Regulating the minimum wage: a social harm perspective

Simon Pemberton investigates the reluctance of government to criminalise breaches of minimum wage legislation.

When the National Minimum Wage Act (NMWA) was launched in 1998, it was claimed that ' . . . some two million workers' would 'escape from poverty pay' (Ian McCartney MP, DTI, 31 December 1998). The Act was part of a wider social inclusion agenda designed to address the record growth in inequality since 1979. However, this agenda has made a minimal impact on income inequality, particularly, for working age adults without children (Sefton and Sutherland, 2005). The reasons for this are numerous. This article will focus on the specific failings of the NMWA to address the harm of 'poverty pay'. These shortcomings stem from New Labour's unwillingness to challenge the power imbalance within the workplace and conversely, the willingness to accept employers' claims over the potential negative consequences of improved pay. Using documentary sources and interviews with representatives from Low Pay Units, the former Department for Trade and Industry, and Her Majesty's Revenue and Customs (HMRC), it will be argued that these concessions to capital keep the minimum wage at an unacceptably low rate and produce a weak regulatory structure.

'Setting the rate'

The Low Pay Commission (1998) recommended the original full adult rate of £3.60 per hour, arguing that this rate balanced the concerns over 'inequalities in pay' with the threat of increased unemployment and inflation. However, it would appear that the latter concern triumphed over the former. Challenging the rate recommended by the LPC, the Low Pay Unit argued that the rate should be: 'the median weekly earnings for full time men . . . divided by average full time hours, excluding overtime, and then halved (Burkitt et al., 1999). The calculation aimed to tackle structural inequalities by: using a male and full-time base, to confront gendered pay differentials; and by excluding overtime from the calculation it attempted to redress the inequalities faced by manual workers, who are forced to work extra hours to increase their income (ibid). On this calculation the original hourly rate would have stood at £4.79. It took six years for the actual minimum wage rate to pass this mark. Yet the current hourly rate of £5.73 falls short of providing even a 'living wage'. Recent research which sought to identify a minimum income standard, calculated that (after taking benefits and tax credits into account), the minimum wage required was £6.88 for a single working age adult, £13.76 for the sole wage earner in a two parent family with two children, and £6.13 for a lone parent family with one child and childcare (Bradshaw et al., 2008).

A 'self regulating' wage?

New Labour viewed employers' capacity to self regulate as the primary mechanism for enforcement of the minimum wage. This was predicated on the notion that employers' share an equal interest in compliance with trade unions—albeit for different reasons. The NMWA created two branches of enforcement: individual worker action through industrial tribunal; and the HMRC Compliance Teams, who can investigate and enforce payment through a 'pyramid' of sanctions. Yet, despite New Labour's hopes for a 'self-enforcing wage' an estimated 146,000–219,000 people are not receiving the wage they are legally entitled to (Low Pay Commission, 2008).

The self-regulation model of enforcement is reliant on workforce awareness. Therefore, the dissemination of information detailing entitlement is crucial. Yet, New Labour has demonstrated some reluctance to promote worker's rights. For example, the right to wage slip information contained in the NMWA was later removed from the National Minimum Wage Regulations (Amendments) 1999, alongside other rights, to avoid the prohibitive employer costs of £51 million per year and an associated one off cost of £85 million (DTI, 1999). It was proposed that all wage slips should carry information raising employees' awareness of their entitlements and draw attention to the ways their income may have been manipulated. Consequently, misinformation is viewed as a major obstacle to the realisation of the wage.

Unsurprisingly, given the misinformation that surrounds the wage, as well as workers' fears over potential reprisals, it is rare for workers to take cases to industrial tribunal (only 500–800 cases a year) (Low Pay Commission, 2008). Therefore, many are reliant on the HMRC teams. However, the self-regulation model imposes considerable constraints on the HMRC's regulatory budget; with only 115 inspectors in the UK, an employer can expect to be inspected once every thirty years (Browne, 1999). This represents half the number of Wages Council Inspectors in the 1950s, when there were considerably less 'at risk' workers (Croucher and White, 2007). Further, in commenting on the regulatory approach adopted by the HMRC, it was explained that it is:

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> *. . . very sort of softly-softly approach in the first stages, just to find a bit out about the business and how things are going . . . I don't want to say a friendly approach and I don't want to say an enemy approach either. It is somewhere in the middle, it is a business relationship.*
> *(HMRC Representative)*

However, the nature of this relationship is a cause for concern:

> *. . . I can imagine that when you go to investigate you do have to create a positive relationship with who you are looking at, so I can see some of the reasons. But sometimes that has meant to our mind that the Inland Revenue has been all too ready to accept, to believe the employer's construction of events, rather than to do the investigation that might be necessary . . .*
> *(LPU Representative)*

This may explain the low usage of regulatory sanctions. Between 2004 and 2007, 4,903 cases were investigated where non-compliance was identified, enforcement notices were issued in four per cent of cases, penalty notices were issued in 0.06 per cent of cases, and criminal prosecutions occurred in just 0.04 per cent of cases (see table 1).

Table 1: Number of cases of non-compliance and regulatory sanctions

	2004/2005	2005/2006	2006/2007
Cases of non-compliance	1798	1582	1523
Enforcement orders	32	81	71
Penalty order	0	1	2
Criminal prosecution	0	0	2

Source: Low Pay Commission (2008).

The operation of the HMRC is also limited in scope. It is restricted to cases of refusal to pay. Therefore workers are left to 'enforce' cases of detriment in relation to breaches of contract. Evidence exists to suggest that the introduction of the wage and subsequent rises in the rate, have provoked a series of 'adjustments' to workers' hours and conditions (Low Pay Commission 2000; Low Pay Unit, 2000). Most typically workers will receive the wage, but are expected to complete the same amount of work in less time therefore leading to a drop in their total income—a view supported by LPU interviewees:

> *. . . what happened when it was introduced is that they started changing other things. The most obvious one was cutting people's hours. That has happened very recently in a case that came to our advice line. Where they were cutting people's hours drastically, so in fact they ended up worse off rather than better off, even though they were getting the minimum wage.*
> *(LPU Representative)*

It would appear that some employers have exploited the vulnerability of low paid workers to lessen the 'burden' of the wage:

> *The problem is if the worker doesn't act and protest in writing preferably about a breach of contract as it happens, then they will have been deemed to have accepted it over time . . . So working hours have changed and come summer 1999, where there had been breaches of contract after the minimum wage it was too late to do anything about it because it would have been deemed that those workers had agreed with it . . . there has been a lot of people ripped off.*
> *(LPU Representative)*

Yet for New Labour, these responses are not seen to contravene the spirit of the Act. Rather, they are (potentially) legal market adjustments, as one DTI representative remarked ' . . . it is a perfectly rational and potentially beneficial reaction to the new law'.

Conclusion

The NMWA represented a step towards the eradication of 'poverty pay'. Yet for the reasons identified it fails to achieve this goal, primarily because the NMWA does not challenge the imbalance that currently exists between employers and low waged workers, whom are drawn predominantly from marginalised social groups. The weight of empirical evidence suggests 'self-regulation' or 'voluntarism' is incapable of protecting worker's rights (Davis, 2004). Moreover, the history of the Wage Councils demonstrates that higher compliance rates can be achieved through workplace representation, alongside a well-resourced regulatory agency that conducts regular inspections and is equipped to enforce the law. Within the current political climate in which 'self regulation' has become virtual orthodoxy a social harm perspective is presented with a serious dilemma. On the one hand, by advocating decriminalisation as a general strategy the deregulatory impulses of government are given credence. On the other hand by supporting criminalisation, as favoured by many academics and workers' organisations, the further expansion of the criminal justice system is legitimated. Perhaps, presenting these as being dichotomous choices limits the response of the perspective. Rather, the role of the social harm perspective is not to oppose campaigns to criminalise corporate harms, but to generate effective alternative policy responses to these problems that replace the need to resort to the criminal justice system to protect workers.

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