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Employment Bill [HL] Committee Stage Report

Bill 151 of 2007-08

The Bill contains proposals to reform existing law covering industrial relations and employment protection.

It will repeal dispute resolution measures which were intended to reduce employment litigation. These statutory procedures will be replaced by a new non-regulatory system.

It seeks to clarify and strengthen the enforcement framework for the National Minimum Wage (NMW) and employment agency standards.

Changes are proposed to industrial relations law to ensure compliance with a judgement of the European Court of Human Rights concerning rights for trade unions to determine their membership.

The Committee sat for four sittings on 14 and 16 October 2008. The Remaining Stages of this Bill are due on Tuesday 4 November 2008.

Vincent Keter

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Summary of main points

The Bill was introduced in the House of Lords on 6 December 2007, having been announced in July 2007 in the Government's Draft Legislative Programme.[1] It contains diverse proposals to reform existing law covering industrial relations and employment protection, with a particular focus on vulnerable workers.

The Bill will repeal the *Employment Act 2002 (Dispute Resolution) Regulations 2004* which were intended to reduce employment litigation. There is a consensus, particularly among judiciary and lawyers, that the intentions of the 2004 Regulations have failed to produce the desired policy outcome. The Government commissioned a review which was undertaken by Michael Gibbons and which recommended the complete repeal of the statutory dispute resolution procedures. Following the Gibbons Review there was a consultation on proposals to implement the Review. It is intended that the statutory dispute resolution procedures will be replaced by a new non-regulatory system; a package of measures to encourage early/informal resolution of employment disputes with increased support for the involvement of Acas. Consultations on a new code of practice, and non-statutory guidance, have been published by Acas and are ongoing.

The Bill will also seek to clarify and strengthen the enforcement framework for the National Minimum Wage (NMW) as well as employment agency standards to address some of the concerns about vulnerable workers.

The European Court of Human Rights (ECHR) judgement in *ASLEF v UK*, requires clearer rights for trade unions to determine their membership, after domestic courts held that trade unions could not lawfully expel British National Party (BNP) activists. The Bill will make changes to the relevant law, in particular section 174 of the *Trade Union and Labour Relations (Consolidation) Act 1992* to ensure compliance with the ECHR judgement.

A wide variety of issues were debated at Second Reading and in Committee Stage. Only one substantial amendment was agreed: allowing for greater sharing of information between enforcement officers of the Employment Agencies Standards Inspectorate and compliance officers for the National Minimum Wage.

The Public Bill Committee met in four out of the eight sessions allotted. There were no evidence sessions. It was ordered that subject to the discretion of the Chairman, any written evidence received by the Committee be reported to the House for publication. There was one division. This was on an opposition amendment which was negatived. In addition to the one substantive amendment, two minor or consequential amendments were agreed.

For further information see Library research paper *RP 08/63 Employment Bill [HL] 2007-08*, 11 July 2008. Progress of the Bill can be tracked on the Parliamentary website at: http://services.parliament.uk/bills/2007-08/employment.html

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1 *The Governance of Britain—The Government's Draft Legislative Programme* (Cm 7175)

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I Second Reading

Second Reading of the Bill took place on 14 July 2008.[2] In addition to the broad debate on the various clauses the following matters were raised.

a. Notification of Second Reading debate

Opposition members protested the "few days notice of debate";[3] and the "extremely short notice".[4]

> First, however, may I say that while the Bill's passage through the Lords lasted for months, we were given only a few days' notice of the debate, which was not ideal and not conducive to allowing Members to participate? Additionally, the Secretary of State has pulled out of leading on a Bill that he wishes to push through at such short notice, and we believe that that deserves some explanation from a Minister.[5]

The Second Reading and subsequent Committee Stage debates have seen a large number of new issues and matters raised which are not covered in the explanatory notes to the Bill or the previous Library research paper.[6] Accordingly, these issues are covered thematically in Part III of this paper to which reference is made in the course of reporting proceedings.

b. Consultation on new Acas code

The Bill will repeal dispute resolution measures which were intended to reduce employment litigation. These statutory procedures will be replaced by a new non-regulatory system focussed on the work of Acas which will receive extra funding. Oliver Heald asked the Government to clarify the closing date for the consultation on the new Acas code, subsequently given: 24 July 2008.[7] Geoffrey Clifton Brown raised concerns about the timing:

> I worry about the timetable. As the Minister made clear, consultation on the code will not finish until 24 July, yet under the timetable we are asked to accept later this evening, all stages of the Bill must be concluded by 23 October. For most of that time, the House will be in recess, so it will be difficult for us to get together to discuss what is in the Bill. The timetable makes it very difficult for the House to consider the code, which is one of the key aspects of the Bill.[8]

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2 HC Deb 14 July 2008 cc39-109

3 Djanogly HC Deb 14 July 2008 c48. The announcement of provisional business on Thursday 3 July indicated that the remaining stages of the *Human Fertilisation and Embryology Bill* would be debated on 14 July. However, the business statement on 10 July announced that this would be changed, to be replaced by Second Reading debate on the *Employment Bill* for the following Monday.

4 Teather HC Deb 14 July 2008 c60

5 HC Deb 14 July 2008 c48

6 *Library research paper 08/63 Employment Bill [HL] 2007-08 [Bill 117 of 2007-08]* 11 July 2008

7 HC Deb 14 July 2008 c41

8 HC Deb 14 July 2008 c91

c. Dispute procedures

Both Conservative and Labour members recalled the initial misgivings they had voiced in debates that took place when the dispute procedures were being introduced in 2003.[9]

d. Employment tribunals

A number of members reiterated concerns about the position of lay members in employment tribunals.[10]

Various speeches raised the issue of the enforcement of awards for compensation made by employment tribunals (for background see section III(A)(2) below). Sarah Teather said:[11]

> That brings me to my gravest concern about the omissions in the Bill. How clear people's statutory rights are and how efficient the tribunal system is are of no matter if, when the tribunal rules in favour of the claimant, they are simply unable to go the next leg of the journey to wrench the money that they are owed from their employer. The Bill is a serious missed opportunity, and the Government must find a way of giving claimants access to the fruits of the justice that they have already attained.[12]

Oliver Heald discussed employment tribunals generally, in particular the effect of the original *Polkey* decision on caseloads.[13]

e. National minimum wage

A range of issues to do with the national minimum wage (NMW) were raised. One of these concerns a perceived loophole in the rules whereby tips and gratuities paid in restaurants and other employments may not be received by the staff for whom they are intended. There are circumstances where employers may count these amounts toward their obligations to pay the minimum wage (see section III(B)(1) below).[14]

The question of enforcement of the minimum wage was also debated.[15] There were proposals, resisted by the Government, that interest should be added to instances of non-payment of minimum wages due.[16] The Minister Pat McFadden explained that the Bill does make changes whereby the unpaid amounts will be chargeable at current rates rather than the rates in force at the time underpayment liabilities were incurred.[17] This is seen by the Government as a simpler way of addressing these concerns. Since the

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9 Djanogly cc49-50 and c66; Marris c71

10 For example Heald c42; see also *Library research paper 08/63 Employment Bill [HL] 2007-08 [Bill 117 of 2007-08]* 11 July 2008, section 19(b)(6)

11 Teather cc63-64

12 HC Deb 14 July 2008 c64

13 Oliver Heald c65-67

14 Charles Walker c43; Sarah Teather c62; Rob Marris c71

15 Sarah Teather cc62-63

16 Sarah Teather c45

17 Pat McFadden c45

minimum wage was introduced in April 1999 there has been substantial annual uprating, the adult rate having increased from £3.60 per hour in 1999 to £5.73 in October 2008.

The complex question of territorial jurisdiction in terms of seafarers who are covered by the NMW was debated (see section III(B)(2) below). Jonathan Djanogly said that the Conservatives opposed any extension of the NMW to seafarers beyond what currently exists.[18] Labour back-bench members called for all seafarers on UK flagged ships to be covered.[19]

The NMW rates are divided into three different bands depending on age. There is a youth rate (16-17 year olds), currently £3.53; a development rate (18-21 year olds), currently £4.77, and an adult rate, currently £5.73. Concerns about the implicit age discrimination in these categories and the level of the lower rates were debated. Government policy is to maintain these age bands for reasons set out in the annual reports of the Low Pay Commission when they examined this issue (see section III(B)(3) below). Various Labour members called for the abolition of the age bands in the rates.[20] The Liberal Democrats supported this position.[21] In the debate it was stated that the Conservatives are "still discussing the issue".[22] Oliver Heald mentioned that the costs to employers arising out of the *Employment and Skills Bill* may be one factor that they would weigh in coming to a view on this question.[23]

John McDonnell said that the general exclusion of volunteers from the NMW needed to be addressed in the Bill:

> We have received representations from the National Union of Journalists and the Performers Alliance, which includes Equity, the Musicians' Union and the Writers' Guild of Great Britain. According to the NUJ, many people, mostly in newspapers but across the media, are required to work voluntarily not just for a few hours a week or a few weeks but, in some cases, for between six and 12 months in order to get on to the ladder even to be considered for a permanent position. As a result, they fall outside any legislation that would protect them from exploitation and ensure that they were paid the minimum wage at some stage in their careers.[24]

f. Regulation and small business

Jonathan Djanogly and Nadine Dorries both raised the general issue of the burden of employment regulation on small business.[25] Jonathan Djanogly referred to a survey by the Federation of Small Businesses:

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18 Jonathan Djanogly c52
19 For example Katy Clark c70
20 For example John McDonnell cc56-57
21 Sarah Teather c62
22 Geoffrey Clifton-Brown c92
23 Oliver Heald c93
24 HC Deb 14 July 2008 c548
25 Jonathan Djanogly c48; Nadine Dorries cc86-88

> Since 1997, the Government have introduced some 18 Acts and more than 280 statutory instruments dealing directly with employment, which have often left employers bemused, baffled and bewildered by the negative implications for UK employment. Last autumn, pre-credit crunch, a survey by the Federation of Small Businesses found that nearly 80 per cent. of small business owners handled paperwork themselves, and that a third of those businesses claimed that they would not be hiring new staff because of bureaucratic complexities. It is by that and other means that the Labour Government are continually damaging the flexibility of the UK's labour market.[26]

g. Trade Union Rights and Freedoms

In the previous session John McDonnell introduced a Private Members Bill on Trade Union Rights and Freedoms. This failed to make parliamentary progress but was widely supported by trade unions (see section III(C)(2) below). In the debate and subsequent amendments tabled for Report many of the same proposals were put forward.[27] Some of the concerns behind these proposals arose out of the Gate Gourmet dispute and the insolvency of the Lyndale Group:

> The reason companies can treat workers so is that we have fewer trade union rights now than we had in 1906, after the Taff Vale judgment. We still do not have the right to strike embedded in law and we no longer have the right to solidarity action. As a result, the reality of work for many people is that they are exploited and feel unprotected, so I was hoping for a more ambitious Bill than this one.[28]

h. Trade union membership

The Bill's provisions that seek to implement the decisions of the European Court of Human Rights in *ASLEF v UK* on trade union membership continue to generate misgivings despite amendments made in the House of Lords.[29] Trade unions remain concerned that the Bill will not effectively legislate for the changes required by the judgement. Some also question if the case would have been decided any differently by domestic courts had the Bill's proposals been in force at the time (see section III(C)(1) below). The Conservatives also voiced concerns. Jonathan Djanogly said:

> I also find the application of the clause to former membership of a political party somewhat worrying. Why should a 40-year-old employee, for instance, face the possibility of being evicted from a trade union on the basis that he was a member of a certain political party for a short time when he was a student? That aspect of the clause represents a one-size-fits-all approach typical of much of the union legislation of the old days, and maintains a definite air of retrospective punishment.[30]

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26 C48

27 John McDonnell c54; Katy Clark c68

28 HC Deb 14 July 2008 c55

29 For example John McDonnell cc59-60; for general background see *Library research paper 08/63 Employment Bill [HL] 2007-08 [Bill 117 of 2007-08]* 11 July 2008, section IV

30 Jonathan Djanogly c53

In the House of Lords the Government referred to the fact that expelled trade union members can currently make a complaint to the Certification Officer. Jonathan Djanogly questioned the role of Certification Officer in this regard:

> …the certification officer has very weak powers of inspection, and is not able to issue penalties to unions. That regulator is a relic of the trade union settlement of the 1940s and 1950s, rather than an effective modern day regulator, and requires reform.[31]

i. Whistleblowing

Richard Shepherd raised the issue of whistleblowing and suggested that the Bill should include changes to this area of employment law (see section III(A)(3) below).

j. Age discrimination

Age discrimination legislation was brought into force in October 2006 but continues to allow mandatory retirement for those over the age of 65 or the employer's normal retirement age. This has attracted considerable opposition and the retirement measure is currently the subject of legal challenge involving a reference to the European Court of Justice as to its compatibility with the relevant European directive.[32] Russell Brown raised this issue in the debate and called for the abolition of mandatory retirement.[33]

k. Gender equality

Nadine Dorries explored gender equality dimensions of employment and regulation, arguing that excessive employment regulation seeking to promote gender equality may be having the reverse effect:

> Some of the comments we heard from employers were appalling—putting batches of CVs in the bin before they would even interview women who might cause a problem to their business—but I wonder whether the amount of equality legislation we are imposing on businesses is having an adverse effect. Perhaps we could use a lighter touch and persuade employers by using incentives or by using the tax system, with benefit-in-kind tax relief, instead of using heavy-handed, burdensome legislation. As Nicola Brewer said today, it seems to be having the opposite effect, and rather than imposing regulation on business I think that there is another way of achieving a desirable outcome.
>
> As someone who ran a business that was all about helping women in the workplace, I do not want us to take a step back. In fact, the issue is about changing the culture in the boardroom and the culture of the people at the top who put women's CVs in the bin and do not employ them because of their

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[31] HC Deb 14 July 2008 c54

[32] Equal Opportunities Review, *In the News*, EOR No.158, November 2006; *Age Concern news release: Heyday takes Government to court over mandatory retirement age*, 3 July 2006; see the most recent development in this case: ECJ, Opinion C-388/07 in *The Incorporated Trustees of the National Council for Ageing*, 23 September 2008, OJ C 283 of 24.11.2007, p.9

[33] Russell Brown c82-83

gender. The answer is not to hit businesses over the head with a massive regulatory hammer. That is not going to give us the results that we need.[34]

[34] HC Deb 14 July 2008 cc84-85

II Public Bill Committee

A. Summary of proceedings

The Public Bill Committee met in four out of the eight sessions allotted. There were no evidence sessions. It was ordered that subject to the discretion of the Chairman, any written evidence received by the Committee be reported to the House for publication. There was one division. This was on an opposition amendment which was negatived. One substantive and two minor or consequential amendments were made.

Sitting	Matters debated	Column
Tuesday 14 October 2008 (Morning) Clauses 1 -10 agreed; one amendment Debate on clause 11 adjourned	Statutory dispute resolution Polkey principle Codes of practice: dispute resolution Power of employment tribunals to vary awards: [*minor government amendment*] Draft ACAS code Determination without hearing; chairman sitting alone Acas conciliation Compensation for financial loss Minimum wage arrears NMW compliance and enforcement NMW criminal penalties mode of trail	4-7 7 7-11 11-16 [*15-16*] 16-19 19-22 22-26 26-28 29-31 31-37 37-38
Tuesday 14 October 2008 (Afternoon) Clauses 11 – 17 agreed	NMW criminal penalties mode of trail NMW investigation powers NMW: cadet force adult volunteers NMW: volunteers Employment Agencies: mode of trial Employment Agencies: enforcement	41-48 48-52 52-53 53-55 55-57 57-58
Thursday 16 October 2008 (Morning) Debate on clause 18 adjourned	Trade union membership: expulsion for membership of a political party *[Conservative amendment negatived on division]*	61-74 74
Thursday 16 October 2008 (Afternoon) Clauses 18 – 22 agreed; amendments made Schedule agreed New clauses considered	Trade union membership: expulsion for membership of a political party *[New clause agreed: information sharing between employment agencies and NMW enforcement]* NMW tips ad gratuities Enforcement of tribunal awards Fair Employment Commission Costs in employment tribunals Time limits in employment tribunals	77-93 93-97 98-104 104-107 107-109 109-117 117-119

B. Amendments made

The Government made a minor amendment on the power of employment tribunals to vary awards where a party has failed to attempt resolution of employment disputes before litigating. Regulation 17 of the *Cross-border Railway Services (Working Time) Regulations 2008* which concerns working conditions for railway workers on cross-border railway services was added to the list of jurisdictions were tribunals can vary awards.[35]

A Government new clause: *Employment agencies and national minimum wage legislation: information-sharing* was passed by the Committee without a vote. The Minister referred to the "Government's vulnerable worker enforcement forum, which has met over the past year and considered a number of issues in relation to the vulnerability of people at work and their capacity to report abuses, and the enforcement agency's capacity to act on those reports." He explained the need for the amendment:

> One key issue that the forum identified was the need for closer working between the enforcement bodies. An important element of that is the ability of the bodies to share information about non-compliance. That is addressed in the new clause in my name and in that tabled by the Liberal Democrats.
>
> As the forum recognised, there are currently barriers to effective information sharing between some of the enforcement bodies, including between those that enforce the national minimum wage and those that enforce employment agency legislation. The Employment Agency Standards Inspectorate can contact Her Majesty's Revenue and Customs, which enforces the minimum wage, about potential non-compliance with the minimum wage only before it has undertaken an inspection when a complainant has clearly stated that there is a minimum wage issue or where that is clear from the complaint. Once an inspection has started, the current legal position is that it would be an offence to disclose information obtained during the inspection. In those circumstances, the agency standards inspectors can only advise the complainants to contact the minimum wage helpline.[36]

C. Debates

During the Committee debates, the following generated new information or highlighted political disagreement.

a. Codes of practice: dispute resolution

Clause 3 covers non-compliance with statutory codes of conduct and is drafted to specify a range of possible codes. Jonathan Djanogly in a probing amendment asked if it would be better to:

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[35] PBC Deb 14 October (morning) cc15-16; SI 2008/1660 (breach of regulations)
[36] PBC Deb 16 October (afternoon) c94

> …specify the relevant code from the outset as the ACAS code of practice on discipline and grievance procedures? [37]

The Minister Pat McFadden explained that:

> A relevant code of practice is one issued under the Trade Union and Labour Relations (Consolidation) Act 1992, which relates exclusively or primarily to procedures for resolving disputes. The hon. Gentleman correctly said that there was more than one code. There are currently six codes, some relating to disclosure of information to trade unions for collective bargaining purposes and others relating to industrial action, picketing and so on.
> […]
> The clause will also allow the application of adjustment in the context of future relevant codes issued by ACAS or the Secretary of State under the 1992 Act.[38]

b. Power of employment tribunals to vary awards

The Conservatives tabled an amendment concerning the Bill's proposal to reduce the power of employment tribunals to vary awards for non-compliance from 50 to 25 per cent. Mr Djanogly pointed out that a consultation in 2006 on proposals to amend the *Employment Act 2002* to extend the jurisdictions affected by the statutory dispute resolution procedure contained the following statement on monitoring:

> The Employment Tribunal Service will be able to monitor the number of cases where failure to comply with the procedural requirements becomes an issue, including the number of cases where awards are adjusted because of procedural failings [39]

The published employment tribunal statistics do not include a breakdown of these figures.[40] The Minster's response was as follows:

> **Mr. McFadden**: Let me first deal with the point about figures. I do not believe that the tribunal service issues a breakdown of the cases in which the current variance of 10 to 50 per cent. is used, but it has told officials in my Department that the top end of that variance is rarely reached.[41]

Mr Djanogly replied:

> … the Minister has admitted that the figures do not exist, even though in 2002 it was claimed that they would. We are all operating in the dark; we do not know what the situation is. The Minister said that it is not an exact science; I say that he is sticking his finger into the wind.[42]

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[37] PBC Deb 14 October (morning) c8
[38] PBC Deb 14 October (morning) c9
[39] BERR, *Dispute Resolution Procedures, Proposals to amend the Employment Act 2002 to extend the jurisdictions affected by the statutory dispute resolution procedure*, May 2006
[40] *Employment Tribunal and EAT Statistics (GB) 1 April 2006 to 31 March 2007*
[41] PBC Deb 14 October (morning) c12
[42] PBC Deb 14 October (morning) c13

c. Draft Acas code

Various points were taken on the draft Acas code that forms part of the non-statutory measures replacing the dispute procedures being repealed. Mr Djanogly asked about the consultation process, its format, the organisations contacted, and responses. He raised various detailed points on how the code has been drafted and comparisons with former versions, including the removal of the wording stating that tribunal litigation should be considered as a last resort failing informal resolution. He asked what steps were being taken to make small businesses aware of the code and ensure that it is not too rigidly applied against them.

The Minister described the draft code's intentions in light of the fact that Acas will no longer face time limits on their intervention and will have more resources:

> The code is an important part of the system, which will replace the 2004 procedures abolished by clause 1. It is more principles-based than some previous ACAS codes, because we have had an important dialogue with business and employee representatives. Some respondents have said that they do not want a lengthy procedural handbook that they have to cover, but that they want to know in broad terms what they have to do to be fair.[43]

d. Compensation for financial loss

Clause 7 gives employment tribunals new powers to further compensate employees for financial loss as a result of unlawful deductions from wages, including failure to pay the national minimum wage, and non-payment of redundancy awards. Such losses must be a direct result of the non-payment by the employer and may include overdraft fees and bank charges. Lorely Burt argued that interest on unpaid amounts should also be charged:

> Where it is not possible to get an idea of bank charges—perhaps if the relevant person does not even have a basic bank account—could a similar interest charge payment be used to ensure that there is fair restitution? [44]

e. Minimum wage arrears

The effect of the new provisions on NMW arrears were summarised by Mr. McFadden as follows:

> …the concept changes an amount of money into an amount of time and multiplies that by the current rate of the minimum wage.[45]

Historically rates have risen since the NMW was introduced in 1999. Michael Jabez Foster asked if this would apply if the rate were to fall.[46]

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[43] PBC Deb 14 October (morning) c18
[44] PBC Deb 14 October (morning) c27
[45] PBC Deb 14 October (morning) c30
[46] PBC Deb 14 October (morning) c30

> The provisions ensure that if the minimum wage were to fall, employers could not argue that they should pay back arrears at the lower current rate. Clause 8 provides that the current rate is used if it is higher than the rate that was in force when the underpayment was made.[47]

At Second Reading the Liberal Democrats had called for interest to be charged on late payment of NMW arrears. The Minister addressed this in Committee:

> It was argued when we were consulting on fair arrears that perhaps interest should be charged on top of the calculation that I have set out. However, if we were to do that, workers would be required to complete self-assessment returns for tax due on the additional element of arrears, or interest. It is not sensible to put minimum wage workers in the position of having to fill in a tax return for what would be relatively small sums of interest when we can deal with the heart of the problem through a simple, fair arrears calculation. This is a highly legitimate issue to raise, and it has been of concern to the Low Pay Commission. Through clause 8 we will ensure fair arrears for people who are underpaid the minimum wage.[48]

Clause 10 gives powers to compliance officers to take copies of employer's records. Mr Djanogly tabled an amendment asking:

> …should officers not be encouraged, where practical, to take copies of relevant documents rather that removing originals in a way that might disrupt the running of the business? [49]

The Minister countered that "given that most employers are decent people, it will not be necessary to take records away".[50] Mary Creagh made the further point that many records are computerised.[51]

f. NMW criminal penalties mode of trial

The Conservatives questioned the evidence behind the proposal to extend the scope of criminal prosecutions for non-compliance by employers with NMW rules:

> The Committee is no doubt aware that under the National Minimum Wage Act, provision is made for criminal prosecution under six offences that relate to the payment of the minimum wage, the maximum penalty for which is £5,000. Those were not used for nine years until 2007 when two prosecutions were successfully made. One of them, a director of a day nursery, was fined £2,500 and ordered to pay costs of £500 for the offence of obstruction under section 31(5)(a) of the Act. More recently, there have been two further prosecutions, most notably, the case of a Sheffield butcher's shop, which was fined £800 plus costs and ordered to pay more than £11,000 in compensation to two previous employees. The payment of that fine was due by 1 October. I would be interested to hear from the Minister whether it has been paid. My point is that we must not wonder why we are being

[47] PBC Deb 14 October (morning) c30
[48] PBC Deb 14 October (morning) c31
[49] PBC Deb 14 October (morning) c32
[50] PBC Deb 14 October (morning) c34
[51] PBC Deb 14 October (morning) c35

> asked to give HMRC more powers when those that it currently has are being used so sparsely.[52]
> […]
> I fear that the Government are trying to hand a howitzer to HMRC, when it has shown itself loth to use even a pop gun.[53]

Pat McFadden explained the change in approach the Bill represents to enforcement:

> I gave some figures in my opening remarks on the clause, which I shall mention again to help Committee members. In 2007-08, Her Majesty's Revenue and Customs, which is responsible for enforcing the minimum wage, investigated 4,524 cases; it found non-compliance in 1,649 cases, of which 96 per cent. were settled without an enforcement notice being issued. That happened under the current, unreformed system of enforcement. HMRC issued enforcement notices to 59 employers and 25 penalty notices for failure to comply with an enforcement notice. I will mention prosecutions in a moment. It is important to set those figures out, because they illustrate that, in the system as it has operated until now, enforcement notices and penalties exist in the process, but they come at the end of the enforcement activity. That is what the Bill changes.
>
> Our thinking behind how enforcement operates has evolved during the course of the minimum wage. This was a major change to the labour market. We took a decision in the early years of the minimum wage to operate with a fairly light touch on enforcement. That was a major change, but the point that I have made several times during our deliberations is that it has been in place for 10 years. Non-payment now is somewhat different from non-payment in the first year or two, when people could argue that the system was new, that they were ignorant of the necessity to abide by it and so on.
>
> We have changed the enforcement regime over time, and the Bill represents a major change. The figures that I gave about the number of companies investigated, penalty notices issued and so on will be changed fundamentally. Clause 9 states that a penalty will now be automatic for non-payment of the minimum wage. Instead of being given at the end of the process, the penalty will be given at the beginning.[54]

On the need for extended powers to prosecute in the higher criminal courts, the Minister had this to say:

> I caution against judging how the future system will work absent the changes that we are making in the Bill. Those changes will give HMRC more powers to take evidence and, as I have said before in our debates, make it less reliant on the testimony of often reluctant and sometimes fearful witnesses.
>
> We can overcomplicate the issue. We are not creating new criminal offences here; there are already criminal offences under the minimum wage legislation. The maximum fine for those, in a magistrates court, is £5,000. The clause will enable HMRC prosecutors, in only the most extreme cases of determined

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[52] PBC Deb 14 October (morning) c38
[53] PBC Deb 14 October (afternoon) c41
[54] PBC Deb 14 October (afternoon) c46

> violation of the law, to make a judgment that the offence is so serious that a fine of £5,000 will not be sufficient deterrent to the company or punishment that meets the crime. In those circumstances, we want to give those prosecutors the option of trial in the Crown court, where the fine is potentially unlimited, although I do not pretend that that will be the norm or that it will occur in a large number of cases.[55]

g. NMW investigation powers

Mr Djanogly tabled a probing amendment limiting the proposed investigation powers:

> I agree with my noble Friend Baroness Wilcox and reiterate her concern that there must be a real need for the massive extension of investigative powers proposed in the clause. More concerning perhaps is that it could represent the proverbial thin end of the wedge. I would not wish to hamper HMRC's good work in enforcing the national minimum wage, but I am hesitant about freely handing it a hammer to smash a nut when it may have a perfect adequate nutcracker in its box of tools.[56]

This drew the following explanation from the Government:

> The intention behind the clause, and the reason why we oppose the amendment suggested by the hon. Gentleman is that HMRC investigators are currently hampered in obtaining evidence of offences to the requisite standard, as we do not have the necessary powers on search and, to a lesser degree, the production of evidence. Investigators therefore have to rely on worker testimony to prosecute employers.[57]

h. Trade union membership

The Bill amends section 174 of the *Trade Union and Labour Relations (Consolidation) Act 1992* to implement the decision of the European Court of Human Rights in *ASLEF v UK*.[58] The last changes made to this aspect of the law by the *Employment Relations Act 2004* gave unions the right to terminate membership on grounds of conduct but not of belief. There was an extensive debate in Committee on this clause (albeit without amendments being agreed). As drafted, the clause allows trade unions to expel members on grounds that they belong to a political party, subject to some constraints.[59] The expulsion or exclusion will be unlawful if any of three conditions are met:

- The decision to exclude or expel does not comply with the union's rules;
- The decision is taken unfairly; and
- Loss of union membership would cause the individual to lose his livelihood or suffer other exceptional hardship.

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[55] PBC Deb 14 October (afternoon) c46

[56] PBC Deb 14 October (afternoon) cc48-49

[57] PBC Deb 14 October (afternoon) c49

[58] For general background see: *Library research paper 08/63 Employment Bill [HL] 2007-08 [Bill 117 of 2007-08]* 11 July 2008, **section IV;** and see **section III(C)(1) below**

[59] Clause 18 in the Bill before the Committee; now clause 19 *Exclusion or expulsion from trade union for membership of political party*

The Conservatives proposed the introduction of a test of proportionality. Their amendment suggested that "other exceptional hardship" which they view as opaque should be replaced by "any material financial disadvantage", on the grounds that this would be "safer and more democratic because Parliament, rather than the courts, will set the parameters".[60] Mr Djanogly said:

> As regards what is material, the courts in this country have a long tradition of considering what is material in any case. Commercial contract disputes often pivot on what is to be considered material. Given that background, the familiarity of the courts and trade unions with these concepts and with case law, and the subsequent ease with which an assessment can be made on the facts, we think it better to replace "exceptional hardship" with "material financial hardship".[61]

Supporting existing drafting, Labour MP Nick Palmer said:

> The balance of interests is satisfied by the rules laid down in the Bill. I do not say that lightly; the issue is finely balanced. If we had a closed shop, the position would be different, because one would have to belong to a union to have a particular kind of employment. […] Therefore, it is important that proposed subsection (4G)(c) stays in the Bill so that if a closed shop were imposed again for a particular trade and for a particular reason, the law would not be totally static.[62]

The Minister explained the wording of the clause as follows:

> The phrase "exceptional hardship" has been the focus of the debate. We did not choose it at random; it was the phrase used in the ECHR judgment, paragraph 43 of which states:
>
> > "Such abuse might occur, for example, where exclusion or expulsion from a trade union was not in accordance with union rules or where the rules were wholly unreasonable or arbitrary or where the consequences of exclusion or expulsion resulted in exceptional hardship".
>
> It is the same phrase used by the Joint Committee on Human Rights when it considered the matter. Its report on how the clause should be amended said that
>
> > "the exclusion or expulsion of the individual is permitted only if...the decision"
>
> is
>
> > "taken in accordance with the union's rules and a fair procedure;...the union's rules are not wholly unreasonable; and...the consequences of exclusion or expulsion would not result in exceptional hardship."
>
> The test we have set in the clause is therefore the same as the test quoted in the judgment by the ECHR and referred to in the report on that issue by the Joint Committee on Human Rights. [68]

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[60] PBC Deb 16 October 2008 (afternoon) c62
[61] PBC Deb 16 October 2008 (afternoon) c64
[62] PBC Deb 16 October 2008 (afternoon) c66

The Committee divided on the amendment which was negatived.[63]

A further amendment was proposed by the Conservatives to limit how far back into an individual's past a trade union would be able to go in identifying grounds of exclusion or expulsion. Mr Djanogly explained this as follows:

> For instance, we must all accept that membership of the Campaign for Nuclear Disarmament as a student in the 1960s should not automatically enable a 50-year-old to be expelled from a trade union that represents workers in the nuclear industry. Without great caution, it seems that this could be extended further. What happens if an over-zealous parent had a teenage child signed up to an extreme party membership? Should the beliefs of the parent be used to punish the son? Of course not.
>
> This provision seems at odds with a person's human rights. The amendment seeks to address the wrong by saying that the party membership must have been within the last 12 months.[64]

John Hemming thought that this limitation would be reasonable but criticised the drafting of the amendment on the grounds that it could "apply only to membership of a political party during the 12-month period prior to applying to be a member of a union, so if someone was a member of the union and subsequently joined the party that would disqualify them, that would not count".[65] Natascha Engel thought that the 12 month limit would render the provision "completely unenforceable".[66]

The Minister rejected the amendment on the grounds that as drafted the clause would cover the concerns raised by the amendment:

> **Mr. McFadden**: I shall come on to the issue of former membership. I understand the hon. Gentleman's point. In the case of former members, it may be that someone's views remain exactly the same, even though they are no longer a member of a particular political party. It may be that their views have changed. Either case could be true. In the latter case, provisions in clause 18(2)—the proposed new subsections (4G) and (4H) of section 174 —would apply. Those provisions require a trade union to act in accordance with its rules; they say that there should be "a fair opportunity" to make representations, which should be "considered fairly". That is, precisely, the natural justice point made by Lord Morris of Handsworth that I quoted this morning. If, for example, someone had had a brief flirtation with an extremist party in their youth, many years before, as the hon. Member for Huntingdon said could be the case, but that this was very different from their views today, that would be properly considered under the protections and provisions in the clause.[67]

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[63] PBC Deb 16 October 2008 (afternoon) c74 (Ayes 5, Noes 11)
[64] PBC Deb 16 October 2008 (afternoon) c77
[65] PBC Deb 16 October 2008 (afternoon) c80
[66] PBC Deb 16 October 2008 (afternoon) c80
[67] PBC Deb 16 October 2008 (afternoon) cc82-83

Another Conservative amendment sought to establish a definition of a political party based on registration with the Electoral Commission under the *Political Parties, Elections and Referendums Act 2000* or "any foreign equivalent".

> We can talk about countering the BNP but we should not think that this legislation is necessarily the format to use. Many other organisations could be caught in the net. Given the position we find ourselves in, we need to regulate carefully who will be caught in the definition of political party. That is why we suggest that we limit the expulsion right to members of political parties that are registered. When a similar amendment was moved in another place, the Minister noted that the employee may belong to a foreign party. The amendment now caters for that eventuality.[68]

This approach was criticised by Nick Palmer:

> …the overtly neo-Nazi group Combat 18, which seeks to prepare for racial war, is not a registered political party. It stretches tolerance to the point of insanity if we say that we should force trade unions to associate with members of a group that is preparing for racial war. The issue is not really whether it is a political party as defined in the amendment, but whether we should enable trade unions to draw the line somewhere in a reasonable manner.[69]

Mr McFadden likewise rejected the amendment on the following grounds:

> We do not believe that it is necessary. The statutory provisions limiting the ability of a trade union to exclude or expel persons for their party membership were first introduced in 1993. No definition of political party was thought to be needed at that time, and there has been no evidence since then that not including a definition in the legislation introduced by that Government has caused a problem. I should also point out that although including registration with the Electoral Commission in a definition of a political party would cover most parties, it would not cover every political party in the country. Emerging parties or parties that do not stand for election in their own name do not need to register. That is precisely the territory that we are talking about with extremist organisations.
>
> There is also a difficulty with the foreign aspect. It is true that it was discussed in the other place, but how can we assume that every other country has equivalent registration systems? I doubt that that is the case. Again, the amendment would create practical hurdles that unions would find well nigh impossible to overcome.[70]

i. NMW Tips and gratuities

John Hemming tabled an amendment which sought to clarify the Government's position of the NMW and tips (see section III(B)(1) below). It proposed that gratuities paid to employees in service industries in the course of their employment should not be included

[68] PBC Deb 16 October 2008 (afternoon) c78
[69] PBC Deb 16 October 2008 (afternoon) c79
[70] PBC Deb 16 October 2008 (afternoon) cc83-84

in the calculation of the national minimum wage to be paid to them. The Government have agreed to look at this issue:

> **Mr. McFadden**: The hon. Gentleman is anticipating me. I have explained how the regulations work at the moment: a service charge, tip, gratuity or cover charge that is paid to the worker through the payroll may, legally, count towards payment or part-payment of the minimum wage. We are seeking to address that issue.
>
> At the end of July, we announced our intentions, and I am pleased to tell the Committee that my Department is preparing a consultation document, which we shall publish in a matter of weeks. We shall consult the hospitality industry on precise implementation. We have heard various comments today about service charges, gratuities, tips and so on—it is true that there are all those different practices. When making such a change, it is right to consult the industry.[71]

j. Enforcement of tribunal awards

John Hemming tabled an amendment, supported by the Conservatives, which would require the Government to act by secondary legislation to enforce unpaid tribunal awards on behalf of claimants who are successful (see section III(A)(2) below). The Minister confirmed that "the Government recognise the need to do more". In this regard the Ministry of Justice is undertaking research to explore the extent of non-payment; and forthcoming regulations will allow unpaid awards and legally binding agreements brokered by ACAS to be automatically registered as country court orders without requiring payment of court fees.[72]

k. Costs in employment tribunals

The Conservatives tabled an amendment seeking to displace the no-costs rule in employment tribunals such that:[73]

> "The losing party in any proceedings before an employment tribunal should bear the costs of the winning party." [74]

This is intended to benefit small business:

> Since 1999, on average 111,754 claims have been accepted every year by employment tribunals, of which only 15 per cent. are successful; 66 per cent. are withdrawn or settled; and 19 per cent.—some 21,233—are dismissed or unsuccessful. Given that the estimated average cost to employers of defending a tribunal case is about £9,000 and almost 10 days of lost time, it is unsurprising that the CBI reports that a quarter of cases are settled by employers, despite receiving advice that they are likely to win. This pattern is especially true for small and medium-sized companies that are less likely to have internal resources or legal advisers to fight claims on their behalf.[75]

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[71] PBC Deb 16 October (afternoon) c103
[72] PBC Deb 16 October (afternoon) c106
[73] See section III(A)(1) below
[74] PBC Deb 16 October (afternoon) c109
[75] PBC Deb 16 October (afternoon) c110

The Minister, Pat McFadden, set out his reasons for rejecting the amendment:

> My problem with the new clause is that it strikes at an access-to-justice point. It has been a long-standing belief of this Government and previous Governments that individuals should have the ability to enforce their rights through a system that provides access to justice for all, regardless of status or background. The tribunal system provides this access to justice, in part through the principle that—other than in limited circumstances, which I will come to—parties are responsible for their own costs. In this way, those without the resources to afford costly legal representation can still try to take action to enforce their rights.
>
> As has been commented on by my hon. Friends the Members for Broxtowe and for Hastings and Rye, were we to abide by the new clause and award costs automatically against the losing party, that would not only set employment tribunals apart from other tribunals where such general powers do not exist; more importantly, it could seriously deter individuals from bringing claims to tribunal when they may have a good case, for fear of being left with a very large bill if they are unsuccessful. We must also consider how such a proposal would have a disproportionate effect on people. The introduction of costs against the unsuccessful party automatically is more likely to deter claimants from pursuing action, rather than respondents.[76]

III Background on related concerns

A. Employment tribunals

1. Costs in tribunals

The general rule in civil litigation is the "costs follow the event" and the losing party must pay the legal costs of the winner. This general rule does not apply in employment tribunals. However, there are some circumstances in which employment tribunals may or are required to award costs.

Employment Tribunals are governed by the *Employment Tribunals Act 1996* and the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004*, SI No.1861. The general power to order costs and expenses is set out in rule 38. Under Rule 39 an appropriate costs order *must* generally be made against an employer if an employee who has won an unfair dismissal case had previously told the employer that they would want their job back rather than compensation and the employer has not produced evidence as to the availability or non-availability of the job from which the employee was dismissed, or of comparable or suitable employment. The order will cover the costs of adjourning/postponing the hearing.

Rule 40 sets out the various situations in which a costs order *may* be made. The most generally relevant case is where the tribunal considers that in bringing or conducting proceedings a party (or his representative conducting the proceedings) acted

[76] PBC Deb 16 October (afternoon) cc115-116

"vexatiously, abusively, disruptively or otherwise unreasonably, or that the bringing or conducting of proceedings was misconceived".

Where costs of a litigant in person are awarded they are generally only entitled to recover disbursements and not in respect of time spent preparing the case.[77] However, section 22 of the *Employment Act 2002* made provision for changes in the rules allowing such orders to be made. Rule 42 provides as follows:

> **General power to make preparation time orders**
>
> 42. - (1) Subject to paragraph (2) and in the circumstances described in rules 43, 44 and 47 a tribunal or chairman may make an order ("a preparation time order") that a party ("the paying party") make a payment in respect of the preparation time of another party ("the receiving party").
>
> (2) A preparation time order may be made under rules 43, 44 or 47 only where the receiving party has not been legally represented at a Hearing or, in proceedings which are determined without a Hearing, if the receiving party has not been legally represented when the proceedings are determined. (See: rules 38 to 41 on when a costs order may be made; rule 38(5) for the definition of legally represented; and rule 46 on the restriction on making a costs order and a preparation time order in the same proceedings).

The costs of parties and witnesses in attending the hearing (such as loss of wages, travelling etc.) can be claimed from the tribunal and are paid by the Secretary of State on a fixed scale. Forms for claiming these allowances are available from the clerk to the tribunal at the end of the hearing or from the Employment Tribunal Service.

2. Enforcement of awards

The Bill gives tribunals new powers to make compensatory awards in cases where the claim is for unauthorised deductions or non-payment of wages; or non-payment of redundancy entitlements. And there are consequential financial losses that the employee suffers as a result of not receiving payment. Currently these can only be recovered separately in the civil courts. The effect of the changes in the Bill is to simplify the employee's methods of recovery in these circumstances.

Beyond these changes there have been long standing calls to improve the position of successful claimants in employment tribunals who face employers non-payment of their awards notwithstanding that they are not appealing the tribunal's decision. Employment tribunals have no power to enforce their own awards. Instead, under section 51(1) of the *Employment Tribunals Act 1996*, any cash award made by an employment tribunal must be enforced through the county court "as if it were payable under an order of that court" as a county court judgement (CCJ). Similar rules apply for Scotland.

In County Courts in England & Wales there are two stages to enforcement:

[77] *Kingston upon Hull City Council v. Dunnachie* (No. 3) [2003] IRLR 843, EAT

> (i) The award must be registered under rule 32 of the employment tribunal rules of procedure.[78] Copies must be sent to the parties under rule 29(2).
>
> (ii) The county court must first make an appropriate order to convert the tribunal judgement into a CCJ. This can then be enforced in the same way other CCJs are enforced. There may be a small court fee to pay which will be added to the amount recoverable from the respondent.

After a CCJ has been obtained and remains unpaid, it will be necessary for the claimant to take further enforcement measures. There are a variety of such measures ranging from charges on property to orders in respect of bank accounts. They are in themselves costly to pursue and the circumstances of the average employment tribunal claimant may mean that there is a commercial incentive for employers to withhold payment.

At Second Reading Sarah Teather framed the problem in terms of risk:

> The issue is really about using the state to take the risk that at the moment is borne by individuals. At the moment, individuals have to pay to go through the county court process. They will get the money back, if they win, but I want the Government to consider whether the state could take on the risk for very low-paid individuals. The state would get the money back, but the burden of risk would be shifted from the individual to the state. NACAB has suggested using High Court enforcement officers.[79]

A possible precedent for such an approach might be the Redundancy Payments Scheme which currently operates where employers become insolvent. Under this scheme the Government underwrites various minimum statutory entitlements for employees such as redundancy pay, some unpaid wages and basic awards in unfair dismissal cases.[80]

The Government is aware of concerns about unpaid tribunal awards and is looking at the issue. New rules under the *Tribunals Courts and Enforcement Act 2007* will make some progress but further change is being explored. In Committee Pat McFadden set out the steps being taken by the Government:

> First, there are measures in the Tribunals, Courts and Enforcement Act 2007 that, when implemented in the secondary legislation to which the hon. Member for Birmingham, Yardley referred, will allow unpaid awards and legally binding agreements brokered by ACAS to be automatically registered as country court orders so that the full range of enforcement options can be pursued.
>
> Importantly, unpaid awards will be included on the register of judgments, orders and fines, which is often consulted by banks and credit companies when considering applications for credit. The Ministry of Justice is working to introduce those measures by April next year, which is the same date as the implementation date for the changes to the dispute resolution system which we have been discussing.

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78 The *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004* SI No.1861

79 HC Deb 14 July 2008 c64

80 See: The Insolvency Service, *Redundancy and Insolvency: A guide for employees*, URN 06-1848

> Secondly, the Ministry of Justice is undertaking research to explore the extent of non-payment. I appreciate that there has been research by Citizens Advice, which has been referred to, but the Government are carrying out research on the issue. The hon. Member for Huntingdon asked about the dates for that research. It started on 8 September and will report by 26 November. Citizens Advice has helpfully published its own research, which will contribute to that work. Taken together, the two studies will provide detailed evidence of the extent to which employment tribunal awards remain unpaid. That will give the Ministry of Justice a firm basis for considering what further steps are appropriate, bearing in mind the changes in the 2007 Act.[81]

3. Whistleblowing

At Second Reading Richard Shepherd raised the issue of whistleblowing and referred to a report in 2005 by the Parliamentary Ombudsman concerning the Government's most recent legislative actions. He set out the history behind that report which involved a judicial review taken against the Government by Public Concern at Work (PCaW) seeking disclosure of information held by the Tribunal Service about whistleblowing cases that have settled. A central worry is that employers may be evading the public interest spirit of the legislation by settling cases before their determination in a final hearing. PCaW was ultimately successful in the judicial review, but the Government subsequently legislated, by statutory instrument laid immediately prior to a summer recess, effectively reversing the High Court's decision; thus attracting the opprobrium of the Ombudsman:[82]

> The ombudsman criticised the DTI's handling of the matter because it was never honest with the High Court or the public about why it objected to information about tribunal claims being publicly available; because it launched a costly appeal that it had no intention of pursuing so that it could overturn the High Court decision in secret through regulations; because it repeatedly misled Public Concern at Work to try to head off all public criticism; because it failed to consider the public interest or to realise that whistleblowing claims
>
> > "might involve matters of very great public interest";
>
> because it issued a one-sided and unfair consultation in breach of Government rules, ignoring "powerful arguments" for openness; and because it blocked parliamentary scrutiny by giving assurances that it failed to keep. I cannot think of anything more damning that has been said in an ombudsman's report about the conduct of a Department. As a result of it, the DTI agreed to apologise and to pay £130,000 compensation to Public Concern at Work for misleading it and wasting its time.[83]

[81] PBC Deb 16 October 2008 (afternoon) c106
[82] Richard Shepherd: HC Deb 14 July 2008 cc72-75
[83] HC Deb 14 July 2008 cc74

B. National Minimum Wage

1. Tips and gratuities

Many workers receive a part of their income in the form of tips or gratuities. Sometimes these are given directly to the worker, or they may be distributed via the employer's payroll. Where a person is designated to distribute tips among workers they are called a "troncmaster" and the tips to be distributed are called the "tronc". A question that often arises is whether money paid as tips counts toward the national minimum wage or not. The answer is not straightforward.

On the question of whether tips can be counted toward payment of the minimum wage, HMRC guidance states as follows:

> **9 National Minimum Wage**
>
> The right to be paid the National Minimum Wage (NMW) is a statutory right. Regardless of any written or oral agreement between the employer and the worker, the law makes it clear that the worker has a statutory right to be paid at least the NMW by their employer.
>
> Amounts paid by a customer as service charges, tips, gratuities and cover charges count towards NMW pay if they are paid by the employer to the worker via the employer's payroll and the amounts are shown on the pay slips issued by the employer.
>
> Tips given directly to the worker by a customer do not count towards NMW pay.
>
> Tronc money paid directly from the tronc to a worker does not count towards NMW pay. However, if the tronc money is passed to the employer, and is both paid to the worker through the employer's payroll and reflected on pay slips issued by the employer, then it will count towards NMW pay. It will also count towards NMW pay where the troncmaster operates PAYE on tronc distributions and uses the employer to pass the net payments to each worker, provided the amounts are paid to the worker through the employer's payroll and are reflected on the payslips issued by the employer.[84]

The relevant provisions is regulation 31(1)(e) of the *National Minimum Wage Regulations 1999* SI No.584. This states that the following reduction must be made from the payments that will count toward the minimum wage:

> (e) any money payment paid by the employer to the worker representing amounts paid by customers by way of a service charge, tip, gratuity or cover charge that is not paid through the payroll;

At Second Reading on 14 July 2008 the Minister signalled that the Government was considering changes in light of the ongoing concerns about employers not passing on tips to their staff or counting those amounts toward their obligation to pay the NMW.[85] Following that indication, on 31 July 2008, the Government announced plans to amend

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[84] HMRC, Leaflet E24 (2008) *Tips, Gratuities, Service Charges and Troncs*
[85] HC Deb 14 July cc101-102

regulations so that tips can no longer count towards payment of the National Minimum Wage. The accompanying press release gave further details:

> The changes will end the practice of employers using gratuities and service charges processed through the payroll to 'top up' staff wages to meet the £5.52 per hour National Minimum Wage, which rises to £5.73 on 1 October.
>
> Business Secretary, John Hutton, also revealed proposals for making tipping practices fairer and emphasised the importance of improving transparency.
>
> "Hundreds of thousands of people in the UK have jobs in sectors where tipping is commonplace. When people leave a tip, in a restaurant or elsewhere, they expect it to go to service staff and as consumers, we've got a right to know if that actually happens.
>
> "This is an issue of fairness and common sense and it's one many people clearly care a lot about.
>
> "Under the current law, all workers are already entitled to receive the minimum wage. The changes we're proposing will mean that in the future, tips cannot count towards payment of the minimum wage.
>
> "We also want to encourage employers to make it clear how tips are distributed so that customers know where their money is going and whether or not the establishment operates a fair tipping policy."
>
> A consultation on implementing the Government's recommendations will be launched in the autumn.
>
> Guidance for both workers and employers will be issued following the consultation to ensure a smooth transition when the regulations are changed, which is anticipated to be 2009.[86]

The consultation mentioned in the press release does not yet appear to have been launched. The publication *Caterer & Hotelkeeper* reported mixed reaction from industry to this announcement. [87]

2. Seafarers

An Early Day Motion tabled on 29 October 2008 reads as follows:[88]

> **Begg, Anne**
> That this House is appalled that in the 21st century ships, including ferry services, which regularly trade on fixed routes between UK ports and between the UK and Europe are allowed to pay poverty wages substantially below the minimum wage to non-UK seafarers including as little as £295 basic monthly pay; notes with the utmost concern that examples of routes on which seafarers are being paid less than the national minimum wage include Aberdeen to the Shetland Isles, Birkenhead to Belfast and Dublin, Heysham to Belfast and Dublin, Liverpool to Dublin and between Portsmouth and Bilbao; further notes that the owners of

86 BERR, *Hutton serves up a fair deal on tips*, 31 July 2008
87 "Mixed response as topping up wages with tips is axed" *Caterer & Hotelkeeper,* 7 August 2008
88 EDM 2380 of 2007-08, *Pay for Seafarers in the UK Maritime Sector*, 29 October 2008

> these ships include Marlow Navigation, Varun Shipping, Levantia Transport, Seatruck Ferries, Norse Merchant, P & O Ferries and Jay Management Corporation; calls on these companies to pay the minimum wage; urges the Government to bring forward amendments to the Employment Bill as appropriate to ensure the minimum wage applies to seafarers working on ships operating between UK ports and in the UK Offshore sector; further urges the Government to work with European partners to eliminate poverty pay for seafarers working between the UK and European ports.

At Second Reading a number of members raised various points on this issue:

- It was said that the policy may amount to indirect race discrimination since seafarers different rates depending on nationality.[89]
- Conservatives opposed any premature decision on this issue.[90]
- Some ships that operate ferry routes to the UK are not UK flagged but nevertheless receive the benefits of tonnage tax which "is provided specifically to promote the employment of UK seafarers and fair employment generally".[91]
- Other legislation, such as licensing laws and health and safety provisions, apply on ferries, therefore employment legislation ought to apply too.[92]

The Government's reply given by Malcolm Wicks was as follows:

> My hon. Friend the Member for North Ayrshire and Arran (Ms Clark) raised a point, which was touched on by one or two other colleagues, about mariners. That is a complex matter, as my hon. Friend the Member for Wolverhampton, South-West (Rob Marris) said. Under current legislation, all resident and non-resident seafarers are entitled to the minimum wage while they are in the UK's internal waters. A seafarer on a UK-registered ship anywhere in the world is entitled to the national minimum wage unless his employment is wholly outside the UK or he is not ordinarily resident in the UK.
>
> International maritime law, and specifically the right of innocent passage, means that the UK is unable to apply legislation to ships sailing under the flag of another country. That is reciprocal. For example, British ships enjoy that right in the Gulf and when passing close to Saudi Arabia. If the Government were to apply further legislation just to UK flagships they would run the risk of those ships flagging out and diminishing the number of UK ships sailing under the UK flag, something that the Government are committed to preventing. If vessels choose to flag out, not only will the number of UK flagships diminish but the seafarers aboard will miss out on the other entitlements that sailing under the UK flag ensures.[93]

3. Youth rate

A number of members raised the question of the youth rate of the NMW. For example at Second Reading John McDonnell said: c57

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[89] HC Deb 14 July 2008 c57
[90] HC Deb 14 July 2008 c52
[91] HC Deb 14 July 2008 c70
[92] HC Deb 14 July 2008 c70
[93] HC Deb 14 July 2008 c101

> It is perplexing for many of us that the youth rate discriminates against younger workers. There are currently three national minimum wage rates based on age; workers between the ages of 16 and 17 receive £3.40 an hour, workers between the ages of 18 and 21 get £4.60 and workers aged over 22 get £5.52 an hour. What that means for the 16 to 17-year-olds is an annual wage of £6,630; and for the 18 to 21-year-olds, it is £8,970. I believe that those are poverty wages, and I find it almost impossible to understand how anyone, particularly an 18 to 20-year-old, could survive on a wage of £8,970 a year. Even for the over-22s, the annual minimum wage is only £10,764. These are poverty pay rates.[94]

The NMW rates are set in regulations made by the Secretary for State, with parliamentary approval, based on the recommendations of the Low Pay Commission (LPC).[95] Initially 16-17 year olds were not covered by the NMW.[96] The main reason given in the annual reports of the LPC for having a different lower rate for younger people is based on an underlying policy that is intended to avoid the minimum wage having a negative impact on the training of young people. A larger rate, it is said, could have the effect of discouraging young people from completing or continuing training or further education by encouraging them into employment early in their career development. Another reason given relates to the possible detrimental effect of a minimum wage on youth employment. There is a perceived danger that a uniform minimum wage provision for all ages would discourage employers from employing young people if they could employ more experienced workers at the same rate of pay.

The European directive under which the age discrimination provisions have been made allows for the possibility of Member States providing for different treatment on the grounds of age, where this difference of treatment is objectively and reasonably justified by a legitimate aim, including employment policy. An example of where the government have relied on this derogation is the decision to retain the age bands in the statutory redundancy pay framework.[97]

C. Trade Unions

1. Trade union membership

Under UK law, any individual who wishes to join or remain a member of a trade union has the right to do so. The union may exclude or expel that person only for one of a number of permitted reasons which are set out in section 174 of the *Trade Union and Labour Relations (Consolidation) Act 1992* (TULRCA) as amended by the *Trade Union Reform and Employment Rights Act 1993*. This section gives trade union members the right not to be excluded or expelled from the union unless this is expressly permitted by the section.

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[94] HC Deb 14 July 2008 c57
[95] *National Minimum Wage Regulations 1999, SI No.584* (as amended)
[96] See: LPC, *The National Minimum Wage First Report of the Low Pay Commission*, June 1998 (Cm 3976)
[97] HC Deb 2 Mar 2006 cc39-40WS

On 27 February 2007, the ECHR issued a judgement in the case of *ASLEF v The United Kingdom*.[98] The case concerned the freedom of trade unions to exclude an individual (in this case, Mr Lee) on the grounds of their political party membership. The ECHR judgement prompted a review of the law and the Department for Trade and Industry issued a consultation on a change in the law to ensure compatibility of Article 11 of the European Convention of Human Rights, of which the UK was found to be in breach.[99] Article 11 here was interpreted as "a right of the union to determine its own membership and the entitlement of its membership to decide in accordance with the union's rules with whom they wished, and did not wish, to associate as their fellow members."[100]

Clause 19 (Bill 151) amends section 174 of TULRCA to allow a trade union to expel or exclude an individual on the basis of their current or past membership of a political party, if membership of that political party is contrary to the rules or objectives of the trade union. There must be a degree of certainty about the relevant objective measured in relation to a person working in the same trade, industry or profession as the excluded individual at the time of at the time of their conduct; or by a member of the union. An individual must be given notice of a proposal to expel or exclude them (including reasons) and a fair opportunity to make representations. However, following amendments in the House of Lords, the expulsion or exclusion will still be unlawful if any of three conditions are met:

- The decision to exclude or expel does not comply with the union's rules;
- The decision is taken unfairly; and
- Loss of union membership would cause the individual to lose his livelihood or suffer other exceptional hardship.

Lord Morris greeted the amended proposals:

> Three key principles have been met: Britain will be able to comply with its statutory obligations, trade unions will have freedom and democratic rights in respect of their rule books, while the ability to discipline their members has been preserved, and members' rights to natural justice will be safeguarded. On that basis...I wish the Bill well on its way.[101]

At Second Reading in the Commons it was made clear that trade unions remain concerned that the Bill will not effectively legislate for the changes required by the ECHR judgement in the *ASLEF* case. Some also question if the case would have been decided any differently by domestic courts had the Bill's proposals been in force at the time.

The ECHR found that the right of freedom of association has priority over the right to join a union. Professor Keith Ewing argues that the judgement went further than this and that it possibly undermines ***as a whole*** the regulation of trade union powers to control their

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98 *ASLEF v The United Kingdom*, application number 11002/05

99 Department for Trade and Industry, *Echr Judgment In ASLEF V UK Case – Implications For Trade Union Law, Consultation Document*, May 2007 http://www.berr.gov.uk/files/file39440.pdf

100 Department for Trade and Industry, *Echr Judgment In ASLEF V UK Case – Implications For Trade Union Law, Consultation Document*, May 2007 http://www.berr.gov.uk/files/file39440.pdf

101 HL Deb 2 June 2008 c21

own membership in section 174 of the *Trade Union and Labour Relations (Consolidation) Act 1992* (TULRCA).

> …the other reason for believing that the *ASLEF* case raises more general questions is to be found in the following passage in the Court's decision…
>
> > Prima facie trade unions enjoy the freedom to set up their own rules concerning conditions of membership, including administrative formalities and payment of fees, as well as other more substantive criteria, such as the profession or trade exercised by the would-be member. (para 38)
>
> Having regard to the foregoing passage, it is not only the political restrictions in TULRCA, s.174, that conflict with the Convention obligations. Section 174 generally is inconsistent with these obligations, representing a direct challenge to the ability of trade unions to 'set up their own rules concerning conditions of membership', being designed principally to stop exclusions or expulsions to comply with TUC Disputes Principles and Procedures, and that other ways have been found to deal with the problem of inter-union competition.[102]

The ECHR cited the previous decision in *Cheall v UK* which stated that "abuse of a dominant position" must be avoided.[103] This is the source of the wording for the balancing provisions: requiring expulsion be in accordance with trade union rules; not be arbitrary or unreasonable; or give rise to exceptional hardship. But the Court dismissed the Government's submission that the existing protections were needed to safeguard Convention rights in the case of Mr Lee. This gives rise to the question as to how someone could suffer detriment beyond loss of union membership in itself. Clearly in the days when trade unions operated closed shop agreements controlling access to employment this would have been an issue, but Professor Ewing argues that under current conditions these protections may have no object. In Mr Lee's case the court found that he would not be excluded from collective agreements and the employer cannot lawfully discriminate on grounds of his union membership status.

2. Trade union rights

a. Compliance with international standards

Written evidence submitted by the TUC to an inquiry by the Joint Committee on Human Rights set out arguments for increased rights for trade unions from the point of view of compliance with international standards:[104]

> As the Committee will be aware, since 1989 the ILO Committee of Experts has consistently found that UK trade union laws fail to comply with ILO Convention 87 (on freedom of association and protection of the right to organise) and ILO Convention 98 (on the right to organise and bargain collectively. Similarly, in its latest report, published in 2005, the Social Rights Committee of the Council of

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[102] Professor Keith Ewing, *The Implications of the ASLEF decision*, Industrial Law Journal Vol.36 No.4, December 2007, p425

[103] [1986] 8 EHRR 74

[104] Joint Committee on Human Rights, *A Bill of Rights for the UK? Twenty–ninth Report of Session 2007–08*, HL Paper 165-I; HC 150-I, 10 August 2008; Written Evidence: Memorandum from the Trades Union Congress (TUC)

> Europe reiterated the view that UK laws do not comply with Article 5 and 6 of the European Social Charter 1961 in a number of key respects. Issues of concern raised by these international supervisory bodies include limitations on the right to strike, including inadequate protection from dismissal for striking workers; restrictions on trade union autonomy, including the inability of unions to determine who should be admitted into union membership and the exclusion of small forms from statutory recognition provisions. In its Report on the International Covenant on Economic, Social and Cultural Rights[165], the Joint Select Committee concluded "The CESCR [Concluding Observations of the UN Committee on Economic Social and Cultural Rights] concludes that current law places undue restrictions on the right to strike, as protected in Article 8 ICESCR. We consider that the Government should take seriously the successive findings of the authoritative international bodies overseeing treaties to which the UK has become party, and should review the existing law in the light of them."

b. Trade Union Rights and Freedoms Bill

The ballot for Private Members' Bills for the last session of Parliament 2006-07 took place on Thursday 23 November 2006. John McDonnell MP came 16 out of the 20 members successful in the ballot. He sponsored the *Trade Union Rights and Freedoms Bill 2006-07*. The Bill was introduced on 13 December 2006 and then tabled for debate on 2 March 2007 but failed to get second reading and so fell. The Bill was accompanied by an EDM on 18 December 2006:

> EDM 532 TRADE UNION FREEDOM BILL CAMPAIGN
>
> McDonnell, John
>
> That this House recognises that free and independent trade unions are a force for good in UK society around the world and are vital to democracy; welcomes the positive role modern unions play in providing protection for working people and winning fairness at work; notes the 1906 Trades Disputes Act granted unions the legal freedom to take industrial action; regrets that successive anti-union legislation has meant that trade union rights are now weaker than those introduced by the 1906 Trades Disputes Act; therefore welcomes and supports the TUC campaign for a Trade Union Freedom Bill whose principles include better protection for workers, such as those sacked by Gate Gourmet in 2005, the simplification of ballot procedures and to allow limited supportive action, following a ballot, in specific circumstances; and therefore urges the Government to bring forward legislation to address these proposals.[105]

In the UK there is no specific statutory provision giving an employer the right to dismiss employees who go on strike. Nor is there a statutory "right to strike". The common law position is that an individual who goes on strike is almost invariably in breach of his contract of employment, and, therefore, liable to dismissal under contract law.

Trade unions that organise a strike will almost certainly commit a "tort" or "civil wrong" such as inducement of breach of contract or interference in performance of the terms of a contract. The remedies for torts are primarily damages and injunctions. Insofar as there is any "right to strike" in British law, it has been conferred by Acts of Parliament

[105] EDM 532 of 2006-07

which granted trade unions and trade union officials immunity from liability for these torts. There is therefore a freedom to strike in cases for which immunity is granted rather than any individual or collective right to strike. The *Trade Disputes Act 1906* first introduced in the UK a system for immunities from tortious liability for unions when organising industrial action.

The Conservative trade union legislation severely reduced the scope of these immunities. Amongst other things, it removed immunity from secondary action and political strikes, and introduced complex procedural requirements involving secret postal ballots and seven-day strike notice which had to be complied with if immunity was to be preserved. It is only strikes for which a trade union has immunity that are "lawful". The current government has preserved this basic framework although some changes have been made by the *Employment Relations Act 2004*.

The *Employment Relations Act 1999* established a statutory procedure for the recognition and derecognition of trade unions for collective bargaining. The function of these procedures is to allow the widest scope for voluntary agreement between unions and employers at the same time as providing a comprehensive process to fall back on when agreement is not forthcoming. Statutory recognition of a trade union allows the union to negotiate collective agreements on behalf of a group of workers called "the bargaining unit" in respect of pay, hours and holidays. The system is administered by the Central Arbitration Committee (CAC) which has the power to grant recognition and to determine various matters to allow collective bargaining to take place.

The *Trade Union Rights and Freedoms Bill 2006-07* was part of the campaign by unions following the TUC 2005 Congress which passed a motion calling for a "trade union freedom bill", in the wake of the dispute between Gate Gourmet and its catering staff at Heathrow airport.[106] The prohibition on secondary strike action was seen as being particularly unfair in the context of this dispute.[107] The TUC website gives the following summary of its main provisions:

- Improved protection from dismissal and more effective remedies for workers taking part in official industrial action;
- Simplification of the complex regulations on notices and ballots which restrict the ability of unions to organise industrial action where a clear majority of members have voted in support; and
- Modernisation of what constitutes a trade dispute, enabling limited forms of supportive action, thereby ensuring that UK industrial action laws reflect changes in UK labour market, including increased contracting out and enabling unions to respond where employers take steps to outsource work during the course of a dispute with a view to breaking a strike.[108]

[106] Full text of the TUC draft Bill: http://www.tuc.org.uk/extras/TUFB.pdf
[107] TUC 2005 Congress: Organising and rights at work [on 14 July 2008]
[108] TUC, Trade Union Freedom Bill, March 2006 [on 14 July 2008]

The TUC prepared explanatory notes on the draft bill which set out the main aims of the proposals in more detail:[109]

In recent press articles the Prime Minister Gordon Brown has been quoted as saying that he would not allow the re-introduction of secondary picketing rights

> "Successful governments are those whose eyes are fixed on the future not harking back to the past. So there will be no return to the 1970's, 1980's or even the 1990's when it comes to union rights, no retreat from continued modernisation and there can be no question of any reintroduction of secondary picketing rights."[110]

[109] TUC, *Notes on draft Trade Union Freedom Bill*, January 2007
[110] Gordon Brown tells trade unions 'no return to 1970s' *Telegraph*, 6 July 2008

Appendix: Members of the Public Bill Committee

Baron, Mr. John (Billericay) (Con)
Binley, Mr. Brian (Northampton, South) (Con)
Burt, Lorely (Solihull) (LD)
Crabb, Mr. Stephen (Preseli Pembrokeshire) (Con)
Creagh, Mary (Wakefield) (Lab)
Djanogly, Mr. Jonathan (Huntingdon) (Con)
Engel, Natascha (North-East Derbyshire) (Lab)
Foster, Michael Jabez (Hastings and Rye) (Lab)
Gardiner, Barry (Brent, North) (Lab)
Hemming, John (Birmingham, Yardley) (LD)
Kidney, Mr. David (Stafford) (Lab)
McFadden, Mr. Pat (Minister of State, Department for Business, Enterprise and Regulatory Reform)
Palmer, Dr. Nick (Broxtowe) (Lab)
Seabeck, Alison (Plymouth, Devonport) (Lab)
Swire, Mr. Hugo (East Devon) (Con)
Ward, Claire (Vice-Chamberlain of Her Majesty's Household)

Appendix 2: *Trade Union and Labour Relations (Consolidation) Act 1992,* s.174

Clause 19 amends section 174 of the *Trade Union and Labour Relations (Consolidation) Act 1992*. As currently in force it reads as follows:

174 Right not to be excluded or expelled from union

(1) An individual shall not be excluded or expelled from a trade union unless the exclusion or expulsion is permitted by this section.

(2) The exclusion or expulsion of an individual from a trade union is permitted by this section if (and only if)—

- (a) he does not satisfy, or no longer satisfies, an enforceable membership requirement contained in the rules of the union,
- (b) he does not qualify, or no longer qualifies, for membership of the union by reason of the union operating only in a particular part or particular parts of Great Britain,
- (c) in the case of a union whose purpose is the regulation of relations between its members and one particular employer or a number of particular employers who are associated, he is not, or is no longer, employed by that employer or one of those employers, or
- (d) the exclusion or expulsion is entirely attributable to conduct of his (other than excluded conduct) and the conduct to which it is wholly or mainly attributable is not protected conduct.

(3) A requirement in relation to membership of a union is "enforceable" for the purposes of subsection (2)(a) if it restricts membership solely by reference to one or more of the following criteria—

- (a) employment in a specified trade, industry or profession,
- (b) occupational description (including grade, level or category of appointment), and
- (c) possession of specified trade, industrial or professional qualifications or work experience.

(4) For the purposes of subsection (2)(d) "excluded conduct", in relation to an individual, means—

- (a) conduct which consists in his being or ceasing to be, or having been or ceased to be, a member of another trade union,
- (b) conduct which consists in his being or ceasing to be, or having been or ceased to be, employed by a particular employer or at a particular place, or
- (c) conduct to which section 65 (conduct for which an individual may not be disciplined by a union) applies or would apply if the references in that section to the trade union which is relevant for the purposes of that section were references to any trade union.

(4A) For the purposes of subsection (2)(d) "protected conduct" is conduct which consists in the individual's being or ceasing to be, or having been or ceased to be, a member of a political party.

(4B) Conduct which consists of activities undertaken by an individual as a member of a political party is not conduct falling within subsection (4A).

(5) An individual who claims that he has been excluded or expelled from a trade union in contravention of this section may present a complaint to an employment tribunal.