



Response to the Low Pay Commission General Consultation on the National Minimum Wage 2013/4

Introductory Comments

Equity is the union for actors, performers, singers and other creative workers. We represent over 36,800 people working in the UK's film, television, theatre, dance, variety and music industries. Our membership includes actors, singers, dancers, circus artists, theatre directors and many other performers and creative workers.

As in previous years, Equity welcomes the opportunity to raise with the Commission those issues that affect our members and to detail instances that demonstrate where we believe the legislation and enforcement mechanisms could be improved. We hope to continue this constructive relationship with the LPC and the Department for Business in order to resolve the outstanding areas of concern for our members.

Low pay trends in the entertainment industry

Equity's most recent survey of members found that 9.6% earn nothing from their work in the industry, and over 69% earned either nothing or under £10k per year. Two thirds of our members say they have had to turn down work because the pay on offer was too low. Of these, 72% say they turned down work in fringe theatre and 36% turned down work in Independent Theatre.

Younger members also tell us they expect to work for up to two years at the start of their careers. Clearly it is important for the sector to preserve a degree of flexibility with respect to the mobility of its workforce and the short-term nature of engagements. That is something that is expected and understood by performers. However this must be balanced against ensuring that performers, from all backgrounds, are able to build sustainable careers.

Despite Equity's success in concluding collective agreements covering our main areas of work – TV, film, theatre and radio – low pay and in some cases exploitation of workers in the sector is increasing. Partly this is to do with a decrease in funding for organisations, but there are also cultural factors and perceptions of the industry that need to be tackled.

Low pay and no pay work is especially noticeable in areas where some of the lowest Equity minimum rates are already in existence, for example for background performers (or walk-on artists) working in film and television.

Where possible, Equity seeks to reach new and adaptable agreements with producers and employers in order to ensure compliance with National Minimum Wage legislation, particularly in areas such as fringe theatre, however the amount of non paid work is growing

and an ever increasing proportion of Equity members report that they are being asked to work for free on a frequent basis.

The most pressing current issues in terms of low pay for Equity members are:-

Charitable status

Many organisations in the arts and entertainment industries, particularly film schools, continue to reference section 44 of the National Minimum Wage Act in their attempts to avoid paying the National Minimum Wage to performers. Equity has sought to highlight the obligations of employers and challenged them to provide evidence that such work is truly “voluntary” under section 44 of the National Minimum Wage Act. In the absence of such evidence we have requested that the performers be paid at least the NMW rate.

This approach is often successful and has led to a number of significant productions reversing their proposals to offer unpaid work, but the approach is reactive in nature and limited to helping individuals.

We do not believe that the use of professional performers for free by any organisation is compatible with the intention of either the National Minimum Wage Act or the Charities Act and believe that this practice should be challenged by the Low Pay Commission.

Advice and guidance

Given the complex nature of the legal framework that covers workers and low pay in the entertainment industry, sector specific advice for large and small employers is essential. As is awareness and recognition that performers are workers, particularly by advice services which have in the past advised businesses that performers are not workers.

In its 2010 Report the Low Pay Commission agreed with Equity that sector specific advice was needed to help businesses and employers understand the application of the NMW to the entertainment sector. The LPC recommended “that the Government produces, in conjunction with interested parties, sector specific guidance on the National Minimum Wage for the entertainment sector.” LPC Report, para 4.50, 2010.

While we did not believe that the advice that was then made available on Business Link adequately achieved this recommendation, the new advice provided on gov.uk is worse again. The TUC and Equity have raised this concern with the Government and Equity is hoping to meet with Ministers shortly with a view to improving guidance for the entertainment sector. In the mean time it may be necessary for the LPC to reiterate its recommendation from 2010 and to urge the Government to act swiftly to remedy this situation.

Enforcement

Across the economy many workers with minimum wage problems are too scared to enforce their rights. In most cases where individual members believe their employment rights have been breached, Equity is able to provide legal assistance. There have been two recent landmark judgements at the Employment Tribunal concerning non payment of the National Minimum Wage to performers:

Case 1: Equity recently supported a successful case taken by a group of members against a fringe theatre company. In the first ruling of its kind, the pre hearing of the Employment Tribunal found that the five actors concerned were entitled to make a claim for the National Minimum Wage and payment in lieu of holiday for this particular fringe theatre show. The actors in this case were found to be workers as per the definitions of the National Minimum Wage Act and Regulation 2 of the Working Time Regulations 1998, despite the fact the engagement was advertised as a profit share by the producers.

The full tribunal hearing date, where a judgement will be made about the sums owed to the actors involved, is yet to be set.

Case 2: An actor, Mr T Ingham had been engaged by a producer, Summertime Pictures, for a short film and although no money was offered for the engagement itself, representations were made about the substantial sums that would follow due to the net profit participation arrangement, which formed part of the contract. Obviously no such sums can ever be guaranteed. These circumstances are not unusual although it is unusual for a performer to want to come forward with a claim against their employer.

Equity brought the claim to the ET in August 2012 on the basis of the National Minimum Wage Act 1998, and the Regulations made under it. Crucially, the Judge (Judge Holmes) stated in his judgement in December 2012 that he was satisfied that the engagement constituted a contract of employment and therefore our member was entitled to receive NMW and holiday pay. The Judge considered that the remuneration provided for, solely by reference to net profit, was an attempt to oust the jurisdiction of the NMW legislation and therefore was of no effect.

The actor concerned received judgment in his favour and was awarded the sum of £1,033.60 in respect of unlawful deduction from wages and a further £124.76 in respect of pay in lieu of untaken holiday.

Following these two cases Equity officials have noticed a substantial increase in demand from members, producers and managers for clear industry-specific guidance. We therefore believe it would be very opportune to issue such guidance now, as it is likely that it would be better and more widely received than it would have been previously.

Enforcement of employment rights would be greatly enhanced if the Government removed the barrier of Employment Tribunals only hearing cases brought by individual workers and enabled unions to launch representative actions. This change would be particularly welcome in the entertainment industry, where short term contracts and other practices further contribute to the insecurity and fear felt by workers.

Equity welcomed the introduction of penalties for infringement of the NMW of 50% of the total underpayment and the proposals to increase the powers of NMW enforcement officers from 6 April 2009. Unfortunately, to date there has been very little evidence of the effectiveness of these new enforcement measures in the entertainment industry.

We are also very concerned about the lack of enforcement activity currently undertaken by HMRC in the entertainment industry. Enforcement of National Minimum Wage legislation in our sector is also bound up with other regulations and bodies, specifically agencies legislation and the Employment Agencies Standards Inspectorate. It is disappointing that in its recent consultation on the reform of agency legislation, BIS has not recommended that EASI be given similar powers to HMRC and other agencies in order to properly investigate and sanction rogue agencies.

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**Christine Payne
General Secretary**

For more information regarding this submission please contact:

**Louise McMullan
Guild House
Upper St Martins Lane
London
WC2H 9EG
02076700260
lmcmullan@equity.org.uk**