

ENDING THE RACE TO THE BOTTOM:



CHANGING THE BALANCE FOR MIGRANT WORKERS IN IRELAND

MRCI POSITION

The exploitation of migrant workers in Ireland, particularly in low-paid employment sectors, is commonplace. There are a number of factors that contribute to migrant workers' increased vulnerability, such as restrictions from moving employer for employment permit holders and fears of problems with immigration. Weak enforcement policies and a culture of noncompliance in many low-wage sectors that employ large numbers of migrant workers is also a significant factor. These realities make it extremely difficult and risky for migrant workers to challenge employers who take the 'low-road' of exploitation. While there is no easy solution to ending exploitation, there are key policy changes that would begin to reduce the risk migrant workers face in challenging exploitation, and deter employers from exploiting.

MIGRANT WORKER EXPLOITATION

Workplace exploitation constitutes a wide variety of situations in which a worker is taken advantage of and denied his or her employment rights provided under Irish, EU and International law. Exploitation can range from discriminatory practices in pay and conditions, to extreme situations of forced labour. It is particularly prominent in sectors that have traditionally been poorly regulated and generally have low levels of unionisation, such as agriculture, domestic work, cleaning and restaurant and hotel work.

The MRCI provides a free legal information and advocacy service to migrant workers experiencing violations of their rights at the workplace. Between 2006 and 2009, MRCI assisted over 250 exploited migrant workers in lodging formal complaints, and in achieving settlements and awards of €1.3 million for unpaid wages and other gross violations of their employment rights. Breaches included payment below the minimum wage, non-payment of holidays, and excessive working hours, among others. Research published by the MRCI in recent years involving domestic workers (*Private Homes: a Public Concern*, 2004), agricultural workers (*Harvesting Justice*, 2006) and restaurant workers (*Exploitation in Ireland's Restaurant Industry*, 2008) highlights this exploitation and vulnerability.

MRCI's study, *Exploitation in Ireland's Restaurant Industry (2008)*, indicated that among restaurant workers:

- 53%** earned below the minimum wage
- 44%** did not get rest breaks
- 85%** did not receive extra pay for Sunday work
- 85%** did not receive overtime pay

For example, approximately one-third of all MRCI formal complaints are taken by workers employed in the hotel and restaurant sector. In Ireland, 35.5% of those employed in this sector are non-Irish nationals - twice as many as in other employment sector.⁰¹ In 2008, the National Employment Rights Authority (NERA) carried out over 1,000 inspections of catering establishments and 142 inspections of hotels.⁰² NERA detected breaches of employment law in 73% of catering businesses and in 78% of hotels inspected. Contract cleaning, another sector employing significant numbers of migrant workers, was shown to have a breach rate as high as 85%. Figures released by NERA for 2009 show that only 21% of employers in the catering industry were compliant.

Domestic work is another sector in which MRCI has witnessed some of the most extreme forms of exploitation and forced labour. In 2009, MRCI assisted an Indian national working in virtual slave-like conditions in a private home, who subsequently received a Labour Court award of over €240,000 in unpaid wages. The MRCI is also currently assisting over twenty individuals who have been in situations of trafficking for forced labour in Ireland, the majority employed as domestic workers.

01 CSO *Quarterly National Household Survey 2008 (Quarter 3)*, Table A2: Estimated number of persons aged 15 years and over in employment (ILO) classified by nationality and NACE Economic Sector.

02 *Annual Review 2008*, National Employment Rights Authority.

Discrimination in the workplace is also a significant issue for migrant workers. A recent report published by the Economic and Social Research Institute (ESRI) and the Equality Authority, *Immigrants at Work: Ethnicity and Nationality in the Irish Labour Market* (2008), found that migrant workers are twice as likely to report discrimination in the workplace as Irish nationals. Another ESRI and Equality Authority study, *Discrimination in Recruitment: Evidence from a Field Experiment* (2009), found that migrant workers with similar skills and experience were less likely to be called for interview by employers, based on the name given on the CV; i.e. foreign-sounding names were significantly less likely to secure interviews than Irish-sounding names.

GREATER VULNERABILITY

Migrant workers as a whole are more vulnerable to exploitation due to several factors. As a result, migrant workers find it more difficult and risky to come forward and do something about exploitative pay and treatment.

Migrant worker vulnerability

- The work permit system ties a worker to one employer, so if anything happens to their job then their immigration status is put in jeopardy.
- Many workers have incurred huge debts to secure work in Ireland. Many are afraid to complain until the debt is paid.
- For many of occupations, particularly domestic work and agricultural work, a worker's accommodation is tied to the job and they may risk losing their job and home if a problem arises.
- Migrant workers have fewer resources and support structures, such as family and a safety net if something goes wrong in their job.
- Many have limited options for decent pay and conditions in their home country and have little choice but to endure exploitative conditions in Ireland.
- Limited English skills and lack of access to supports of rights and information.

For example, migrant workers consistently claim that the lack of freedom to change employers is the leading factor in their exploitation. Approximately 80% percent of MRCI exploitation cases involve migrant workers holding employment permits. Workers claim the lack of freedom puts them in a powerless situation, wholly dependent on the employer for their permit and legal status. Migrant workers commonly speak of employers threatening them with revoking or not renewing their permit if they complain. Many workers prefer to keep their head down until they secure a more established immigration status, which only happens after more than five years in the employment permits system. This is one of many factors that increase migrant workers' vulnerability to exploitation.

Arvidas: Dairy farm worker

Arvidas, a migrant worker from Lithuania, worked for three years on a dairy farm in County Cork, between 2005 and 2008. He lived on the farm with his wife and young son. He worked twelve-hour days, seven days a week, performing all the duties around the farm and often with the help of his family. While his employer provided him with accommodation, he was paid just €350 per week, equating to an hourly wage of €4 to 5 euro per hour. He was not provided with any written terms of employment or pay slips. He did not receive his entitlements to overtime pay, Sunday pay, bank holiday pay, or annual holiday leave pay.

Undocumented migrant workers are also at a significant disadvantage in the workplace and are often easily exploited by their employer. With few options and fearing deportation and the State authorities, undocumented workers have little chance to challenge exploitation or to seek redress when their rights are violated. For example, it is NERA's policy not to seek unpaid wages for undocumented workers due to the determination that their contract of employment is illegal. If undocumented workers have no right to redress, then employers who employ them have little to fear in exploiting them. In addition, no proceedings have been taken against employers for employing workers without a permit over the past three years.

HIGH RISK FOR WORKERS, LOW RISK FOR EMPLOYERS

The risks involved for a migrant worker in coming forward and potentially losing their job and (for some) their immigration status, outweighs the potential benefit of proper pay and conditions. These risks have been heightened in the current recession. On the other hand, the benefit of cheap labour to an employer who exploits is much greater than the risk of being caught and penalised. At present, the worst-case scenario for employers who violate workers' rights and steal workers' wages is that they have to pay a portion of the back wages to a worker. In most cases when workers lodge formal complaints to redress bodies such as the Rights Commissioner Service, the employer settles the matter without any deterrent or penalty. When a NERA inspector catches an employer who is noncompliant and not paying workers their proper wages, inspectors simply ask the employer to pay the workers what they are already owed without penalty. Penalties only come in to play when employers refuse to co-operate. The underlying message communicated to employers is, "rob the bank and if you're caught the worst that can happen is that you will be asked to pay some of the money back." With a small number of NERA inspectors the chances of even being caught are quite low.

Anne: Domestic Worker

Anne is a domestic and child care worker from the Philippines. In 2006 she came to Ireland on a work permit to work in the private home caring for two young children and carrying out all of the household chores, including cleaning, cooking, laundry. She worked six and a half days per week, from 7am until 9 or 10pm, with a half day on Sunday. During this time, she was not entitled to proper rest breaks as she was always expected to keep watch over the young children. She was also expected to wake in the evening to attend to the baby. She was paid approximately €2 per hour. When she asked about increasing her pay her employer threatened her and stated that if she left she would become illegal, and if the Garda found her she would be deported to the Philippines.

This imbalance between employee and employer risk is fundamentally unjust. Stronger enforcement policies such as 'on-the-spot' fines against employers who breach employment laws are needed, in order to start shifting this balance. Business and employer associations argue that such policies would add additional burdens on employers. Fines and penalties, however, only affect those who break the law. Importantly, strong enforcement ensures fair competition between employers and protects sustainable businesses who take the 'high road' to employment compliance. "Some companies may unfairly win business in a tendering situation by reducing their wage bill illegally," explains Ger Deering, director of NERA. "Employers and potential investors must have confidence to know that the Irish labour market is properly regulated and that those who abide by the law will not be disadvantaged."⁰³

Employer associations also argue that exploitation and wage theft is not as widespread as it is claimed. NERA inspection reports from 2008 and 2009, as already shown, contradict these arguments. If exploitation is not as widespread as is claimed by employer groups, then one might ask why there is so much opposition to the introduction of stronger enforcement policies as they would impact on very few employers.

THREE KEY POLICY CHANGES NEEDED

The creation of NERA and the increase in inspectors since 2007 has been a positive move but it is only a part of the solution. It must be understood that the NERA Inspectorate is only truly effective when workers are willing and able to come forward to make complaints. Exploitation can easily be covered up by an employer unless a worker is willing to blow the whistle. Therefore, only when the extreme risk and vulnerability for workers is acknowledged and addressed, will workers be more willing to come forward to the NERA Inspectorate. The following are three key policy changes that would begin to do this.

1. Provide true freedom of movement for employment permit holders so that they are not tied to one employer

The holder of an Employment Permit is only allowed to work for the employer and in the employment stated on the permit. The system of binding an employee to an employer and denying the basic freedom to change employer is fundamentally flawed. It is unjust, discriminatory and encourages exploitation. The system must change to allow workers who hold employment permits the right to change employer. This is a basic freedom that should be afforded to all workers. Given options, workers could move out of exploitative situations without the barrier of costly and lengthy work permit applications and the risk of becoming undocumented. Such a freedom would improve employment conditions for permit holders. It would also ensure that compliant employers are not undermined and can compete fairly. It would reduce the number of individuals becoming undocumented as a result of exploitation.

A better and fairer employment permit system would be one in which employment permits were granted to workers within a designated occupation or job category as opposed to one employer. This change would be significant but would not require a complete overhaul of the entire system. Freedom to change employers is not a new or radical idea, as it existed previously under the working visa/authorisation scheme. An initial application for an employment permit would follow current procedures and labour market needs tests where required. Once granted, permit holders would be given a permit for a designated occupation or job category as named on their permit. When a change of employer occurred, employees would simply be required to notify the DETE. Renewals of permits would operate the same way they do currently.

2. Pass the Employment Law Compliance Bill (ELCB), including amendments that allow NERA Inspectors to introduce 'on-the-spot' fines against employers who are found to have broken the law.

The ELCB was a measure agreed in the *Towards 2016* (2006) partnership agreement in the wake of the GAMA and Irish Ferry scandals. The ELCB, however, has yet to be passed into law. The ELCB gives NERA a statutory footing and also introduces a number of measures to strengthen workers' rights and protections, in addition to increasing penalties and fines against employers upon conviction.

The Bill, however, needs to be stronger in order to be effective. According to the Bill in its current form, NERA will be responsible for enforcing regulations and recovering monies owed to employees by serving Compliance Notices to employers. NERA currently operates this way, i.e. "pay your workers back or we'll take you to court." In effect this

means that employers just have to pay what is owed to employees. There is no added fine or deterrent for employers who are caught in violation.

It is essential that deterrents such as 'on-the-spot fines' are introduced in the ELCB. Potential deterrents might be that employers be required to pay back money owed with high interest penalties, or that an automatic fixed penalty be set for each breach. Employers who feel they are wronged and wish to challenge the compliance notice and fine can do so in court, as provided for in the ELCB.

3. Legislate so that all workers, regardless of their legal status, have the right to exercise their employment rights, and ensure there are no barriers to legal redress.

It is important that the employment rights of undocumented workers are upheld and that labour inspectors as well as legal redress mechanisms follow through on this. To date, however, NERA has indicated that they will not seek unpaid wages owed to undocumented workers. It is also unclear whether or not an undocumented worker is legally entitled to seek redress for violations of employment rights. Putting a bar on the recovery of unpaid wages by an undocumented worker would lessen the liability of exploitative employers, and make it more attractive to hire undocumented workers.

In the US, the Supreme Court held that in the National Labour Relations Act, the definition of employee plainly included undocumented workers. It concluded that, "[a]pplication of the NLRA [to illegal aliens] helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment. If an employer realises that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened."

It should also be noted that an EU Directive on the issue of the employment of undocumented migrant workers has been passed by the EU Council and the European Parliament.⁰⁴ Article 6 of the EU Directive provides that member States must ensure that employers are liable to pay outstanding wages owed to undocumented migrant workers and that these workers be ensured access to redress regarding their employment rights. Ireland, however, has opted out of this directive.

The Migrant Rights Centre Ireland is a national organisation working to promote justice, empowerment and equality for migrant workers and their families.

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04 European Parliament (EP) & European Council (EC) Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.