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# Low Pay Commission Consultation 2018

## Response from the Employment Lawyers Association

**1 June 2018**

EMPLOYMENT LAWYERS ASSOCIATION

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## Introduction

The Employment Lawyers Association (ELA) is a non-political group of specialists in the field of employment law and includes those who represent claimants and respondents in courts and employment tribunals. It is not ELA's role to comment on the political or policy merits or otherwise of proposed legislation or regulation, rather it is to make observations from a legal standpoint. Accordingly, in this consultation we do not address such issues. ELA's Legislative and Policy Committee consists of experienced solicitors and barristers who meet regularly for a number of purposes including to consider and respond to proposed legislation and regulations.

The Legislative and Policy Committee of ELA set up a working party chaired by Michael Reed of the Free Representation Unit to consider and comment on the 2018 consultation paper from the Low Pay Commission. The working party members are listed at the end of this paper.

## Question 20: What issues are there with compliance with the minimum wage? Has the NLW affected compliance and enforcement? Are there any other trends, for example in particular sectors or groups?

ELA has not conducted a rigorous survey of NMW compliance. Nor, given the nature and size of our organisation are we in a position to do so. But, we can express the following views based on the anecdotal experience of our members.

Compliance issues tend to arise in four main ways.

First, much non-compliance involves breaches in the detailed calculation of the NMW owed, rather than straightforward failure to pay the headline rate. For example, workers who travel as part of their duties may not receive pay for that travelling time. Or time may be calculated on an assumption that a particular task takes half an hour, even though in practice it takes significantly longer. Or some workers may be required to undertake training or assessments before they start work, are subject to deductions for travel or even required to attend work earlier in order to start work/production at their contracted start time.

Particular issues arise where workers work overnight, on call or sleep-in shifts. Determining whether these periods should be counted for the purposes of NMW is challenging, because the applicable law is subtle and requires a careful consideration of the way in which the workplace operates.

The difference between 'working time' for the purposes of the Working Time Regulations 1998 and NMW is not widely understood by employers and workers. Such ambiguity can lead to disputes.

A similar point arises in relation to distinguishing between workers and self-employed. The distinction is not widely understood (and sometimes understood but abused). Anecdotally many self-employed workers are paid more than NLW. However, some are not. ELA is not in a position to carry out a robust analysis of the numbers incorrectly classified as self-employed and paid less than NMW, but we consider this to be an area of concern.

The end result of such non-compliance is the worker is paid less than the NMW. But this may not be apparent of the face of the agreement or to those unfamiliar with the detail of both the relevant law and the circumstances of work in that particular workplace. Much of the problem in relation to this type of non-compliance is that, while the headline rates of the NMW are well known, the more detailed provisions of the law are often extremely unclear to both employer and employee.

Second, non-compliance with the NMW is more likely to occur where there is a substantial power imbalance between the worker and their employer. This may occur in a number of ways, including insecurity in employment, lack of education / language skills and difficulty accessing enforcement mechanisms. Problems are more likely to arise in workplaces using zero hour contracts and in sectors with low union membership.

The phenomenon of a power imbalance making non-compliance with employment law more likely is not restricted to NMW issues. It is a common thread through employment rights. But it is particularly problematic in the context of the NMW. Wages issues commonly arise while a worker remains employed (in contrast to rights like unfair dismissal, which inevitably arise in the context of dismissal). A worker facing non-compliance with the NMW while in employment must therefore balance their desire to correct the wage issue with their desire to remain on good terms with their employer and retain their job. In practice, this can create a strong disincentive to challenge non-compliance.

Also, those workers who benefit from the NMW are those in low paid, often insecure employment. This arises inevitably from the context of the law. Higher paid, valued and skilled employees do not need to rely on the NMW to ensure fair pay in the same way.

Unfortunately, that means that those who need the NMW, are also those most likely to have difficulty in ensuring compliance with it. This is further exacerbated when they remain in employment, because they are less likely to be able to risk an unscrupulous employer retaliating against them.

Third, there are particular sectors where non-compliance is common. For example, workers in the home care sector are frequently not paid properly for travel between appointments, causing non-compliance with the NMW.

Fourth, non-compliance is closely associated with a lack of transparency around pay. Employers who do not provide contracts and pay slips that set out clearly how pay is calculated are more likely to exhibit non-compliance with the NMW. This adds to the burden of challenging their employer, especially where the non-compliance is more complex than a simple failure to pay the correct hourly rate.

In recent years all of these compliance issues have been exacerbated by the introduction of employment tribunal fees, resulted in a drop of approximately 70% of claims to the tribunal. In ELA's collective experience this drop disproportionately affected relatively low-value wages claims, including NMW claims.

The fees regime has now been declared unlawful by the Supreme Court in R (UNISON) v The Lord Chancellor. The number of claims brought to the tribunal has risen, although not to the pre-fees level. The rise in claims has inevitably had an impact on the Employment Tribunals.

It is too early to tell to what extent the increased ability of employees to bring claims before the tribunal will effect compliance with the NMW more generally, although ELA expects that it will have at least some positive effect. It must be borne in mind, however, that bringing a tribunal claim remains a complex and arduous process, particularly for vulnerable employees. Only a small minority have ever or ever will do so. Much of the positive effect of the tribunal's enforcement role is therefore in its halo effect. Employers are encouraged to comply, because they are aware that employees have access to the tribunal.

All of this also has to be understood in the context of the difficulties in enforcing employment tribunal awards. Research carried out by BIS in 2013 found that 35% of claimants received no money at all. Only 49% were paid in full. This reflects the current anecdotal experience of ELA members.

With rare exceptions, our experience is that large and established private employers will also pay awards promptly. This means that judgments against small employers appear to be significantly more likely than not to go unpaid. This almost certainly includes the majority of NMW claims determined by the tribunal system.

For these reasons, despite the legal right to enforce the NMW through litigation in the employment tribunal, it is far from a straightforward process and many of our members doubt that it represents an effective mechanism for ensuring compliance with NMW law.

Some members have reported concerns that rates for apprentices and young people are too low and do not attract people into work or the habit of working. Operating fewer and higher rates might encourage and incentivise younger workers.

Some of the ELA's members have reported that as a consequence of NMW it has become harder to recruit workers for certain 'less attractive' roles e.g. working in factory or farming environments, as they struggle to offer competitive rates when compared to other perceived 'more attractive' or less strenuous roles which pay marginally less at NLW.

Workers earning NMW are not eligible for benefits operated on a salary sacrifice basis e.g. pension, childcare, cycle to work, which means that disadvantaged workers might miss out on additional benefits afforded to those on higher rates of pay.

In ELA's anecdotal experience the introduction on the NLW had made little difference to compliance with the NMW.

**Question 21: What comments do you have on HMRC's enforcement work? What is your opinion on the quality and accessibility of the official guidance on the NLW/NMW?**

In general, HMRC's enforcement work does not operate at a sufficient scale to have a meaningful impact on NMW compliance. It simply does not investigate enough cases to have a significant direct or deterrent effect on employer behaviour.

This contrasts with, for example, Health and Safety issues and HMRC's own work on tax issues. In these areas employers feel a sense of regulatory pressure — they believe that there is a real risk they will face consequences if they fail to comply with the law. This is just not the case in relation to the NMW.

Some of our members have indicated that they consider that compliance could be improved by greater resources being focussed on enforcement work rather than light touch "nudge" action whereby the HMRC write to employers to remind them of their obligations and "nudge" them into action.

Most employers and employees are not aware the HMRC's role in the enforcement of the NMW.

Some ELA members have also expressed concern that HMRC investigations appear not to follow up from investigation of an individual's NMW issues to a wider investigation of an employer's NMW compliance. Our experience is that, in general, non-compliance with the NMW is not isolated to an individual employee. It would therefore seem sensible that HMRC consider, where an individual complaint is substantiated (or appears to have merit) to extend their investigation to other employees' pay.

However, some ELA members have expressed concern that when HMRC do investigate employers the process is excessively onerous and consumes significant resources. This is particularly true in the the recruitment sector. We have heard examples of

investigations taking many months, involving many interviews with management and staff and on occasions more than 3 to 4 separate requests for detailed reports.

Some ELA members have expressed concern with the quality and accessibility of the official guidance on the NLW/NMW and ELA's anecdotal experience is that many issues of non-compliance might have been avoided by better education of both employers and workers (see question 22 below).

**Question 22: What more could be done to improve compliance with the NLW/NMW?**

As noted above much non-compliance with the NMW relates either to mistake or misunderstanding about the relevant law (or, similarly, a failure of HR process to monitor compliance) or, in broad terms, inadequate regulatory pressure (in the widest sense) to incentivise compliance.

Mistake and misunderstanding might be reduced by improved education and support of employers, particularly small employers where problems are most likely to arise.

Ensuring adequate regulatory pressure is, in large part, ensuring that HMRC enforcement is better resourced and more active. Although that, no doubt, involves trade-offs in relation to other enforcement activity and the wider impact of more intense enforcement. Maintaining access to the Employment Tribunal is also important.

Further, providing workers with clear guidance as to their rights (perhaps in the form of an awareness campaign or even a statutory requirement to include details in worker contracts or pay slips) may encourage workers to report matters to HMRC and incentivise compliance. For this to be effective, workers should also be informed of the existing statutory protections afforded to them in event they 'blow the whistle'.

**Question 23: What are your views on the accommodation offset? To what extent is it protecting low-paid workers? What difference, if any, has the increase in the rate since 2013 made to the provision of accommodation?**

ELA's anecdotal experience is that the accommodation offset has relatively little impact, because the provision of accommodation to workers is so rare. Few employers provide accommodation and, where they do, it is often to individuals earning well above the NMW. There are a few low paid workers who do receive accommodation and the offset is an important safeguard for them. But the numbers are, in practice, very small.

We would note that a small minority of workers who are provided with accommodation are among the most vulnerable. This includes, for example, migrant workers and migrant domestic workers. This is one of the areas in which compliance with the NMW is sometimes problematic. But when problems of this type occur it tends to be a much wider failure to pay the NMW at all, rather than breaches of the rules relating to accommodation offsets.

The ELA is aware of examples (albeit very few) where employers have ceased to provide accommodation due to this becoming commercially unviable in light of increasing NLW.

ELA does not have sufficient institutional experience in relation to the increases in the rate since 2013 to form a view on its impact.

**Question 24: What is the scale and nature of the problem described in the Taylor review – that is low-paid workers who face uncertain, unpredictable and volatile work schedules? Does it affect particular workers or parts of the economy?**

ELA is not able to produce a robust estimate of the scale of this issue. Anecdotally, there are undoubtedly low-paid workers who face this issue. ELA members have reported that it occurs within the gig economy and food / beverage sectors.

**Question 26: Are there examples of particularly good practice in the use of flexible employment arrangements for low-paid workers? That is, ways of working that manage to balance flexibility and security for workers but also work for employers?**

To some degree there are zero sum issues involved that best practice cannot address.

The benefit of flexibility for employers are that they can precisely match their supply of labour with their need. This allows them to minimise their costs during a quiet period, while maximising their work at busier times. This flexibility for the employer comes with an equivalent cost in security for workers. This is inescapable; the employer's flexibility is the other side of the worker's lack of security. You cannot have one without the other.

Flexibility can also be a benefit for workers. But it comes at the cost of security.

Better employers, however, can act to mitigate these issues. There are broadly three elements to this. First, employers can minimise the loss of security by seeking to ensure that workers do receive the level of work they desire. This may involve allowing them to become employees if they wish. But it can also involve engaging an appropriate number of workers and sharing the work sensibly between them. Better employers are also responsive to workers' desire for flexibility. For example, students who wish to work more during holidays, but less during exams, or parents who need to work around school holidays. Some employers will also seek to ensure workers do receive a minimum amount of work, in some cases that will involve taking on some cost to themselves in order to do so.

Second, good employers allocate work fairly between their workers, consulting with them and trying to avoid arbitrary or disadvantageous requests e.g. back to back shifts or shifts in geographically separated locations. Good employers also avoid punishing workers who exercise their own right to flexibility; and make it clear this is their policy. ELA members report that many workers are apprehensive about what may be the repercussions for

them if they take time off, even if contractually permitted or they have a good reason for doing so e.g. sickness.

Third, good employers are transparent about how their flexible arrangements operate, how hours are assigned, how pay is calculated and what workers' legal rights are.

**Question 28: The LPC has been asked to consider the impact of Matthew Taylor's idea of a higher minimum wage for hours that are not guaranteed as part of the contract. What impact would this have on workers? Would it achieve greater stability of hours/income for workers and/or compensate them for the volatility of their work schedules? Are there any trade-offs, for example more predictable hours in exchange for fewer hours overall?**

Given our apolitical remit, ELA does not feel it would be appropriate to comment substantively on this.

We note, however, that this would be a substantial change to the way that NMW law now operates. At present there is no direct link between the NMW rate and any particular hour worked. Instead the law looks at the total number of hours worked in a pay reference period and the total amount paid relating to that same period in order to calculate an average hourly rate. That average hourly rate is then compared to the appropriate NMW rate.

Refactoring the present NMW into a system that permitted an enhanced rate for certain hours would be a substantial exercise. In the short term it would generate costs and uncertainty. These might be thought to be outweighed by the benefits, but should be considered.

**ELA Working Party**
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