

Justice denied

The deliberate non-payment of Employment Tribunal awards by rogue employers

Summary

Every year, about 15,000 Employment Tribunal claims conclude with a judgment in favour of the claimant, and a monetary award of hundreds, thousands or even tens of thousands of pounds. The preparation of the claim and its presentation at the tribunal hearing will often have involved many months of stressful effort. But for as many as one in ten of these workers, their apparent success in the tribunal soon proves to be a hollow victory, when the employer simply fails to pay up. For these claimants, the Employment Tribunal system has delivered empty justice.

Employment Tribunals have no powers to enforce their awards, which must be enforced through bewilderingly complex and costly legal action in the civil courts. However, rogue employers can easily drag out and frustrate such enforcement action so that, for an individual claimant, it becomes inordinately time-consuming and expensive.

As a result, many claimants never even try to enforce their unpaid award in the civil courts, whilst others try but soon give up in frustration. Rogue employers appear to be only too aware of this, and seemingly calculate that non-compliance with the tribunal system, including non-payment of any award made against them, is a gamble that pays.

This briefing argues that closing this loophole in the Employment Tribunal system is essential if the Government is to deliver on its promise to 'protect vulnerable workers' and 'support good employers'. It concludes that unpaid awards should be enforced by the State, rather than by claimants, and suggests how this could be done at minimal cost to the taxpayer. In the words of the Employment Relations Minister, 'there should be no hiding place for [rogue] employers who are not prepared to obey the law'.

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Introduction

“The country is only strong if all people are treated fairly in the workplace.”

Gordon Brown MP, Prime Minister, announcing the Government’s draft legislative programme for 2008/09, May 2008.

“Most employment rights are for the individual worker to assert, in discussion with their employer, but if necessary by making a claim at an Employment Tribunal. Only a minority are enforced directly by government. It is vital, therefore, that the tribunal system is accessible and relevant to all workers, including vulnerable workers.” Report of the Government’s Vulnerable Worker Enforcement Forum, August 2008.

“There should be no hiding place for [rogue] employers who exploit vulnerable workers and are not prepared to obey the law.” Pat McFadden MP, Employment Relations Minister, in his foreword to the Report (as above).

In August 2005, Nicola was sacked from her job as an accounts administrator, simply because she was pregnant. Devastated, Nicola brought an Employment Tribunal claim against her former employer and, in September 2006, she ‘won’ a tribunal award of £32,000 for pregnancy-related unfair dismissal. Yet, two years later, Nicola has still not received a penny of this award – and probably never will. As a result of her dismissal and the non-payment of her tribunal award, Nicola, her partner and her four children (including the new baby) became homeless after their home was repossessed, and to this day the family remains heavily in debt. Although the company in question – a manufacturer of shop displays – has

ceased trading, its directors continue to trade under a different company name. Nicola has been advised by a solicitor that, whilst it would be possible to pursue the directors personally in the civil courts, this would be costly and, of course, Nicola has no money to pay for such legal action. As Nicola says in a letter she has written to the Prime Minister, ‘Where is the justice in this?’¹

Unlike Nicola’s former employer, the vast majority of employers willingly comply with the law, and treat their workers fairly. Inevitably, disputes between workers and their employers do arise, just as they do in other areas of life, but the great majority are resolved within the workplace, either informally or through internal procedures.² However, where a dispute cannot be so resolved, or where a mistreated or exploited worker has asserted his or her legal rights to no avail, the worker can make a claim to an Employment Tribunal. About 120,000 such claims are made each year.

Most of these claims are settled before they reach a tribunal hearing, often with the help of the Advisory, Conciliation and Arbitration Service (Acas), whilst others are withdrawn. But every year, about 15,000 claims conclude, as in Nicola’s case, with a judgment in favour of the claimant and a monetary award of hundreds, thousands or even tens of thousands of pounds. The making and preparation of the claim, and its presentation at the tribunal hearing, will often have involved many months of effort, stress and anxiety for the claimant. But for as many as one in ten of these 15,000 claimants, their apparent success in the tribunal soon proves to be a hollow victory, when the employer against whom the claim has been brought – and the award made – simply fails to pay up. For them, as for Nicola, the Employment Tribunal system has delivered empty justice.

¹ Nicola wrote to the Prime Minister on 18 February 2008. In March, she received an acknowledgement stating that her letter had been passed to the Department for Business Enterprise and Regulatory Reform (BERR) so that ‘they may reply on [the Prime Minister’s] behalf’. In May, Nicola received a response from the Insolvency Service (an agency of BERR), simply stating its inability to do anything to recover the money owed to Nicola.

² *Better dispute resolution: a review of employment dispute resolution in Great Britain*, (The Gibbons Report), Department of Trade and Industry (DTI) (now BERR), March 2007.

In some cases, this is because the employer has ceased trading for genuine business reasons, or is otherwise genuinely unable to pay the award. But in many cases the non-payment of the award is deliberate, as **rogue** employers know that they can ignore a tribunal judgment and any award with near impunity.

Employment Tribunals have no powers to enforce their awards. Where an employer fails to pay the award within the stipulated period of 42 days after the tribunal's final judgment, the unpaid award can only be enforced by initiating legal action in the civil courts (the local county court for awards of less than £5,000, and the High Court for larger awards). However, the civil court enforcement mechanisms are bewilderingly complex and dauntingly legalistic – the standard guide on enforcement in the county court alone runs to more than 50 A4 pages of closely-typed text. At the outset, and after paying a £35 fee simply to register the unpaid award in the county court, a claimant will have to decide, for example, whether to:

- pay a fee of £45 for an order to obtain information from a judgment debtor, which is an order requiring the debtor to appear before the court to provide information about his or her financial affairs (which can then be used to decide the most appropriate means of enforcement); or
- pay a fee of £55 for a warrant of execution, an instruction to the county court bailiffs to recover the amount owed by seizing and selling assets belonging to the debtor; or
- pay a fee of £55 for a charging order, a means of securing payment of the amount owed against land owned by the debtor, by preventing the debtor from selling the land without first paying the amount owed; or

- pay a fee of £55 for a third party debt order, a means of securing payment of the amount owed from a third party who owes the debtor money; or
- pay a fee of £190 plus a non-returnable deposit of £415 to initiate the process to have the debtor declared bankrupt (applicable only where the debt owed is more than £750).

However, there are a number of strategies that rogue employers can – and do – employ to frustrate each of these routes to enforcement. For example, when visited by the county court bailiffs they may claim that their visible assets, such as office equipment, are on lease or otherwise belong to someone else, and so cannot be seized. Whilst it is possible for claimants to combat such strategies, and to try a new route to enforcement where one is frustrated, to do so will involve yet more time and effort, and yet more court fees. For an individual claimant, such complex and prolonged legal action in the civil courts can easily prove to be inordinately time-consuming and disproportionately expensive. Furthermore, whilst in theory these costs, plus interest, can be added to the value of the unpaid award, there is of course no guarantee that the legal action will lead to the recovery of **any** money.

As a result, many claimants never even try to enforce their unpaid award in the civil courts, even though the money would make a significant difference to their lives. Others set out on enforcement action, but soon give up in frustration. Some rogue employers appear to be only too aware of this, and seemingly calculate that non-compliance with the tribunal system, including non-attendance at the tribunal hearing and non-payment of any award made against them, is a gamble well worth taking.

John³, a married man with five young children, sought advice from his local CAB in Hampshire, in May 2007. The year before, he had not received his final wages and owed holiday pay upon leaving his job as a driver with a distribution company, and when his former employer had failed to respond to his formal grievance he had brought a tribunal claim. John's former employer did not attend the tribunal hearing or otherwise contest the claim, and in February 2007 John had won a tribunal award of just over £2,600 for the unpaid wages and holiday pay. Nearly four months on, however, he had still not received any of this award. Reporting his case to Citizens Advice, the CAB notes that 'John can ill afford to go to the further expense of pursuing his award in the county court, and he is fed up with trying to follow legal procedures to no avail'.

Rachel sought advice from her local CAB in the West Midlands, in June 2007. Almost a year before, in July 2006, Rachel had won a tribunal award of some £2,200 for unfair dismissal from her job as a pub chef. Her former employer had not attended the tribunal hearing, or otherwise contested her tribunal claim, and subsequently failed to pay any of the award. In November 2006, Rachel had paid £35 to register the unpaid award in the local county court, and when this had no effect she had paid a further £45 for an order to obtain information from a judgment debtor. However, the employer had provided no information of any value, and still refused to pay any of the award. Reporting her case to Citizens Advice, the CAB notes that 'Rachel has considered taking steps to make her former employer bankrupt, but the initial court fee for this is £190 and she would

also have to pay a £415 deposit, which she cannot afford. She is very distressed and feels that she has been totally let down. Despite having won her tribunal claim, she has received no justice at all and feels thoroughly disillusioned about the whole thing. She now regrets having taken her case to a tribunal, and feels she has been throwing good money after bad'.

Marilyn sought advice from her local CAB in Hampshire, in November 2007. Two months previously, Marilyn had won a tribunal award of £1,800 for unpaid wages and notice pay. Her former employer had not attended the tribunal hearing, or otherwise contested the tribunal claim, and had since failed to pay the award. Reporting her case to Citizens Advice, the CAB notes that 'having been through the stressful, time-consuming tribunal procedure, Marilyn is now faced with negotiating a whole new set of hurdles in the county court enforcement system, with fees payable at each stage and no guarantee that she will be able to recover the money to which she is entitled'.

Hollow victories

Every year, the 430 Citizens Advice Bureaux in England and Wales alone deal with about 1,000 such cases of an unpaid Employment Tribunal award requiring enforcement action by the claimant. Allowing for those cases reported to or dealt with by Acas, law centres, trade unions and others, as well as those that do not come to the attention of any such agency, this would suggest that the total number of awards that go unpaid and require enforcement action nationally each year is somewhat more than 1,000 – and quite possibly as high as 1,500, or one in ten of all awards made.

Many of the affected individuals are – or more accurately, were⁴ – employed in a relatively low paid, low skilled job, often in a small, non-unionised workplace, and might well be described as ‘vulnerable workers’. Our research on the some 1,000 cases of an unpaid award dealt with by Citizens Advice Bureaux in 2007/08 shows the most common client occupations to be retail assistants; kitchen and catering assistants; cleaners; builders and construction workers; bar staff, waiters and waitresses; drivers and delivery workers; and care workers.⁵ Also, a significant minority (at least 10 per cent) are migrant workers, especially from countries such as Poland, Latvia and the Czech Republic. For such vulnerable workers, navigation of the county court or High Court enforcement mechanisms is an especially daunting prospect.

Magda, a heavily pregnant Polish woman, sought advice from her local CAB, in London, in June 2008. Magda had won a tribunal award of some £1,900 for unpaid wages and holiday pay in June 2007. Despite having already paid £35 to register the unpaid award in the local county court, and a further £55 fee to obtain a warrant of execution, Magda had still not received any of the award. Magda had now learnt that her former employer had obtained a county court hearing to contest the warrant of execution – something not provided for in the court rules and procedures. Reporting her case to Citizens Advice, the CAB notes that ‘Magda is distressed at having to attend an unwarranted court hearing when she is seven months pregnant’, and suggests that ‘this whole process makes a mockery of the Employment Tribunal award’.

With the help of his local CAB in Wales, in October 2006, Owen won a tribunal award of £1,750 for non-payment of

notice and owed holiday pay upon leaving his job as a haulage driver with a small transport company. Owen’s former employer did not attend the tribunal hearing or otherwise contest the tribunal claim, and subsequently paid only £200 of the award. However, fearing costs he could ill afford to pay, in July 2007 Owen decided to give up on trying to enforce the unpaid portion of the award of £1,550 in the county court.

Sarah was dismissed from her administrative job with a skip-hire company in October 2006, simply because she was pregnant and had asked her employer about her legal right to paid maternity leave. Despite the pressures of late pregnancy, Sarah sought advice from her local CAB and, with their assistance, brought an employment tribunal claim against her former employer. In March 2007, the tribunal awarded Sarah just over £4,500 for pregnancy-related unfair dismissal. However, the employer – a subsidiary of a company with a turnover of £52 million in 2006 – did not pay the award, and offered only to pay it at a rate of £10 per week. At such a rate, it would have taken nine years to pay the award in full. Reporting Sarah’s case to Citizens Advice, the CAB notes that ‘Sarah is distressed that, having endured the ordeal of a tribunal hearing when her baby was just eight weeks old, and being busy looking after two young children, she now faces having to go through enforcement action in the county court to get the money to which she is entitled’.

The **total** value of the awards not paid to these workers is substantial. Our research indicates the total value of the some 1,000 unpaid awards dealt with by Citizens Advice Bureaux in 2007/08 to be in the region of

⁴ In three out of four of all tribunal claims, the claimant has left the employment in question prior to submitting the tribunal claim. Source: *Findings from the Survey of Employment Tribunal Applicants 2003*, DTI (now BERR), August 2004.

⁵ *Final report of Citizens Advice research on cases coded by Citizens Advice Bureaux for ‘enforcement of an Employment Tribunal award’ in 2007/08*, Citizens Advice, August 2008.

£4.5 million. However, as just noted, many of the CAB clients denied their tribunal award by a rogue employer are (or were) employed in relatively low paid jobs – many were being paid at or near the national minimum wage rate of less than £6 per hour.⁶ Also, as most awards are directly linked to the claimant's level of pay, their tribunal awards were also **relatively** small.

Our research indicates that nearly half of the unpaid awards dealt with by Citizens Advice Bureaux in 2007/08 were for less than £2,000, and almost a quarter were for less than £1,000. The median award was £2,300, and the smallest award – for two weeks' unpaid wages, to a claimant who had been employed as a care assistant in a care home – was £134. Significantly, about a third of the awards included an element for unfair dismissal, and two-thirds included an element for unpaid wages.

In many cases, therefore, the financial costs of enforcement in the civil courts can easily prove to be prohibitively disproportionate, relative to the value of the award. Yet the amounts involved, whilst small relative to **some** tribunal awards, matter greatly to the individuals concerned. Were this not so, they would not have endured the stress of pursuing a tribunal claim to its conclusion. As the Employment Relations Minister, Pat McFadden MP, has noted recently, 'for someone earning £5.52 an hour on the minimum wage, [even] £202 is a lot of money'.⁷

Sam, a married man with three young children, sought advice from his local CAB in Cornwall, in May 2007. He had been employed full-time as a chef at a local restaurant for five weeks in February and March that year, before being sacked for no apparent reason. Sam had not received his final two weeks' wages, or any pay in lieu of notice, and when he had approached

his former employer about this, he had been verbally abused and threatened with violence. With the assistance of both Acas and the CAB, Sam brought a tribunal claim for his unpaid wages and notice pay, and in August 2007 he won an award of £730. However, Sam's former employer, who did not attend the tribunal hearing or otherwise contest the tribunal claim, subsequently failed to pay the award within the stipulated 42-day period. With the assistance of the CAB, Sam then paid £35 to register his unpaid award in the local county court to no avail. Fearing further costs, Sam then decided not to pursue the matter.

Julie sought advice from her local CAB in South Yorkshire, in January 2008. Upon leaving her receptionist job at an optician's practice in late 2006, following a period of illness, Julie had not received holiday and sick pay owed to her. When her former employer failed to respond to correspondence on the matter, Julie had brought a tribunal claim and, in February 2007, had won an award of £800. However, Julie's former employer, who did not attend the tribunal hearing or otherwise contest the tribunal claim, subsequently failed to pay any of the award. As the CAB notes in reporting Julie's case to Citizens Advice, 'it is at this stage that the whole Employment Tribunal system seems to come unstuck. Julie has found it very difficult to start enforcement proceedings and has been given the run around by the courts'.

Julie had first paid £35 to register the unpaid award in her local county court, only to be told by court officials that she needed to initiate the action in a different county court, for a second fee of £35. But then officials at that court had told her that she needed to initiate the action in a **third** county court,

⁶ The national minimum wage rate (for workers aged 22 and over) was £5.52 from 1 October 2007, and increased to £5.73 from 1 October 2008.

⁷ Pat McFadden MP, *Hansard*, House of Commons, column 45, 14 July 2008. The Minister was referring to the fact that, in 2007, the average amount of arrears of the national minimum wage recovered by HM Revenue and Customs enforcement action was £202 per worker.

necessitating a further £35 fee.⁸ Julie had then paid a further £55 to obtain a warrant of execution. However, when the bailiffs eventually visited the optician's practice, they had reported back to Julie that the employer named on the tribunal and county court judgments didn't and never had worked there. Also, when Julie contacted the bailiffs to say that she had proof that her former employer did indeed still work there, she was told 'that's your problem, not ours'. In all, by January 2008 Julie had paid £160 in fees to try and enforce an award of just £800, and all to no avail.

Maggie first sought advice from her local CAB in Hertfordshire, in February 2007. Upon resigning from her job as a care assistant at a care home in December 2006, due to repeated non-payment of her wages, Maggie had not received her final four weeks' wages. When her former employer did not respond to correspondence on the matter, Maggie approached the CAB and, with their assistance, made a tribunal claim. In June 2007, Maggie won a tribunal award of £720 for unpaid wages, but her former employer subsequently failed to pay any of the award. In October 2007, Maggie paid £35 to register the unpaid award in the local county court, and in January 2008 she paid a further £45 to obtain an order to obtain information from a judgment debtor, all to no avail.

Reporting Maggie's case to Citizens Advice in May 2008, the CAB notes that 'it is now 18 months since the wages were not paid, and almost a year since the tribunal judgment, and yet Maggie has still not received her money. Apart from spending £80 on court fees to try and enforce the award, Maggie has spent a considerable amount of time in

appointments and telephone calls with the CAB, and visits to the county court to submit forms'.

A common feature of many of the cases dealt with by Citizens Advice Bureaux is the failure of the employer to respond to the individual's original grievance and/or their subsequent tribunal claim, and/or to attend the tribunal hearing. Indeed, in many cases, the employer has made no effort at all to deal with the matter, let alone to contest the tribunal claim. To encourage employers to put in place and follow proper internal grievance and disciplinary procedures, the law gives Employment Tribunals the power to increase an award by up to 50 per cent where the employer has failed to follow such procedures (known as an 'uplift').⁹ However, where the uplifted award is not paid, this simply becomes an additional 10, 20 or 50 per cent of nothing.

With the help of her local CAB in Dorset, Debbie won a tribunal award of £760 for unpaid wages, unpaid notice pay and unpaid holiday pay in March 2007. Debbie's former employer – a swimwear manufacturer – did not attend the tribunal hearing or otherwise contest her claim, and the tribunal applied an uplift of 50 per cent on account of the employer's failure to follow proper internal procedures. However, the employer subsequently failed to pay any of the resultant £1,140 award.

With the help of his local CAB in Somerset, Stephen – a young, illiterate man with two infant children – won a tribunal award of £2,600 for unfair dismissal from his job as a semi-skilled car mechanic, as well as for unpaid wages, holiday pay and notice pay, in July 2007. Stephen's former employer did not attend the tribunal hearing or otherwise contest the tribunal claim, and the Employment Tribunal applied

⁸ The Civil Procedure Rules provide that the unpaid award must be registered in the county court nearest to where the employer lives or carries out their business.

⁹ Section 31, *Employment Act*, 2004.

an uplift of 50 per cent on account of the employer's failure to follow proper internal procedures. The tribunal also added a further £450 to the award on account of the employer's failure to provide Stephen with a written statement of his terms and conditions, bringing the total award to £4,350.

However, Stephen's former employer subsequently failed to pay the award, despite Stephen paying £35 to register the unpaid award in the county court and then a further £55 for a warrant of execution. The county court bailiffs visited the employer's premises on several occasions, without success, and as of August 2008 Stephen had still not received a penny of his supposedly 'enhanced' award. Reporting his case to Citizens Advice, the CAB notes that 'after the many months of preparing for the tribunal hearing, Stephen feels badly let down by the tribunal system, and that awards are not worth the paper they are written on'.

With the help of her local CAB in Hampshire, Jackie won a tribunal award of £4,840 for unfair dismissal, unpaid redundancy pay and unpaid notice pay in September 2007. Jackie's former employer had failed to respond to her tribunal claim within the stipulated time period, and the tribunal applied an uplift of 20 per cent on account of the employer's failure to follow proper internal procedures. However, the employer subsequently failed to pay any of the resultant £5,800 award.

Empty justice

Citizens Advice has highlighted this deliberate non-payment, by rogue employers, of Employment Tribunal awards in two previous reports – *Empty justice* (September 2004) and

Hollow victories (March 2005) – and in numerous articles and responses to governmental consultations since 2001. We have suggested that the Employment Tribunal system's lack of teeth seriously undermines its credibility with both workers and employers. For it means that, where a tribunal claim is brought and successfully pursued against a rogue employer, they can simply ignore it – and so profit from exploitation – with near impunity. This is grossly unfair not only to those claimants who do not receive the compensation due to them, and to the taxpayers whose taxes have paid for the tribunal to process the claim, but also to the great majority of employers who abide by the rules and, however reluctantly, pay the awards made against them.

In the words of one leading Member of Parliament, 'enforcement is also important for employers, [as] there is nothing worse than a competitor down the road who is cheating'.¹⁰ Indeed, in a recent debate in the House of Commons, there was cross-party consensus on the injustice done to reputable employers if rogue employers are able to profit from exploitation with impunity. Another Member of Parliament noted that 'enforcement and compliance with the law are important for employers who abide by the law, who face unfair competition if rogue employers are flouting the law and therefore able to undercut those other employers'.¹¹ And yet another noted that 'businesses, small or otherwise, who have to compete in an open market do not want to be undercut by another employer ... that is why compliance is an issue not only for [individual workers], but for maintaining the support of the employers who comply'.¹²

Equally, the impact of such non-compliance with the tribunal system extends far beyond those individuals who are denied their tribunal award each year. For exploited vulnerable workers who see – or simply hear of –

¹⁰ Dr Vince Cable MP, *Hansard*, House of Commons, column 112WH, 11 June 2008.

¹¹ David Gauke MP, *Hansard*, House of Commons, column 114WH, 11 June 2008.

¹² Ian McCartney MP, *Hansard*, House of Commons, column 112WH, 11 June 2008.

someone else going to all the trouble of bringing and 'winning' a tribunal claim, only to get nothing when the employer simply fails to pay the award, are likely to seriously question whether it is worthwhile bringing a tribunal claim themselves.

It must be noted that, ultimately, **some** of those denied their award do eventually receive some or even all of the money owed to them. Some do eventually manage to enforce the award (and maybe also recover their costs) through legal action in a county court or the High Court. Others are also able to recover at least part of the award from the National Insurance Fund (NIF), upon application to a Redundancy Payments Office, if their employer has ceased trading **and** has become legally insolvent – that is, is in administration, liquidation or receivership – or where the award is for unpaid statutory redundancy pay only.

However, many businesses that cease trading never actually become legally insolvent (and the legal costs associated with getting a company 'wound up' on grounds of insolvency are prohibitive to most individuals). Also relatively few unpaid tribunal awards are for unpaid redundancy pay **only**. Our research on the unpaid awards dealt with by Citizens Advice Bureaux in 2007/08 indicates that only seven per cent were for unpaid redundancy pay only. In two-thirds of the cases in which the award included an element for unpaid redundancy pay, it also included an element for one or more of unfair dismissal, unpaid wages, unpaid notice pay and unpaid holiday pay. Yet, unless the employer has become legally insolvent, these elements of the award cannot be claimed from the NIF.

Moreover, all the available evidence suggests that such recovery of even part of an unpaid award – whether by legal action in the civil courts or from the NIF – is very much the exception rather the rule. As the following cases illustrate, such a satisfactory outcome is rarely achieved without immense and

prolonged effort on the part of the claimant and in many cases, the advisers at their local CAB.

With the help of her local CAB in Gloucestershire, Susan won a tribunal award of £1,620 for unpaid redundancy pay (£450 of the total award), unpaid wages (£660) and unpaid holiday pay (£510) in April 2008. However, Susan did not receive any money from her former employer, who had by then ceased trading but not gone into liquidation. Reporting her case to Citizens Advice in June 2008, the CAB notes that 'Susan's former employer has ceased trading but has not been formally wound up, so a receiver has not been appointed. As a result, Susan is only able to claim her statutory redundancy pay [that is £450 – less than one third of the total award] from the NIF, and has neither the time nor the money to apply to court to have a liquidator or receiver appointed – the only way she could recover the [£1,150 of] wages and holiday pay she is still owed'.

Peter sought advice from his local CAB in Cambridgeshire, in April 2007. The week before, he had been summarily dismissed from his job as a paint-sprayer with a firm of galvanisers, and had not received his final wages, owed holiday pay or pay in lieu of notice. When Peter's former employer failed to respond to his formal grievance letter, the CAB helped him to bring a tribunal claim, and in August 2007, Peter won an award of some £14,000 for unfair dismissal, unpaid wages, unpaid holiday pay, and unpaid notice pay. Peter's former employer did not attend the tribunal hearing or otherwise contest the tribunal claim, and subsequently failed to pay the award.

Peter then paid £35 to register his unpaid award in the local county court, and when this was ignored by his former employer, paid further fees totalling £250 to transfer the judgment to the High Court, for enforcement by one of the commercial firms of Authorised High Court Enforcement Officers. Finally, in February 2008, after the High Court Enforcement Officers seized two cars and a truck belonging to the employer, Peter received the money owed to him. In July 2008, Peter told Citizens Advice that 'the CAB adviser was extremely helpful and knowledgeable. I could not have afforded a solicitor, and without the CAB's help I would never have been able to enforce my award'.

The Government's response to date

To some extent, the Government has recognised this flaw in the Employment Tribunal system. In a July 2004 White Paper, *Transforming Public Services*, the Government acknowledged that the existing regime for the enforcement of unpaid Employment Tribunal awards is 'unsatisfactory'. This recognition led directly to the Tribunals, Courts and Enforcement Act 2007, providing for some welcome – but relatively minor – reform of the process for enforcing an unpaid award (or settlement) in the civil courts. In particular, Section 27 and Paragraph 43 of Schedule 8 of the 2007 Act provide that an unpaid Employment Tribunal award will no longer need to be registered in a local county court (for a fee of £35) before enforcement action can be initiated. The Government has indicated that this minor reform will come into force in April 2009.¹³

However, we believe that this reform – welcome as far as it goes – does not go anywhere near far enough. Indeed, in our

judgement, as well as that of the TUC's Commission on Vulnerable Employment, it is simply 'inadequate to ensure that unpaid awards are enforced'.¹⁴ For it is not the registration of the unpaid award in a county court that causes claimants difficulty. Such registration is simply the first – and the lowest – of the many hurdles that claimants have to jump when trying to enforce their unpaid award. As in many of the cases already described in this evidence briefing, it is the common experience of CAB clients and their advisers that registration of the unpaid award in a county court – which under the provisions of the 2007 Act is to become automatic and free of charge – fails to secure payment of the award. This is not least because the associated consequences for the employer of continued non-compliance are negligible.

A CAB in East Sussex reports helping Paulina, a young Portuguese woman with very limited English who had been working as a chambermaid in a local hotel, to win a tribunal award of £3,100 for unpaid wages and notice pay in March 2007. Paulina's former employer did not attend the tribunal hearing or otherwise contest the tribunal claim, and the award included a 50 per cent uplift on account of the employer's failure to follow proper internal procedures. When Paulina's former employer ignored the tribunal judgment, she paid £35 to register the unpaid award in the local county court. However, the CAB reports that 'this was also ignored, and Paulina eventually gave up as she did not want to pay further fees for enforcement procedures without any likelihood of payment being made'.

With the help of her local CAB in Merseyside, Bethan won a tribunal award of £5,500 for unpaid wages and holiday pay in January 2006. In late 2005, she had worked as a manager

¹³ Lord Bach (BERR Minister), *Hansard*, House of Lords, column GC108, 25 February 2008; and Malcolm Wicks MP (BERR Minister), *Hansard*, House of Commons, column 100, 14 July 2008.

¹⁴ *Hard Work, Hidden Lives: The Full Report of the Commission on Vulnerable Employment*, TUC, pages 134-5, May 2008.

at a children's nursery for eleven weeks without ever being paid. Bethan's former employer did not attend the tribunal hearing or otherwise contest the tribunal claim, and subsequently failed to pay the award. In March 2006, Bethan paid £35 to register the unpaid award in the local county court, and over the following months the CAB wrote a series of letters to her former employer, all to no avail. Six months later, Bethan decided to give up on pursuing the unpaid award, fearing 'costs and more personal stress'. In July 2008, Bethan told Citizens Advice. "I couldn't believe that the legal system made it so easy for employers to get away with it, and that I was expected to keep paying out money to take the issue higher, but with no guarantee that I would ever get my money."

The relevant provisions of the 2007 Act will do little if anything to improve this situation once implemented in April 2009, for the simple reason that the kind of rogue employer who is prepared to disregard a tribunal award is unlikely to be moved by the simple fact of registration in a county court. They **might** be moved, for example, by the arrival of the county court bailiffs but, for an individual claimant, arranging that is the difficult (not to mention costly and time-consuming) part of the process.

This is not least because, as noted above, rogue employers can and do employ a number of strategies to frustrate the work of the county court bailiffs. In the words of one CAB adviser, 'registering the unpaid award in a county court is easy enough, but [for our clients] enforcement is almost impossible'. In short, the relevant provisions of the 2007 Act will, when implemented in April 2009, make automatic what is already 'easy enough', but will do nothing to aid actual **enforcement** and so do not address the key difficulties faced by individuals when trying to enforce an unpaid tribunal award.

Conclusions

We believe that the Government needs to go much further, and to provide for unpaid Employment Tribunal awards to be enforced **by the State**, on behalf of the claimant. The chief advantage of such state-led enforcement over the current, claimant-led regime would be that rogue employers would know that, unlike many individual claimants now, the State would not easily give up on enforcing an unpaid award. In other words, the mere existence of a state-led enforcement regime would cause rogue employers to make a very different calculation about the gamble of deliberate non-compliance, and many of the awards that currently go unpaid would be paid **without the need for any actual enforcement action by the State**. This 'self-regulation effect' would also have welcome implications for the cost of a state-led enforcement regime (see below).

In recent years the Government has made 'protecting vulnerable workers' a key plank of its strategy on employment relations. In March 2006, in its strategy document *Success at work*, the Government stated that, having 'got more people into jobs and put in place an improved framework of workplace rights' since 1997, its 'next task' is to 'ensure that the most vulnerable workers get those rights and are not mistreated'. Furthermore, recognising that there is a small minority of rogue employers who 'deliberately flout the law', the Government acknowledged its 'duty to enforce the law against those who break it'.¹⁵

As part of this new strategy, in June 2007 the then Department of Trade and Industry (DTI, now BERR) established a Vulnerable Worker Enforcement Forum, chaired by the Employment Relations Minister, to 'consider whether abuses are tackled effectively through existing enforcement and support mechanisms or whether improvements to existing mechanisms, or new approaches, are needed'.

Citizens Advice was pleased to participate in this Forum, alongside the TUC, the CBI and others, and to raise the issue of non-payment of tribunal awards by rogue employers. The Forum's final report, published in August 2008, expressed the Government's concern at 'Citizens Advice evidence about non-payment of tribunal awards', and rightly noted that 'workers who have been through the Employment Tribunal process need confidence that they will be able to enforce their awards'. However, the report fell short of suggesting any reforms that might actually give workers such confidence.¹⁶

We have welcomed these and other relevant initiatives, including a doubling of the number of Employment Agency Standards Inspectorate (EASI) inspectors (from 12 to 24) from July 2008, and provisions in the current Employment Bill that will significantly enhance enforcement of both the national minimum wage and the employment agency regulations. More particularly, we welcome and endorse the recognition by the Business Secretary, John Hutton MP, in his speech to the TUC Congress in September 2007, that 'the existence of workplace rights is not enough if employers think they can flout the law with impunity'.¹⁷

We hope very much that the Government will now move to tackle the failure of some rogue employers to comply with tribunal awards. For we believe that closing this loophole in the Employment Tribunal system is essential if the Government is to deliver on its promise to 'protect vulnerable workers' and 'root out the rogues', to the benefit of workers, taxpayers and good employers alike. In the words of the Employment Relations Minister, Pat McFadden MP, 'there should be no hiding place for employers who exploit vulnerable workers and are not prepared to obey the law'.¹⁸

Proposals for reform

Clearly, the Employment Tribunals need to be given the legal powers to enforce their own awards – something that could be achieved by the inclusion of appropriate legislative provisions in the Government's current Employment Bill, which is due to become law in 2009. However, the crucial question is how such legal powers will be used to recover the money owed to the claimant from the non-compliant employer in question – in other words, how enforcement will actually be conducted. If the powers given to Employment Tribunals are to be any more effective than those of the civil courts, then the enforcement regime must be switched from one that is claimant-led, as now, to one that is state-led. That is, the State, in the form of the Employment Tribunals, must enforce an unpaid award on behalf of the claimant.

There are a number of different ways in which state-led enforcement of unpaid awards could be conducted. One possible model would involve the direct employment of a small team of lawyers (or specially trained officials), based within the Tribunals Service (of which the Employment Tribunals are now a part) and using the existing county court and High Court mechanisms to enforce unpaid awards. Another possible model would involve the enforcement of unpaid awards by one or more of the commercial firms of Authorised High Court Enforcement Officers, on behalf of the claimant and under contract from the Tribunals Service. Not only are these firms widely regarded as more effective than the county court bailiffs, but they recover all their costs (and profit) from the debtors concerned – thereby creating a strong incentive for early compliance. We note that in recent years, both the Department for Work and Pensions and the Child Support Agency have used commercial debt collection agencies to collect benefit debt (such as outstanding Social Fund

¹⁶ *Vulnerable Worker Enforcement Forum: Final Report and Government Conclusions*, BERR, page 40, August 2008.

¹⁷ Rt Hon John Hutton MP, speech to TUC Congress, 12 September 2007.

¹⁸ Pat McFadden MP, in his foreword to *Vulnerable Worker Enforcement Forum: Final Report and Government Conclusions*, BERR, August 2008.

loans) and outstanding child support maintenance respectively.¹⁹ But whichever model the Government deems most appropriate and cost effective, it has a ready opportunity, in the form of its current Employment Bill, to introduce the necessary legislative provisions.

It is difficult to estimate the likely cost of such state-led enforcement of unpaid awards, at least with any precision, as there is currently no directly comparable governmental activity on which to base such an estimate and there are, in any case, a number of variables to consider. It is difficult, for example, to predict how much the mere existence of a state-led enforcement regime would reduce the number of awards that go unpaid (the 'self-regulation' effect), and in any case the likely cost will vary according to the method of enforcement. However, even if the Government spent as much as £1,000 on enforcing each unpaid award – that is, the same amount that it currently spends on processing the tribunal claim in the first place – then, assuming that (a) there are currently 1,500 unpaid awards each year; (b) this would be reduced to under 1,000 by the 'self-regulation effect'; and (c) state-led enforcement action would be successful in at least half of the remaining cases (with full costs being recovered from the employers concerned in addition to the unpaid awards), the total net cost would be **less than** £0.5 million per year.²⁰

Under these (cautious) assumptions, at least 1,000 Employment Tribunal claimants would benefit financially each year (at least 500 from improved employer compliance with tribunal awards, and the rest from enforcement action taken by the State against initially non-compliant employers). And, if the unpaid awards dealt with by Citizens Advice Bureaux

in 2007/08 are typical of **all** unpaid awards, the total monetary benefit to these 1,000 or more claimants would be upwards of £4.5 million per year. That is, for every £1 spent by the Government on enforcement, claimants would benefit by £9 or more. Non-monetary benefits would include reduced stress and anxiety for, and greater fairness to, the 1,000 or more tribunal claimants concerned; greater fairness to the great majority of law-abiding employers who comply with the awards made against them; and enhanced credibility of the Employment Tribunal system as a whole.

We would suggest that even £0.5 million per year is a relatively small amount when set against total current Government expenditure on the employment dispute resolution system, that is, both Acas and the Employment Tribunals, of some £120 million per year.²¹ We also note the Government's very welcome plans to provide Acas with **additional** funding of £37 million over the next three years to allow Acas to 'boost its helpline and advice services and offer help at any stage of a dispute to make sure it is never too late to choose an informal resolution'.²² So, there would appear to be 'extra cash' available for the employment dispute resolution system when the Government deems it appropriate and effective.

Furthermore, according to the Employment Bill regulatory impact assessments, the Government expects the provisions of the Bill to produce savings to the taxpayer (from reduced costs of the Employment Tribunal system) of some £14 million per year.²³ Given that a stated key purpose of the Bill is to 'increase protection for vulnerable workers', we do not think it unreasonable to suggest that the Government should plough less than four per cent of these projected annual

¹⁹ *Hansard*, House of Commons, column 77WS, 29 March 2004; and House of Commons, column 1021, 9 February 2006.

²⁰ Under different assumptions, the total cost could be considerably less than £0.5 million per year. For example, if the average cost to the Government of enforcing an unpaid award was £500, rather than £1,000, then the total net cost (all other assumptions remaining the same) would be less than £0.25 million per year.

²¹ Source for £120 million figure (which relates to financial year 2005/06): *The Gibbons Report*, DTI (now BERR), paragraphs 1.43–1.45, March 2007.

²² *Extra cash to aid early resolution of workplace disputes*, BERR press notice, 6 February 2008; and Pat McFadden MP (BERR Minister), *Hansard*, House of Commons, column 41, 14 July 2008.

²³ berr.gov.uk/files/file44363.pdf

savings back into ensuring that tribunal awards (many of them made to vulnerable workers) do not go unpaid by rogue employers. Indeed, we would suggest that this would be a very good way for the Government to meet its self-proclaimed duty to 'enforce the law against [the rogue employers] who break it'.²⁴

In conclusion, there appears to us to be no good reason – financial or otherwise – why the Government should not act now to ensure that there is 'no hiding place for [rogue] employers who are not prepared to obey the law', and that the Employment Tribunal system does not provide empty justice to exploited vulnerable workers.

The service aims:

- to provide the advice people need for the problems they face
- to improve the policies and practices that affect people's lives.

The Citizens Advice service provides free, independent, confidential and impartial advice to everyone on their rights and responsibilities. It values diversity, promotes equality and challenges discrimination.

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