematic, and represents some sort of rite of passage. This ignores however, the (often illegitimate) transfer of surplus from one class to another that is involved. Looked at from the other side of the employment relationship, a constantly replenished supply of over-exploited workers is as good (perhaps even better) than a stable one for the employer for whom this is a business model.

We see ‘Modern Truck’ system in place in some sectors. In place of wages, young workers are offered the ‘three Ex-s’, experience, exposure and exploitation. In interviews, chefs and performers talked in similar terms regarding their chance to work with high profile individuals or at highly rated establishments as being a form of currency in itself. This was justified by a theatre maker. But given that the ultimate customers of these services are the wealthier classes, we would have to see in this the failure of the ‘trickle down’ theory.

We also see workers doubting their own judgement of the rights and wrongs of unpaid work, and harbouring beliefs in the insecurity and unpredictability of the labour market which might not be reflected in reality.

The work contract is often dressed up in other clothing. It might be presented as ‘a foot in the door’, valuable experience, collaboration, friendship and favours, or even as a moral calling. But the ‘don’t ask, don’t get’ (or for that matter DO ask and don’t get) approach is essentially transferring the risk and responsibility of the employment relationship to the worker.

It may be that margins in some of the sectors are tight. However, for the abusive employer, gathering more of the cash generated in a business does not necessarily require profit to be made in the accepted sense. Opaque structures of ownership and debt, which may well lead offshore, will ensure that surplus is protected from reclamation by aggrieved workers or the state.

In some cases, the actions of the state itself lead to the outcomes we have been describing. They may set the terms of the market (as in the case of disabled students’ support provision, for example), but more importantly, they determine the regulatory regime. The resources devoted to detection and enforcement of breaches of employment law, as well as the penalties for breaches will influence the extent to which those breaches represent a good risk for the employer. It is hard to avoid the conclusion that the diminishment of scrutiny of companies and their directors has reached a point when most offences will go both undetected and unpunished.

³¹ David Harvey (2010), *A Companion to Marx’s Capital*, London: Verso, p.246

Economist Joan Robinson's statement that *"The misery of being exploited by capitalists is nothing compared to the misery of not being exploited at all"* (Robinson 1970) is often used to justify all manner of abuses. But it is based on the notion that while the system denies (for those who have only their labour to sell) the means of sustenance to those who do not work, for those who do, work is the route out of poverty. But this notion is turned on its head if, in order to have the chance to be exploited, one must provide labour power for free. This is the lesson which is apparently being passed on to young workers, and is no doubt music to the ears of the abusive employer.

There are striking parallels with corporate tax avoiding behaviour, and in terms of the dynamics of the workplace, some uncomfortable ones with the reports of sexual assault and harassment which are being aired at present. This may help to dispel any lingering doubts regarding the extent of deliberate abuse of employment rights – if the imbalance of power between worker and employer can be deployed for the employers' sexual gratification, why not for their pecuniary advantage?

But those we spoke to were questioning their world view. Some had taken action to recover money, even if it was only to write a letter, while others had gone further, including the Beach Blanket Babylon workers mounting demonstrations. Many looked back on past experiences in the light of experience and saw their non-payment as being abusive.

The problems they face are not primarily to do with clarity regarding their employment status. It is about the capacity to enforce their rights. Most importantly, this means recovering the owed money, in good time. The experiences we have examined demonstrate that for the most part there appears to be no sense of urgency amongst regulators or advisors, or even unions regarding the need to recover unpaid wages. Obtaining favourable judgment years after the event is of limited value, and if this fails to result in restitution, it will be of almost none.

Asserting the rights associated with either employee or worker is, in the absence of collective representation, out of reach for most workers, even after the abolition of ET fees. State agencies' efforts may not result in workers receiving their money – as the cases of NMW non-payment examined showed. These suggest that the capacity of trade unions, advice bodies and individuals to respond quickly with a view to obtaining payment (rather than just a judgment) needs to be improved.

Recommendations: necessary, but not sufficient

Reducing the perception, and reality of risk

The level of ignorance on the part of many workers regarding their rights, the operation of the PAYE system, and possible means of redress when there has been a breach is clearly too high. So too is the sense that demanding one's minimum rights is either over-assertive or risking one's career prospects (or both). Information campaigns alone will not reduce workers' concerns over individual enforcement action, although they are no doubt necessary. Reducing this concern requires still further development of advice and advocacy services, a fresh campaigning approach from unions (and those educating young people of working age), and stronger enforcement. Some of the

practical steps which might help with this are set out below. These will need to be considered in greater detail following the report launch conference.

a. HMRC to pay NMW arrears

The one party most likely to be able to trace underpaid workers is HMRC, through their NI numbers. Relying on the employer to pay arrears, either in a timely matter or at all, is demonstrably failing. If workers knew that they could claim back at least their NMW through the state (and receive it quickly), they might be more persuaded of the value of raising complaints. HMRC can then take on the responsibility for recovering the money from employers.

b. Enforcement

The low proportion of ET awards (and possibly County Court judgements) which are actually paid needs to be addressed. Limits on Insolvency Service pay-outs should be re-evaluated, and the statutory limit raised to at least the median for a weeks' full time pay.

c. Bond/insurance for employers

Employers in sectors where they have little deployed in the way of fixed capital should be required to demonstrate that they can guarantee sufficient variable capital to meet wage obligations. This could be achieved through insurance or the deposit of a bond, and could reduce the extent to which the workforce carries the risk for the enterprise.

d. Penalties for failure to provide paid holidays or payslips,

Enforcement for these key issues is laughable, in that it relies entirely on individual workers to pursue. Even then there is no penalty for holiday pay offences, and very little for payslip ones. Both deterrent penalties and enforcement powers for regulators are needed to plug this gap. Agency and other 'workers' should have the same rights to payslips as employees. Rules should be amended to require the inclusion of hours worked and the hourly pay rate. The provision of electronic payslips should be specifically covered (right to opt out, facilities for printing off and saving, right to access post-employment, for example).

e. Evidence of terms and conditions

Matthew Taylor's suggestion of requiring the provision of a summary of terms and conditions from day one of employment is a good one, but the remedy and penalty for failure to do so must be sufficient to encourage workers to pursue claims, while deterring employers from breach.

f. Use of aggravated breach of rights:

Since April 2014 tribunals can impose penalties on employers thought to have deliberately and excessively breached workers' rights - ranging from £100 to a maximum of £5,000. However, in January 2017, business minister Margot James admitted that just £17,704 has been paid out under this provision. 18 fines were levied against employers, of which 12 had been paid. Means need to be found to bring larger employers with more sophisticated systems of multiple small scale abuses to book. Smaller employers who simply escape fines through abuse of limited

liability and networks of offshore holding companies need to feel more exposed to punitive justice.

g. Students in the labour market

Educational institutions and workers' organisations need to improve their performance in informing younger workers of their rights, and assisting them to enforce them. Most students, especially those from working class families, have to work during their studies. Anything which increases what they receive from this work is likely to improve their ability to concentrate on their studies. It will also diminish the extent to which abusive employers can profit from the students' lack of knowledge and organisation

h. Availability of legal advice

The paucity of free legal advice on employment matters leaves many workers with nowhere to go to help decide on a strategy to recover unpaid wages. This is made worse by the stringent time limits for ET claims. Legal aid needs to be made available for employment matters.

i. Potential to pursue directors considered to have deliberately failed to pay

Current provisions are weak and little utilised. Directors are far more likely to be banned for employing workers without the legal right to work than they are for failing to pay wages or holidays. Limited liability is protecting abusive employers from paying for their misdeeds.

j. Enhanced regulatory regimes for limited companies and their directors,

Directors clearly feel at present that they are at little risk of penalty. Companies House and the Insolvency Service are apparently seriously under-resourced to implement even the light-touch regulation that currently exists.

k. Empower unions to take up cases on behalf of groups of workers

- l. Removing the individual's risk of retribution and blacklisting would encourage greater use of legal routes to deter business model breaches. It would also ensure the applicability of decisions to the wider workforce.

m. Campaigning and naming names

It is no doubt of value for union members to have services which provide support to use official channels for recovering unpaid wages and fees. However, many of the examples we have looked at required a firmer and more high-profile approach. That there were ET cases challenging notional self-employed status over six years ago, while it is only now that the cases of Uber, Pimlico etc. come to attention suggests that a more comprehensive approach to litigation as part of a broader campaign is necessary. These abuses will only be challenged effectively when the workers see some prospect of those challenges bearing fruit. This also suggests that the dictum of 'follow the money' should be adopted. If wages and holiday pay are not going to the workers, it is likely that they are going elsewhere, quite possibly offshore. Highlighting this should also form part of any strategy to deter non-payment, but also to recover pay where deterrence has not worked.

n. A safety net

The benefit system was mentioned in a couple of cases, and the roll out of Universal Credit is likely to make the consequences of drops in pay even more catastrophic. Delays in making changes are also likely to discourage workers from leaving abusive employment, since this might render their financial position even worse.

o. Further areas for research

- a. Analysis of pay cases heard in county courts would add a useful dimension to the research, particularly in adding information regarding frequent offenders.
- b. International comparative work on enforcement and regulation would help to evaluate the effectiveness of various national models.
- c. Loosening the restrictions on access to administrative data on insolvencies, NMW enforcement activities would permit further forensic examination.
- d. The extent of use of pro-forma contracts for supposed self-employment
- e. The relationship between insolvency, unpaid wages and offshore parent companies.

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Appendices

NMW offenders named in London (to August 2017) – summary by sector

Sector	No employ-ers	%	No workers	%	Sum owed (£)	%	av. owed per worker (£)
Residential care	2	2	2	0.0	6340.17	0.28	3170.09
Telecommunications	2	2	2	0.0	6009.34	0.26	3004.67
Travel agency, tour operators	1	1	1	0.0	2732.09	0.12	2732.09
Food & beverage services	18	17	87	0.5	£162,039.32	7.12	1862.52
Other wholesale	3	3	3	0.0	4756.72	0.21	1585.57
Education	11	11	19	0.1	29744.65	1.31	1565.51
Office administration & support	5	5	5	0.0	7378.48	0.32	1475.70
Social work without accommodation	4	4	4	0.0	4945.78	0.22	1236.45
Other personal services	23	22	62	0.4	64965.85	2.86	1047.84
Construction	2	2	3	0.0	2879.3	0.13	959.77
Advertising & market research	4	4	8	0.0	7492.06	0.33	936.51
Head offices & management consulting	2	2	3	0.0	2765.48	0.12	921.83
Real estate	5	5	24	0.1	20567.43	0.90	856.98
Employment activities	6	6	9	0.1	7644.31	0.34	849.37
Accommodation	3	3	5	0.0	3686.21	0.16	737.24
security & investigations	1	1	2519	15.5	1742655.56	76.62	691.80
Sports, amusements and recreation	2	2	2	0.0	1218.73	0.05	609.37
Creative arts & entertainment	2	2	2	0.0	1123.11	0.05	561.56
Land transport	2	2	2	0.0	1064.69	0.05	532.35
Information services	1	1	1	0.0	442.26	0.02	442.26
Financial services (excl. insurance & pensions)	1	1	1	0.0	347.24	0.02	347.24
Legal & accounting	5	5	5	0.0	1270.75	0.06	254.15
Manufacturing	2	2	2	0.0	425.75	0.02	212.88

wholesale, retail & repair of motor vehicles	1	1	1	0.0	126.13	0.01	126.13
Architecture & engineering	1	1	1	0.0	114.01	0.01	114.01
Retail	11	11	13307	82.1	£244,302.49	10.74	18.36
Human health	4	4	177	1.1	2608.92	0.11	14.74
Total	125	100	16,258	100	2,332,378.92	100	143.46

Insolvency

Arrears of Holiday Pay and Wages 2007-2016 (number of claims paid)									
Sources: FOI requests to Insolvency Service									
Year	Holiday pay (claims)	total paid (£)	Average (£)	Wages (claims)	total paid (£)	Average (£)	Statutory limit on week's pay	no weeks wages @ stat limit	no weeks hols @ stat limit
2007/8	46632	11172058	239.58	50123	21524668	429.44	310.00	1.39	0.77
2008/9	99681	23530795	236.06	83988	40394959	480.96	330.00	1.46	0.72
2009/10	98471	26221933	266.29	87125	48805790	560.18	350.00	1.60	0.76
2010/11	70497	22402733	317.78	75810	43172721	569.49	380.00	1.50	0.84
2011/12	61348	19163385	312.37	65569	39468983	601.95	400.00	1.50	0.78
2012/13	59546	20369649.31	342.08	63380	41888682.05	660.91	430.00	1.54	0.80
2013/14	47577	16063954.43	337.64	48113	32266189.57	670.63	450.00	1.49	0.75
2014/15	35547	12586828.83	354.09	38949	28034201.85	719.77	464.00	1.55	0.76
2015/16	35310	12931324.79	366.22	34004	25876292.35	760.98	475.00	1.60	0.77
Totals		164442661.4			321432486.8				

Unpaid holidays 2014, 2015

	number workers LFS Oct-Dec 2014, 2015	av weekly hours (ASHE)	daily rate at NMW Apr; £	annual holiday pay (28 days); £	Prop with no hols, LFS Oct-Dec	workers with no hols (LFS Oct-Dec)	est annual value unpaid holidays (£)
Unpaid holiday pay 2014/15							
Full time	19337000	37.4	48.62	1361.36	2.00%	386740	526492366
Part time	6843000	16.3	21.19	593.32	12.30%	841689	499390917
Total	26180000						1025883284
Unpaid holiday pay 2015/16							
Full time	19636000	37.5	50.25	1407.00	2	392720	552557040
Part time	6925000	19	25.46	712.88	13.1	907175	646706914
Total	26561000						1199263954

List of interviews

Case study interviews (CSI)					
ID: CSI	Job	Sector	Gender	Age	Date of interview
04	Sign Holder	Retail	Female	36-46	09/11/2016
05	Administration Manager	Activities of membership organisations	Female	26-35	15/11/2016
06	Support worker	Education	Female	56-65	09/11/2016
08	Healthcare Assistant	Health	Female	36-45	21/11/2016
09	Payroll Manager	Construction	Male	36-45	03/11/2016
10	Performer	Arts and Entertainment	Female	26-35	04/11/2016
11	Support worker	Education	Male	36-45	11/11/2016
12	Waiter Bartender	Food and Beverage Services	Female	under 25	19/01/2017
13	Support worker	Education	Male	26-35	30/11/2016
14	Invigilator	Education	Female	under 25	20/12/2016
15	Sales Assistant	Retail Fashion	Female	under 25	16/03/2017
17	Official in Workers Organisation	Arts and Entertainment	Male	36-45	19/04/2017
18	Performer	Arts and Entertainment	Female	26-35	11/04/2017

19	Chef	Food and Beverage Services	Male	26-35	05/04/2017
20	Courier driver	Postal and courier activities	Female	46-55	04/04/2017
21	Chef	Food and Beverage Services	Female	36-45	09/05/2017
22	Press/PR	Sports and Leisure	Male	under 25	26/04/2017
23	Supporters Organisation Official	Sports and Leisure	Male	36-45	03/05/2017
24	Theatre Maker	Arts and Entertainment	Male	46-55	03/05/2017
25	Official in workers' Organisation	Sports and Leisure	Male	56-65	08/05/2017
26	Waiter	Food and Beverage Services	Male	36-45	16/05/2017
27	Official in Professional Association	Education	Male	56-65	13/6/2017
28	Legal professional	Health	Female	36-45	29/6/2017
30	Sports lawyer	Sports & leisure	Male	46-55	25/7/2017
31	Waitress	Food and Beverage Services	Female	Under 25	10/8/2017
32	Recruitment consultant	Temporary agency	Male		
33	Cleaner	Contract cleaning	Female	46-55	31/10/2017
34	Cleaner	Contract cleaning	Female	56-65	31/10/2017
35	Cleaner	Contract cleaning	Female	36-45	31/10/2017

Key Informants (KI)					
ID	Organisation	Gender	Sector (where relevant)	Age	Date of interview
KI02	Voluntary sector	Female		36-45	15/12/2015
KI03	Public sector regulator	Male		56-65	22/01/2016
KI04	Advisory organisation	Male		56-65	06/01/2016
KI05	Service sector contractor	Male	Hospitality	46-55	21/01/2016
KI07	Professional Association	Female		46-55	29/01/2016
KI08	Advisory/advocacy NGO	Female		46-55	29/01/2016
KI09	Public sector regulator	Male		56-65	01/02/2016
KI10	Operations manager	Male	Food processing	36-45	05/02/2016
KI11/ KI16	Supplier of services to industry	Female, female		36-45/46-55	25/02/2016
ki12	Workers organisation	Female	Entertainment	26-35	09/02/2016
KI13	Workers organisation	Female	Entertainment	36-45	03/02/2016
KI14	Public sector advisory body	Female		56-65	09/02/2016
KI15	Workers organisation	Female		26-35	08/02/2016
KI18	Employment Solicitor	Female		26-35	20/03/2017

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