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**Low Pay Commission Consultation:  
National Living Wage and National Minimum Wage:  
2016 evidence**

**Response from the Employment Lawyers Association**

**29 July 2016**

# **Low Pay Commission Consultation National Living Wage and National Minimum Wage: 2016 evidence**

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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 sub-committee under the chairmanship of Shubha Banerjee of Leigh Day and Michael Reed of the Free Representation Unit to consider and comment on the Low Pay Commission's consultation. Its response to the various queries set out in the consultation paper is set out below.

A list of the members of the sub-committee is at the end of this paper.

**4. What has been the impact of the NLW (from April 2016)? We are interested in any views or data on the initial effects on employment, hours, earnings, pay structures (including premium pay) and benefits, outsourcing, differentials, progression, job moves, training, contract type, business models, prices or profits.**

Members of ELA have reported anecdotal examples of NLW acting to undermine pay progression. Instances have been reported where the rate between worker and supervisor is negligible and likely to be negated rapidly even with modest rises in NLW. Employers have not enhanced pay scales in response to the introduction of the NLW. This disincentivises workers and their managers from taking on roles with greater responsibility and creates low morale.

Concerns have been identified about the effect of workers doing the same work, previously on the same rates of pay, now being paid different rates based on age alone. This is seen as unfair and discriminatory by workers.

**21. What has been the impact of the minimum wages on workers aged 21-24 and what effect do you think it has on their employment prospects?**

Concerns have been raised by ELA members about the non application of NLW to workers aged 21-24. ELA members representing workers in this age group have expressed views that the lower rate for this age group is unfair and potentially discriminatory. Concern has been expressed about workers performing exactly the same tasks, in the same roles being paid different rates, based only on age.

ELA members have noted the concluding observations of the UN Committee on Economic, Social and Cultural Rights in June 2016<sup>1</sup> which noted concerns that the NLW introduced in April 2016 did not “apply to workers under the age of 25”. The Committee has called upon the UK to “extend the protection of the NMW to those under the age of 25”.

**23. What has been the impact of the Apprentice Rate (on pay; provision and take up of places; and training volume and quality)?**

The apprenticeship rate in the first year is clearly the most attractive rate for an employer to recruit at. It is not linked to age in the first year. However, because of the increase in hourly rate of pay in the second year, this can lead to difficulties.

With the introduction of the National Living Wage (NLW) from April 2016 workers aged 25 and over can see an increase from £3.90 in the first year to £7.20 in the second year. The Low Pay Commission (LPC) Annual Report 2016 notes of a warning from some ELA members of apprenticeship status being used as a loophole to keep costs down of workers aged 25 and over being classified as apprentices, but without the associated training. This has also caused concern about groups of workers being removed from the protection of collective bargaining arrangements. Presumably, this is also likely to arise in the 18-24 age

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[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGBR%2fCO%2f6&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGBR%2fCO%2f6&Lang=en)

group as the incentive is the reduced labour cost and the meeting of apprentice scheme targets.

There is some evidence of some employers becoming somewhat creative in trying to get around this. Such attempts have included Apprenticeships being offered for 11 months and/or where progressing to the next level is cast as commencing a new apprenticeship altogether. (see P.67 Centre for London, Dec 13, Andy Hull “Settle for Nothing Less: NMW Compliance and Enforcement”.)

The effect is that HM Revenue and Customs may need to prioritise this as an area of increased risk.

**24. What do you think might help employers to comply with paying the right apprentice rate?**

The LPC Annual Report 2016 paragraph 8.10 states that “The Government has always argued that the overwhelming majority of NMW non-compliance is made up of inadvertent and /or accidental mistakes”. In these circumstances raising awareness of the existing 1<sup>st</sup> year and 2<sup>nd</sup> year hourly rates for apprentices should help. One way to increase awareness would be for these rates of the NMW to be printed on the payslip.

**25. What issues are there with compliance with the minimum wage? Do particular groups experience problems with NMW compliance (for example, apprentices, those working in the social care sector, migrant workers or interns/ others undertaking work experience)? What is the extent and trend?**

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. The end result of such non-compliance with the detailed NMW calculation is that the worker is paid less than the NMW, although this may not be apparent of the face of the agreement or to those not familiar with the detail of the law. Much of the problem in relation to this type of non-compliance is that, while the fact of the NMW is well known and the headline rates commonly understood, 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. Indeed 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 who falls victim to non-compliance with the NMW while in employment must 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.

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. This was recognised by the LPC in their recent report<sup>2</sup> which recommended that the Government:

*“reviews the current obligations on employers regarding provision of payslips and considers introducing a requirement that payslips of hourly-paid staff clearly state the hours they are being paid for.”*

All of these compliance issues have been exacerbated by the introduction of employment tribunal fees, which have resulted in a drop of approximately 70% of claims to the tribunal. The total fee for a non compliance claim without dismissal is £390. A worker who works 37.5 hours per week on NMW will earn £251.25 gross, and a worker on NLW £270 gross. Fees are paid from net pay by workers. Fees are the equivalent to almost 2 weeks’ net pay. Workers may be required to pay more than they stand to recover in order to enforce the minimum pay standard.

A detailed analysis of the impact of tribunal fees is beyond the scope of this consultation. However, ELA would concur with the evidence given by the Council of Employment Judges, which noted that low value wages claims had suffered a particularly marked decline. Many NMW issues arise in the context of these low value wages claims.

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.

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.

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<sup>2</sup> Low Pay Commission Report: Spring 2016, The Low Pay Commission, March 2016, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/507455/10493-TSO-Low\\_Pay-ACCESSIBLE\\_05.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/507455/10493-TSO-Low_Pay-ACCESSIBLE_05.pdf)

**26. What impact, if any, is the National Living Wage having on compliance and enforcement?**

ELA members have drawn attention to the concluding observations of the UN Committee on Economic, Social and Cultural Rights in June 2016 where the Committee expressed concerns that the NLW “is not sufficient to ensure a decent standard of living”.

However, overall, we feel that it is, as yet, too early to judge this.

**27. What comments do you have regarding the enforcement work of HMRC, and/or the quality and accessibility of official guidance on the NMW? What more could be done to improve compliance? Do workers and employers have enough information on the NMW and what could be done to improve it?**

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. In 2014 the UK Government introduced a policy of naming and shaming employers found to be non-compliant with the NMW. Members representing home care workers have expressed concern that enforcement appears to be what they view as superficial. They have noted that only 13 separate care providers have been exposed. Arrears of £47,956.39 have been identified for a total of 210 workers in this process. All of the providers named to date have also been very small and localised providers. Further, of the 13 care companies that have been named and shamed the majority have been identified as owing arrears to 1 care worker at their company. 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. They are of the view that the NMW legislation has been in place since 1998 and that simple reminders that employers must comply with the law falls short of the steps needed to ensure that minimum pay standards are being uniformly observed by employers.

Most employers and employees are not aware the HMRC's role in enforcement of the NMW. This is also true of a significant number of employment lawyers. For instance, there are low levels of knowledge that care workers should be paid for their travel time, and about the avenues for redress including a dedicated, state funded helpline. Evidence indicated that only 11 homecare workers called the helpline to formally complain about non payment of NMW in 2011-12, and a further 19 the following year<sup>3</sup>.

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 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.

#### **ELA Sub-committee**

**Co Chairs: Shubha Banerjee. Leigh Day; Michael Reed, Free Representation Unit**

Emma Cousins, Addleshaw Goddard LLP

Michael O'Donoghue, Bradford Law Centre

Kate Ewing, Unison

Eirwen Pierrot, Field Court Chambers

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<sup>3</sup> House of Commons, Hansard, 10 June 2013,  
<http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130610/text/130610w0002.htm>