

# The weighted scales of economic justice

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*Unpaid Britain: an interim report*

*Nick Clark, Middlesex University, June 2017*

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The conclusions and suggestions in this report, however, are the responsibility of the author alone.

## Abbreviations

|       |   |
|-------|---|
| ACAS  | Advisory Conciliation and Arbitration Service |
| ET    | Employment Tribunal                           |
| FRS   | Family Resource Survey                        |
| GLAA  | Gangmasters and Labour Abuse Authority        |
| HMCTS | HM Courts and Tribunals Service               |
| HMRC  | HM Revenue and Customs                        |
| LFS   | Labour Force Survey                           |
| NMW   | National Minimum Wage                         |
| ONS   | Office for National Statistics                |
| ZHC   | Zero Hours Contract                           |

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## Executive summary

- This is an interim report of research carried out since September 2015 into the phenomenon of unpaid wages in Britain, with a particular focus on the London labour market.
- Official data shows widespread but little known breaches of employment rights: one in 12 workers does not receive a payslip, and one in 20 reports receiving no paid holidays.
- An estimated £1.2 billion of wages and a further £1.5 billion of holiday pay remain unpaid each year. This excludes unpaid statutory pay (for sickness or maternity for example), and wages unpaid to the self-employed.
- On 23,000 occasions in a year, the impact of unpaid or delayed wages is so severe as to leave workers without food.
- Some types of unpaid wages occur repeatedly (“little and often”), including failures to provide holiday pay, unpaid hours of work and unauthorised deductions. To represent a successful strategy for employers, the sums unpaid have to be small enough not to cause the worker to be unable to survive, yet repeatable enough to make a significant contribution to the employers’ net income.
- Other types, such as not paying the last wage (or outstanding holiday pay) to those leaving, unpaid induction or trial shifts, ceasing to pay while approaching insolvency or simply absconding without paying, are by their nature one-offs (“episodic”).
- Sectors most likely to abuse workers (including failing to pay wages) are identified as ‘sports activities, amusement and recreation’; ‘food and beverage services’; ‘other personal services’; ‘employment activities’; ‘accommodation’, to which, based on other London related considerations, are added ‘arts and entertainment’; and ‘construction’.
- It is clear that failing to pay wages is no barrier to continuing as an employer, and this research suggests there is a widespread culture of repeated non-compliance with employment rights sheltered behind limited liability and a failure to check the standing of potential directors.
- Directors of half the companies found to have defaulted on wages and subsequently been dissolved are back in business as directors of other companies.
- In the arts, many young workers feel driven to accept unpaid work, or at least not to complain about it.
- ET (and County Court) fees, the absence of legal aid for advice, and the complexity of the bureaucracy in pursuing cases may deter recovery action by workers.
- There is a desperate need for improved coordination of official data on serial offenders against employment rights.
- Workers need better guidance not only on their rights, but the manner in which they can most effectively be enforced. Here, further and higher education institutions have a role to play. Interviewed students have argued “we should be taught about this”. It is hard to disagree.

## Introduction

This is a preliminary report of the research and findings of the Unpaid Britain project, which was established at Middlesex University Business School in September 2015, and is co-funded by Trust for London. Although case studies are still being conducted at the time of writing, some research findings are emerging, and are in turn suggesting some policy responses. This report is intended to highlight these, in order to provoke a discussion with those who have already participated in or supported our research. Through this process, we hope to identify gaps, refine our understanding and improve our recommendations. In turn this will enable us to produce a better final report, which we anticipate launching in November 2017.

## Project aims and background

Unpaid Britain's aim is to reveal the scale, distribution, trends, causes and costs to workers, their families and the state, of non-payment of wages<sup>2</sup> in Britain. Reflecting the financial support of Trust for London, our case studies have focused on the London labour market in particular. Having identified the sectors where we believe the problem to be worst, we have conducted a number of case studies whose aim is to assess the causes and consequences of unpaid wages, and the current systems for supporting workers attempting to reclaim owed wages, and to make recommendations for addressing this problem more effectively.

The idea for this research arose out of my experiences of assisting workers (many of them from migrant backgrounds) with employment problems. A key element of most cases was the failure to pay all or some of their wages. But when I found myself providing the same type of assistance to some of my own children, it suggested to me that this was a problem with the labour market itself, rather than with the profile of the workers being hired.

At the same time, concerns over excessive exploitation of workers have been entering political debate. The first Commissioner of Labour Market Enforcement (David Metcalf) was appointed in January 2017, and since April 2017 a newly expanded (and renamed) Gangmasters and Labour Abuse Authority (GLAA) has been given the remit of dealing with abuse across the economy. In an apparent response growing public concern over the practices of large companies such as Sports Direct, Uber, Deliveroo and Pimlico Plumbers a review into modern employment practices to be conducted by Matthew Taylor was announced in November 2016, just after the Business, Energy and Industrial Strategy Committee announced their own inquiry into the future world of work and rights of workers in October 2016.

These initiatives are primarily concerned with the definition of employment status and the supposed growth in Zero Hours Contracts (ZHCs), and they include almost no examination of the basic failure to pay wages. Unpaid labour can take many forms: forced labour; "workfare"; unpaid internships; cessation of pay in company insolvency; or unwaged domestic work and childcare. Each of these has been the subject of extensive study with the probable exception of insolvency. There is also a body

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<sup>2</sup> Non-payment, for work carried out, of all or part of a workers' wage (including those falsely categorised as self-employed), at the time agreed, contracted, or legally required. Since it is not possible for an employee to lawfully contract to work for less than the NMW, this is considered a default contractual commitment, as are the number of paid holidays set out in the Working Time Regulations. Holiday pay, statutory sick pay and other statutory pay are considered to be wages.

of work examining unpaid wages (“wage theft”) in the United States, post-Soviet Russia and recently, China. But there has been almost none regarding Britain.

Despite this absence of evidence, there have been recent increases in potential penalties for offending employers. In 2014 the possibility of Employment Tribunal fines was introduced for those employers whose breaches of workers’ rights were accompanied by “aggravating features”.<sup>3</sup> Tougher penalties have also been introduced for non-compliance with the National Minimum Wage with a new upper limit of 200% of the outstanding pay (subject to a £20,000 per head maximum).

From the workers’ point of view, however, these penalties have little impact on their chances of recovering unpaid sums. The research presented in this report suggests that powers of enforcement and restitution are so heavily weighted against them as to render the right to be paid almost unenforceable when up against a determined defaulter.

### Methods and data sources

Anyone looking for official data showing the scale or frequency of failure to pay wages is in for a disappointment. Although many of those who were interviewed for this project saw such failure as a sort of crime (and indeed in the USA the term “wage theft” is often used), taking labour power without paying for it is not a criminal, but a civil offence. This means that it does not appear in crime statistics, and although claims for unpaid wages are near the top of the list of issues coming before Employment Tribunals (ETs), this represents only a minority of cases.

In the absence of specific data on unpaid wages, Unpaid Britain used a number of official data sources: the Labour Force and Family Resources surveys to identify economic sectors with the highest tendency to abuse workers’ rights, the periodic BEIS lists of National Minimum Wage offenders, Insolvency Service data (secured through FoI requests) on payments to workers affected by insolvency of their employer, HMCTS data on Employment Tribunal claims, the 2013 Survey of Employment Tribunal Applications, and ACAS data on conciliation. We have also examined a large number (c. 750) of Employment Tribunal judgements from London tribunals and recorded Companies House data on the respondents in those cases.

In addition, the Gangmasters Licensing Authority, Barnet Citizens Advice Bureau, Lambeth Law Centre and the Chartered Institute of Payroll Professionals have all permitted access to survey, administrative or casework data. We have also used the Unrepresented Workers Survey data deposited at the ONS by Professor Anna Pollert.

This data has enabled me to paint a picture of unpaid wages in Britain, although the outlines may admittedly still be a little blurred. I have also made an estimate as to the size of the problem, but it should be stressed that it is in no way the responsibility of any of those providing us with data. However, data alone cannot reveal the underlying causes, responses, justifications and even shame that surround unpaid wages. We have therefore embarked on a series of case studies (mostly from London), chosen to illustrate the variety of ways in which wages come to be unpaid, and the sectors in which this is most likely. An appendix at the end of this report lists all the interviews so far carried out.

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<sup>3</sup> 16 fines had been imposed by the end of August 2016, HC 2 Sept 2016 c 44542W

## Structure of this report

I have kept this report as short as possible to stimulate comments from contributors. This means that not all the data I examined is presented, and many references to other research have been omitted. These will reappear in the final report which is due to be published in November 2017.

First I discuss the forms that unpaid wages can take, and why we have focused on some forms but not others. I then describe what we have learnt about the scale and distribution of failure to pay and the consequences that this can have. There follows a section setting out what we know of the problem in the London labour market, if and how it might differ from other regions of Britain. The reasons for non-payment suggested by interviewees and case studies are set out, and there is a section discussing the remedies available to workers. I discuss these preliminary findings before putting forward some tentative proposals for changes in regulation, law and practice. Examples of comments made by those we have interviewed are shown throughout the report.

## The forms of unpaid wages

There are many types of work which may not be paid, for example work in the home (which is largely carried out by women), work experience, community service or volunteering. There are also more controversial types such as unpaid internships. We have not sought to deal with unpaid housework and childcare (except when carried out by workers hired for that task) or unpaid internships where no promise to pay had been made. These exclusions were made to keep the research to manageable proportions.

Set out below are some of the key forms that we have found unpaid wages to take.

### Unpaid hours

This appears to be one of the more common forms of unpaid wages. Perhaps not surprisingly, the Lambeth Law Centre case records we examined showed that those reporting unpaid wages frequently had variable working hours. Interviewees often reported failures to pay for all hours they had worked. Sometimes this would be rectified if the worker protested; on other occasions it would prove difficult to reclaim the money. Studies in the USA have shown these “off the clock” violations

*“I work for 20 hours, I guess around 20 hours, and the unpaid work is 4 - 5 hours. But it's not so much the hours, it's the stress and the anxiety that it's causing, that you have to ..”.*

INT: All that responsibility?

A: *‘Oh, I have to check my timetable, whether they will pay. Oh, I have to call them again tomorrow.’* CS  
Interview 11

*“Because I work in outpatients, if you do half an hour over that you'll get paid for it, if you do 25 minutes over, you don't get paid for it.”*

INT “What do you think of that?”

*“I think that's appalling”.* CS

Interview 08

to be common, and the Low Pay Commission has reported them to be a frequent cause of NMW breaches.

Meanwhile a forensic study conducted into the 7-Eleven shops in Australia concluded that the failures to record hours correctly were systematic (Bernhardt et al 2013, Low Pay Commission 2016, Fair Work Ombudsman 2016).

### National Minimum Wage breaches

Data published by BIS regarding National Minimum Wage non-compliance reports that the total “recovered” by enforcement action was £3.3 million in 2014/15 (for 26,318 workers). The average number of underpaid workers per case was 12, and they were owed an average of £125 each. Looking at the information published

periodically which ‘names and shames’ employers who breach the NMW Regulations tells us a little more about their identity and sectors. Few cases regarding the NMW go to ETs, perhaps because of the enforcement powers of HMRC minimum wage inspectors. NMW breaches when encountered in our interviews were usually associated with unpaid hours, or with total cessation of pay.

### Holiday pay

The right to paid holidays was introduced in 1998 as part of the Working Time Regulations. Entitlement currently stands at 28 days per year (for those working a five-day week), and this includes any public holidays (there are eight in England and Wales). It applies to employees and ‘workers’ but not to the genuinely self-employed. For those working variable hours, or leaving a job before they have been able to take leave, holiday pay is calculated as 12.07% of their average pay.

Key Informants described employers regularly failing to pay outstanding holiday to leavers, waiting instead for the workers to challenge this (one described this as a “don’t ask, don’t get” policy). Agency and other ZHC workers often do not realise that they have any entitlement to holiday pay. Enforcement has to be pursued by the worker themselves through an ET, or possibly through a small claim to the County Court. There is no penalty on employers for failing to pay holidays, apart from restitution of up to a year’s entitlement, so this is clearly tempting to those wishing to add to their bottom line. The GLAA told us of one temporary agency where they believed that the total in holiday pay owed (but unpaid) to workers exceeded £1.5 million.

### Unauthorised deductions

Workers may agree to certain deductions being made from their pay (such as union subscriptions, or workplace charitable giving), but they should do so in writing for this to be lawful. However, examples from interviews and documents showed that by (probably wrongly) classifying the worker as self-employed, by getting them to sign long complex contracts, or simply by insisting that they have the right to make such deductions, employers reduce the risk of being challenged. Charges made in this way might include travel to work, training costs, fines or penalties and deductions for work clothes.

### Cessation of pay

Employers sometimes simply stop paying wages, often associated with some sort of real or pretended financial crisis. In the case of insolvency, some of the unpaid wages (and holiday) pay can be paid out from the Redundancy Payments Fund (which is financed from National Insurance contributions and administered by the Insolvency Service), always assuming that the workers can be identified. In other cases, however, wages are deferred with a promise of payment later, which may occur, but it might not. One case study suggests that several administrations may be undertaken one after another, with the assets of the company being sold on to allegedly new owners, while workers turn to the state for their wages.

### Failure to pay

Some work is treated by employers as not qualifying for payment. For example, those who are misclassified as volunteers, who are undergoing initial training or induction, or asked to work “for

*“So three times I went back for the collection at that address. That’s ten minutes there and ten minutes back to my round again and then they docked me that cost.”*

...  
INT And what was their reasoning for docking the time, what was the reason they gave you for docking?

*“My god they don’t have to give a reason to me.*

*...They just dock your wages.”*

CS Interview 20



*“...you don’t have to be a rocket scientist to work out that it’s not going to make much money. So you opt to do it as a self-employed person because you consider it will either help you by allowing you to practice your skills, make contacts...” CS Interview 24*

exposure” (very common in the arts) may not be paid for their time at all. In these circumstances there is some implication that there is a distinction between ‘real’ work and whatever the worker in question is performing – a view promoted by employers, but also sometimes accepted by the workers themselves. This is further blurred in fringe theatre (another of our case studies), where performers may be recruited on a “profit share” basis, but the profit rarely materialises.

### Other elements of pay

Workers who pay National Insurance have statutory entitlements to pay in certain circumstances: during sickness of longer than four days, or during statutory maternity or paternity leave, for example. Employers may not understand this, or be reluctant to make the payments (even though in the case Statutory Sick Pay it currently amounts to only £89.35 per week). Bonus or commission may also go unpaid, particularly when the worker has left the job.

*“...we’ve recently (well, a year ago), took on a contract where the outgoing contractor doesn’t pay anybody for the first two weeks of their employment and calling that, by definition, training. Which quite frankly, having checked out the legislation ... it’s completely 1) immoral and 2) illegal, because you can’t not pay people for working”.*  
KI05

### Frequency

Some types of unpaid wages occur repeatedly. These include failures to provide holiday pay, unpaid hours of work and unauthorised deductions. For this to be a successful strategy for employers, the sums unpaid have to be small enough not to cause the worker to leave or be unable to maintain themselves, yet repeatable enough to make a significant contribution to the employers’ net income. I have termed this “little and often”.

Other types, such as failing to pay for the final pay period (or outstanding holiday pay) to those leaving their jobs, requiring new starters to work unpaid induction or trial shifts, ceasing to pay when approaching insolvency or simply absconding without paying, are by their nature one-offs (for each worker, at least). I have termed these “episodic” since the employer may go on to repeat them with fresh groups of workers.

### Extent and distribution of unpaid wages

In 2012/13 (the last year before the introduction of ET fees), official statistics from HM Courts and Tribunal Service (HMCTS) identified 53,581 “unauthorised deductions” (also known as Wages Act) claims, although following the imposition of fees (in 2014/15) this had fallen to 28,701. Only Working Time Directive claims are more numerous – 99,627 in 2013/13 (which includes an estimated 10,000 which were submitted on behalf of airline staff involved in a multiple claim), down to 31,451 in 2014/15. But most of these relate to failure to provide holiday pay, and are therefore also for unpaid wages. So almost half (46%) of the issues complained of at ETs in 2014/15 were for

unpaid wages or holiday pay. Evidence from the Unrepresented Workers Survey, supported by reports from Citizens Advice and ACAS, suggest that the vast majority of cases which could be taken to an ET are not in fact pursued, so this represents the tip of the iceberg, as discussed further below (ACAS 2016, Pollert & Charlwood 2009).

It is difficult to be certain how many cases there may be in total. In addition to cases which reach the ET stage, many as a result of employers' insolvency, in which some (but not all), workers can claim up to eight weeks unpaid wages and outstanding holiday pay (subject to a weekly cap – currently £479). There are between 35,000 and 40,000 cases per year. The National Minimum Wage Inspectorate records detected underpayment of the NMW, and may require restitution of such "arrears" – another 26,300 cases in 2014/15. Workers who are not paid Statutory Sick Pay, Maternity or Paternity pay can complain to HMRC who may advise employers or make a declaration requiring them to pay, but the number of cases making it as far as this is small – fewer than 6000 cases in 2014/15. Cases may also be raised through ACAS (now a prerequisite for an ET claim), or brought to the attention of Citizens Advice Bureaux (CAB), or the dwindling band of law centres. To some extent these categories may overlap – some insolvency cases go first to an ET, for example, and may also have been raised with a CAB or ACAS. Most data will exclude non-payment of wages to "self-employed" workers, although many working time claims at ET are for holiday pay denied by employers claiming that their workers are self-employed.

### Estimating unpaid wages

The most reliable indicator we have for failure to pay is the proportion of workers reporting that they receive no paid holidays. As shown in Table 1, this is about one in twenty of the employed workforce<sup>4</sup>. Even if it is assumed that

- a) all of those who report that they do not know how many paid holidays they are entitled to (about 15% of the workforce) do in the end receive their legal entitlement,
- b) that all those who receive no holidays are earning only the adult National Minimum Wage, and
- c) account is taken of the full-time/part-time split in the workforce;

Then for the last year in question (2015) we can estimate that the value of unpaid holidays was at least £1.5 billion. It is probably higher because many will earn more than the NMW, and others will find they (quite unlawfully) lose their accrued holiday pay when they change jobs.

Estimating other forms of unpaid wage is more difficult. In 2005, academic Anna Pollert commissioned a survey of workers who had experienced problems at work (Pollert & Charlwood 2009). This showed that of those experiencing unpaid wages, 8% did nothing, while 83% raised it informally with their line manager. Of those who raised the matter fewer than half reached some sort of outcome, and of these over a quarter regarded that outcome as unsatisfactory. Only 5% went so far as registering a claim with an ET, while the figures above suggest that 65% did not receive an adequate settlement. If this is representative, for each claim getting as far as an ET there may be a

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<sup>4</sup> Only those in employment (i.e. not self-employed or not working) are asked this question in the Labour Force Survey.

further 13 cases which do not. This is broadly consistent with the other data cited above which shows that only a minority of cases proceed to an ET.

Taking data from before the introduction of ET fees in 2013, and assuming that the total number of cases has stayed level, although the number proceeding to ET has fallen, according to HMCTS, the number of ET “Wages Act” claims lodged in 2012 was 52,244 (cases where ‘unauthorised deductions’ was identified as the principal jurisdiction)<sup>5</sup>.

Based on a median settlement of £400 (ACAS 2015), this is equivalent to £20.9 million. However, as we show above, this probably represents only 1/14<sup>th</sup> of the total owed, suggesting a total of £292.6 million. This, however, is for the cases which would involve no other issue, and as footnote 5 below shows, there will be many more – perhaps four times as many – which include other matters such as unfair dismissal. We will have to carry out further work with our sample of ET judgements to be more precise, but this suggests that unpaid wages could come to £1.2bn per year.

Data provided by the Insolvency Service shows that payments to workers affected by insolvency for unpaid wages are about double the amount paid for unpaid holidays (for the most recent year this was £25.9 million for wages and £12.9 million for holiday pay). This suggests that unpaid wages may be higher than unpaid holidays, so the estimate of £1.2 billion may be conservative, as indeed is my estimate for unpaid holiday pay of £1.5 billion. This excludes unpaid statutory pay (for sickness or maternity for example), and wages unpaid to the self-employed. Nevertheless, for the purposes of this interim report, £2.7 billion unpaid per year is my working figure, which even if it is conservative, is certainly bad enough to require attention.

*“...our grievance procedure said to submit a letter raising our concerns collectively as staff to the Chief and sending it to the Chief Executive which would basically request a meeting within five days. That was obviously ignored. The next step was to write to the Chairman and that was ignored. It basically ended with the final step being taking them to court for a tribunal, which a lot of people were very scared of doing because we all kind of knew that that would mean you were waving goodbye to your job if you were to take them to court”. CS Interview 22*

## Where does it happen and who to?

As already pointed out, there is no official data on non-payment. Evidence suggests that breaches of one employment right will be accompanied by others – non provision of payslips with failure to pay for all hours worked for example. So we examined a series of indicators from official data which could indicate that workers might either have their rights breached or be particularly susceptible to such breaches. The indicators were drawn from two major official surveys, the Labour Force Survey and the Family Resource Survey. The five indicators we are examined are set out in Table 1 below.

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<sup>5</sup> In gathering data on claims HM Courts & Tribunal Service will only allocate each case to one jurisdiction and this is determined by the order in which the issues appear on the ET1 form. This means that cases are only classified as “Wages Act” if they do not also include unfair dismissal, breach of contract, or discrimination elements. This figure is therefore a substantial underestimate of the number of claims which include an element of unpaid wages.

| Variable                               | 2012/3 | 2013/4 | 2014/5 |
|--|--------|--------|--------|
| No payslip                             | 6.9%   | 8.0%   | 8.6%   |
| Low-paid self- employment <sup>6</sup> | 7.1%   | 7.1%   | 6.1%   |
| Zero hours contract                    | 0.8%   | 1.8%   | 2.2%   |
| Unpaid overtime                        | 14.0%  | 14.1%  | 14.3%  |
| No paid holidays                       | 5.6%   | 5.0%   | 4.9%   |

That one in twelve workers reported receiving no payslip (about 2.3m workers), and one in twenty no holidays (about 1.3m) is indicative of widespread failure on the part of employers to meet even the minimum legal requirements of the employment contract. These two breaches are far more widespread than ZHCs (although these are almost certainly under-measured by the LFS). That so little attention has been accorded to them, in contrast to the considerable interest devoted to ZHCs shows how novelty can prove more attractive to commentators and researchers than the more 'mundane' but systematic abuses.

### The index of employer delinquency

To help us find the sectors where we might most expect to find unpaid wages, we ranked sectors for their tendency to exhibit each of these indicators, and combined the scores into a single index, which we have called the Index of Employer Delinquency. The top scoring sectors are shown in Table 2, although using a stringent minimum sectoral sample size (of  $n=100$ ) resulted in two sectors which had appeared in earlier years being omitted from the top of the table: Animal and Crop Production, and Arts and Entertainment. The first of these is of only limited interest to a study focusing on London, but the second is highly significant, and has therefore contributed a case study. The results are discussed in detail in a separate paper which is currently subject to peer review.

| Rank | Sector  |
|------|---|
| 1    | Sports activities and amusement and recreation activities |
| 2    | Food and beverage service activities                      |
| 3    | Other personal service activities                         |
| 4    | Employment activities                                     |
| 5    | Accommodation   |
| 6=   | Education   |

<sup>6</sup> Full time earnings below 67% of the national median for all full time employees

|    |  |
|----|--|
| 6= | Activities of membership organisations                           |
| 8= | Computer programming, consultancy and related activities         |
| 8= | Activities of head offices; management consultancy etc.          |
| 9= | Architectural and engineering activities; technical testing etc. |
| 9= | Social work activities without accommodation                     |

## Demographics

To date, we have conducted only limited analysis comparing the indicators according to age, gender or ethnicity. The provision of payslips does not seem to be associated with gender, although there is an age aspect, as there is with paid holidays. Young workers (aged below 25) and older workers (over 64) tended to show the highest tendency to report non provision of both. Further examination of the data for such patterns will appear in the final report.

Some of the sectors where problems abound are highly gendered- in the education sector the Early Years workforce is almost entirely female, while construction is largely male. The experiences may differ – a frequent problem in construction is the failure to pay for holidays on the grounds that the worker is self-employed, while in early years, additional (unpaid) working time seems to be a problem, and because the workers are so poorly paid, this shows up as breaches of the NMW Regulations.

We know that certain sectors tend to have higher proportions than others of workers from other countries. Some of such sectors appear in the list of potentially abusive industries in Table 1 – food and drink services, employment activities (agencies) and other personal services (which include nail bars and hairdressers), for example. It is therefore to be expected that migrant workers may be more at risk than the British born. However, this could be more related to the identity of their employer than their own national origin, according to extensive research conducted in the USA (Bernhardt *et al* 2013). Other sectors which, in London at least, also have high proportion of non-UK born workers (for example finance, health) display many fewer issues, again suggesting that sector may be more significant than demographics for predicting abuse. Case study interviews have encountered some non-UK born workers, recent arrivals and longer established, but most were white. This is a shortcoming which we will try to rectify in the coming months.

## Consequences of non-payment

For many workers, budgeting is tight and goes from pay day to pay day, with little slack. Even relatively well-paid workers would encounter problems if their expected pay was not forthcoming.

For others, the consequences can be catastrophic. Food bank charity the Trussell Trust provides data on the reasons for food bank use<sup>7</sup>. In the last year “delayed wages” was one of the least significant reasons for needing to visit, but at .97% of all visits it still accounted for 11,500 people. Given that the Trust believes that it provides only about half of the food bank assistance in Britain, we could

*“I didn’t go to get a loan as such, but I borrowed money off of my family. I was only comfortable doing it at the point when I was told I was getting paid on a specific date.” CS*  
Interview 22

<sup>7</sup> <https://www.trusselltrust.org/wp-content/uploads/sites/2/2017/04/Early-Warnings-Universal-Credit-and-Foodbanks.pdf>

estimate that on 23,000 occasions in a year, the impact of unpaid or delayed wages is so severe as to leave workers without food. Others will turn to short term borrowing, or if they can, their families.

## Unpaid London

The sectors shown in the league table above are derived from all Britain data, but are also prominent in the London labour market. In addition we decided to include in our selection of case studies arts and entertainment because of its particular significance in London, and construction which we found featured prominently in London ET cases involving unpaid wages claims (see Table 3 below).

## London vs. other regions

Two of the indicators we examined measured actual breaches of employment rights, and allow us to compare their prevalence in London with other regions of Britain. London displays both the lowest and highest proportions reporting no paid holidays: 2.5% in Central London, and 8.7% in Outer London<sup>8</sup>. The highest proportion of “don’t knows” was found in South Yorkshire (19.7%)<sup>9</sup>, but the lowest was in Central London (9.6%).

Figures from Greater London Assembly (2016) show that Outer London has a substantially higher proportion of workers in Retail, Transport and storage, Wholesale, Education and Healthcare & social work than Inner London, but a much lower proportion in Finance and insurance and Professional, scientific and technical activities. This may explain some of the differences between zones of London, but other issues such as employer size and travel to work (workers with caring responsibilities or mobility problems may find it harder to commute long distances so tolerate worse conditions) may also play a part.

The FRS, from which the data on payslips is derived, does not separate London into sub-regions. The all-London data for payslips nevertheless shows a dramatic variance from the UK average. In 2014/15, 10.3% of London workers reported receiving no payslip (the national average was 8.6%), second only to Wales (where 14% got no payslip). Interestingly, London also displayed the highest proportion of workers reporting the provision of electronic payslips at 15%, compared with a national figure of 11.6%. These may also present problems to workers with limited access to computers, or who need copies after they have left the job.

## ET cases by sector

Our analysis of Employment Tribunal judgements was drawn from London tribunals only, and therefore gives us a handy comparison with the national index above. Where possible, we identified the employer’s economic sector (Table 3) which shows some overlap with those in Table 2 above. The most notable coincidence is ‘food and drink services’. This sector, which is a major employer in London, is clearly exhibiting a variety of practices which deprive the workforce of their rights. ‘Construction’ is more prominent in Table 3 than in the Index, but it is not clear that this represents a particular London issue – it may reflect the frequency with which challenges are made at ETs against workers’ alleged self-employed status (relating to holidays and minimum wage). Further

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<sup>8</sup> For LFS purposes Central London is the Department of Transport definition: the area within the bounds of the main London British Rail train termini. Outer London consists of Barking and Dagenham, Barnet, Bexley, Brent, Bromley, Croydon, Ealing, Enfield, Greenwich, Harrow, Havering, Hillingdon, Hounslow, Kingston upon Thames, Merton, Redbridge, Richmond upon Thames, Sutton, and Waltham Forest.

<sup>9</sup> S. Yorks has the highest regional proportion of full time students amongst its workforce, and these are known to be poorly informed regarding their rights.

examination of the cases will throw some light on this. ‘Other business services’ will include contract cleaning, but the category of ‘HQs and consultancy’ seems to be used by directors registering companies as something of a catch-all, perhaps to disguise actual activities. There is clearly little scrutiny of classification at Companies House - at least 28 companies recorded their sector as “To be provided on next annual return”, and had clearly remained in such a position for a number of years.

**Table 3: Count by sector of ET claims including unpaid wages, lodged in London tribunals in 2012 and 2014 and listed for hearing**

| Sector                            | No cases |
|-----------------------------------|----------|
| Food and drink services           | 51       |
| Construction                      | 40       |
| Other business services n.e.c.    | 36       |
| HQs and management consultancy    | 33       |
| Transport                         | 31       |
| Retail                            | 29       |
| Education                         | 24       |
| Manufacturing                     | 24       |
| Wholesale                         | 23       |
| Employment activities             | 18       |
| Professional & technical services | 18       |
| Facilities management             | 16       |
| Investigation & security          | 16       |
| Other services                    | 15       |

### Case studies

Based on these, in conjunction with the data on ‘employer delinquency’ and Key Informant interviews, we have embarked on a series of illustrative case studies, mostly based in London. These are not yet complete, and some will be in the form of individual testimonies gathered through face to face interviews.

Others take the form of combinations of documentary evidence with interviews, including:

- In the Arts and Entertainment sector, so-called ‘profit share’ in London fringe theatre;
- In the Sports and Leisure sector, delayed payment of wages in a professional sports club;

- In Food and Beverage Services, the repeated use of insolvency procedures in a chain of restaurants and take-aways;
- In Employment Activities, the errors and delays in payment for provision of student support services via a temporary labour agency;
- In Security and Investigations, failure to pay the National Minimum Wage to thousands of staff;
- In professional and technical services, the use of questionable self-employed contracts to impose charges and fines on workers.

Although these are still works in progress, I have included extracts from some of the interviews and documents below, and throughout this report, for illustrative purposes.

*“The employees are collectively owed wages and holiday pay...The preferential claim received to date amounts to £70,332.62...Whilst it is possible that there may be a dividend to the preferential creditors, at present it is not possible to predict either the timing or quantum of any future distribution.”*  
Administrator’s proposals to High Court, Food & Drink services case study

*“...it’s well known that he owns a 25 million pound house in Mayfair, he’s got his own plane, he’s got the yacht, he’s got the business in [city], all over the world, you know so what else is there for [Name] to have? You know a [sport] club is just an extension of his ego”.* CS Interview 23

*“...during performance, obviously I’m already on the billing, I’m already there, so I would have more power to be able to stay in the production and try to be paid, but that venue wouldn’t have me back, and probably all the creatives - especially if they all work in fringe theatre, which is not just performers, a lot of choreographers make their name in fringe theatre. Directors, lighting designs, sound designers - they would probably all go ‘oh, she’s not on our team.’ Does that make sense? It’s like ‘ok, no, you’re not on our team.’”* CS Interview 06

*“The Engineering Contractor shall be liable for and shall indemnify... [company X]...in respect of any liability or obligation and any related cost, claims damages penalties expenses or other losses...in the event that:*

- *Any person (including the Engineering Contractor...) should seek to establish any liability or obligation upon [company X] on the grounds that they are an employee of [company X];*  
Extract from contract, Professional and technical services case study



## Why do wages go unpaid?

### Errors and misunderstandings

On many occasions, there will be errors which result in workers not receiving their correct pay. Some employers we spoke to, recognising this, had mechanisms in place to respond, including making temporary cash “advances” where the worker might be in difficulties as a result. This was associated with an appreciation that not only did the worker have a legitimate claim for the money, late or under-payment could have serious consequences for their household budgets.

*“A very common one that people get wrong is they think ‘oh I’ve got 28 days holiday and I’m leaving after 9 months, so I want my holiday’. But you’re not entitled to that because you haven’t accrued it, so the accrual system, they might get that wrong.” K114 interview*

There may also be some lack of clarity as to what the contractual arrangements are.

Misunderstandings regarding holiday pay calculations were cited by employers and advisors as a frequent source of friction. Some ‘misunderstandings’ however may more accurately be described as differences of opinion, such as the view on the part of some homecare providers that time spent travelling between assignments at clients’ homes should not count as working time for the purpose of calculating minimum wage entitlements. This is not a view shared by tribunals or by HMRC, let alone the workers themselves.

### Events beyond employers’ control

Companies can be plunged into crisis by the collapse of a key client, or by bank computer failures, or as we now know, by the fraudulent activities of a bank<sup>10</sup>. However some catastrophic insolvencies are triggered by HMRC or other creditor losing patience with a debtor company, and applying to the courts for some form of administration. These events could be foreseen by employers, although in interviews with workers who have found themselves unpaid in these circumstances, it seems that they may be the last to know what is happening.

### Business model

We examined a one in ten sample of 2012, and one in five of 2014 ET judgements from claims including unauthorised deductions from wages lodged at the London South, London Central, London East and Watford tribunals. Of a total of 735, 640 were against private sector organisations<sup>11</sup> for which we checked Companies House records, noting their sector, directors and their addresses, and status (i.e. if still trading).

It seems that there are two distinct populations of respondent. One has a high tendency to have gone out of business. These are those which either fail to defend the claim (so have a default judgement recorded), or who defend but lose. The other group, which is likely to still be trading either goes to a hearing and wins, or the case is withdrawn – and this we suggest is because they have settled. In a minority of cases the judge records that withdrawal is due to settlement. The profile of these companies is very close to that of those where dismissal is simply recorded as being due to withdrawal. I conclude that most withdrawals are due to settlement. This is supported by the 2013 survey of ET Applications (BIS 2014). In the case of unpaid wages, settlement (particularly if it is late in the process), suggests that the workers claim is at least partly justified.

<sup>10</sup> UK watchdog restarts probe into HBOS fraud case, Financial Times 7 April 2017

<https://www.ft.com/content/61664a4e-1b69-11e7-a266-12672483791a>

<sup>11</sup> There were also 72 public sector, 15 individuals and 8 others.

Comparing 2012 and 2014 cases, apart from the dramatic decline in the number of claims registered there is some evidence that a smaller proportion of cases are lost by claimants. There is also an increase in the proportion being withdrawn, and a fall in the proportion subject to default judgements. The implications of this will be addressed further in the final report.

We should understand, however, that by no means all of the businesses which have been wound up are evidence of unsuccessful risk-taking by their proprietors. During our Key Informant stage, we were repeatedly told about “phoenixing” companies. These are businesses which are wound up only to reappear with the same directors and premises, but with a different name, and free of obligations to the previous business’s creditors and employees. There was also the high proportion of default judgements described above.

If there was a tendency for some employers to wind up companies to avoid obligations to their workers (amongst others), one might expect them to set up fresh companies to repeat the pattern.

From our overall sample of ET judgements, we selected 24 where a default judgement had been handed down, and the respondent company is no longer trading. Based on advice from Key Informants and PAG members, it is reasonable to assume that in most of such cases, the ET award was not paid in full (or at all).

Twelve were compulsory liquidations. In six out of those 12, we found directors still to be in charge of other live companies. Eleven were identified as “dissolved”, and in five of these directors are still directors of other, live companies. The remaining case was subject to a Company Voluntary Arrangement, and a director is currently active elsewhere.

The pattern was similar for companies ceasing to trade around or after the claimant won at a hearing (so the claim was defended by the respondent). Out of ten compulsory windings-up, four had directors who are currently active, and of 14 dissolved companies, seven had still-active directors.

So from this sample of 48 respondents, directors of half the companies found to have defaulted on wages and then been dissolved are now back in business. Not all the companies subsequently controlled by employers judged to have failed to pay workers their full wage will be true “phoenixes” as they may not be carrying out the same business (to find this out would require further research). However, it is clear that failing to pay wages is no barrier to continuing as an employer, and indeed these figures are consistent with there being a widespread culture of repeated non-compliance with employment rights sheltered behind limited liability and a failure to check the standing of potential directors.

### **Information, knowledge & beliefs**

It is certainly the case that some workers know little about their employment rights – the “don’t know” figures for annual leave entitlement from the Labour Force survey attest to that. Awareness of the existence and approximate level of the NMW is higher, and nearly all workers consider that at least some of their work warrants payment, even if some employers disagree.

However, not all work is seen as worthy of payment even by the workers themselves. This may be at its worst in the arts, where many young workers feel driven to accept unpaid work, or at least not to complain about it, but elsewhere we have encountered acceptance of unpaid training/induction, the need for additional hours to provide a service (or simply to keep a job), classification of some work as volunteering, and acceptance of the additional risk of non-payment associated with supposed self-employment. There are also doubts regarding the enforceable nature of contracts.

Knowing about rights may at least give workers some basis for challenging non-payment, but knowing where to turn for advice, advocacy or enforcement is a further challenge. Advice bodies point out that it is a brave (or trade union organised) worker who will threaten legal action against their current employer, with many waiting until they have left to attempt to reclaim owed sums. Even then ET (and County Court) fees, the absence of legal aid for advice, and the complexity of the bureaucracy in pursuing cases may deter recovery action. But there is also a problem of legitimacy, workers feeling that their employer probably knows better than them what the legal position is. In some cases the evidence suggests that the employer may have previously evaded legal obligations with impunity.

*“the worker may have done a few hours, maybe half a week, but they say they're going to go for a whole week but they get another job or something halfway through, so they leave the temporary assignment, which they can do without notice, but because the client then gets upset with the agency, the agency sort of takes it out on the worker and say we're not going to pay you this week, and it's just being spiteful if you like for want of a better word” K109 interview*

This may encourage them to use non-payment as a disciplinary device, imposing fines or charges, or withholding wages on departure as a punishment – even where such departure is supposedly part of a flexible work arrangement.

### **Remedies: the chances of being paid**

Workers affected by insolvency have a fair chance of recovering at least some of their unpaid wages. Those found to have been paid less than the NMW can rely on HMRC to at least ask for arrears to be repaid (it is unclear to what extent this is followed up). In sectors regulated under the Gangmasters Licensing Act, the GLAA could require payment of unpaid wages as a condition of continued permission for agencies to operate under license. The Employment Agencies Standards Inspectorate also has powers to require payment of arrears, but these are less frequently used.

Outside of these areas, it is down to the worker themselves to attempt recovery, either collectively (such as through trade union intervention), or as individuals,

*Well I think the only way I have is to do it myself or to go to Citizens Advice, I can't think of any other way... I mean there is a governing body or something isn't there of agencies. I did contact them once, I don't know whether it was about the unpaid wages or whether it was about holiday entitlement or what, and I did contact them once and they said they were very interested to hear this and that was the last I heard! Thank you for the information! (Laughs.) Yeah. CS interview 20*

ultimately through ETs or the County Court system. For most workers, this will involve court or tribunal fees, but even where they succeed, there may be further costs of enforcement where an employer proves reluctant to pay. It has been estimated that only about half of all successful ET claimants receive all of their awards.

The mechanisms, costs and outcomes will be addressed in further detail in the final report, as will a discussion of the emotional toll which pursuing cases through the legal system can impose on the claimants.

## Discussion

Deliberately unpaid wages take two forms, according to preliminary case studies. There are “Little & often” strategies and those which are “Episodic”. But in both types, there are a number of underlying causes. These include:

- a. Low risk of detection by enforcement bodies (and absence of enforcement bodies in some cases)
- b. Absence of effective enforcement (including of Tribunal and Court awards)
- c. Workers’ lack of knowledge of their rights
- d. Workers’ reluctance to pursue employers, particularly while their employment continues
- e. Restrictions on access to justice
- f. No pursuit or penalty for employer recidivism (apart from NMW offences).

There are others which are almost cultural in their effect. One of these is the notion that it is perfectly legitimate to provide something other than a wage in exchange for at least some, and sometimes all, labour power. For entertainers this can be in the form of alleged ‘exposure’, but there is also a pervasive belief that experience is in itself some sort of commodity which workers (particularly the young) need to obtain from those who would otherwise be their employers. Similar intangibles are training, practice, developing networks, or improving a *c.v.*, or even the promise some work next week, or accommodation or even food, or turning a blind eye to pilferage. This, I see as modern day “truck”, akin to the practices of the 19<sup>th</sup> century whereby employers would pay workers with vouchers for their shops, or even with some of the goods they themselves had manufactured.

A second is the issue of employment status. I am not convinced that the problem is one of legal definitions, since recent cases have shown that when challenged, much notional self-employment is shown to be nothing of the sort. The problem in law is rather access to the procedures leading to such judgements, their applicability beyond the individuals named in the cases, and their effective enforcement after judgement – all of which are deficient.

But there is also a conceptual problem, with some (particularly young) workers making a distinction between those jobs which are “proper” and therefore accompanied by rights, and those which are not. Many also seem convinced that jobs are scarce and therefore precious, despite the labour market statistics which strongly suggest otherwise. These distorted perceptions provide fertile ground for the unscrupulous employer to practice deception and deductions from wages.

## Regulation and “fit and proper” employers

The issue of whether certain individuals are fit to be employers has come strongly to the fore, particularly as we examined the Companies House records, which are of varying quality and accuracy, to put it mildly. It is all too apparent that there is little real scrutiny of company registrations or even monitoring of bans on directors. Even in sports which have developed their own tests for determining whether a new owner is suitable to run a club, it is clear that the bar has been set low, perhaps deliberately.

But outside a few areas, there appears to be no impediment to continuing as an employer even if the individual or enterprise has repeatedly been judged to have breached workers’ rights. Far from

*“the guy who ran the employment business had disappeared, he did a bunk, we couldn't find him, so we issued a warrant for his arrest, and he just gave himself up. I think he'd been out of the country, so he gave himself up when he came into the country. Workers got paid, but three and a half years later, so you know.” K109*

being protected by their employment contracts, it seems that when it comes to the crunch, workers are the ones carrying the risk.

## What needs to happen: the implications for policy and practice

Having a notional right in law is not the same as having protection, or obtaining restitution. For most workers there is considerable risk in seeking enforcement, to current employment, future employment, costs which may not be recoverable, of stress, and of shame. The risk for the delinquent employer on the other hand, may be of possible fines for breaches of the NMW, but little else. Even where tribunal awards are made, there is little risk attached to non-payment. The shelter of limited liability does indeed protect the individual employer from risk to their personal property, but does little to protect the worker from theft of their person (in the form of labour power).

There is a desperate need for improved coordination of data on serial offenders against employment rights, involving at least Companies House, the Insolvency Service, HMRC and the GLAA. The lack of usable data from county courts is also a barrier to identifying recidivists. Consideration needs also to be given to the information flowing through ACAS conciliation, Citizens Advice bureaux, Law Centres, trade unions and employment tribunals. However, all the coordination in the world will not be of any value if there are no powers (or none that the state will use, at any rate) to penalise those so identified.

Secondly workers’ access to justice is seriously deficient. The reduction in support to law centres, the lack of support for the development of collective bargaining and the imposition of ET fees all act to separate workers from the exercise of their contractual rights. Added to this is the way in which ACAS is charged with seeking agreement rather than enforcing rights, the weak process of recovery of awards and the abuse of insolvency and limited liability.

Workers do need better guidance not only on their rights, but on the manner in which they can most effectively be enforced. Here, further and higher education institutions have a role to play. When

providing basic guidance on reclaiming wages to students as part of the data gathering process, I lost count of the number of times that I was told “we should be taught about this”. It is hard to disagree.

Developing these areas of concern into some concrete proposals will require more expertise than I possess alone. The next phase of the Unpaid Britain project will therefore be to establish an ‘Implementation Group’ to generate some policy and practice which could lead to at the very least reducing the billions of pounds of subsidy given by their workers to unscrupulous employers operating in the many grey areas of British employment and company regulation.

### **A note on Brexit**

The rights to be paid, or to minimum wages, are not within the legislative reach of the European Union. Workers from EU states ought to be treated no less favourably than UK nationals, although as we have shown, in this respect, that is not much to hope for. However, there are some elements of employment law which relate to unpaid wages, and which may change as a result of the UK’s departure from the EU. The most significant is the right to paid holidays, established as a consequence of the Working Time Directive. Insolvencies involving companies operating in more than one EU state come under the Insolvency Regulation<sup>12</sup>, but this has little impact on workers’ entitlements.

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<sup>12</sup> Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings

## Appendices

### Interview participants

| <b>Case study interviews</b> |                                   |  |               |            |                          |
|------------------------------|-----------------------------------|--|---------------|------------|--------------------------|
| <b>ID</b>                    | <b>Job</b>                        | <b>Sector</b>                          | <b>Gender</b> | <b>Age</b> | <b>Date of interview</b> |
| 04                           | Sign Holder                       | Retail                                 | Female        | 36-46      | 09/11/2016               |
| 05                           | Administration Manager            | Activities of membership organisations | Female        | 26-35      | 15/11/2016               |
| 06                           | Support worker                    | Education                              | Female        | 56-65      | 09/11/2016               |
| 08                           | Healthcare Assistant              | Health                                 | Female        | 36-45      | 21/11/2016               |
| 09                           | Payroll Manager                   | Construction                           | Male          | 36-45      | 03/11/2016               |
| 10                           | Performer                         | Arts and Entertainment                 | Female        | 26-35      | 04/11/2016               |
| 11                           | Support worker                    | Education                              | Male          | 36-45      | 11/11/2016               |
| 12                           | Waiter Bartender                  | Food and Beverage Services             | Female        | under 25   | 19/01/2017               |
| 13                           | Support worker                    | Education                              | Male          | 26-35      | 30/11/2016               |
| 14                           | Invigilator                       | Education                              | Female        | under 25   | 20/12/2016               |
| 15                           | Sales Assistant                   | Retail Fashion                         | Female        | under 25   | 16/03/2017               |
| 17                           | Official in Workers Organisation  | Arts and Entertainment                 | Male          | 36-45      | 19/04/2017               |
| 18                           | Performer                         | Arts and Entertainment                 | Female        | 26-35      | 11/04/2017               |
| 19                           | Chef                              | Food and Beverage Services             | Male          | 26-35      | 05/04/2017               |
| 20                           | Courier driver                    | Postal and courier activities          | Female        | 46-55      | 04/04/2017               |
| 21                           | Chef                              | Food and Beverage Services             | Female        | 36-45      | 09/05/2017               |
| 22                           | Press/PR                          | Sports and Leisure                     | Male          | under 25   | 26/04/2017               |
| 23                           | Official Supporters Organisation  | Sports and Leisure                     | Male          | 36-45      | 03/05/2017               |
| 24                           | Theatre Maker                     | Arts and Entertainment                 | Male          | 46-55      | 03/05/2017               |
| 25                           | Official in workers' Organisation | Sports and Leisure                     | Male          | 56-65      | 08/05/2017               |

|    |        |                            |      |       |            |
|----|--------|----------------------------|------|-------|------------|
| 26 | Waiter | Food and Beverage Services | Male | 36-45 | 16/05/2017 |
|----|--------|----------------------------|------|-------|------------|

| <b>Key Informants</b> |   |                   |             |                          |
|-----------------------|---|-------------------|-------------|--------------------------|
| <b>ID</b>             | <b>Organisation</b>                               | <b>Gender</b>     | <b>Age</b>  | <b>Date of interview</b> |
| KI02                  | Voluntary sector                                  | Female            | 36-45       | 15/12/2015               |
| KI03                  | Public sector regulator                           | Male              | 56-65       | 22/01/2016               |
| KI04                  | Advisory organisation                             | Male              | 56-65       | 06/01/2016               |
| KI05                  | Service sector contractor to hospitality industry | Male              | 46-55       | 21/01/2016               |
| KI07                  | Professional Association                          | Female            | 46-55       | 29/01/2016               |
| KI08                  | Advisory/advocacy NGO                             | Female            | 46-55       | 29/01/2016               |
| KI09                  | Public sector regulator                           | Male              | 56-65       | 01/02/2016               |
| KI10                  | Operations manager food processor                 | Male              | 36-45       | 05/02/2016               |
| KI11/<br>KI16         | Supplier of services to industry                  | Female,<br>female | 36-45/46-55 | 25/02/2016               |
| kl12                  | Workers organisation                              | Female            | 26-35       | 09/02/2016               |
| KI13                  | Workers organisation                              | Female            | 36-45       | 03/02/2016               |
| KI14                  | Public sector advisory body                       | Female            | 56-65       | 09/02/2016               |
| KI15                  | Workers organisation                              | Female            | 26-35       | 08/02/2016               |
| KI18                  | Employment Solicitor                              | Female            | 26-35       | 20/03/2017               |



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