**Chapter 8: Pay and working time**

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1. Which account of the effects of national minimum wage laws, maximum weekly limits on working hours, and annual leave do you prefer, i.e. the neoclassical or new institutional economics analysis? Give reasons for your answer.

**Author's answer:** In order to answer this question, you would have to consider your own economic and political outlook. For example, are you sympathetic to the neoclassical economic argument that employment rights impose unnecessary costs on businesses, which incentivises them to hire fewer labour, thus leading to unemployment? Alternatively, would you categorise such rights as constitutive of the labour market in terms of the new institutional economic analysis, e.g. by eroding labour market failures, such as the informational advantages in favour of employers, transaction costs, etc.?

2. Now that a National Living Wage has been introduced, do you agree that it has been beneficial to a) the UK economy and b) to workers and employees? How does it differ from the 'Living Wage'? Give reasons for your answer.

**Author's answer:** The National Living Wage is the minimum amount of earnings that must be paid by employers to employees and workers aged 25 or over. It differs from the 'Living Wage' in that this is an amount of money that is set by an organisation called the Living Wage Foundation. The 'Living Wage' is a sum that is based on the cost of living in the UK. In responding to the question whether you believe the introduction of the National Living Wage has been beneficial to the economy and to workers and employees, this will again depend on your economic, philosophical and political views. From an economic perspective, you may be of the opinion that the National Living Wage does nothing other than burden business with additional expense. On the other hand, you may consider this viewpoint to be ill-conceived on the grounds that it fails to account for a person's dignity and their moral entitlement to earn a fair wage for a fair day's work.

3. The earlier extract from Davidov's article argues that the national minimum wage is an employment policy designed to redistribute a modest amount of resources and wealth away from employers and their shareholders to workers and the State (via the benefits saved), i.e. distributive justice. In your opinion, is it justifiable for employment policy and laws to be utilized as a means of effecting distributive justice? Or is redistribution a goal which should only be pursued via State fiscal/tax policy?

**Author's answer:** The nature of your response to this question will be shaped by your views on the desirability of pursuing a policy of distributive justice, i.e. a redistributive arrangement which compels employers to set aside a larger proportion of their total commercial revenues and profits towards staff salaries, wages and benefits than they might otherwise have chosen if left to their own commercial judgment. In essence, by introducing a National minimum wage in such a fashion, the State will save money in so far as it will be required to top up the wages and salaries of working families via the tax credit system to a lesser extent than would otherwise be the case. Therefore, if you are in favour of redistributive policies such as the National Minimum Wage, you may argue that they are necessary in order to reduce the burden of paying benefits that is imposed on the public purse. Other reasons for favouring the introduction and preservation of a National minimum wage are rooted in social and political justifications, e.g. social justice and the politics of equality of opportunity. However, the

principal arguments against such redistributive policies find their expression in economics. Classical economic models suggest that National minimum wage policies are self-defeating insofar as they end up hurting the working poor by having the effect of increasing redundancies and the unemployment rate, reducing aggregate productivity and output, and distorting the labour market. On this basis, the contention is made that minimum wage laws interfere unjustifiably into the labour market and ought not to be used as a means of implementing a policy drawn up to redistribute assets, wealth and resources amongst members of society, which should be left to the taxation and social security systems adopted by the State, which are matters for acute political debate and judgment by Parliament.

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3. Bearing in mind that a payment in lieu of notice is a sum paid in respect of a period (i.e. the notice period) which the employer has prevented the employee from working, do you agree with the decision in *Delaney v Staples*? Give reasons for your answer.

**Author's answer:** Where an employer pays an employee in lieu of notice, a payment is tendered to the employee in respect of his/her notice period. The payment is made immediately on the discharge of the employee and the latter is under no obligation to work his/her notice in order to qualify for the payment. On one view, there is some attraction in the notion that the employer has prevented the employee from working the notice period by invoking the payment in lieu of notice provision, and that this points towards that payment counting as wages foregone. If the payment amounts to wages, then income tax must be paid, and the employee would recover the net sum. However, the contrary argument is that the payment is not made to the employee in respect of work he/she has done and completed. As such, the more fitting description of the payment is that it arises in respect of the termination of the employee's contract of employment. Under this rationalisation of the position, the payment is not wages, but damages, and as such, ought to be paid gross of income tax.

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2. In your opinion, should the individual opt-out be retained? If so, why? If not, why not?

**Author's answer:** Reliance on a strictly contractual and liberal model would tend to direct a policy-maker towards the retention of the opt-out. The notion that the autonomy of the contracting parties should be respected ties in with the doctrine of freedom of contract. Moreover, contractual autonomy leads to flexibility in the social practice of work relations, enabling the contracting parties to structure their working hours around their personal lives. As such, a model which removes the opt-out can be said to strike at the dignity and autonomy of the parties to the contract of employment. The counter-argument is that the policy considerations are so weighty that there is no space for freedom of contract to operate. The adverse health consequences of employees working excessive hours is consistent with the argument that the opt-out should be abolished.

3. The flexibility associated with the individual opt-out to the 48-hour limit on weekly working time is not replicated in the context of the worker's right to paid annual leave/holiday pay. To what extent can this rigidity in the context of the latter be justified?

**Author's answers:** Bearing in mind that the WTD and WTR are explicitly grounded in health and safety policy, namely the desire to protect staff from excessive working hours and to give them sufficient periods of rest to relax, and recuperate from the level of demands and effort imposed by their job, it is something of a paradox that only some of the provisions in those instruments may be derogated from with the agreement of the workers concerned, whereas others – such as annual leave/holiday pay – are treated as inderogable irrespective of the grant of any consent of workers, or any waiver of rights. Whilst this singularly signals an inherent contradiction at the heart of these legislative provisions, it does underscore the point that the right to annual leave and holiday pay is treated as a centrepiece entitlement and an inderogable fundamental right, as enshrined in Article 31(2) of the EU Charter of Fundamental Rights and recognised by the Court of Justice of the European Union in *Land Tirol* [2010] 3 CMLR 30. In this way, it is clear that something of a pecking order of entitlements has been constructed, which prioritises holiday pay and annual leave in any hierarchy of rights.