



## **CONSULTATION RESPONSE ON NMW & EMPLOYMENT AGENCY STANDARDS ENFORCEMENT**

### **Introduction**

Unite - the union is the UK's largest union, representing 2 million members across multiple areas of the British economy including road transport, finance, manufacturing, construction, print, aviation, food and farming, public services and many others.

Unite welcomes the opportunity to respond to this consultation, as action is required to address NMW non-payment and arrears, not only for the sake of fairness to those workers who lose out, but also to provide disincentives to those employers who may be tempted to avoid their obligations. Unite has appreciated the opportunity to discuss the NMW enforcement issues with officials and has appreciated the thorough manner in which the NMW part of the consultation has been conducted.

Unite also believes that the regulation of employment agencies in the UK is inadequate. The increase in the availability of migrant labour has led to increasing opportunities for unscrupulous employers to use migrant agency labour to bypass existing employment rights, and to undercut existing terms and conditions of employment. In Unite's experience the vast majority of these migrant workers are employed through employment agencies. It is our belief that this problem can only be effectively addressed if the UK Government signs up to the principle of the proposed EU Directive on Agency workers and introduces legislation to provide for equal treatment for agency workers in basic terms and conditions. This measure would help remove the incentive for employers to use agency labour as a form of cheap labour.

In the absence of legislation, Unite welcomes this opportunity to call for better enforcement and regulation in the agency sector. Unite successfully campaigned for the introduction of the Gangmasters Licensing Act following increasing

evidence of the exploitation of migrant labour in the food processing sector. Unite would like to see such protections extended to other areas of the economy.

## **PART I: NATIONAL MINIMUM WAGE ARREARS**

Workers who have been illegally underpaid the NMW wait many months to receive arrears. It is clear that these workers need some form of compensation for the period that they have had to wait.

Unite are pleased to see that this issue is being addressed in this consultation in line with the LPC recommendation that:

***'The government should introduce interest charges on arrears arising from minimum wage underpayment.'*<sup>1</sup>**

Unite believe that the best option would be **Option C** - to calculate all arrears at the current rate of the minimum wage (rather than the rate that applied when the underpayment actually occurred). The main reason for this is because it's the only option that currently wouldn't require a worker to complete a self assessment form for income tax. It is important to avoid such a necessity if the objective of ease and speed is to be achieved.

Although this option has the benefit of simplicity, some workers would benefit more than others depending on the date of their underpayment, as pointed out in paragraph 24. Unite would like additional thought to be given as to how this can be addressed, even partially, without incurring the need for a low paid worker to become liable for self-assessment.

## **PART II: NATIONAL MINIMUM WAGE PENALTIES**

### **1) Fines to start on day one of NMW underpayment.**

The National Minimum Wage is now a well known and accepted part of the UK economy. There can be no excuse for an employer to breach the legislation so the time is right to address penalties. Unite therefore agree with proposals in paragraphs 46 and 47 of the consultation document that there should be an automatic penalty and **do not think that there are any circumstances where an automatic penalty should not apply**. The growth of the agency sector and the employment of migrant labour provides a further rationale for ensuring that there are clear disincentives for employers to break the law in this area.

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<sup>1</sup> 'National Minimum Wage: Low Pay Commission Report 2005', LPC 2005, P.xxii

Unite welcomed the recent increase in the penalty notice for employers who do not pay NMW arrears in time. The current system whereby 95% of non-compliant employers end up not paying a penalty does not provide adequate incentives.

Currently if an employer has not been paying the NMW, then they don't have to pay any penalty if they either agree to pay up when first asked to do so or at anytime before the enforcement notice period of 28 days has elapsed. This 'get out of jail free card' system is a double financial incentive to break the law as employers benefiting from the short term reduction in costs as well as the interest that they are accruing on that money.

Unite therefore support penalties from day one, with significant escalation for non-payment.

## **2) Fixed penalty per worker.**

Unite supports **Option C, a fixed penalty per worker starting from day one of failure to pay the NMW.** The fixed penalty element is a simpler calculation compared to other suggested options. In addition the per worker element has a better link to the total number of workers affected.

**Option B** would be entirely inappropriate as it would lack proportionality. A system whereby a small business who accidentally underpays one worker would receive the same penalty as a larger business deliberately underpaying 100 workers would be unacceptable.

**Option D** is too complex because, as Para 79 points out it would necessitate an exact calculation of arrears. If arrears is paid at the current rate of NMW the issue of the timing of the underpayment in relation to the date of any uplift in the NMW would arise again.

**Option E.** Unite would not favour this option as we believe that the penalty should reflect the number of workers who are being underpaid.

## **3) £100 minimum fixed penalty per worker.**

**Unite recommend that employers who fail to pay the NMW should be subject to an immediate penalty of a minimum of £100 per worker.**

## **4) Second stage penalty.**

If the penalty notice is ignored, **Unite recommend that this second stage penalty should be charged in accordance with the present penalty fine system.** This penalty is set at 42 x the hourly rate of the adult minimum wage per

worker (currently £224.70) and, for those who fail to comply, increases at a rate of 2 x the hourly rate of the adult minimum wage per worker (currently £10.70) for every extra day that the employer fails to comply.

## **6) Repeat offenders.**

Unite believe that this area of enforcement needs to be toughened in order to ensure that employers who have consistently underpaid the NMW and prevented the HRMC's inspectors from conducting their searches are punished with such severity that they won't be tempted to do it again. We believe that such a move would send out a clear message that we are now entering a new era of NMW enforcement and that the National Minimum Wage Act is as important and serious piece of legislation as any other.

The current maximum penalty of £5,000 is not a sufficient for the worst offenders. Unite believes that the maximum should be increased significantly to allow for any potential worst offenders. It should be noted in this context that the maximum fine for an employer who breaches the Information and Consultation Regulations, for example, is £75,000. We also believe that HMRC should be able to prosecute the worst NMW offenders in a similar way that criminal prosecutions can ultimately be taken for tax evasion.

## **FURTHER ISSUES FOR CONSIDERATION**

### **Group actions**

On a more general point regarding NMW enforcement, Unite requests that trade unions should be able to take group actions on behalf of workers who have been underpaid the national minimum wage. Not only would this make enforcement easier and simpler, it would provide protection for many vulnerable workers who believe that if they make a complaint about underpayment they will be dismissed. In the case of agency workers, of course, there are limited employment protections. Unite the union has encountered many cases where agency workers have been 'unassigned' from jobs because they have made a complaint about their employer.

### **Migrant Workers**

The most vulnerable workers in our economy are undocumented migrant workers, many of whom are being paid below the National Minimum Wage. Unite does not believe that any worker should be exempt from basic employment rights. Unite believes that employers should face penalties for paying below the minimum wage whether their workers are documented or not. In Unite's

experience employers capitalise on the fear and insecurity of these workers and often only become interested in their status if a worker complains.

The maintenance of the National Minimum Wage is dependent on all workers irrespective of their employment status, to be paid no less than the NMW level. The position encourages employers to recruit migrant workers (documented or otherwise) precisely because they are able to get away with paying significantly less than the National Minimum Wage. This has had a downward (deflationary) pressure on the wages of indigenous workers at the lower end of earnings in the economy. This is clearly an unintended gap in the enforcement of the NMW and employment rights per se.

It is unacceptable that an employer who commercially benefits from paying low wages to an undocumented worker on the basis of illegality of contract, can escape subsequent penalties, based on the same illegal contract to which they were (as employers) party.

Clearly undocumented workers will not make a complaint if they believe that the involvement of the authorities may lead to their detention and deportation, so enforcement in this case cannot rely on individual complaints by workers. As a minimum Unite would like to see a situation whereby a trade union can make a complaint on behalf of such workers where we feel it is appropriate and that in such instances HMRC enforcement officers should have access to such workers if they are detained. The issue of arrears is more complex. There would clearly need to be specific mechanisms in place to penalise such employers in these circumstances. Unite would welcome further discussions on this issue.

## **PART 111 EMPLOYMENT AGENCY PENALTIES**

**Unite strongly welcomes the proposals to strengthen the options available to the Employment Agency Standards Inspectorate in their attempts to enforce the currently inadequate employment agencies penalty system.**

We therefore agree with the following proposals as set out in the consultation document:

**Prosecutions under employment agency legislation should be capable of being tried in the Crown Court in the most serious cases**

This will give the EAS increased flexibility to effectively pursue rogue employment agencies.

**The maximum penalty for such serious offences should be an unlimited fine**

The current maximum of £5000 is no disincentive for a prohibited individual to continue running an employment agency.

**Do you consider that enabling such prosecutions to be tried in the Crown Court would have any implications for reputable agencies, and if so, what do you consider these implications would be?**

This move, if it leads to more prosecutions, could potentially assist reputable agencies by taking rogue agencies out of the market and tackling undercutting.

**Do you agree the EAS should have powers to seek financial information from third parties such as banks and financial authorities where an agency or individual is suspected of a serious offence under the Employment Agencies Act where a prosecution is under active consideration?**

Yes – The EAS should have access to all the financial information that they need at any stage of proceedings in the pursuit of justice.

**What, if any, implications do you consider the grant of such powers would have for reputable agencies?**

This should have few implications for reputable agencies, beyond the advantages already stated of more successful prosecutions of rogue agencies.

## **FURTHER ISSUES FOR CONSIDERATION**

### **Licensing of the agency sector**

Whilst Unite welcomes these proposals we believe that more needs to be done to regulate the agency sector in the UK. It is clear from our experience on the ground that in recent years there has been a substantial increase in the use of agency migrant labour, especially in low paid sectors of the economy. We have found examples of extremely bad practice by employment agencies who often sub contract to labour providers further down the supply chain. Unite has also re-iterated that domestic legislation to provide for equal treatment for agency workers should be introduced as soon as possible.

The exploitation of workers in the agriculture and food processing sectors led to the creation of the Gangmaster Licensing Authority. Unite would also like to see the return of licensing for employment agencies. We do not believe that such a move would adversely affect reputable employment agencies, but would make enforcement much easier.

## **Increased resources for EAS**

Unite welcomed the increase in resources that have been given to HMRC National Minimum Wage enforcement teams. The Government have recognised that something needs to be done about vulnerable workers in today's economy. Unite would like to see an increase in resources for EAS to address the needs of the modern economy and to allow for more pro-active enforcement of the agency sector. The current resource of 12 inspectors and four helpline staff is wholly inadequate.

## **The use of agency labour during industrial disputes**

Regulation 7 of the Conduct of employment agencies and Employment Businesses Regulations 2003 provides that:

*an employment business shall not introduce or supply a work-seeker to a hirer to perform*

- a) the duties normally performed by a worker who is taking part in a strike or other industrial action (the first worker)*
- b) the duties normally performed by any other worker employed by the hirer who is assigned by the hirer to perform duties normally performed by the first worker*

*unless in either case the employment business does not know , and has no reasonable grounds for knowing , that the first worker is taking part in a strike or other industrial action.*

In Unite's experience regulation 7 has proved to be ineffective and unenforceable. We therefore recommend that the following changes are made:

- The fact that the employment agency can claim that it was unaware that industrial action was taking place provides a significant loophole in this regulation. The hirer should be obliged to inform any employment agency when industrial action is taking place. If agency labour is used in these circumstances then the hirer should become liable for a significant penalty. Alternatively, the agency should be liable for a penalty but should be able to claim the money back from the hirer if the hirer did not inform them that industrial action was taking place.

- Industrial action usually lasts for a short period of time, often just for a 24 hour period. In these circumstances, if agency labour is being used in breach of these regulations then EAS should contact the relevant employment agency immediately to request that they remove the agency workers. If the agency deny that they are in breach of the regulations but are subsequently found to be so then the penalty should be increased accordingly. It should simply be a matter of a few phone calls for EAS to establish whether agency workers are being used in these circumstances. In our experience it can take EAS up to 3 or even 6 months to investigate a complaint that an agency has breached this regulation. This renders the regulation essentially useless. Unite requests that this matter is addressed as part of this review.
- The effective enforcement of this regulation would be far better facilitated by the licensing of all employment agencies. Unite believes that an agency would think twice about breaching this regulation if it thought that its operating license may be under threat. This is our experience with the GLA.

### **The charging of fees by employment agencies**

Section 6 (1) of the Employment Agencies Act 1973 prohibits employment agencies from charging work seekers for finding them work, except in some specific areas such as entertainment and modelling.

Unite believes that the area of charges and fees needs to be looked at again. We have found instances of agency workers who have had excessive deductions from their wages – from ‘administrative’ fees to accommodation, transport or cleaning. In some cases these charges are excessive. Unite recalls one occasion where an agency worker was having an administrative fee of £45 a week deducted from their wages but the EAS helpline was unclear as to whether this was actually in breach of the regulations or not. Unite requests that the area of charges and deductions is re-examined with a view to tightening up the regulations in this area.

## **SUMMARY OF RECOMMENDATIONS**

### **PART I : NATIONAL MINIMUM WAGE ARREARS**

- **Unite supports Option C - to calculate all arrears at the current rate of the minimum wage but with additional thought to be given as to how variations according to the date of underpayment may be simply addressed without incurring the need for a low paid worker to become liable for self-assessment.**

### **PART II: NATIONAL MINIMUM WAGE PENALTIES**

- **Unite supports Option C, a fixed penalty per worker. A fine system should start from day one for failure to pay the NMW.**
- **The penalty should be set at a minimum of £100 per worker.**
- **The second stage penalty should be charged in accordance with the present penalty fine system.**
- **The current maximum penalty of £5,000 is not a sufficient for the worst offenders. Unite believes that the maximum should be increased significantly to provide an adequate deterrent to any potential worst offenders.**
- **HMRC should be able to prosecute the worst NMW offenders along the same lines as criminal prosecutions for tax evasion.**
- **Trade unions should be able to take group actions on behalf of workers who have been underpaid the National Minimum Wage.**
- **Employers who pay undocumented migrant workers less than the National Minimum Wage should face penalties – there should be further examination of this issue.**

### **PART III EMPLOYMENT AGENCY PENALTIES**

**Unite welcomes and supports all the following proposals in the consultation document:**

- **Prosecutions under employment agency legislation should be capable of being tried in the Crown Court in the most serious cases**
- **The maximum penalty for such serious offences should be an unlimited fine**

- **The EAS should have powers to seek financial information from third parties such as banks and financial authorities where an agency or individual is suspected of a serious offence under the Employment Agencies Act where a prosecution is under active consideration**

**Unite also calls for the following additional measures:**

- **UK legislation to provide for equal treatment of agency workers in basic terms and conditions**
- **Licensing for the UK agency sector**
- **Increased resources for EAS**
- **Tightening up of regulation 7 on the use of agency labour during industrial disputes and a change in enforcement practice by EAS in relation to this matter**
- **A re-examination and tightening up of the regulations in relation to deductions of fees and charges by employment agencies.**

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