

## Still wish you were here:

# continuing non-compliance with the paid holiday provisions of the Working Time Regulations 1998

### Summary

In September 2004, the Prime Minister, Tony Blair, pledged that a third term Labour government would increase the statutory minimum paid holiday entitlement, from the current four weeks per year (which can include the Bank Holidays) to “four weeks *plus* Bank Holidays”.

Citizens Advice warmly welcomes this pledge, which if implemented would give some two million workers more time for themselves and their families. However, it seems unlikely that this benefit would be felt by many of the tens of thousands of workers who are not receiving their current statutory minimum paid holiday entitlement. As a result, the existing inequality between those workers who receive their legal rights (the ‘haves’), and those who do not (the ‘have-nots’) would increase.

Low-paid and non-unionised, these ‘have-nots’ perform unglamorous but essential work from home, or in small workplaces such as: care homes; bars, restaurants and hotels; shops; and contract cleaning companies. And, for many, the legal protection supposedly offered by the Employment Tribunal system is rendered meaningless by a number of factors, not least their fear of being victimised or dismissed simply for making a Tribunal claim (or even just for initiating now obligatory internal grievance procedures).

This report argues that, in order to ensure that such workers benefit from the Government’s strategy for the enhancement of statutory workplace rights, such as that to paid holiday, the more accessible and pro-active compliance regime associated with the National Minimum Wage – commonly regarded as “a huge success” – should now be extended to some of these rights, through the establishment of a Fair Employment Commission.

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## Introduction

The right to enjoy paid holiday from work is one that the majority of working people take for granted. Most employers in the UK – large and small – now provide their workforce with reasonable and in many cases generous contractual rights to paid annual leave. In the autumn of 2001 (the most recent date for which data is available), the average paid holiday entitlement of full-time, permanent employees in the UK was 25 days plus the eight (or ten, in Northern Ireland) Bank Holidays.<sup>1</sup> And, for those working in public administration, education and health, it was 31 days plus the eight (or ten) Bank Holidays – a total of some eight working weeks.<sup>2</sup>

Such opportunity to take paid time off from the demands of work – whether it be for a week or more for a proper ‘holiday’ at home or abroad, for a shorter break, or even just for a day in order to attend a particular family or leisure event – clearly plays a major part in the good work-life balance that the Government has said it wants all workers to enjoy. Since launching its Work-Life Balance Campaign in March 2000, the Government has repeatedly emphasised that “getting the right balance between work and the other things in life” is not only “crucial to our well-being”, but brings financial and other benefits to employers in the form of “a more motivated, more productive and less stressed workforce”.<sup>3</sup>

However, not all workers are lucky enough to receive the average paid holiday entitlement of five working weeks, plus Bank Holidays. Millions of men and women receive only the statutory minimum entitlement of four weeks’ paid holiday per year – a legal entitlement that can, and in practice often does, include the eight (or ten) Bank Holidays. And tens of thousands more are not receiving even this legal minimum entitlement to paid holiday.

In September 2000, in our report *Wish you were here*, we highlighted the seemingly widespread non-compliance by employers – and especially small employers in low-

profitability sectors of the economy – with this legal right to at least four weeks’ paid holiday, as provided for by the Working Time Regulations 1998.<sup>4</sup> Noting that, in many cases, this non-compliance stemmed from a lack of awareness or less than full understanding of the Regulations on the part of the employer, we called on the Government to conduct further awareness-raising campaigns on the Regulations, with a view to improving employers’ understanding of their legal obligations to their workforce. But we also noted that, as often as not, such non-compliance appeared to be *deliberate*, with rogue employers using a range of excuses and devices to try and avoid meeting their legal obligations to their workforce.

At the same time, *Wish you were here* noted the considerable gap between the statutory minimum entitlement to paid holiday, and the national average level of contractual paid holiday (i.e. five working weeks, plus Bank Holidays). Accordingly, we called on the Government to review the position in respect of the Bank Holidays, with a view to closing this gap.

Citizens Advice therefore warmly welcomes the pledge, given by the Prime Minister, Tony Blair MP, at the Labour Party conference in September 2004, that a third term Labour government would act to increase the statutory minimum paid holiday entitlement to “four weeks plus Bank Holidays”.<sup>5</sup> As the Secretary of State for Trade & Industry, Patricia Hewitt MP, noted in a pamphlet published during the same conference, this would effectively add “eight [or ten] days’ paid holiday to the basic legal entitlement”, and give “around two million people more time for themselves and their families”.<sup>6</sup>

However, given that this would simply increase the compliance challenge for small employers, it seems unlikely that the benefits of this very welcome move would be felt by many of those workers who are not receiving the current legal minimum of four weeks’ paid holiday per year. And the evidence from the advice work of Citizens Advice Bureaux

continues to suggest that tens of thousands of the most vulnerable workers in the UK economy are losing out from inadvertent or deliberate non-compliance with this legal minimum entitlement.

Often low-skilled and nearly always low paid, many of these workers are performing unglamorous but essential work from home, or in small workplaces such as care homes, hairdressers, bars, restaurants and hotels, shops and other retail centres, clothing and food processing factories, and contract cleaning companies.<sup>7</sup> The majority of them are women, many working part-time in order to juggle family or other caring responsibilities. They are invariably non-unionised, and tend to have little if any awareness of their statutory workplace rights, let alone how to assert or enforce them. As a result, they are extremely vulnerable both to inadvertent non-compliance by an overstretched or inadequately informed employer, and to deliberate abuse by a 'rogue', exploitative employer.

Less than one in five private sector workers in the UK are members of a trade union, and in two out of three private sector workplaces there is no trade union presence.<sup>8</sup> More to the point, and as the New Policy Institute has noted, trade union membership is "weakest among the lowest paid workers who need them the most", with just one in six low paid workers belonging to a trade union. For example, only five per cent of workers in the hotel and catering industry, and only 11 per cent of sales staff in the retail sector, are members of a trade union.<sup>9</sup>

Such low skilled, low paid workers are, and will remain, a significant feature of the UK labour market. In recent years, public policy has been littered with rhetoric about the 'knowledge-driven economy' and 'Internet-enabled working practices'. But the simple truth remains that workers in professional occupations cannot get their offices cleaned or their hair cut on the Internet, and food and drink – not to mention care for the elderly – cannot be delivered by email. Some

commentators have suggested that, by 2010, there will be 500,000 more jobs in personal caring services, the majority of them taken by women, and a great many of them low paid.<sup>10</sup>

At the same time, it is clear that the compliance challenge to the small, mostly low-profitability employers of such workers is immense, and growing. Much employment law is complex and, as the Small Business Council's Regulatory Interest Group has noted, there is a widespread belief amongst small employers – who tend to lack an in-house human resources specialist – that the law is "difficult to understand and apply".<sup>11</sup> In relation to paid holiday, for example, many small employers appear not to understand that statutory paid holiday entitlement continues to accrue during maternity leave. There is also ample evidence that not all of the UK's 1.2 million small employers fully appreciate the "positive difference that compliant and best practice approaches to [employment rights] can make to their 'bottom line'".<sup>12</sup> In short, the demands of running a small business in an increasingly competitive economic environment all too often lead to inadvertent (or, at least, not *deliberately* exploitative) non-compliance.

Sadly, it is also apparent that there are too many employers who *deliberately* flout their obligations to their workforce. Well over a decade ago, a Citizens Advice report, *Hard labour*, concluded that many low paid, non-unionised workers "tolerate very poor working conditions because they are fearful of losing their jobs and the subsequent consequences of unemployment".<sup>13</sup> Whilst such 'rogue', exploitative employers are undoubtedly a small minority, they remain all too numerous today and the number of workers affected is clearly substantial. And the power of the market place can all too easily lead to a rapid downward spiral of wages, conditions, and workplace safety – to the detriment of employers as well as their workers.

## All work, no play

Four years on from our report *Wish you were here*, non-compliance with the statutory right to paid holiday remains a staple of the advice work of Citizens Advice Bureaux, and – along with pregnancy-related discrimination and detriment – is one of the two most commonly reported issues amongst the employment-related social policy reports submitted to Citizens Advice by Citizens Advice Bureaux. Since 1 January 2003, 570 (10 per cent) of the 5,570 employment-related social policy reports received by Citizens Advice from Citizens Advice Bureaux have involved non-compliance with the right to paid holiday. This, together with oral evidence from bureau managers and advisers, strongly suggests that at least several tens of thousands of the 510,000 employment-related advice enquiries made to Citizens Advice Bureaux in 2003-04 involved non-compliance with the right to paid holiday.

As in 2000, the recent evidence from Citizens Advice Bureaux indicates that non-compliance with the paid holiday provisions of the Working Time Regulations 1998 takes various forms. But by far the most common situation reported by Citizens Advice Bureaux is that where the worker is simply not receiving his or her full statutory entitlement of at least four weeks' paid holiday. Some workers have approached a bureau before or shortly after starting work with a new employer, with a view to clarifying their entitlement to paid holiday, whilst others have been working for the same employer for many years – often without ever having received any paid holiday.

A man who sought advice from a CAB in Dorset in May 2004 had been working full-time as a night porter in a local hotel for the past 15 years, but had never received any paid holiday.

A young woman who sought advice from a CAB in Northern Ireland in June 2004 had been working part-time as a waitress in a local restaurant for the past

four years, and during that time had never received any paid holiday.

The 18-year-old son of a woman who sought advice from a CAB in Norfolk in March 2004 had recently been offered a full-time job as a sales assistant in a local retail centre, but had been told that he would receive only one week's paid holiday per year.

Similarly, a young man who sought advice from a CAB in Wiltshire in June 2004 had been working full-time as a delivery person for a national fast food chain for the previous eight months; when he had asked his manager about his entitlement to paid holiday, he had been told that he was entitled to only one week per year.

A middle-aged woman who sought advice from a CAB in Kent in July 2004 had been working part-time as a sales assistant in a local pharmacy for the past two years, and had not received any paid holiday during this time.

In many such cases, non-compliance with the paid holiday provisions of the Working Time Regulations is compounded by the failure of the employer to comply with other basic statutory workplace rights, such as the rights to a written contract of employment, to itemised pay slips, and to Statutory Sick Pay.<sup>14</sup>

A single mother with two school-age children who sought advice from a CAB in Wales in July 2004 was working part-time as a hotel receptionist; she had no written contract of employment, had never received any paid holiday, and had not been paid wages or Statutory Sick Pay when off work due to illness.

A Portuguese man who sought advice from a CAB in the East Midlands in September 2003 had been working full-time as the manager of a local fish and

chips restaurant for the past seven months; he had no written contract of employment, had never received any pay slips, and had not received any paid holiday. He had raised these matters with his employer, to no avail, but was “afraid that he would lose his job if he took any enforcement action”.

A man who sought advice from a CAB in East Sussex in May 2004 was employed by a firm of contract cleaners and working an average of 60 hours per week. Despite having worked for the company for almost two years he had no contract of employment, and when he had asked for one he had been told to write one himself. He had also asked recently about paid holiday, which he had never received, and had been told that he would not get any.

A CAB in Somerset reports being approached in June 2004 by a Portuguese man working full-time as an agricultural labourer through a large employment agency and, in the words of the CAB, “receiving an extremely poor wage” from which excessive deductions were being made for “poor quality” accommodation provided with the job. In his first six months in the job he had not received any paid holiday as, the agency claimed, this was being offset against the cost of his travel to the UK from Portugal (for which deductions were, in any case, being made from his wages).

Sometimes, it is evident that the employer’s action stems from a lack of awareness – or full understanding – of his or her obligations under the Working Time Regulations 1998. But in many others, such multiple non-compliance appears to reflect a deliberate strategy on the part of the employer to flout their legal obligations to their workforce, and take advantage of vulnerable individuals’ desperation for a job, and an income. As at

the time of our September 2000 report, the recent evidence from Citizens Advice Bureaux reveals a wide range of excuses used by employers for refusing to grant workers their full legal entitlement to paid holiday.

The employer of a young woman working as a catering assistant in a restaurant who sought advice from a CAB in Staffordshire in January 2004 had told her that he “could not afford” to give her paid holiday.

A CAB in Northern Ireland reports being approached in May 2004 by a young man who had been working part-time in a local bar for the past two years. He had never received any paid holiday, and when he had recently presented his employer with a copy of the Working Time Regulations the employer had simply ripped it up and told him the Regulations were “rubbish”.

Similarly, a young man working part-time (three days per week) as a bar man at a local golf club, who sought advice from a CAB in Kent in July 2004, had recently been told by his employer that, as “a part-timer”, he is not entitled to any paid holiday.

A CAB in Gloucestershire reports being approached in November 2003 by a man working full-time as a skilled labourer whose employer had deducted money from his wages when he had taken time off, and had justified this on the grounds that he “could not afford holiday pay”.

A middle-aged woman with children, working as a sales assistant, who sought advice from another CAB in Kent in March 2004, had been told by her employer of ten years that she had no right to paid holiday as “she had not got a contract [of employment]”.

As in some of the above cases, one of the most common reasons given for not granting the full legal entitlement to paid holiday is that the worker is 'only' employed on a part-time basis. In fact, the Working Time Regulations apply to part-time workers in exactly the same way as they do to full-time workers – so that, for example, a part-timer working two days per week has a right to eight days (i.e. four working weeks) of paid holiday each year. Yet recently-published research for the Department of Trade & Industry, conducted in 2001, indicates that part-time workers are three-times more likely than full-time workers to be not receiving their full legal entitlement to paid holiday.<sup>15</sup>

Another extremely common reason given by employers for not granting the full legal entitlement to paid holiday is that the worker has been employed with the company for less than one year. In fact, since October 2001, following a ruling of the European Court of Justice in June 2001, the Working Time Regulations have provided that a worker becomes fully entitled to four weeks' paid holiday per year from the first day of the employment (with the Regulations setting out how the amount of paid holiday that the worker is actually able to take may accrue during the first year of work).<sup>16</sup>

A young woman who sought advice from a CAB in Dorset in May 2004 had been working full-time as a sales assistant in a local shoe shop for the past 11 months. Her employer had told her that she would not be entitled to paid holiday until she had worked for the company for one year.

The 18-year-old son of a man who sought advice from a CAB in Cheshire in June 2004 had been working full-time in a local petrol station for the past three months. The son's employer had recently told him that he would not receive any paid holiday until he had worked for the company for one year.

A CAB in Oxfordshire reports being approached in March 2004 by a man working full-time as the assistant manager of a local hotel. When he had asked to take some paid holiday, the owner of the hotel had told him that he would not be entitled to any paid holiday during the first year of his employment.

## All work, no holiday pay

In many of the cases dealt with by Citizens Advice Bureaux, the issue of paid holiday entitlement has only become problematic at the point when the worker is *leaving* a job, voluntarily or otherwise, and is expecting to receive a lump sum payment in lieu of his or her outstanding (i.e. unused) annual entitlement to paid holiday.

The Working Time Regulations provide that, where a worker has entitlement to paid holiday which has not been taken, and the employment terminates, the worker has a right to payment in lieu of the untaken holiday. However, the evidence from Citizens Advice Bureaux indicates that there is widespread non-compliance with these provisions of the Regulations.

A woman who sought advice from a CAB in Hampshire in March 2004 had been working part-time at a local (private) nursery school for several years, but had recently left due to a clash of personalities. The client was owed some £350 by the employer in respect of untaken paid holiday entitlement, which had not been included with her final wages, and her former employer had since failed to respond to several letters on the matter.

A CAB in Central Manchester reports being approached in March 2004 by a woman who had recently left her job of 12 months having taken only five days' paid holiday during the year. The client

had not received any holiday pay in lieu of the untaken 15 days of her annual paid holiday entitlement in her final wages.

A CAB in Greater Manchester reports being approached in October 2003 by a woman who had recently left her part-time cleaning job of 16 months. The client had not taken any paid holiday during the employment, and had not received any holiday pay in lieu of her untaken paid holiday entitlement in her final wages.

A young woman who sought advice from a CAB in County Durham in May 2004 had recently left her job of 18 months, having taken only two weeks' paid holiday during this time; she had not received either her final wages, or the holiday pay owing to her in lieu of her untaken paid holiday entitlement.

A CAB in Hertfordshire reports being approached in March 2004 by a man who had recently completed a three-month contract working as a store detective for a local security company. He had not taken any paid holiday during this time, but had not received any holiday pay in lieu of his untaken paid holiday entitlement with his final wages. When he had contacted his former employer by telephone, he had been told that "temporary workers don't get holiday pay".

## Enforcing the right to paid holiday – Employment Tribunals

Citizens Advice Bureaux work hard to increase both workers' awareness of their statutory right to at least four weeks' paid holiday, and employers' understanding of their legal obligations to their workforce under the Working Time Regulations. And they can

assist workers who are not receiving their full legal entitlement to paid holiday to approach their employer and, if necessary, assert their rights by making a formal complaint under now statutory grievance procedures.<sup>17</sup>

However, as with most statutory workplace rights, where the employer proves to be unresponsive or intransigent, the only means of enforcement available to the worker is the making of a claim to an Employment Tribunal. In the case of a successful claim, the Employment Tribunal may award financial compensation "according to what is just and equitable having regard to the employer's default and any attributable loss for the worker".<sup>18</sup> And, again, Citizens Advice Bureaux can and do provide advice on and assistance with the making of such a claim, and in some cases can provide representation at the Tribunal hearing itself. But the Employment Tribunal process is unduly legalistic and increasingly adversarial, and thus extremely daunting – especially to pregnant women, new and lone parents, very young and elderly workers, people with mental health problems, and other vulnerable individuals.

In the case of pregnant women and new mothers, for example, the Equal Opportunities Commission has noted that "the odds are stacked against them [pursuing a Tribunal claim] at a time when they need to protect their own and their baby's health, their career, and their income".<sup>19</sup> Legal aid for basic advice in relation to the making of a Tribunal claim is not available to all but the lowest paid workers. Every year, about one-third of all Employment Tribunal claims are withdrawn by the claimant before the case reaches a hearing, and research by the Department of Trade & Industry has found that in 51 per cent of such cases this is because the applicant considers there to be too much stress, difficulty, fuss or expense involved in continuing.<sup>20</sup>

For most low paid, non-unionised workers, the cost of legal representation at an Employment Tribunal hearing is prohibitive –

there is no legal aid at all for such representation, and the resources of Citizens Advice Bureaux and other sources of *free* representation (such as community law centres and the Low Pay Units) are extremely limited. Increasingly, claimants face intimidation from some employers' legal representatives, in the form of unjustified threats of a counter claim for 'costs' of up to £10,000.<sup>21</sup> And, even where a claim is successfully pursued to its conclusion, a favourable ruling and the making of a financial award by the Tribunal may prove to be a hollow victory. Too many employers simply fail to pay the award – which Employment Tribunals themselves have no power to enforce – and the legal and financial obstacles to enforcement through the civil courts are immense.<sup>22</sup> For example:

A woman who sought advice from a CAB in Hampshire in June 2003 had won an Employment Tribunal award of some £500 against her former employer in respect of unpaid wages, including unpaid holiday pay in lieu of untaken holiday entitlement. The employer had since failed to pay any of the award, despite the client having paid £30 to register the unpaid award in the County Court, and then a further £45 to obtain a warrant of execution.

Similarly, a CAB in Kent reports being approached in April 2004 by a woman who had won an Employment Tribunal award of some £220 against her former employer in respect of unpaid holiday pay in lieu of untaken holiday entitlement. The employer had since failed to pay any of the award and, as the CAB notes in its report to Citizens Advice, "the £30 fee to register the unpaid award in the County Court represents a significant proportion of the award, and there is no guarantee that such enforcement action in the courts will lead to payment by the employer".

A CAB in Devon reports no less than seven cases in which it has, since October 2002, assisted the client to make a successful claim to an Employment Tribunal in respect of unpaid wages, including unpaid holiday pay in lieu of untaken holiday entitlement, only for the employer to fail to pay any of the award. In some of these cases, the award remains unpaid despite the client having initiated, with the assistance of the CAB, enforcement action in the County Court.

Moreover, the experience of Citizens Advice Bureaux indicates that, for many non-unionised workers, the legal protection supposedly offered by the Employment Tribunal system is rendered meaningless by their fear of being victimised or dismissed for making a claim to an Employment Tribunal (or even just for initiating now obligatory internal grievance procedures or otherwise asserting their rights). In particular, working parents, carers, homeworkers, migrant workers, and those who – on account of their age, skills or disability – face the greatest challenge in finding alternative employment are often reluctant or unwilling to put their job at risk.

In the case of pregnant women and working mothers, for example, recent research by the Equal Opportunities Commission suggests that many women "accept [denial of their rights] as they believe that complaining would cause more harm than good", and that, for many, "it is a choice between taking a stand and possibly losing one's job or keeping quiet and remaining in employment". In particular, the research has found that some women from ethnic minority groups "would not contemplate taking action against their employer".<sup>23</sup> More generally, the New Policy Institute has concluded that "low paid workers are far more vulnerable than other workers to infringement of their rights, yet they are also less likely to be in a union who can act for them, or to opt for [an Employment Tribunal claim]".<sup>24</sup>



This reluctance to initiate enforcement action for fear of the likely repercussions is evident from many of the paid holiday-related social policy reports submitted to Citizens Advice by Citizens Advice Bureaux since 1 January 2003, and which inform this report.

A young woman who sought advice from a CAB in Tyne & Wear in July 2004 had been working part-time in a local social club for the past six years, and throughout this time had only ever received one week's paid holiday per year. The CAB advised the client of her statutory rights, and how to assert them, but she was "reluctant to take action because she may lose her job".

A CAB in Greater London reports being approached in October 2003 by a single mother of three, working part-time as a sales assistant in a local pharmacy. The client had not received any paid holiday during the eight months in which she had been in the job, and was required to work an extra eight hours, for no extra pay, whenever a fellow sales assistant took a day of (unpaid) leave. After being advised of her legal rights, and how to enforce them, the client was "worried about taking action in case she loses her job. She recognises she could go to an Employment Tribunal but feels the job, however unfair, is more important".

The employer of a man who sought advice from a CAB in Cornwall in September 2003 had told him that he did not qualify for any paid holiday. When advised of his rights and how to assert them, however, he decided that he did not want to take any action as "he is sure that if he complains his employer will sack him".

A man who sought advice from a CAB in the West Midlands in December 2003 was working part-time at a local firm of funeral directors. Until visiting the CAB,

the client had been "completely unaware" of his legal right to at least four weeks' paid holiday. The CAB advised the client of his legal rights, and how to assert them, but he decided "not to pursue the matter" with his employer as he did not want to "rock the boat".

A CAB in Kent reports being approached in April 2004 by a married woman, with children, working full-time in a local fish and chips restaurant. The client had never received any paid holiday (or any rest breaks during her nine-hour day), and her employer had refused her request for a written statement of her terms and conditions. The CAB reports that "the client realises all this is illegal" but was unwilling to initiate enforcement action "because she needs the job".

A woman who sought advice from a CAB in Wiltshire in September 2003 had recently started working full-time as a senior care assistant in a local care home. She had recently asked her employer about her entitlement to paid holiday, and had been told that she would not receive any paid holiday until she had been employed for 12 months, and then only three weeks per year. The CAB advised her of her legal rights and how to assert them, but reports that "the client is very unhappy at work but feels powerless to do anything because of the risk that she may be sacked if she does".

Furthermore, the recent paid holiday-related evidence from Citizen Advice Bureaux that informs this report indicates that such fear of losing one's job simply for asserting one's basic workplace rights all too often proves to be well-founded.

A man who sought advice from a CAB in Surrey in July 2004 had been working full-time as a waiter at a local restaurant for the past 12 months. He had always

been paid in cash, had never received a written contract of employment or pay slips, and it appeared that no tax or national insurance had ever been paid by the employer. He had never received any paid time off from work, and had recently been summarily dismissed after asking about his entitlement to paid holiday.

A CAB in Essex reports being approached in May 2004 by a young, single mother who had been working as a sales assistant in a local shop. The client had never received any paid holiday, and had recently been summarily dismissed after presenting her employer with written information about the paid holiday provisions of the Working Time Regulations that she had obtained from ACAS.

We and others have repeatedly suggested that, for such vulnerable, low paid and non-unionised workers, there needs to be available a more accessible and pro-active system of enforcement that does not rely on individuals entering into such stressful, costly and potentially highly damaging legal confrontation with their employer (or former employer, where they have already resigned or been dismissed).<sup>25</sup>

## Pro-active enforcement of workplace rights

Rather than try and re-invent the wheel, we and others have suggested that the more accessible and pro-active compliance regime associated with the National Minimum Wage – under which workers can make anonymous complaints to the Inland Revenue enforcement agency, which also uses tax credit and other data to conduct *carefully targeted* investigations of employers suspected of non-compliance – should be extended to many of the other basic, statutory workplace rights through the establishment of a Fair Employment Commission.<sup>26</sup>

Following the ‘Principles of Good Regulation’ identified by the Better Regulation Task Force, and working closely with ACAS, the Small Business Service, the Health & Safety Executive (HSE), the forthcoming Commission for Equality and Human Rights (CEHR) and other agencies, such a Fair Employment Commission could ensure a more joined-up system of advice, guidance and practical business support for small employers, as well as a more pro-active (but educational rather than punitive) approach to compliance and, where necessary, enforcement.

The Government has stated that it established such an accessible and *pro-active* approach to compliance with the National Minimum Wage because it did not want workers “to have to rely on taking action against their employer themselves, as intimidation or fear of losing their job could prevent a worker from making a complaint”.<sup>27</sup> Clearly, this argument applies as much to the statutory right to paid holiday – and, indeed to many other statutory workplace rights – as it does to the National Minimum Wage.

And, despite the Inland Revenue enforcement agency’s narrow brief and extremely limited resources – it has just 120 staff in total – there is broad support for the Government’s view that the agency’s work in enforcing the National Minimum Wage has been “a great success”.<sup>28</sup> For example, the Leicester Minimum Wage Project, which is managed by Leicester City Council and works in partnership with the Inland Revenue at a community level, has stated that “much of the success of the [National Minimum Wage enforcement machinery] lies with the [original decision] to have a dedicated enforcement authority that has the powers to make on-site inspections”.<sup>29</sup>

Similarly, both the TUC and CBI have recently characterised the National Minimum Wage enforcement machinery as “a huge success story as an example of regulation”.<sup>30</sup> Since 1999, the Inland Revenue agency has dealt with more than 13,700 complaints from workers and third parties, has conducted

some 22,600 targeted investigations of employers, has revealed non-compliance with the National Minimum Wage by more than 10,000 employers, and has identified almost £18 million in arrears of wages.<sup>31</sup>

As with the National Minimum Wage, a more broadly-based Fair Employment Commission, charged with ensuring compliance with a range of statutory workplace rights, would help ensure that *good* employers – the vast majority – are not unfairly undercut by rogue employers and employment agencies, offering a cheaper product to their customers simply by neglecting their legal obligations to their workforce. In the words of the former Cabinet minister, Nick Brown MP, “there is nothing more galling for an honest employer than finding that they are being undercut by others who are not obeying the law and, worse, finding that the law is not being enforced”.<sup>32</sup> And, as the New Policy Institute has emphasised, “enforcement, which impacts on the ‘rogue’ end of any industry, is not the same as ‘more regulation’, which impacts on all”.<sup>33</sup> Only those employers that are in breach of their legal obligations, and yet do not respond positively to the (even-handed and educational) intervention of the Commission’s compliance officers, would have any reason to fear *enforcement* action by the Commission.

At the same time, as some but not all trade union leaders have recognised, the trade union movement would benefit from the associated extension of a culture of enforceable rights, in which trade union membership is more likely to flourish. The shift in jobs from manufacturing to service industries, and from larger to smaller workplaces, is – as the Secretary of State for Trade & Industry, Patricia Hewitt MP, has noted – “creating a tough challenge to unions to increase their membership, even when employment is increasing”.<sup>34</sup>

William Brown, Professor of Industrial Relations at Cambridge University and a member of the Low Pay Commission, has suggested that a Fair Employment Commission, charged with ensuring

compliance with a basket of statutory workplace rights, would “help to maintain a floor of rights in areas of employment where unions have difficulty winning members, but which have employers who undercut and thereby threaten those workers in the same areas who *are* members. The enforcement of labour standards for the unorganised is an essential buttress for the labour standards of the organised. In short, British trade unions should see [a Fair Employment Commission] not as a potential rival, but as an essential complement.”<sup>35</sup>

None of this is to suggest that such a Fair Employment Commission could identify and inspect every non-compliant small employer in the UK. Clearly, given the realities of public expenditure, it could not. But that is not an argument for doing nothing. And, as the Work & Pensions Committee of MPs has noted recently, the available evidence suggests that the very existence of a *pro-active* enforcement regime considerably strengthens the incentive for self-compliance.<sup>36</sup> A Fair Employment Commission would help achieve the Government’s stated aim of encouraging small employers to “think pro-actively about the benefits of good practice and compliant human resources [policies]”.<sup>37</sup>

Nor is it to suggest that the National Minimum Wage enforcement machinery is perfect. On the contrary, we believe that there are a number of improvements and refinements that could, and should, be made to this machinery. For example, there is a serious issue around the current inability of the Inland Revenue enforcement agency to deal with cases where the worker has suffered detriment – dismissal, for example – simply for asserting his or her right to the National Minimum Wage. We suggest that, for a Fair Employment Commission to be truly effective, the even-handed and educational approach of its ‘front office’ compliance officers would need to be complemented by a ‘back office’ charged with dealing with such cases of detriment, serial non-compliance, and other serious matters.<sup>38</sup>

Finally, it is important to note that the Fair Employment Commission could *not* cover all statutory employment rights (let alone *contractual* rights), and that it would sit alongside – and so complement rather than replace – the Employment Tribunal system (including ACAS). For, whilst the more accessible and pro-active approach to compliance of the Fair Employment Commission would provide an alternative remedy for non-unionised and other especially vulnerable workers who are too afraid of victimisation or dismissal to even raise the matter with their employer, it would still be necessary and appropriate for many disputes

and grievances – and especially those involving alleged breaches of *contractual* as well as statutory rights, and those involving allegations of discrimination – to be resolved by an Employment Tribunal (or, in some cases, the civil courts). In this context, the Fair Employment Commission would need to work very closely with the forthcoming Commission for Equality and Human Rights (CEHR).<sup>39</sup>

In short, the Fair Employment Commission would simply form one part of a multi-layered approach to compliance and, where necessary, enforcement.

## Conclusions and recommendations

The transformation of the Inland Revenue's National Minimum Wage enforcement agency into a more broad-based Fair Employment Commission, charged with ensuring compliance with a basket of statutory workplace rights, would clearly be a significant and long-term undertaking. It would require a fair degree of 'joined-up' government, the necessary funding is unlikely to be found within one departmental budget – so HM Treasury would need to commit new resources – and it would no doubt present many significant challenges of implementation. For example, some statutory workplace rights are more complex than others, and not all are equally or so obviously susceptible to such a pro-active approach to compliance and enforcement.

It might well be sensible, therefore, to adopt a gradualist approach to the creation of such a Fair Employment Commission, with the remit, functions and resources of the existing Inland Revenue enforcement agency being added to incrementally. This would allow for the lessons learnt when tackling the more straightforward statutory workplace rights to be applied when tackling the more complex rights. And we suggest that the right to paid holiday – being one of the more straightforward and readily verifiable statutory workplace rights – could be a very good one with which to start.

As a first step, therefore, we recommend that the Government establishes a Task Force on Fair Employment, led by a senior Minister with specific responsibility for both employment rights and business support. The Task Force should then oversee consultation on the interim and final roles, remits, functions and structures of a Fair Employment Commission, to be constructed – gradually and over a period of time – on the foundations laid by the existing Inland Revenue National Minimum Wage enforcement agency.

More immediately, we believe that the Government needs to do more to ensure both that low paid, non-unionised workers are aware of their statutory right to paid holiday, and that small employers – especially those in low-profitability sectors of the economy – are aware of, and fully understand, their associated legal obligations to their workforce. This should involve further awareness-raising campaigns, targeted at such workers and employers, but we also recommend that the Department of Trade & Industry re-instates, in paper format, its widely respected 30-page guide to the Working Time Regulations for workers and employers.<sup>40</sup>

First published in July 2003 (in replace of earlier versions), this booklet has been unavailable in paper format to Citizens Advice Bureaux and other advice outlets (to distribute to clients) since early 2004, following the decision of the Department of Trade & Industry (DTI) in late 2003 to withdraw paper copies of nearly all of its series of employment rights booklets, in favour of the texts being available via the Department's website only. Until their withdrawal, Citizens Advice Bureaux commonly used the detailed and authoritative booklets to complement and reinforce the information and advice given to clients – both workers and small employers – in face-to-face (or telephone) interviews. As noted above, much employment law is complex, and many clients found it helpful to take away a DTI booklet to read and absorb in their own time, and – in the case of worker clients – to show to their employer.

Despite the Employment Tribunal Service, the Law Society, the TUC, the Federation of Small Businesses and others all having expressed concern about the DTI's decision – on which there was no consultation – the DTI has so far rejected our repeated call for the re-instatement in paper format of at least those booklets most widely used in the past,

including the guide to the Working Time Regulations.<sup>41</sup> In doing so, the DTI appears to have seriously under-estimated the extent to which the booklets have contributed to the early resolution of workplace disputes and the avoidance of Employment Tribunal claims – a key plank of the DTI's wider strategy on employment relations. To our mind, such benefits easily exceed the relatively low costs associated with producing the booklets in paper format.

## References

- 1 In England, Scotland and Wales there are eight public holidays (i.e. Bank Holidays) each year; in Northern Ireland, there are ten. This compares with an average, across the 25 member states of the European Union, of 11.35 public holidays; Cyprus, Malta, Portugal, and Spain all have 14 public holidays, for example, whilst Slovakia has 18. Source: TUC news release, 25 October 2004.
- 2 Source: *Labour Force Survey, Autumn 2001*, Office for National Statistics, June 2002.
- 3 For further information, see for example: [www.dti.gov.uk/work-lifebalance](http://www.dti.gov.uk/work-lifebalance) and [www.employersforwork-lifebalance.org.uk](http://www.employersforwork-lifebalance.org.uk)
- 4 The Working Time Regulations 1998 came into force on 1 October 1998, and implement the provisions of the European Union Working Time Directive of 1993. They apply to all workers except the genuinely self-employed and other specifically excluded groups, and provide for: a weekly limit of 48 hours on the time that a worker can be required to work (subject to an individual opt-out provision); a right to at least one day off each working week; a right to at least 11 hours uninterrupted rest each working day; a right to a minimum in-work rest break of 20 minutes if the working day is longer than six hours; and a right to at least four weeks' paid holiday per year.
- 5 The Rt Hon Tony Blair MP, speech to Labour Party conference, 28 September 2004.
- 6 Hewitt, P., *Unfinished business: the new agenda for the workplace*, Institute for Public Policy Research, September 2004.
- 7 There are an estimated one million home workers in the UK, many of them working for extremely low rates of pay. For further information, see: *Made at home*, National Group on Homeworking/Oxfam/TUC, May 2004.
- 8 Source: *Trade union membership 2003*, National Statistics/DTI, July 2004.
- 9 Howarth, C. & Kenway, P., *Why worry any more about the low paid?*, New Policy Institute, October 2004.
- 10 See, for example: Dickens, R. et al (eds), *The Labour Market under New Labour*, Palgrave Macmillan, 2003.
- 11 *Evaluation of Government Employment Regulations and Their Impact on Small Business*, Small Business Council, March 2004.
- 12 *Final report of the shared human resources pilots*, DTI, August 2004.
- 13 *Hard labour*, Citizens Advice, August 1990.
- 14 Sections 1 and 2 of the Employment Rights Act 1996 provide employees with the right to receive, no later than two months after commencing employment, a written statement (or contract) of employment. This must include, for example: the scale and rate of remuneration, pay intervals and its method of calculation; terms and conditions relating to hours of work and holiday entitlement; the job title or description; and the place of work. Section 8 of the Employment Rights Act 1996 provides employees with the right to itemised pay statements listing gross pay, deductions and net pay.
- 15 *A survey of workers' experience of the Working Time Regulations*, Employment Relations Research Series No 31, DTI, November 2004. Of the workers sampled for the research, eight per cent of full-time workers, and 27 per cent of part-time workers, were not receiving at least four weeks' paid holiday per year.
- 16 *BECTU v DTI (ECJ) 2001 ICR 1152*. Originally, the WTR 1998 provided that a worker became entitled to paid holiday after 13 weeks of continuous employment. Now, during the first year of employment, the amount of paid holiday that may be taken builds up monthly in advance at the rate of one-twelfth of the annual entitlement each month.
- 17 From 1 October 2004, new Regulations require all employers to have legal minimum procedures for dealing with grievances, disciplinary action and dismissal, and Employment Tribunals will normally not accept a claim based on a grievance (such as denial of a statutory employment right) unless the claimant has written to his or her employer and waited at least 28 days without a response.
- 18 Lewis, T., *Employment law: an adviser's handbook*, Legal Action Group, 2003. This applies where the employer has refused to allow the worker to take paid holiday, and the ET claim is brought under Regulation 30(4) of the WTRs.
- 19 *Tip of the iceberg: interim report of the EOC's investigation into discrimination against new and expectant mothers in the workplace*, Equal Opportunities Commission, September 2004.
- 20 Source: *Findings from the 2003 Survey of Employment Tribunal Applicants*, Employment Relations Research Series No 33, DTI, August 2004.
- 21 For further information, see: *Employment Tribunals: the intimidatory use of cost threats by employers' legal representatives*, Citizens Advice, March 2004. In fact, Employment Tribunals may make costs awards even greater than £10,000, but such awards must be referred to a County Court or the High Court for assessment.
- 22 For further information, see: *Empty justice: the non-payment of Employment Tribunal awards by employers*, Citizens Advice, September 2004.
- 23 *Ibid*, note 17.
- 24 *Ibid*, note 9.
- 25 See, for example: *Nowhere to turn: CAB evidence on the exploitation of migrant workers*, Citizens Advice, March 2004; and *Somewhere to turn: the case for a Fair Employment Commission*, Citizens Advice, October 2004 (published with the endorsement of the Free Representation Unit, the Legal Action Group, the National Group on Homeworking, One Parent Families, Oxfam, and the West Midlands Employment & Low Pay Unit).
- 26 Other examples of such a pro-active approach to compliance and enforcement include the work of the Health & Safety Executive (HSE), and that of the DTI's Employment Agency Standards Inspectorate.
- 27 *National Minimum Wage Annual Report*, DTI/Inland Revenue, September 2003.
- 28 See, for example: Paragraph 5.19 of *The National Minimum Wage: Fourth Report of the Low Pay Commission*, Low Pay Commission, Cm 5768, March 2003.
- 29 *Response to the Low Pay Commission's consultation on the National Minimum Wage*, Leicester Minimum Wage Project, October 2004.
- 30 Uncorrected transcript of oral evidence to the House of Commons Trade & Industry Committee, 2 November 2004, to be published as HC 1223-i.
- 31 Source: *Hansard*, House of Commons, 27 October 2004, col. 1244-5w.
- 32 The Rt Hon Nick Brown MP, *Hansard*, 27 February 2004, col. 538.
- 33 *Ibid*, note 9.
- 34 *Ibid*, note 6.
- 35 Brown, W. "The Future of Collectivism in the Regulation of Industrial Relations", lecture to Manchester Industrial Relations Society, 6 May 2004.
- 36 *The Work of the Health and Safety Commission and Executive*, Fourth Report of Session 2003-04, Work and Pensions Committee, HC 456-1, July 2004.
- 37 *Final report of the shared human resources pilots*, DTI, August 2004.
- 38 For further information on how we envisage a Fair Employment Commission working in practice, see: *Fairness & Enterprise: the CAB Service's case for a Fair Employment Commission*, Citizens Advice, October 2001; and *Somewhere to turn: the case for a Fair Employment Commission*, Citizens Advice, October 2004.
- 39 The CEHR – which the Government has said will begin operations in 2006/07 – will bring together the work of the existing equality commissions: the Commission for Racial Equality (CRE), the Disability Rights Commission (DRC), and the Equal Opportunities Commission (EOC). It will also take responsibility for new laws outlawing workplace discrimination on religion or belief, sexual orientation, and age.
- 40 *Your guide to the Working Time Regulations – Workers and Employers* (URN 03/1068), DTI, July 2003.
- 41 For further information, see: "The paperless waiting room" in the April 2004 edition of *evidence*, the quarterly social policy journal of Citizens Advice.

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