



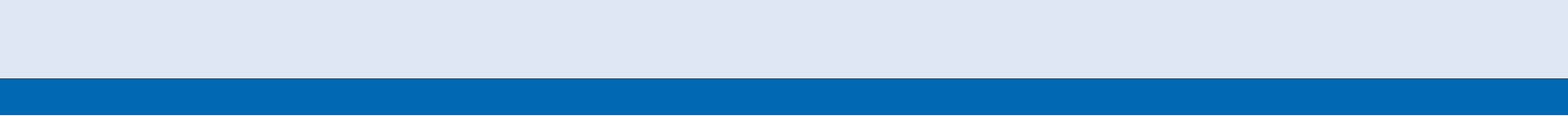
April 2011

# CAB evidence briefing: **Give us a break!**

## The CAB service's case for a Fair Employment Agency

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## Executive summary

In December 2010, the Employment Relations Minister, Edward Davey MP, announced a review of the Government's existing workplace rights compliance and enforcement arrangements, to "establish the scope for streamlining them and making them more effective" and, in particular, to "look at the potential cost and operational benefits of enforcement models that would consolidate enforcement functions in a single body".

In announcing the review, the Minister noted that the "[existing] enforcement functions are undertaken by a number of bodies, including the Employment Agency Standards Inspectorate (EAS), HM Revenue & Customs (HMRC), the Gangmaster Licensing Authority (GLA) and the Health & Safety Executive (HSE). The single Pay and Work Rights Helpline [created in 2009] has drawn those bodies closer together and has been a major step forward in creating a single port of call for workers who want advice or to report an abuse. It has also been a powerful spur to more joint working between the enforcement bodies, which are now carrying forward multi-issue cases together on a regular basis. However, the time is right to ask whether it is possible to build on [this] progress."

Citizens Advice warmly welcomes this review, and the opportunity it provides to build on the progress to which the Minister refers. In this briefing – which represents our formal submission to the review, and which is endorsed by the Child Poverty Action Group (CPAG), the Fawcett Society, Gingerbread, Homeworkers Worldwide, the Law Centres Federation, Legal Action Group (LAG), Maternity Action, Oxfam, and Working Families – we reiterate our case, first made a decade ago, for consolidating the enforcement bodies that lie behind the Pay and Work Rights Helpline into a single Fair Employment Agency fit for the challenges of the 21st Century.

Through the application of a proactive, intelligence-led and proportionate approach to the enforcement of all those statutory workplace

rights that are amenable to such an approach, including the right to paid holiday, a single Fair Employment Agency would simplify the enforcement framework and enhance the protection of vulnerable workers. But it would also provide better value to the taxpayer, both through greater organisational efficiency and by reducing the number of potential employment tribunal claims. And, by targeting the rogues who profit from exploitation, it would help secure the fair competitive environment – or 'level playing field' – that is quite rightly sought by good employers, employment agencies and labour providers.

# Introduction

Kelly, a 22-year-old woman living with her parents in Berkshire, has been working as bar staff in a local pub for the past 18 months. Kelly enjoys her job and the fellowship of her colleagues but, during this time, she has only ever had one week's holiday – and that was unpaid. The manager of the pub has told her, without giving reasons, that Kelly is not entitled to any paid holiday. In fact, as she discovered when she finally sought advice from her local CAB, like all workers Kelly has a legal right to at least 5.6 weeks' paid holiday (including bank holidays). But, faced with her employer's unlawful intransigence, the only way for Kelly to enforce her right to this paid holiday is to bring an employment tribunal claim. Kelly fears that, were she to do so, she would simply be dismissed. And, given the current economic climate, she worries that she would then struggle to find a similar job.

Every year, the 400 Citizens Advice Bureaux in England and Wales assist tens of thousands of workers like Kelly. Low-paid, relatively low skilled and mostly employed in small, non-unionised workplaces, they are often not fully aware of their basic workplace rights. And in many cases, as with Kelly, the CAB quickly establishes that those rights have been abused.

The vast majority of employers – large and small – try hard to meet their legal obligations to their workforce, and most go way beyond such minimum statutory requirements. Sadly, however, there are still far too many rogue employers and employment agencies prepared to flout the law and so profit from exploitation. As a result, many tens of thousands of the most vulnerable workers in the UK economy do not benefit fully from the legal framework for fairness in the workplace. They include many of the restaurant and bar staff, cleaners, retail staff, couriers and delivery drivers, clerical staff, builders and decorators, care workers and others that the rest of us rely on.

In recent decades, as the role of trade unions and collective bargaining in protecting the basic rights of workers has declined, successive governments have recognised that, left unchecked, the behaviour of such rogue employers creates injustice not only to the workers they exploit, but also to law-abiding employers, who quite rightly want – and are entitled to expect – a level playing field on which to compete fairly, within the law. And they have recognised – in relation to some workplace rights, at least – that it is not enough to rely on individual workers taking action against such rogue employers themselves, as “intimidation or fear of losing their job” could – as in Kelly's case – prevent them from bringing an employment tribunal (ET) claim.

Government-commissioned research has shown that only half of those who experience a problem at work seek advice, and only two in five of these take action.<sup>1</sup> And one academic survey of low-paid, non-unionised workers found that fewer than one in forty of those who had been mistreated at work brought an ET claim.<sup>2</sup> More generally, there is a widespread consensus that the employment tribunal system is “increasingly complex, legalistic and adversarial”.<sup>3</sup> This makes the pursuit of an ET claim an especially daunting prospect for pregnant women, new and lone parents, carers, migrant workers, those with mental health problems, and other vulnerable individuals lacking the time, skills and/or energy to prepare and present their case. As the TUC notes, “it is widely recognised that bringing an ET claim can be a highly stressful and time-consuming experience, and as a result many individuals decide not to enforce their rights”.<sup>4</sup>

In direct recognition of this reality, some key workplace rights are additionally policed by five, separate enforcement bodies, as follows:

- The National Minimum Wage is enforced by a unit within HM Revenue & Customs (HMRC).
- The Agricultural Minimum Wage and other aspects of the Agricultural Wages Order are enforced by a unit within the Department for the Environment, Food and Rural Affairs (Defra).<sup>5</sup>

1. *Awareness, Knowledge and Exercise of Individual Employment Rights*, Employment Relations Research Series No 15, DTI (now BIS), 2002.

2. Pollert & Charnwood (2008), *The unorganised worker: problems at work, routes to support and views on representation*, University of the West of England.

3. *Better dispute resolution: a review of employment dispute resolution in Great Britain* (the Gibbons Review), DTI (now BIS), March 2007.

4. TUC briefing on reform of the Employment Tribunal system, January 2011.

5. The Government has announced its intention to abolish the Agricultural Wages Order in October 2012; agricultural workers in England will then be brought within scope of the National Minimum Wage Act 1998, with enforcement falling to HMRC.

- The right not to have to work more than 48-hours a week (on average) is enforced by the Health & Safety Executive (HSE).
- Rules governing the conduct of employment agencies are enforced by the Employment Agency Standards Inspectorate (EAS).
- Rules governing the conduct of licensed gangmasters are enforced by the Gangmaster Licensing Authority (GLA).

Until 2009, each of these enforcement bodies had to be contacted separately, even in multi-issue cases requiring investigation and possible action by more than one of the bodies. However, in 2008, the then government recognised that “vulnerable worker access to enforcement options is complicated because five separate bodies are involved, each with their own helpline”.<sup>6</sup> And, in order to “transfer the burden of navigating the system of enforcement from the vulnerable worker to the system itself”, in late 2009 the then government established the Pay and Work Rights Helpline as a single telephone gateway to the enforcement bodies. One major benefit of this very welcome move is that it enables the referral of multi-issue cases to two or more of the enforcement bodies (with the most common ‘issue cluster’ to date being the National Minimum Wage with the employment agency rules).

However, the enforcement bodies that lie behind the new helpline continue to be sponsored and funded by different government departments: HMRC is sponsored by HM Treasury but its National Minimum Wage enforcement work is funded by the Department for Business Innovation & Skills (BIS); the HSE is sponsored and funded by the Department for Work & Pensions (DWP); the EAS is sponsored and funded by BIS; and the GLA is sponsored and partly funded by the Department for the Environment, Food and Rural Affairs (Defra), the remainder of its income coming from licence fees. And two of the bodies – HMRC and the HSE – also perform a broad range of other functions in addition to their role in enforcing the specific workplace rights referred to here.

As a result, not only is the collective remit of the

Pay and Work Rights Helpline enforcement bodies far from comprehensive, but each body has its own overheads and their funding and operational priorities are decided in isolation from each other, without any over-arching strategic plan. So the taxpayer spends about £19 per worker enforcing the gangmaster licensing regime – which covers just 200,000 temporary workers – but only £4.25 per worker enforcing the National Minimum Wage, and a mere 85 pence per agency worker enforcing the employment agency standards regime.<sup>7</sup> Even allowing for the fact that those working for gangmasters in the sectors covered by the GLA-administered licensing regime may be at particular risk of exploitation, such grossly unbalanced expenditure raises questions about the potential for cost efficiencies.

In short, it is probably fair to say that the Government’s existing workplace rights compliance and enforcement arrangements are not those that someone starting now, with a blank sheet of paper, would devise. In practice, this means that Kelly, above, and the many tens of thousands of exploited and mistreated workers like her, have nowhere to turn – other than to the “increasingly complex, legalistic and adversarial” employment tribunal system, with its associated risk of victimisation or summary dismissal.

Even where an exploited worker is not deterred by the risk of victimisation or dismissal – perhaps because he or she has already found another job to go to – or by the likely time and stress involved, there is no guarantee that he or she will obtain justice by making and pursuing an ET claim. The rogue employer may simply ignore the tribunal process, and then fail to pay the resultant tribunal award. In 2009, research by the Ministry of Justice – prompted by a series of reports by Citizens Advice on such non-payment of tribunal awards<sup>8</sup> – found that an astonishing four out of ten awards are simply not paid at all, and fewer than half of all awards are paid in full.<sup>9</sup>

For example, in August 2009, having been made redundant from her job with a bakery, Sharon made an ET claim in respect of £240

6. *Vulnerable Worker Enforcement Forum: Final Report and Government Conclusions*, Department for Business, Innovation & Skills (BIS), August 2008.

7. Assumes: (1) 200,000 temporary workers covered by the gangmaster licensing regime (source: GLA), and GLA enforcement budget of £3.8 million; (2) two million low paid, vulnerable workers at risk of non-compliance with the NMW (source: TUC Commission on Vulnerable Employment), and HMRC budget (for enforcement of the National Minimum Wage) of £8.5 million; and (3) 1.3 million agency workers covered by the employment agency standards regime (source: Recruitment and Employment Confederation), and EAS budget of £1.1 million.

8. *Empty justice* (2004); *Hollow victories* (2005); and *Justice denied* (2008).

9. *Enforcement of Employment Tribunal Awards in England and Wales*, Ministry of Justice/Tribunals Service, March 2009.

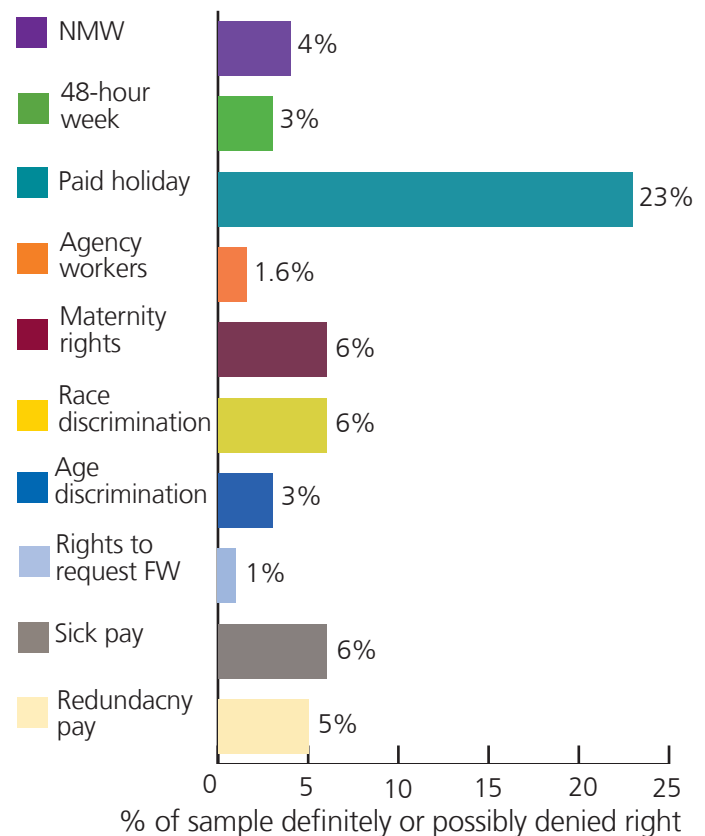
of holiday pay that her former employer had failed to pay to her upon her redundancy. The company did not respond to the tribunal claim, and did not attend the tribunal hearing, held in January 2010. As a result, a default judgment for £240 was entered in Sharon's favour by the tribunal. However, the company did not pay the award and – as of April 2011 – Sharon has not received a penny of the £240 of statutory holiday pay denied to her.

Similarly, in November 2009, Chan, a 22-year-old care home worker, made an ET claim in respect of four weeks' wages and five weeks' owed holiday pay that he had not received after leaving to take up a job at another care home. The Tribunal awarded Chan the nine weeks wages claimed, as well as an additional two weeks' wages on account of the employer's failure to provide a written statement of terms and conditions. However, the care home did not pay the award and – as of April 2011 – Chan has not received any of the wages and holiday pay denied to him.

Sharon, Kelly and Chan did not have the option of making a complaint via the Pay and Work Rights Helpline – promoted by the Department for Business, Innovation & Skills as 'your powerful friend' – as in general the statutory right to paid holiday (and so to owed holiday pay), together with other basic workplace rights, is not directly enforced by any of the enforcement bodies that lie behind the helpline.<sup>10</sup> And yet the casework statistics of Citizens Advice Bureaux, set out in the following table, suggest that denial of paid holiday (or owed holiday pay) affects many more workers than denial of each of the rights that are covered by those enforcement bodies.

Indeed, it is evident from these statistics that, every year, Citizens Advice Bureaux deal with more cases involving denial of paid holiday (or owed holiday pay) than they do cases involving breaches of all the rights covered by the Pay and Work Rights Helpline enforcement bodies put together.

In terms of workplace rights more generally, research commissioned and funded by the then Department for Business, Enterprise & Regulatory Reform (BERR, now BIS), and conducted by Citizens Advice in late 2007, found that breach of the statutory right to paid holiday is far more common among CAB clients with an employment problem than are breaches of a wide range of other key workplace rights.<sup>11</sup>



### CAB casework statistics, Pay and Work Rights Helpline rights

Workplace right (and enforcement body)	2007/08	2008/09	2009/10	Total
National Minimum Wage (HMRC)	4,936	3,627	3,268	11,831
48 hours/breaks (HSE)	7,448	6,475	6,585	20,508
Gangmasters (GLA)	41	137	30	208
Agency workers (EAS)	1,300	755	1,193	3,248
Paid holiday (none)	18,702	17,424	15,804	51,930
<b>Total</b>	<b>32,427</b>	<b>28,418</b>	<b>26,880</b>	<b>87,725</b>

10. The GLA indirectly enforces the statutory right to paid holiday via a licence condition, but only in the case of a labour provider covered by the gangmaster licensing regime. Unlike HMRC, it does not have powers to recover money for individual workers (though it can do so indirectly by threatening to revoke a licence).

11. *Citizens Advice client research – final report*, Employment Relations Research Series No 99, BERR (now BIS), October 2008.



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## All work, no play: denial of the right to paid holiday

The right to enjoy paid holiday from work is one that most 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 2010, the average paid holiday entitlement of full-time employees in the public sector was 31 days plus bank holidays, and that of full-time employees in the private sector was 23 days plus bank holidays.<sup>12</sup> Such opportunity to take paid time off from the demands of work – whether it be for holiday at home or abroad, for a shorter break, or even just for a day in order to attend a family or leisure event – undoubtedly plays a major part in the good work-life balance that, it is generally agreed, benefits both workers and their employers.

However, many workers receive only the statutory minimum paid holiday entitlement of 20 days plus bank holidays. And, in a series of reports since 2000, Citizens Advice has highlighted the seemingly widespread non-compliance by employers – and especially small employers in low profitability sectors of the economy – with this legal minimum.<sup>13</sup> Noting that, in some cases, this non-compliance stems from a lack of awareness or less than full understanding of the law, we have repeatedly called on BIS and its predecessors to work to raise employers' awareness and understanding of the law. But we have also noted that much of this non-compliance appears to be deliberate, with rogue employers using a range of excuses to avoid meeting their legal obligations to their workforce.

Recent evidence from the casework 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 the legal minimum paid holiday entitlement.

Paula, a 41-year-old single mother, sought advice from her local CAB after deciding to resign from her bar job of 12 months, as she was deeply unhappy about how she and other bar staff were treated by the bar's manager. The manager had told Paula that she was not due any owed holiday pay, but the CAB calculated (and Acas confirmed) that she was owed 16 days of statutory holiday pay. The CAB helped Paula to draft a letter to her employer, setting out the amounts of money that she expected to receive in final wages and owed holiday pay. Soon after, Paula began to receive abusive text messages from the bar's manager, in which he continued to deny that she was owed any holiday pay.

Simon had worked as a lorry driver for six months through an employment agency. During this time, Simon had taken only two days of paid holiday, and when the employment had come to an end the employer had refused to pay Simon his owed holiday pay. Simon had asked the agency for his owed holiday pay several times, to no avail.

Gail had been working full-time as a sales assistant in a local shoe shop for the previous ten months when she sought advice from her local CAB. The manager of the shoe shop had told Gail that she is entitled to just one week of paid holiday per year.

Often low skilled and nearly always low paid, many of these workers are performing unglamorous but essential work from home<sup>14</sup>, or in small workplaces such as care homes; hairdressers; bars, restaurants and hotels; shops and retail centres; building and decorating companies; clothing and food processing factories; and contract cleaning companies. The majority are women, many working part-time in order to juggle family or other caring responsibilities. Invariably, they are non-unionised, and tend to have less than full awareness of their

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12. Source: ONS Labour Force Survey figures, cited in Hansard, House of Commons, 9 March 2010, col. 285w.

13. See, for example: *Wish you were here* (2000), *Still wish you were here* (2004), and *Rooting out the rogues* (2008).

14. There are several hundred thousand homeworkers in the UK, many working for very low rates of pay. See, for example: *Made at home*, Oxfam, May 2004; *Subject to status*, National Group on Homeworking, November 2007; and *Homeworking here and now*, Homeworkers Worldwide (forthcoming).

statutory workplace rights, let alone how to assert or enforce them. As a result, they are vulnerable both to inadvertent non-compliance by an overstretched or inadequately informed employer, and to intentional abuse by a 'rogue', deliberately exploitative employer.

Fewer than one in six private sector workers in the UK are members of a trade union, and in 70 per cent of private sector workplaces there is no trade union presence.<sup>15</sup> Moreover trade union membership is weakest among the lowest paid workers who need them the most. For example, only one in twenty workers in the hospitality sector, and just one in eight in the retail sector, belong to a trade union.

Such vulnerable workers are, and will remain, a significant feature of the UK labour market. In recent years, public policy debate has been littered with rhetoric about 'the knowledge-driven economy' and 'internet-enabled working practices'. But the simple truth is 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 of the elderly – cannot be delivered by email.

At the same time, it is clear that the compliance challenge to the mostly small, low-profitability employers of these workers is substantial. Much employment law is complex – some of it unduly complex – and can be difficult for someone who is not a human resources specialist to understand. In relation to paid holiday, for example, many small and even some large employers appear not to understand that statutory paid holiday entitlement continues to accrue during maternity leave. There is also ample evidence that not all small employers appreciate the positive impact that legally compliant and 'best practice' approaches to meeting their legal obligations can have on their 'bottom line', through a better motivated, more productive workforce.<sup>16</sup>

It is also apparent that there are still too many unscrupulous employers who deliberately flout their legal obligations to their workforce. Two decades ago, a Citizens Advice report, *Hard labour*, concluded that many vulnerable workers

"tolerate very poor working conditions because they are fearful of losing their jobs". Whilst such 'rogue', deliberately exploitative employers are undoubtedly a small minority, they remain all too numerous today and the number of workers they employ is clearly substantial. The TUC has estimated that "around two million workers are trapped in a continual round of low-paid and insecure work, where mistreatment is the norm".<sup>17</sup>

Jacob, a young migrant worker, had been working as a cleaner with a contract cleaning company for the previous 18 months when he sought advice from his local CAB. During this time, he had not received any paid holiday, and his employer was refusing to pay him for two weeks that he had taken off recently. Jacob reported that his fellow workers had also been denied paid holiday; he believed that the company was getting away with this because most of the cleaners were, like Jacob, migrant workers who do not know their legal rights.

Gina had worked full-time as bar staff in a pub for the previous two years when she sought advice from her local CAB. During this time, she had never received any pay slips or contract of employment, and had taken very few holidays or breaks from work as her manager had told her that she was not entitled to paid holiday. Over the recent few months, her monthly wages had been steadily reduced, and when she had challenged her employer about this he had said that he had been told by his accountant that Gina was "overpaid". Gina was also worried that the employer may not have paid her tax and national insurance contributions.

Moira, a 37-year-old single mother of two children, had worked full-time as a catering assistant in a café for the previous 15 months when she sought advice from her local CAB. She had never been given a contract of employment or written statement of particulars, and had never received any paid holiday (or statutory sick pay).

15. Source: *Trade Union Membership 2009*, National Statistics/BIS, April 2010.

16. See, for example: *Engaging for success: enhancing performance through employee engagement* (the MacLeod Review), BIS, July 2009.

17. *Hard work, hidden lives: the short report of the Commission on Vulnerable Employment*, TUC, May 2008.



However, it is not only workers who are losing out. As the TUC has noted, those in insecure and exploitative employment are “more likely to be caught in the cycle between benefits and work”, to the detriment of the public purse.<sup>18</sup> Good employers lose out when their competitiveness is undercut by the bad, and the power of the market place can easily lead to a rapid downward spiral of wages, conditions, and workplace safety – to the detriment of workers, employers and the taxpayer. The reason for this is simple: no arm of government has been given overall responsibility for enforcing workplace rights. In practice, ignorant, unscrupulous or criminally exploitative employers can deny workers their legal rights with near impunity.

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## Protecting vulnerable workers, supporting good employers

In 2006, the then Labour government recognised that:

“The vast majority of employers give their staff the rights to which they are entitled. A small minority, however, deliberately flout the law. By doing so they drive standards down, effectively putting good employers at a competitive disadvantage or forcing them to cut corners so they do not lose out. Vulnerable workers find themselves sucked into this downward spiral, often feeling they have little choice but to accept the terms on offer.”<sup>19</sup>

Further recognising that “we have a responsibility to ensure that the vulnerable are not put at risk in this way” and that “we have a duty to enforce the law against those who break it”, in 2007 the then government established a Vulnerable Workers Enforcement Forum, to examine the nature of workplace rights abuses, assess the effectiveness of the existing enforcement

arrangements, and identify possible improvements.<sup>20</sup>

In its August 2008 final report, the Forum concluded that “vulnerable worker access to enforcement options is complicated, because five separate bodies are involved, each with their own helpline”. The report set out the then Government’s objective to “streamline” such access and “transfer the burden of navigating the system of enforcement from the vulnerable worker to the system itself”.<sup>21</sup>

As noted above, this culminated, in September 2009, with the establishment of the Pay and Work Rights Helpline. At the same time, the powers and resources of some of the enforcement bodies were significantly enhanced, and (from April 2010) a new, more proactive regime for the enforcement of unpaid employment tribunal awards was put in place.

In its first year of operation, the Manchester-based helpline received some 73,500 calls from workers (69 per cent), employers (17 per cent) and third parties (13 per cent). Most of the employer callers were small businesses without a human resources specialist. Forty-eight per cent of calls were resolved by the helpline (for example, by the provision of information), but some 4,500 complaints (six per cent of calls) were referred to the enforcement bodies; a further 38 per cent of helpline callers were signposted to Acas or another organisation. The five most common sectors that callers were working in were: administrative/office work (16 per cent); health, social work and child care (nine per cent); wholesale and retail (eight per cent); construction and related trades (eight per cent); and hospitality (seven per cent).<sup>22</sup>

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18. *Fair work: fighting poverty through decent jobs*, TUC, March 2010.

19. *Success at work: protecting vulnerable workers, supporting good employers*, DTI (now BIS), March 2006.

20. The Forum included representatives of the main business and worker groups (including the CBI and the TUC), Acas, Citizens Advice, and the enforcement bodies.

21. *Vulnerable Worker Enforcement Forum: Final Report and Government Conclusions*, Department for Business, Innovation & Skills (BIS), August 2008.

22. *Survey of Pay and Work Rights Helpline callers*, Employment Relations Research Series 113, BIS, September 2010.

## Somewhere to turn

Citizens Advice has warmly welcomed and supported the establishment of the Pay and Work Rights Helpline, the enhancement of the powers and resources of the enforcement bodies, and the new regime for the enforcement of unpaid employment tribunal awards. However, we believe that the coalition Government now needs to build on this progress if it is, in the words of the former Business Secretary, John Hutton, to “shine a light into the dark corners of the labour market and rid Britain of practices that have no place in a modern economy”.<sup>23</sup>

In particular, the Government should – as Citizens Advice has argued for more than a decade – give exploited vulnerable workers a visible, simple and effective alternative to the employment tribunal system, and ensure a level playing field for law-abiding employers, by consolidating the workplace enforcement bodies that lie behind the new helpline into a single Fair Employment Agency. This new agency should be provided with the powers and resources both to secure individual workers their key statutory rights, and to tackle the illegal practices of rogue employers more generally.<sup>24</sup>

We believe that such a rationalisation would generate not only a higher public profile and greater efficacy of investigatory and enforcement action, but would also allow for a more balanced and cost-efficient allocation of resources in relation to the rights covered. And, just as importantly, it would allow for the current gaps in the collective remit of the Pay and Work Rights Helpline enforcement bodies to be gradually closed. In time, all statutory workplace rights that involve only questions of fact could be enforced by the Fair Employment Agency, as well as by employment tribunals. The TUC has suggested that this should include the rights to “a written statement of employment [terms and conditions], paid statutory annual leave, statutory maternity and paternity pay, and statutory sick pay”, but it

could also include unlawful deductions from wages and, for example, the right to request flexible working.<sup>25</sup>

Such a rationalisation of the Pay and Work Rights Helpline bodies into a single Fair Employment Agency, and in particular the expansion of its remit to cover all basic statutory rights that rest on questions of fact, would no doubt present many significant implementation challenges. It might be sensible, therefore, to adopt a gradualist approach, with the remit of the Agency being expanded incrementally. And we suggest that the right to paid holiday – one of the most straightforward and readily verifiable workplace rights, but also one of the most commonly abused, accounting for 11 per cent of all calls made to the Pay and Work Rights Helpline – could be a very good one with which to start.<sup>26</sup>

Not all employment rights are suitable for enforcement by a statutory Fair Employment Agency. So non-discrimination rights, contractual rights and claims of unfair or constructive dismissal, for example, would continue to be enforced only through the employment tribunal system. But more risk-based, intelligence-led and proactive enforcement, by a Fair Employment Agency, of the basic statutory rights that rest on questions of fact might well reduce the overall number of ET claims – a key objective for the coalition Government.

In 2009/10, for example, only 500 (0.2 per cent) of the 236,000 claims accepted by employment tribunals involved a claim in respect of the National Minimum Wage. Yet National Minimum Wage-related enquiries account for more than 60 per cent of all calls made to the Pay and Work Rights Helpline and, since September 2009, more than 2,500 such enquiries to the helpline have been referred to HMRC for further action.<sup>27</sup> Such figures strongly suggest that the number of National Minimum Wage-related ET claims would be higher, but for the existence of the proactive, HMRC enforcement regime.

We are not alone in thinking that it would be more proportionate to remove from the employment

23. Rt Hon John Hutton MP, speech to TUC Congress, 12 September 2007.

24. See, for example, the Citizens Advice reports *Rooting out the rogues* (2007), *Somewhere to turn* (2004), and *Fairness & Enterprise: the CAB Service's case for a Fair Employment Agency* (2001).

25. Page 155 of *Hard work, hidden lives: the full report of the Commission on Vulnerable Employment*, TUC, May 2008.

26. Source: Table 3.1 in *Survey of Pay and Work Rights Helpline callers*, Employment Relations Research Series 113, BIS, September 2010.

27. *National Minimum Wage Annual Report for 2009/10*, BIS/HMRC, October 2010.

tribunal system some or all of the significant number of relatively simple, low value ET claims brought by workers seeking to enforce their basic statutory rights, and which rest solely on questions of fact. In 2007, the Gibbons Review of employment dispute resolution recommended “a new, simple process to settle monetary disputes on issues such as wages, redundancy and holiday pay, without the need for tribunal hearings”. The Review suggested two “main options” for this, the second of which was to:

“Establish a new service outside of the employment tribunals. Complaints to a helpline might be referred to a ‘compliance officer’ who would advise the parties of the legal position and issue enforcement orders where appropriate following a desk-based investigation.”<sup>28</sup>

As described above, to some extent such a service already exists, as some basic statutory workplace rights are enforced by ‘compliance officers’ empowered to ‘issue enforcement orders where appropriate’. But a broader-based Fair Employment Agency, covering all basic statutory rights that rest solely on questions of fact, would maximise the potential of such an approach and so obviate a significant proportion of the current caseload of the employment tribunal system.

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## The current review of workplace rights enforcement

Citizens Advice therefore welcomes the announcement, in December 2010, by the Employment Relations Minister, Edward Davey MP, of his intention to conduct a review of the existing workplace rights compliance and enforcement arrangements to “establish the scope for streamlining them and making them more effective” and, in particular, to “look at the potential

cost and operational benefits of enforcement models that would consolidate enforcement functions in a single body or fewer bodies”.

The Minister was responding to debate of a Private Member’s Bill, to extend the scope of the gangmaster licensing regime to the construction sector.<sup>29</sup> He indicated that the review will be conducted in 2011, as part of a wider rolling review of employment law being coordinated by BIS. The Bill itself was talked out and now has no realistic chance of progressing further.<sup>30</sup>

Announcing the review, Mr Davey noted that:

“It is clear that an extension of gangmaster licensing is not the way forward, but there is a case for taking a fresh look at our compliance and enforcement arrangements. [Existing] enforcement functions are undertaken by a number of bodies, including the EAS, HMRC, the GLA and the HSE. The single Pay and Work Rights Helpline has drawn those bodies closer together and has been a major step forward in creating a single port of call for workers who want advice or to report an abuse. It has also been a powerful spur to more joint working between the enforcement bodies, which are now carrying forward multi-issue cases together on a regular basis. However, the time is right to ask whether it is possible to build on [this] progress.”

The Minister further stated that he envisaged the review:

“looking at different ways of organising the Government’s compliance and enforcement work. It will consider whether incremental improvements can be made to encourage further co-ordination and joint working, such as better legal information sharing gateways and governance machinery, which would allow priorities to be discussed and set on a broader, cross-agency basis. I envisage it considering whether online and helpline employment law advice channels can be linked and streamlined. I also want it to look at the potential cost and operational benefits of enforcement models that would consolidate enforcement functions in a single body or fewer bodies.”

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28. Paragraphs 3.22 – 3.24 of the Gibbons Review; *ibid* note 3.

29. The Gangmasters Licensing (Extension to Construction Industry) Bill, introduced by David Hamilton MP.

30. See: *Hansard*, House of Commons, 3 December 2010, col. 1157-62.

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# Pulling up the employment tribunal drawbridge?

The timing of this review is apposite, as the Government is currently consulting on proposed reforms to the employment tribunal system that Citizens Advice fears would only further hinder access to redress by low-paid, exploited workers such as those featured above.

In January 2011, the Government launched a consultation on a range of proposed reforms, including an extension of the qualification period for workers to bring a claim of unfair dismissal, from the current one year to two years.<sup>31</sup> The consultation paper sets out the Government's estimate that this will reduce the number of tribunal claims by between 3,700 and 4,700 a year.

It is not easy to see how such a modest reduction in the total number of tribunal claims would "give businesses greater confidence to hire new staff" and so "fire up economic growth", as the Government intends. But Citizens Advice is concerned that an unknown but quite possibly significant proportion of these 'lost' claims would have been brought by low-paid, exploited workers. Indeed, we view the extension of the qualification period as little more than a charter for rogue employers, who would then have up to two years, rather than 12 months as now, to exploit a worker and then dismiss them just before they complete the qualification period.

Jean was summarily dismissed from her job as an events organiser at a local hotel in late 2010; the hotel manager told her that she was "no longer needed". Jean had been employed by the hotel for eleven months and three weeks.

Christine was summarily dismissed from her job as a secretary at a local financial services company in early 2011; her manager told her

that she was "not up to the job". Christine had been employed by the company for eleven months and two weeks, and told the CAB from which she sought advice that her immediate two predecessors in the role had both been dismissed in their 12th month of employment.

In the same consultation, the Government also proposes to double the upper limit on costs awards – which a tribunal can make against a claimant deemed to have pursued a claim with no reasonable prospect of success – from the current £10,000, to £20,000. The consultation paper suggests that this will "encourage parties who pursue weak claims to think carefully before initiating tribunal proceedings", but it also notes that "anecdotal evidence suggests that in many cases, where the claimant is unrepresented, [employers] or their representatives use the threat of costs sanctions as a means of putting undue pressure on [the claimant] to withdraw from the tribunal process".

In fact, the evidence of such intimidatory practice is not simply 'anecdotal': in 2004, a Citizens Advice report set out detailed evidence from the casework of Citizens Advice Bureaux on the use of such unjustified costs threats to intimidate low-paid workers, pursuing relatively low-value claims, into withdrawing their claim.<sup>32</sup> Recent evidence from CAB advisers indicates that such intimidatory practice remains widespread and indeed is routine on the part of some employer representatives.

Furthermore, as 84 per cent of all costs awards made are for less than £4,000, and 92 per cent are for less than £8,000, there is no real, evidence-based case for increasing the £10,000 upper limit. Indeed, the median award is just £1,000, and even the average award (inflated by a small number of large awards) is just £2,288.<sup>33</sup> But doubling the limit to £20,000 would undoubtedly strengthen the hand of unscrupulous employers and legal representatives when seeking to intimidate low-paid claimants, many of them unrepresented, pursuing a relatively low-value claim.

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31. *Resolving workplace disputes: a consultation*, BIS/Tribunals Service, January 2011.

32. *Employment tribunals: the intimidatory use of cost threats by employers' legal representatives*, Citizens Advice, March 2004.

33. Source: *Employment Tribunal and EAT statistics 2009-10*, Tribunals Service/Ministry of Justice, September 2010.



Most damaging of all, the Government has announced its intention to introduce (and is shortly expected to launch a consultation on) an employment tribunal application fee. Some employers' bodies have called for a fee of up to £500. There can be no question that any significant application fee – and especially one of £500, the equivalent of two weeks wages for someone on the National Minimum Wage – would constitute a substantial barrier to justice to low-paid, exploited or mistreated workers such as those featured above. Employers' bodies have argued that such application and other fees are needed to deter the "spurious and baseless", "vexatious" or "speculative" claims that they claim (without presenting any substantive evidence) are "clogging up" the tribunal system.

However, the last major review of the employment tribunal system, in 2007, concluded that "weak and vexatious cases make up only a small minority of tribunal claims".<sup>34</sup> And tribunals already have extensive powers to deal with this small minority of cases: they can require a deposit of up to £500 in a seemingly weak case, can strike out a vexatious or misconceived claim, and (as noted above) can award costs of up to £10,000 against a claimant deemed to have pursued a claim with no reasonable prospect of success. Despite claiming that it intends its policy-making to be "based on sound analysis [and] evidence", the Government has not set out any evidence that these existing powers and mechanisms are not used effectively and consistently by tribunal judges.

Citizens Advice remains hopeful that the Government will give consideration to the impact of these (and other) proposed reforms of the employment tribunal system on vulnerable, low-paid workers who have been exploited by a rogue employer. However, if the Government decides to press ahead without mitigating the predictable impact of the reforms on such workers, then the need to provide such workers with a simpler, more accessible alternative to the employment tribunal system – in the form of a broad-based, proactive Fair Employment Agency – will only increase.

## Conclusion

Citizens Advice warmly welcomes the ministerial review of the Government's workplace rights compliance and enforcement arrangements, to which this briefing constitutes our formal submission. We hope that ministers will recognise the significant potential benefits – to workers, employers and the taxpayer – of consolidating the Pay and Work Rights Helpline enforcement bodies into a single Fair Employment Agency fit for the challenges of the 21st Century. As Oxfam has noted, "a single [enforcement body], empowered to proactively protect all rights at work for all workers, and to ensure that victims receive redress, would be the most effective form of labour rights enforcement and would be a significant and vital lever in relieving poverty in the UK".<sup>35</sup>

Through the application of a proactive, intelligence-led and proportionate approach to enforcement of those statutory workplace rights that are amenable to such an approach, including the right to paid holiday, a single Fair Employment Agency would simplify the enforcement framework and so enhance the protection of vulnerable workers. But it would also provide better value to the taxpayer, both through greater organisation efficiency and by reducing the number of potential employment tribunal claims. And, by targeting the rogues who profit from exploitation, it would help secure the fair competitive environment – or 'level playing field' – that is quite rightly sought by good employers, employment agencies and labour providers.

34. Paragraph 4.39 of the Gibbons Review; *ibid* note 3.

35. *Who cares? How best to protect UK care workers employed through agencies and gangmasters from exploitation*, Oxfam, December 2009.



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