

Richard Dunstan outlines a new Citizens Advice report, 'Justice denied', published on 14 October 2008. The report reveals that in ten percent of cases, employers fail to pay the compensation awarded to employees by the Employment Tribunal.

Low paid, non-unionised workers who have been exploited by a rogue employer, and who have been brave and determined enough to bring and win an employment tribunal claim, are entitled to expect that they will actually receive whatever financial compensation the Tribunal decides is due to them. Yet a new Citizens Advice report, *Justice denied*, published on 14 October 2008, shows that all too often this expectation is dashed when the (rogue) employer simply fails to pay up.

Every year, the 430 Citizens Advice Bureaux in England and Wales alone deal with about 1,000 such cases of an unpaid employment tribunal award requiring enforcement action by the claimant. Allowing for the cases reported to or dealt with by Acas, law centres, trade unions and others, as well as those that do not come to the attention of any such agency, this would suggest that the total number of awards that go unpaid and require enforcement action in Great Britain each year is somewhat more than 1,000 – perhaps as high as 1,500, or one in ten of the 15,000 or so awards made by tribunals each year.¹ For these claimants, the employment tribunal system has delivered empty justice.

The problem, as highlighted in *Justice denied* and two previous Citizens Advice reports, *Empty justice* (2004) and *Hollow victories* (2005), is that employment tribunals have no powers – and so no mechanism – to enforce their own awards. Where a rogue employer fails to pay, it is left to the individual worker to try and enforce their award by starting a new round of bewilderingly complex and – due to the need to pay court fees at every stage – potentially costly legal action in the civil courts. But rogue employers can be adept at dragging this out, so that it becomes too time-consuming, stressful and expensive to continue. Many workers simply give up in frustration, whilst others never even try to enforce their award.

To understand why this should be so, it is important to recognise that most of the workers concerned are low paid: they are shop assistants, bar and restaurant staff, cleaners, kitchen assistants, and care home workers. Almost invariably, they are non-unionised. And, as tribunal awards are linked to wages, their awards are also relatively small. Research by Citizens Advice for *Justice denied* reveals that nearly half of the some 1,000 unpaid awards dealt with by Citizens Advice Bureaux in 2007-08 were for less than £2,000, and almost a quarter were for less than £1,000. For such vulnerable workers, navigation of the county court or High Court enforcement processes is an especially daunting challenge, involving excessive time, stress and costs *relative to the value of the award*.

This means that, for the kind of rogue employer who sets out to gain a competitive advantage simply by exploiting its workforce, non-compliance with the Employment Tribunal system, including any award, is a gamble well worth taking. And that is unfair not only to the workers who do not receive their awards, and to the taxpayers whose taxes have paid for the Tribunal to process the claim to no end, but also to the vast majority of employers who abide by the rules and pay any award made against them.

¹ Over the four-year period 2003-07, the average annual number of awards made in England, Wales & Scotland was 14,713. Source: Employment Tribunal Service annual reports.

Indeed, this ‘lack of teeth’ undermines the credibility of both the employment tribunal system as a whole, and the otherwise very welcome reforms of that system contained in the new Employment Act, to which the Government has rightly devoted so much time and effort since late 2006. For, as the Chief Executive of Acas, John Taylor, comments in his response to *Justice denied*: “if a small minority of employers find they can disregard Tribunal awards with impunity, the Law will not serve as an incentive for them to behave responsibly in the workplace”. Not only that, but exploited vulnerable workers who see or hear of someone else going to all the trouble of bringing and winning a tribunal claim, only to get nothing when the employer simply fails to pay up, are likely to seriously question whether it is worthwhile bringing a claim themselves.

To some extent, the Government has recognised this flaw in the system, and the Tribunals, Courts and Enforcement Act 2007 includes some welcome – but very minor – reform of the process for enforcing an unpaid employment tribunal award in the civil courts. In particular, Section 27 and Paragraph 43 of Schedule 8 of the 2007 Act provide that an unpaid employment tribunal award will no longer need to be registered in a county court, for a fee of £35, before enforcement action can be initiated. Ministers have indicated that these provisions of the 2007 Act will come into force in April 2009.

This minor reform is, of course, welcome. But it does not go anywhere near far enough, and certainly will not solve the problem. Indeed, as the May 2008 report of the TUC’s Commission on Vulnerable Employment concluded, it is simply “inadequate to ensure that unpaid awards are enforced”. For registration in a county court is simply the first – and by far the lowest – of the many hurdles that claimants have to jump if they are to try and enforce their award in the civil courts. It is the many legal, financial and practical hurdles *subsequent* to registration that cause so many claimants to give up in frustration.

Justice denied concludes by calling for unpaid awards to be enforced by the State, on behalf of individual claimants. The chief advantage of such state-led enforcement over the current, claimant-led system would be that rogue employers would know that, unlike many individual claimants now, the State would not easily give up on enforcing an unpaid award. In other words, the gamble of non-compliance would no longer be a good one, and many of the awards that go unpaid now would be paid *without the need for any actual enforcement*. And, of course, this ‘self-regulation effect’ would have welcome implications for the *cost* of a state-led enforcement regime.

In recent years the Government has made “protecting vulnerable workers and supporting good employers” a central plank of its strategy on employment relations. In March 2006, in its strategy document *Success at work*, the Government recognised that there is a small minority of rogue employers who “deliberately flout the law”, and acknowledged its “duty to enforce the law against those who break it”.² And, in his speech to the TUC Congress in September 2007, the then Business Secretary, John Hutton, stated that “the existence of workplace rights is not enough if [rogue] employers think they can flout the law with impunity”.

² *Success at work: protecting vulnerable workers, supporting good employers – a policy statement for this Parliament*, DTI (now BERR), March 2006.

In August 2008, the report of the Government's Vulnerable Worker Enforcement Forum expressed concern at "Citizens Advice evidence about non-payment of Tribunal awards". The report noted that "workers who have been through the Employment Tribunal process need confidence that they will be able to enforce their awards". However, the report fell short of suggesting any further reforms that might actually give workers such confidence.³

Most recently, during the committee stage of the then Employment Bill in the House of Commons, the Employment Relations Minister, Pat McFadden, stated that "we all want people who win their case at tribunal to get the award to which they are entitled". And, on 28 October, the Under-Secretary of State for Justice, Bridget Prentice, stated that "when a claim goes to an employment tribunal and the tribunal upholds the claimant's position, it is quite unacceptable that the employer should then either delay or deny the claimant their rightful compensation".⁴

Time will tell whether such statements reflect a growing appreciation on the part of Ministers that they need to go much further than the very limited reform provided by the 2007 Act. In the meantime, the employment tribunal system will continue to deliver empty justice to too many exploited vulnerable workers.

³ Page 40 of *Vulnerable Worker Enforcement Forum: Final Report and Government Conclusions*, BERR, August 2008.

⁴ Bridget Prentice MP, *Hansard*, House of Commons, 28 October 2008, col. 725.