

What minimum wage? Why enforcement of EU migrants' employment rights matters

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EU migrants nominally enjoy the same employment rights as Britons. Yet (left to right) Catherine Barnard, Amy Ludlow and Sarah Fraser Butlin of the [EU Migrant Worker Project](#) found that they are often ignorant of the minimum wage and the Working Time Directive and do not pursue claims in Employment Tribunals. In this they are sometimes aided and abetted by exploitative employers who are willing to use them to undercut the wages of UK staff. They also found that enforcement of employment rights in the UK is, at best, patchy.



'British jobs for British workers' has been a familiar cry from parts of both the left and the right. The left see migration as depriving national workers of jobs; the right see migration as a challenge to Britishness. Yet EU law allows people from other EU Member States to work in the UK on the same terms and conditions of employment. While some employers have met their legal obligations, others, especially agencies in the food processing sector, have taken advantage of migrant workers and denied them their employment rights. For example, during interviews for [our current project on EU migration](#) as part the [ESRC's UK in a Changing Europe programme](#), we have been told that some agencies do not pay their staff holiday pay: this is seen as a normal part of agencies' profit margin.



This evidence raises questions about social justice towards migrant workers. It also means that law-abiding employers find it difficult to compete with rogue employers in their sector. It has led to a perception that migrant workers are undercutting national workers and are thus, effectively, 'taking British jobs'. Making it possible for migrant workers to enforce their employment rights may be as important for British workers as it is for migrant workers who are being mistreated.



Promises to combat exploitation

In its manifesto of 2015, the Conservative Party promised to 'take further steps to eradicate abuses of workers, such as non-payment of the Minimum Wage, exclusivity in zero-hour contracts and exploitation of migrant workers.'

This commitment was made on the back of a mixed political and legal context from an employment protection perspective.^[1] Although The Modern Slavery Act 2015 seeks to address some of the most exploitative working circumstances in the UK,^[2] other reforms have made it more difficult for workers to respond to mistreatment short of enslavement. These changes include the extension of the minimum qualifying service period for employees bringing unfair dismissal claims, from one to two years, and the introduction of fees for accessing Employment Tribunals from 2013 (leading to a [60% reduction in the number of claims presented to Tribunals](#)). These changes have coincided with cuts to Local Authority funding, which have led to some [community legal advice services closing or reducing their services](#).

It is against this background that our research has looked at how EU migrant workers currently respond to disputes at work: do they enforce their rights and, if so, how and to what effect.

EU migrants aren't bringing claims to Employment Tribunals

We started by trying to answer an apparently simple question: how many claims are brought before Employment Tribunals by EU-8 nationals (nationals of the 2004 EU accession States, such as Poland). We discovered that the

[Government does not keep data about this](#). By analysing all Employment Tribunal cases over three calendar years we produced a set of 1548 cases where there was at least some evidence to suggest that the claimant was an EU-8 national. Our method was not without shortcomings but, even if we assume that all of these 1548 cases were brought by EU-8 nationals, our data suggests a significant under-representation: we would have expected nearer 12000 cases had EU-8 nationals enforced their rights in proportion to their population size.^[3] Once cases were brought to Employment Tribunals we found good evidence of fair treatment; the problem was getting migrant workers to tribunals in the first place.

Obstacles to enforcement

We conducted interviews with migrants, employers, judges, advice organisations and trade unions to find out why EU-8 nationals were not making greater use of Employment Tribunals.



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An important early finding was that understandings of wrongdoing and approaches to enforcement were shaped by migrants' motivations for coming to Britain and the length of time they planned to stay in the UK: the shorter the period of planned stay and the more migrants were motivated by maximising income, the less likely they would be to enforce their employment rights. For migrant workers whose objective was to maximise income, being sacked was seen as the most problematic situation. But it was rare that the migrants we talked to suggested that being sacked would give rise to any legal remedy: they simply had to find another job. Compensation was considered impossible (often because of concerns about proof) and impractical (because by the time the case was brought the claimant may have returned to their home Member State). Some 'rights' were seen by migrants as obstacles to their personal objectives. This is especially true of rules restricting working time: if the aim is to maximise income, migrants may wish to work in excess of hours permitted by the Working Time Regulations, and so they are highly unlikely to enforce compliance with these rules.

Another of the most important themes was vulnerability. This was generated by the sort of work being done as well as the nature of the employing organisation. Interviewees talked to us about how contractual arrangements such as zero-hour contracts and agency structures make workers feel insecure and less able to enforce their rights. Sometimes this is because it is not obvious against whom rights should be enforced, sometimes it is because of fears about blacklisting, and sometimes it is because workers do not have the right legal status to claim (i.e. they are not an 'employee', as is required to bring an unfair dismissal claim). Companies using their own agencies to employ agency staff exacerbated the situation: the lack of division between end user and agency made workers more

fearful about raising complaints. Vulnerability increased where workers were living in accommodation tied to employers and where they couldn't speak English and had no access to support networks for legal or other advice. More secure contractual and organisational contexts generated less perceived vulnerability. However this can be 'false security' – even if migrants are working in 'good' jobs for 'good' businesses they have no barometer about what is 'normal' for their sector in Britain (see the [story of Raj, from Poland](#), for example).

Other enforcement organisations need to do more

Our data suggests serious shortfalls in the protection provided for migrant workers by the current scheme of rights enforcement through Tribunals. Consequently, we have begun to examine (through interviews and public data analysis) the contribution that other enforcement bodies make to protecting migrant workers' rights. Key organisations are the Gangmasters Licensing Authority, Her Majesty's Revenue and Customs, the Health and Safety Executive and the Employment Agencies Standards Inspectorate.

We have been surprised by the paucity and variability of information about these organisations, as well as differences in how they approach enforcement. Of all of these organisations we have found greatest support for the Gangmasters' Licensing Authority (GLA), albeit that we have also heard frustration about the organisation having too little power and resource. The GLA's approach is currently one of inspection and licensing against a list of critical and non-critical standards.^[4] In May 2012, the GLA announced that its focus would shift to where criminal activity was alleged. This is reflected in GLA data that show increase in prosecutions and significant reduction in the number of licences that have been revoked. As with the Modern Slavery agenda, there seem to be risks in shrinking the classic role of labour law in favour of a criminal law approach: although the most serious instances of exploitation may be addressed, systemic, everyday mistreatment may go unchecked. Between May 2010 and November 2014 there were only two prosecutions by Her Majesty's Revenue and Customs for non-payment of the minimum wage. Hardly any information is available about the enforcement policies or practices of the Health and Safety Executive. The Employment Agencies Standards Inspectorate's role appears mostly limited to issuing warning letters.

The upshot is that enforcement bodies beyond Employment Tribunals seem to play a rather limited role in protecting rights. Many of our interviewees do not know about these bodies, less still what they do.

Why under-enforcement matters in discussions about the EU referendum

Fears that British workers and British businesses are being undercut by EU workers and businesses loom large in the Brexit debate. [Writing for the Guardian](#), Zoe Williams argues that it is impossible to 'sell' free movement to (British) people who feel insecure. She suggests that 'what is making the world so precarious and the future so unsettling' is partly that people feel that they do not have access to high quality and secure employment opportunities.

Our data suggests that there is another problem: too few EU-8 migrant workers are enforcing their employment rights and the powers and resources of enforcement bodies beyond Employment Tribunals appear too limited to protect rights in the ways that are needed. Holding employers to account seems to us to be in the interests of British nationals as much as EU nationals. Mistreatment that goes unchecked because there are too many legal and financial barriers to enforcement is objectionable as a matter of social justice. But it can also mean that good employers, who play by the rules, and good employees, who expect to be treated fairly, are priced out of the market.

References

[1] See further B. Hepple 'Back to the future: employment law under the Coalition Government' (2013) 42(3) *Industrial Law Journal* 203-223.

[2] V. Mantouvalou 'Modern slavery: the UK response' (2010) 39(4) *Industrial Law Journal* 425-431.

[3] See further C. Barnard and A. Ludlow 'Enforcement of employment rights by EU-8 migrant workers in Employment Tribunals' (2016) 45(1) Industrial Law Journal.

[4] The government is proposing to extend the remit and powers of the GLA via the Immigration Bill.

This post represents the views of the authors and not those of the LSE BrexitVote blog, nor the LSE.

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