RESEARCH PAPER 02/77
4 DECEMBER 2002

National Minimum Wage (Enforcement Notices) Bill [HL]

HL Bill 8 of 2002-03

This Bill closes a loophole in the *National Minimum Wage Act 1998* exposed by the case of *Inland Revenue v Bebb Travel plc*. The Inland Revenue had thought they had the power to issue enforcement notices in respect of workers who were no longer employed by the under-paying employer. In *Bebb*, the Employment Appeal Tribunal ruled that they did not. This two clause Bill ensures that they do.

The Bill was introduced in the Lords on 21 November 2002 and is due to have its second reading there on 10 December 2002.

An updated version of this research paper will be issued after the Bill has completed its passage through the Lords.

Julia Lourie

BUSINESS AND TRANSPORT SECTION

HOUSE OF COMMONS LIBRARY

Recent Library Research Papers include:

02/62	The *Regional Assemblies (Preparations)* Bill	21.11.02
02/63	Communications Data: Access and Retention	21.11.02
02/64	Iraq and UN Security Council Resolution 1441	21.11.02
02/65	Agriculture, Modulation and Environmental Policy	21.11.02
02/66	The *Community Care (Delayed Discharges etc)* Bill	22.11.02
02/67	Telecommunications and the *Communications Bill* [Bill 6 of 2002-03]	26.11.02
02/68	Media Ownership and the *Communications Bill* [Bill 6 of 2002-03]	28.11.02
02/69	Broadcasting and the *Communications Bill* [Bill 6 of 2002-03]	29.11.02
02/70	Economic Indicators	01.12.02
02/71	The *Local Government Bill:* Housing Finance Clauses [Bill 9 of 2002-03]	02.12.02
02/72	The *Criminal Justice Bill* [Bill 8 of 2002-03]	02.12.02
02/73	The *Criminal Justice Bill:* Juries and Mode of Trial [Bill 8 of 2002-03]	02.12.02
02/74	The *Criminal Justice Bill:* Double Jeopardy and Prosecution Appeals [Bill 8 of 2002-03]	02.12.02
02/75	The *Criminal Justice Bill:* Disclosure and evidence [Bill 8 of 2002-03]	03.12.02
02/76	The *Criminal Justice Bill:* Sentencing [Bill 8 of 2002-03]	03.12.02

Research Papers are available as PDF files:

- *to members of the general public on the Parliamentary web site, URL:* ***http://www.parliament.uk***
- *within Parliament to users of the Parliamentary Intranet, URL:* ***http://hcl1.hclibrary.parliament.u****k*

ISSN 1368-8456

Summary of main points

A National Minimum Wage (NMW) of £3.60 an hour for adults and £3 an hour for young workers aged 18 to 21 inclusive was introduced on 1 April 1999. It has been increased three times since then and now stands at £4.20 an hour for adults and £3.60 an hour for young workers.

The *National Minimum Wage Act 1998* lays down the method for enforcing the NMW. A worker who is paid less than the NMW can, himself, bring a claim for the money owed in either an employment tribunal or a county court. Alternatively, the enforcement agency (usually the Inland Revenue) can issue an enforcement notice requiring the employer to pay the NMW and make good any underpayment.

If the employer fails to comply with an enforcement notice, the Inland Revenue can issue a penalty notice imposing an escalating fine. It can also sue on behalf of the underpaid worker for recovery of the underpayment.

Since April 1999, over £9 million in wage arrears have been identified, over 400 enforcement notices issued, and over 60 enforcement cases heard at employment tribunals.

In August 2002, an Employment Appeal Tribunal ruling in *Inland Revenue v Bebb Travel plc* exposed a loophole in the law. Contrary to their previous understanding, it appears that Inland Revenue enforcement officers do not have the power to issue enforcement notices in respect of workers who are no longer working for the under-paying employer.

The Inland Revenue has appealed against this ruling, but, in the meantime, the Government has introduced a short Bill – the *National Minimum Wage (Enforcement) Bill [HL] 2002/03* - to close the loophole and allow enforcement officers to revert to their previous practice of pursuing cases involving workers who are no longer employed by the employer in question.

The Bill amends the *National Minimum Wage Act 1998*, and, like that Act, extends to the whole of the United Kingdom.

CONTENTS

I Introduction: enforcing the National Minimum Wage

The *National Minimum Wage Act 1998* introduced a National Minimum Wage (NMW) throughout the UK. Details of the rate and method of calculation are contained in regulations made under the Act – principally the *National Minimum Wage Regulations 1999*, SI 1999/584, as amended. When the NMW first came into force on 1 April 1999, the adult rate for workers aged 22 and over was £3.60 an hour and the development rate for young workers aged 18-21 inclusive was £3 an hour. The rates have been increased three times since then and now stand at £4.20 an hour for adults and £3.60 an hour for young workers.

Effective enforcement of the NMW has been seen as vital from the outset. The Low Pay Commission, which consulted extensively before the introduction of the NMW found that:

> A recurrent theme during our consultations was that the National Minimum Wage must be implemented and enforced effectively to be successful. If businesses do not understand its implications, they cannot make sensible and positive adjustments to implement it. If the National Minimum Wage is not enforced properly, then unscrupulous employers may gain an advantage over reputable ones, and the most vulnerable workers will not be protected.[1]

The Government's first annual report on the NMW described their approach to enforcement and the role of enforcement officers. While "self-enforcement" was the ideal, it was backed up by enforcement officers, who, uniquely in employment law, could take cases to tribunals on behalf of workers:

> The Government have always recognised that the minimum wage can only be truly successful if it is "self-enforced", that is, if it is so widely known about and accepted that there is widespread voluntary compliance (…)
>
> Even with publicity and a high level of awareness of the NMW, some employers will deliberately or accidentally fail to comply. The Government therefore set up an enforcement regime that is fair and effective without introducing unnecessary burdens on business (…)
>
> The Act gives workers a contractual right to the NMW, and adds the right to receive NMW to the existing right not to suffer any unauthorised deduction. To enforce these rights, a worker can take a case to an employment tribunal or a civil court (…)
>
> However, the Government did not want workers to have to rely on taking their own action themselves against their employer, since intimidation or fear can often

---

1 First Report of the Low Pay Commission, *The National Minimum Wage*, 18 June 1998, Cm 3976, para 8.1

> act as a deterrent to making a complaint (even with the protections against unfair dismissal and detrimental action provided by the Act). Under the powers of the Act, the DTI therefore arranged with the Inland Revenue and the agricultural departments for certain of their officers to act as NMW compliance officers. Uniquely in employment law, these officers can take cases to tribunals on behalf of workers. But most cases do not get that far, as officers can issue civil notices and serve penalties on employers without recourse to a tribunal.[2]

The DTI's *Detailed guide to the national minimum wage*, describes the actions a compliance officer may take to enforce the NMW:

> 227. If an enforcement officer believes that an employer has failed to pay at least the national minimum wage to a worker:
>
> - The officer may serve an enforcement notice which requires the employer to start paying the national minimum wage and to make good previous underpayments for each named worker. The employer may appeal against the enforcement notice.
>
> - If the employer ignores the enforcement notice, the officer may serve a penalty notice. The penalty notice imposes a financial penalty on the employer of £8.20 for each day from the time the enforcement notice was issued, and for each worker named in the enforcement notice who has not been paid the money due. The penalty notice does not recalculate the amount owed to the worker but penalises the employer for non-compliance with the notice. The original enforcement notice remains in force pending the outcome of any appeal by the employer. The employer may appeal against the penalty notice.
>
> 228. If the above steps do not result in the employer complying with the enforcement notice, the enforcement officer can:
>
> - encourage the worker to take the employer to a tribunal or court to recover the money owed (if he has not already done so);
>
> - take such a case on behalf of the worker;
>
> - prosecute the employer. Deliberate refusal to pay the national minimum wage is a criminal offence...
>
> 229. Enforcement officers can act in response to complaints by workers or others that an employer is not paying the national minimum wage. They can also decide to make inspections of employers at any time.[3]

---

2 DTI, Inland Revenue, *National Minimum Wage, Annual Report 1999-2000*

3 DTI, *Detailed guide to the national minimum* wage, October 2001, http://www.dti.gov.uk/er/nmw/gtmw.pdf

Since the introduction of the NMW, over 400 enforcement notices have been issued and over £9 million of underpayments identified:

	Enforcement notices	Employment tribunal cases	Arrears identified (£)
1999/00	136	12	5,135,799
2000/01	213	26	3,034,373
2001/02	86	27	1,242,341
Total	435	65	9,412,513

Source: DTI, Inland Revenue, *National Minimum Wage Annual Reports*, 1999-2000, 2000-2001, 2001-2002

II Current legislation

Sections 17 to 22 of the *National Minimum Wage Act 1998* provide the statutory basis for enforcement by compliance officers. Section 17 gives workers who have been paid less than the NMW an entitlement to be paid the difference between what they were actually paid and what they should have been paid. Section 19 gives enforcement officers the power to issue enforcement notices and section 20 gives them the power to sue on behalf of workers. The key sections are reproduced below:

> **19 Power of officer to issue enforcement notice**
>
> (1) If an officer acting for the purposes of this Act is of the opinion that a worker who qualifies for the national minimum wage has not been remunerated for any pay reference period by his employer at a rate at least equal to the national minimum wage, the officer may serve a notice (an "enforcement notice") on the employer requiring the employer to remunerate the worker for pay reference periods ending on or after the date of the notice at a rate equal to the national minimum wage.
>
> (2) An enforcement notice may also require the employer to pay to the worker within such time as may be specified in the notice the sum due to the worker under section 17 above in respect of the employer's previous failure to remunerate the worker at a rate at least equal to the national minimum wage.
>
> (…)
>
> **20 Non-compliance: power of officer to sue on behalf of worker**
>
> (1) If an enforcement notice is not complied with in whole or in part, an officer acting for the purposes of this Act may, on behalf of any worker to whom the notice relates,—
>
> (a) present a complaint under section 23(1)(a) of the Employment Rights Act 1996 (deductions from worker's wages in contravention of

section 13 of that Act) to an employment tribunal in respect of any sums due to the worker by virtue of section 17 above; or

(b) in relation to Northern Ireland, present a complaint under Article 55(1)(a) of the Employment Rights (Northern Ireland) Order 1996 (deductions from worker's wages in contravention of Article 45 of that Order) to an industrial tribunal in respect of any sums due to the worker by virtue of section 17 above; or

(c) commence other civil proceedings for the recovery, on a claim in contract, of any sums due to the worker by virtue of section 17 above.

(2) The powers conferred by subsection (1) above for the recovery of sums due from an employer to a worker shall not be in derogation of any right which the worker may have to recover such sums by civil proceedings.

Until the decision in *Bebb Travel* (see below) Inland Revenue enforcement officers had been issuing enforcement notices under section 19 that related to past periods only, particularly in cases where the workers in question were no longer working for the underpaying employer.[4] They had also been suing employers who did not comply with these notices to recover underpayments on behalf of ex-workers who were unwilling or unable to sue on their own.

III Inland Revenue v Bebb travel plc

Bebb Travel employed stewards and stewardesses on its coaches until May 2000. During 2000, a National Minimum Wage Compliance Officer, acting for the Inland Revenue, visited Bebb Travel and inspected its wage records. As a result of these inspections, the officer decided that 25 of these workers had been paid less than the NMW on various occasions. On 6 October 2000, he issued an enforcement notice requiring Bebb Travel to pay arrears, amounting in total to £37,649.43.

Bebb Travel appealed against the enforcement notice to an employment tribunal, arguing that the enforcement notice was invalid as it related to workers who had left their employment some months previously. Section 19 (1) of the Act only allowed an enforcement notice to be issued in respect of a worker who "qualifies for the national minimum wage". Moreover, it had to require "the employer to remunerate the worker for pay reference periods ending on or after the date of the notice at a rate equal to the national minimum wage". The notice was dated 6 October 2000, but the underpaid workers had been dismissed in May 2000. Their argument succeeded and the Inland Revenue appealed to the Employment Appeal Tribunal (EAT).

---

[4] Explanatory notes HL Bill 8 – EN, para 9

On 16 August 2002, the EAT delivered a judgment upholding the employment tribunal ruling and supporting Bebb Travel's interpretation of the law. Judge JR Reid, QC, said:

> 15. By section 19(1) "if an officer…is of opinion that a [qualifying] worker has not been [properly] remunerated" he may serve "a notice (an "enforcement notice") on the employer" (ie the employer of that worker) "requiring the employer to remunerate the worker for pay reference periods ending on or after the date of the notice at [the proper] rate". Thus far it is clear that the notice can only be served in respect of the current or future periods. It also seems to us to be clear that an "enforcement notice" is a notice containing a requirement as to future payment.
>
> 16. Then we come to subsection (2). "An enforcement notice may also require the employer to pay to the worker within such time as is specified in the notice the sum due under section 17 above in respect of the employer's previous [underpayment]". The words "may also" show that the notice must contain the requirement as to future payments referred to in subsection (1), whether or not it contains in addition a requirement for payment for past underpayment. If it does not contain a requirement as to future payment, it is not an "enforcement notice" as identified by subsection (1). It may or may not "also require" a payment in respect of past periods, but it cannot only make such a requirement and not contain a requirement as to future periods. The fact that section 55 requires the expression "enforcement notice" to be construed "in accordance with section 19 above" does not assist the Revenue. Indeed, it reinforces Bebb's construction is correct, because in accordance with section 19 an enforcement notice is one which, (as section 19(1) says, contains a requirement as to future payment.
>
> 17. It seems to us the use of the definite article in the expressions "the employer" and "the worker" in subsection (2) are harking back to the employer on whom the notice referred to in subsection (1) was served and the worker in respect of whom it was served. If this were not so the words used would be "an employer" and "a worker". This is further support for the view we have formed as to the clear meaning of the section.
>
> 18. Another indication which supports us in our view is that in section 19(1) the draftsman has used the words "a worker who qualifies". That indicates a worker still in employment at least at the time the officer's opinion is formed. If the words were intended to include also a former worker, then the expression used would be "qualifies or qualified at any time" as in section 28(1).
>
> 19. A still further minor indication that an enforcement notice under section 19 is intended only to deal with current workers is that there is nothing in the Act which provides for the situation where the worker cannot be traced. The requirement under section 19(2) is for "the employer to pay to the worker". There is nothing, for example, which enables the employer to get a good discharge by paying the Revenue amounts demanded to be paid to a vanished worker. The possibility of not being able to trace a worker is a real one when dealing with long gone casual short term workers: for instance in the present case one of the workers to whom Bebb was required to make payment was a lady who appears to

> have worked for only two weeks in April 1999 and had left some eighteen months before the notice was served. An employer (however anxious he was to pay up) would be at risk of a continuing daily penalty for failing to pay a person whom he could not find.
>
> 20. We have taken into account an oddity to which our construction leads, namely that if there are two workers who are underpaid one of whom leaves just before the pay period to which an enforcement notice relates, the notice can require back payments to the one who has stayed on but not to the one who has left. Notwithstanding this anomaly, the considerations we have set out persuade us the construction at which the Employment Tribunal arrived was clearly the correct one. Subsection (2) provides a summary way of obtaining underpayments for existing workers. It was not intended to enable or require enforcement officers to investigate and initiate recovery proceedings for workers who had long since moved on. In those circumstances we do not regard the Parliamentary material placed before us as being admissible, but in any event we did not regard it as shedding any real light on the construction of this particular section. We also acknowledge the apparent anomaly that would permit an employer who becomes aware of the Revenue's intention to serve an enforcement notice could with impunity dismiss all the relevant employees before the notice is served. Indeed, this in effect what happened in this case. However, the circumstances which would allow an employer to dismiss his employees and still carry on his business will be very rare, and in any case Parliament has ensured that such workers have their own remedy in the Employment Tribunals and the County Courts.[5]

The Inland Revenue has appealed against this ruling to the Court of Appeal and the hearing is scheduled for March 2003. In evidence to the Low Pay Commission, the Government said that its intention had always been that enforcement notices could be issued in respect of workers who were no longer employed by the underpaying employer:

> The Government believes that Ministers clearly intended, when introducing the Act, that compliance officers should be able to pursue cases involving workers who are no longer employed by the employer in question. We are determined to help low paid workers and intend to restore the position as soon as possible, so that the Revenue and Agricultural minimum wage compliance officers can once more pursue these cases fully. We submitted an appeal to the Court of Appeal in September and the hearing is scheduled for March 2003.
>
> In the interim period, Revenue and Agricultural compliance officers cannot issue enforcement notices on behalf of former workers. In these cases they can still investigate complaints and remind the employer of their duty to pay the minimum wage, but it will be for the worker to decide whether to take their case to an employment tribunal or civil court.[6]

---

5 Appeal No EAT/1311/01, *Inland Revenue Wales and Midlands v Bebb Travel plc*, http://www.employmentappeals.gov.uk/judge_fr.htm

6 *The Government's Evidence to the Low Pay Commission*, November 2002,

IV The Bill

On 21 November 2002, the Government introduced the *National Minimum Wage (Enforcement Notices) Bill [HL] 2002/03* in the House of Lords.[7]

This two clause Bill is designed to close the loophole exposed by the *Bebb* case and put what the Inland Revenue was already doing on a legal footing. It achieves this by introducing a new subsection (2A) to section 19 of the 1998 Act:

> (2A) If an officer acting for the purposes of this Act is of the opinion that a worker who has at any time qualified for the national minimum wage has not been remunerated for any pay reference period (whether ending before or after the coming into force of this subsection) by his employer at a rate at least equal to the national minimum wage, the officer may serve on the employer an enforcement notice which imposes a requirement under subsection (2) above in relation to the worker, whether or not a requirement under subsection (1) above is, or may be, imposed in relation to that worker (or any other worker to whom the notice relates).

http://www.dti.gov.uk/er/nmw/evidence02.pdf

7 HL Bill 8 2002/03