

Professor Sir David Metcalf CBE
Director of Labour Market Enforcement

By e-mail to:
directorsoffice@lme.gsi.gov.uk

13 October 2017

Dear Sir David,

Informing Labour Market Enforcement Strategy 2018/19

I have the pleasure to provide a response to a number of questions raised in the above consultation on behalf of the United Kingdom Homecare Association (UKHCA). We welcome the appointment of a Director of Labour Market Enforcement, and support the intention of reducing unlawful employment practice in the UK.

UKHCA is the member-led professional association for homecare providers in the United Kingdom, with over 2,000 homecare agencies in membership. Our mission is to promote high quality, sustainable care services so that people can continue to live at home and in their local community.

Our member organisations agree to comply with UKHCA's Code of Practice,¹ and UKHCA is actively engaged with Government departments (including the Departments of Health, and Business, Energy and Industrial Strategy) and statutory regulators (including the Care Quality Commission) and arms-length bodies (including the Low Pay Commission).

The majority of homecare services are delivered by independent and voluntary sector employers, but are largely commissioned and funded by local authorities and the NHS.

¹ UKHCA (2016) Code of Practice. See:
<https://www.ukhca.co.uk/ukhacodeofpractice.aspx>

The vast majority of homecare agencies are regulated by statutory regulators in their respective UK administration,² and homecare workers in Wales, Scotland and Northern Ireland are at various stages of registration with a professional workforce regulator.

In line with the guidance supplied in the consultation exercise, we have answered those questions which we believe are directly related to our area of expertise. As the majority of homecare providers are employers (rather than 'employment agencies' or 'employment businesses'), most of our response relates to HM Revenue and Customs (HMRC), rather than Employment Agencies Standards (EAS). We do, however, supply answers to questions relating to the Gangmasters and Labour Abuse Authority (GLAA).

1. Development of the intelligence hub

UKHCA is supportive of the development of the intelligence hub, as described in the consultation document. We believe that this will provide a more comprehensive assessment of available information on changes in employment practices.

As noted above, the majority of homecare providers are subject to statutory regulation. Each of the UK regulators undertakes regular inspection of registered services which may provide useful information for the Intelligence Hub. For example, interviews with selected careworkers employed by the service.

While these regulators are primarily concerned with assessing the quality of care service provided to individuals (and/or the providers' compliance with specific care standards) they have a significant understanding of the operation of the overall picture of care services. For example, England's regulator, the Care Quality Commission (CQC), notes a relationship between

² The Care Quality Commission (CQC) in England; The Care and Social Services Inspectorate Wales (CSSIW); The Care Inspectorate (Scotland) and the Regulation and Quality Improvement Authority (RQIA) in Northern Ireland.

the quality of services and potential warning signs which suggest other problems within an individual business.

We believe that the Information Hub should consider entering into memoranda of understanding (MOU) with the social care regulators in each UK administration to identify issues and geographic areas where employment practice may be unsatisfactory.

In terms of information which UKHCA produces and which could assist the Intelligence Hub, examples include the following:

1. UKHCA produces a "Minimum Price for Homecare" which is intended to guide employers and the commissioners of homecare services on the prices necessary to enable employers to comply with the cost of the statutory National Minimum Wage.³ UKHCA's Minimum Price for Homecare is cited in HM Government's statutory guidance for the Care Act 2014, as a methodology which local councils can follow.⁴
2. We have on two occasions undertaken extensive Freedom of Information enquiries with every council in England, Scotland, Wales and the Health and Social Care Trusts in Northern Ireland to gauge whether councils are paying prices sufficient to enable employers to meet NMW and run sustainable businesses.⁵ Our findings suggest that many councils are failing to acknowledge the real costs of care. Our most recent assessment, in 2016, we found that the average weighted price paid for homecare by councils was £14.65 per hour, compared to our Minimum Price for Homecare (at the time) of £16.70 per hour.

³ Angel, C (2017) A Minimum Price for Homecare, Version 4.0. See: <https://www.ukhca.co.uk/downloads.aspx?ID=434>.

⁴ Department of Health (2017) Care and support statutory guidance, updated 17 August 2017, paragraph 4.31. See: <https://www.gov.uk/government/publications/care-act-statutory-guidance/care-and-support-statutory-guidance#chapter-4>

⁵ UKHCA (2016) The Homecare Deficit 2016. See: <https://www.ukhca.co.uk/downloads.aspx?ID=525>.

We make the findings from these research projects available to interested stakeholders. For example, data from "The Homecare Deficit 2016" was shared with HM Treasury, Department of Health, the Low Pay Commission and the King's Fund. UKHCA would be pleased to share this, and future research findings with the Intelligence Hub.

2. Approach to enforcement

Promotion of awareness of rights and responsibilities

UKHCA produces a range of information for our member organisations to assist them to comply with employment law. Most notably, UKHCA produces a regularly updated "National Minimum Wage Toolkit".⁶ This comprehensive guide is made available without charge to employers (whether members of our association or not) to assist their compliance with the National Minimum Wage (NMW) within the complexities created by a peripatetic workforce, most of whom are considered to be 'time workers'.

The original development of this toolkit was a response to the lack of detailed information produced by HMRC and available on government-run websites.

It is our view that HMRC have consistently failed (and continues to fail) to produce accurate information which meets the specific needs of different types of employers, an observation which we make annually in evidence to the Low Pay Commission. Indeed, in designing UKHCA's National Minimum Wage Toolkit, our solicitors had to resort to the Freedom of Information Act in order to obtain guidance which HMRC's inspectors used to establish compliance with National Minimum Wage. We believe that this is an extraordinary approach for an inspectorate to take.

Most recently, HMRC have produced written guidance for the social care sector which we believe is insufficiently detailed to assist employers with their specific circumstances. Our attempts to influence the content of this

⁶ UKHCA (2017) National Minimum Wage Toolkit. See: www.ukhca.co.uk/nmwtoolkit.

guidance (working jointly with other care provider associations) has not produced a significant improvement in the document.

We recommend that the Director of Labour Market Enforcement:

1. promotes a greater openness to sharing technical information used by HMRC with employers;
2. encourages HMRC to work with employer representatives to ensure that the information it provides is sufficiently detailed to assist employers with their compliance.

We believe there is a reasonable, if not universal, understanding amongst social care workers that the ACAS helpline is available to report concerns about underpayment of the National Minimum Wage. We think that this is evidenced by the number of reactive investigations mounted in the social care sector by HMRC.

UKHCA does not represent individual careworkers and is unaware of instances where employees have found that their allegations have not been investigated as a result of contacting ACAS. Our colleagues in the trades union movement may be able to illustrate whether this is an issue which their members encounter.

Balancing reactive and proactive enforcement

Over time, we believe that if the Intelligence Hub enters into effective MOUs with care service regulators, it would be in a better position to target enforcement activity in parts of the country where there are greater reasons for concern over employment practices, particularly in relation to areas where local councils are believed to under-fund the care services they purchase.

Effective use of spectrum of enforcement tools

Our impression in the homecare sector is that Government's naming policy for NMW non-compliance has promoted a significantly higher awareness of the requirements to pay NMW. Based on our review of the pattern of underpayment of NMW in our sector reported by BEIS, we believe that the majority of non-compliance found is unintentional.

We are, however, concerned by the possibility that some specialist services are at risk of financial closure due to historic under-payment of NMW for 'sleep-in' duties. We believe that this issue further supports our earlier belief that HMRC has failed to provide employers with sector-specific information. We also believe that retrospective claims, while a just position for workers affected, carry associated risks to the viability of employers, particularly those delivering care services to under-funded local authorities.

We would like to see a similar degree of emphasis placed on assisting employers understand and correct incorrect practices as enforcement activity.

Joint working

We have already recommended the potential benefit of the Intelligence Hub entering into memoranda of understanding with the UK's social care regulators, above.

With respect to the social care sector, we believe that the relationship between the prices paid for care and the terms and conditions of social care workers are directly related. The Intelligence Hub may wish to explore how it can assess the prices paid for care services by councils with employers' ability to meet their obligations towards employees, as described in the following section.

3. Issues specific to enforcement bodies

HMRC

In section 1 above, we refer to the fact that local councils fail to comply with UKHCA's Minimum Price for Homecare. We believe that this is significant because:

- Local councils are thought to purchase around 70% of all homecare delivered (this is an estimated figure, as there is little data available on the size of the state-funded market);
- Councils almost always purchase homecare services in units of time (hours, or part of hours), in a way which is unlikely to enable employers to offer guaranteed hours contracts.

- Councils are recognised as adopting a range of cost-control strategies which impact on the workforce (including, but not limited to: purchasing very short periods of time for care delivery; capping prices that providers can submit in tenders; insisting on contracts which exclude price increase mechanisms; and failing to pay sleep-in duties at a rate consistent with NMW);
- Councils themselves repeatedly report their concerns over the adequacy of their budgets to meet their statutory responsibilities to meet people's needs.

Homecare employers are challenged by:

- Often extremely low prices paid for care (for the reasons stated above);
- The fragmented purchase of homecare by councils, reducing the likelihood of workers' time being fully utilised, and resulting in otherwise avoidable down-time;
- Understanding how to ensure that they capture the full working time of a peripatetic workforce – even IT systems which capture the time that careworkers spend delivering care do not accurately capture travel time;
- A lack of guidance on how to interpret the National Minimum Wage Regulations for a peripatetic workforce, particularly in relation to what counts as a 'break' and what is 'working time';
- A lack of awareness that enhanced rates of pay (such as those to incentivise workers to accept short homecare visits or working during unsocial hours) do not count towards calculation of the National Minimum Wage.

Gangmasters and Labour Abuse Authority

We do not share the view that the GLAA's remit should be extended to social care.

Social care employers are already required to pay for annual registration and inspection.⁷ The link between the quality of employment and the quality

⁷ In the case of the Care Quality Commission (CQC) in England, inspection is moving to a proportionate risk-based system of inspection every six to thirty

of care is well established and regulators already have the powers to conduct interviews with staff on providers' working practices as part of their inspection of the quality of employment as it relates to the provision of care.

While inspectors do not routinely ask workers about their employer's compliance with employment law, inspectors do check employment records and processes to ascertain they are fair, safe and consistent with delivering regulated activities to older and disabled people. Inspectors may increase the number of front-line workers they interview according to the needs of each individual inspection.

Regulators also receive intelligence from people who use care services, which often includes comments on the users' perception of the working experience of the careworkers they meet.

We believe that care service inspectors act on this sort of intelligence during their inspection of services, for example, referring possible examples of illegal working to Home Office agencies.

A well-functioning Intelligence Hub would provide a helpful route for inspectors to escalate concerns about employment which are not directly within their remit. We believe that the social care regulators would welcome suitable guidance from the Director of Labour Market Enforcement on warning signs which they should consider when making contact with the Intelligence Hub.

We are not aware of examples of coercive employment practices within the homecare sector and HMRC's findings from investigations into the social care sector suggest that underpayment of NMW is at the lower level of non-compliance. While underpayment of workers is never acceptable, the registration of over 8,800 homecare businesses with GLAA may represent a disproportionate cost for both Government and providers, when compared to the benefits it is likely to achieve.

months, with organisations where quality is lowest being inspected more frequently.

The additional cost of licensing and registering with the GLAA would, in our view, be a duplication of regulatory functions, with the potential to confuse the public (including members of the social care workforce) and be an extra financial burden on independent and voluntary social care employers in a sector widely acknowledged to be under significant financial strain.

We are not therefore convinced that registration with GLAA would add a significant degree of assurance if information gathered by social care regulators is systematically shared with the Intelligence Hub to inform the enforcement agencies' assessment of sector-based risk.

In addition, licensing by GLAA would have some additional negative impact, which ought to be considered:

- Employment in social care already suffers from a perceived low status, where workers' contribution is not sufficiently recognised by society. Associating social care with a regulatory regime equated in the mind of the public with agriculture and food processing would diminish the status of social care even further;
- The registration process of homecare services with the respective social care regulators already builds-in barriers to new entrants to the sector, particularly small and micro-businesses, who struggle to remain financially viable between setting-up their service and obtaining a license to provide regulated care. Small and micro-social care services are being promoted by Government because they are thought to be particularly effective at providing highly personalised care to older and disabled people. Registration with GLAA is likely to add further complexity and delays for these businesses;
- At the opposite end of the spectrum, the very largest social care employers (in England) are subject to a 'Market Oversight' regime operated by CQC, which investigates organisations' financial viability throughout the year.

We would like to close with our thanks for the opportunity to contribute to this consultation and confirm our willingness to assist you, as the Director of Labour Market Enforcement, with any additional contribution that you would find helpful.

Yours sincerely,

A handwritten signature in black ink that reads "C. Angel". The signature is written in a cursive, slightly slanted style.

Colin Angel

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