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The challenge of enforcing employee rights: the case of underpaid wages and free labour time

Dr Michelle O'Sullivan

Synopsis

Evidence internationally suggests that wage theft is prominent especially amongst workers in precarious jobs. Wage theft refers to the non-payment of wages for work performed. Claims of wage theft 'crises' in other countries with billions in underpaid wages has led to new laws elsewhere but wage theft remains underexplored in an Irish policy context. This article examines if existing minimum wage and working time employment laws provide an effective remedy for workers to recover underpayments or if stronger wage theft laws are needed. The analysis finds that radically new legislation is not necessary, however, workers do face legal obstacles and some aspects of our current laws should be amended.

Introduction and Background

Wage theft can take many forms but typically include instances where employers underpay employees any form of agreed or legal pay rate, where employees work more hours than paid hours, and where employees do not receive leave entitlements. Other forms are where employers make illegal deductions from wages, retain tips due to employees or misclassify

them as independent contractors or as being exempt from statutory rights. Internationally, precarious workers are particularly exposed to employer exploitation and often include female, young, and migrant workers in low unionised sectors. In Ireland, the Irish Congress of Trade Unions has called for a new crime of wage theft to be introduced and the Migrants Rights Centre of Ireland has sought the introduction of criminal penalties for employers who commit wage theft but there has been little policy debate about these demands.

Issues and Questions Considered

There is no database on the extent to which employment rights are not complied with in Ireland, so we rely on a compilation of sources. Estimates on non-compliance with the national minimum wage range from over one per cent to almost eight per cent of total employment. State labour inspectors who enforce employment laws recovered over €12m in unpaid wages for workers between 2016 and 2020 while a survey of early years and childcare practitioners found that 72 per cent reported undertaking unpaid work and 42 per cent did not have enough time to take rest breaks.

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Calls for wage theft laws internationally often centre on the arguments that workers face significant obstacles in recouping lost wages and that employment laws are not strong enough to dissuade employers from engaging in wage theft. A combination of time consuming and confusing laws, low penalties, and weak enforcement agencies can deter workers from making complaints.

Research suggests wage theft most commonly takes the form of non-compliance with minimum wages and working time rights and for this reason, we examine the operation of the National Minimum Wage Act 2000 and the Organisation of Working Time Act 1997. The National Minimum Wage Act 2000 obliges employers to pay not less than the national minimum hourly rate of pay to employees. The Organisation of Working Time Act 1997 provides that employees have certain rights regarding maximum working hours, rest periods, annual leave, notice for starting and finishing times, payment for zero hours contracts, and payment for working on a Sunday and a public holiday.

The article assesses the effectiveness of these laws in providing a remedy for workers by examining the prominent legal issues that arose in worker complaints. Through an analysis of legal cases, the study aims to identify commonalities in the characteristics of employees and employers in cases, the level of employee success in claims, and the reasons for their success or otherwise including the extent to which workers satisfied legislative provisions.

Methodology

The findings are based on an analysis of adjudicated decisions of state employment rights bodies following worker complaints. Worker complaints must be submitted to the Workplace Relations Commission (WRC) first and may be appealed to the Labour Court. All 151 decisions issued by the WRC and Labour Court under the Organisation of Working Time Act 1997 in 2020 were examined. As there was a small number of decisions issued in 2020 under the National Minimum Wage Act 2000, the population was widened to include all decisions published in 2018, 2019 and 2020, amounting to 64 decisions.

In total 215 decisions were reviewed quantitatively and qualitatively.

Outcomes and Findings

A significant proportion of employees in cases worked in low wage sectors including food and drink service, retail, and security. It is not easy for employees to be successful in minimum wage claims. Of the 51 WRC decisions issued in the period 2018-2020, only nine were found in favour of workers. Almost half of WRC working time decisions were fully or partly in workers' favour while six out of the ten Labour Court appeals were fully or partly in their favour.

Other than instances where the workers did not attend adjudication hearings, many failed because they did not submit their complaint within specific time limits and, in the case of minimum wage claims, because they did not satisfy the legislative requirement that employees must seek a statement of pay from the employer before making a complaint.

The level of awards to workers in successful cases was low but even small amounts recovered can be important for low wage workers. The average award in working time cases was less than €1,500 compared to €3,900 in minimum wage complaints. The level of awards was impacted by the workers' low length of service and restrictions in the legislation on awards.

Our analysis suggests that radically new employment laws may be unnecessary. The minimum wage and working time laws already have many provisions which are being included in new wage theft laws in other countries. The laws, however, have flaws and several areas merit amendment in particular regarding the time limits on the submission of complaints, the requirement for workers to seek a statement of pay from employers in minimum wage complaints, and restrictions on awards especially in minimum wage cases.

Changing legislation, however, will likely be insufficient for an effective enforcement regime and it must be supplemented by collective representation rights and enhancing the capacity of labour inspectors to act on workers' behalf.

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