Unpaid Britain Project
Towards a typology of non-payment

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Introduction
This paper is intended to introduce participants in the Unpaid Britain typology workshop to a proposal for a typology of non-payment. Bearing in mind that the workshop is intended to be a practical session, and includes practitioners as well as academics, I have tried to keep the discussion of the academic and other literature on which I have relied as short as possible. It is not possible, of course to avoid it altogether, since without it, the proposals may make little sense.

I am preparing a more thorough discussion of the process which has led me to my preliminary proposal, which I intend to publish as a Working Paper, together with any amendments and refinements which may arise as a result of our discussions. This should appear on the project website (http://unpaidbritain.org), but will also be sent out to all participants who indicate that they would like to receive a copy.
Recognising that not all participants are familiar with the Unpaid Britain project, I begin with a summary of it, followed by a discussion of the existing data on non-payment. I should stress that this is not an in-depth analysis, since we still have work to do with the data, particularly that which we have gathered from the Employment Tribunal Registry. Such an analysis will be prepared for the final report which will appear next year (although again some preliminary results will appear on the website). I will then explain the purpose of the typology we will be discussing at the workshop.

To put this in context, this report will explain potentially relevant typologies or classifications produced by other writers and regulators, which have to some extent influenced my thinking in preparing the one we will be considering in the workshop. The factors considered as having potential relevance for constructing our typology will then be discussed, followed by as short a summary as possible of the thought process which brought me to my proposal.

After having set out the draft typology we will be testing in the workshop, I will explain how we intend to use it to design the rest of our research. References and further reading are then set out in a section at the end.

**Background**

The Unpaid Britain project has been set up to examine the extent to which wages are unpaid, and identify the mechanisms of and reasons for non-payment. Through doing this we also intend to propose means for reducing the frequency with which this occurs and to improve the likelihood of workers recovering the owed wages.

Our research will examine in detail the data sources which might help us to determine the frequency with which wages are unpaid, who might be affected, how much is involved, what form the non-payment takes, and why it has happened. We find that there is no source of data which can measure the incidence of non-payment, but there are, several which show us what may be the tip of the iceberg.

Workers who do not receive their wages or outstanding holiday pay because their employer has become insolvent are entitled to at least some of the outstanding sum from the National Insurance Fund, administered by the Insolvency Service. The National Minimum Wage (NMW) Inspectorate maintains figures for the amount of underpayment of NMW they identify. HMRC record cases where complaints have been made to them regarding statutory payments (such as Statutory Sick Pay or

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1 Although there are some exceptions to this, where there have been Creditors Voluntary Arrangements (CVAs). This will be discussed in a blog later in the year.
Statutory Maternity Pay) that have not been paid. **Citizens Advice** collates enquiries made to their Bureaux across the country and can identify cases where workers feel that they have been subjected to unauthorised deductions (another way of saying that they have not been paid all that they are owed). HM Courts and Tribunals Service publish a count of the number of cases accepted by **Employment Tribunals** (ETs), and count these by the type of complaint ("jurisdiction"), and a separate count of tribunal outcomes by jurisdiction\(^2\).

Before any case can proceed to an ET, the complaint must first be subject to **conciliation by ACAS**, who keep count of the number of cases handled.

The **self-employed** cannot use the ET system unless they can demonstrate that they are in fact employees or workers (for a temporary agency for example). If not, the only route for recovery of their unpaid wages is via the County Court system, where claims are classified as “money claims” and cannot be distinguished from other debts pursued in County Courts.

Some of these categories overlap – for example not all ACAS conciliation cases are resolved, and some will progress to ETs. Similarly, some ET cases determine liability for redundancy payments and unpaid wages in cases of insolvency, so may be counted twice by appearing in the Insolvency Service figures as well. Not all cases actually involve unpaid wages – the complaint may result from a misunderstanding, for example. We cannot, therefore simply add up the figures to arrive at a total for a given year.

A table setting out the various figures discussed above can be found as an Appendix to this paper. We can see that payments for wages and holidays in insolvency cases are running at 39,000 and 36,000 respectively, “Unauthorised deductions” from wages claims at tribunals fell from 28,500 in 2013-14 to 12,600 in 2014-15, and working time claims (largely regarding holiday pay) went from 49,000 down to 31,000 in 2014-15\(^3\). Any downward trend seen in these figures should be treated with caution, since they may reflect changes in practice such as ET fees and obligatory conciliation. Recent Citizens Advice and ACAS figures (not reported here) both show sharp increases in wage-related problems.

The government has argued that many cases reaching ET were in fact “vexatious”, justifying the introduction of a system of fees. This is not the place for a lengthy discussion of the merits of this practice, which seems to have dramatically reduced the number of cases going to an ET. That there is no sign of an improvement in the success rate for ET claims after the introduction of fees suggests that if there were many vexatious claims, they are no more deterred by fees than those with merit. Even where a case is arguable, it may not succeed in a tribunal – only about half of the unpaid wages and working time claims which proceed as far as a hearing being set succeed or win by default\(^4\).

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\(^2\) these two sets of data or not quite comparable, because each claim is counted only once even though it may include several types of complaint

\(^3\) The working time figures include a large number of multiple claims, submitted en masse.

\(^4\) Judgement is given where the respondent (usually the employer) has offered no defence.

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At this stage of our research, it is difficult to be certain just how many cases there may be, although we will be returning to this topic later in the year and making some estimates, which we hope are at least credible. We can be certain however, that unpaid wages is one of the most frequently encountered problems at work. A reasonable estimate of the frequency of the phenomenon will tell us only a limited amount about the circumstances which may give rise to non-payment, the motivations of the key players and the decision-making process involved in deciding to pursue money that may be owing. Research by ACAS (2013) and Anna Pollert (2005) suggests that only a minority of cases will reach the stage of any steps being taken to recover owed sums, as for one reason or another, the workers cease to pursue them. This confirms data gathered, for the EHRC regarding maternity discrimination at work (Adams et al 2016), and on employment issues in general for the Legal Services Commission (Pleasance et al 2011). Either the worker will do nothing or, having taken advice or begun proceedings, will give up. Gaining a better understanding of the processes in motion will require more detailed examination of a series of case studies of non-payment.

In consultation with our Project Advisory Group (PAG), we will be choosing such case studies later in the year (2016). In order for us to be sure that our choice reflects the variety of ways in which unpaid wages come about, we will suggest a series of categories (types) into which we think most non-payment falls. Case studies will then be selected which we consider to fall in each category. This requires that our typology is robust, and we are using the workshop on 9 May to try to ensure this.

**Typologies**

Workers who experience unpaid wages are heterogeneous. This is something that happens across the labour market, although it may be more likely for some than for others. Certain sectors, or sizes or types of employer might have a higher tendency than others to fail in their obligations regarding pay. The manner in which wages are unpaid, the frequency and sums involved can all vary, as can the factors which cause non-payment to take place. Furthermore, the extent to which means of recovering unpaid wages is effective varies, depending for example on workers’ ability to pay fees, and employers’ ability or willingness to pay. To make some sense of what would otherwise seem a chaotic picture, we have decided to group the forms of non-payment into distinct categories, or “types”.

The first step in this task is to see what others have written on the topic, and the second is to ask those who have some understanding of at least some of the types of unpaid wages. What follows is a summary of the most significant literature and thirteen “Key Informant” interviews conducted between December 2015 and February 2016. Some illustrative quotes from these interviews appear in boxes dotted around this report.

While there is only limited literature dealing specifically with unpaid wages in Britain, there is a range of material covering related matters, such as non-payment of the National Minimum Wage, “wage theft” in the USA, or labour abuses more generally. Interviews with employers, unions, advisers, regulators and professional associations provided us with much useful detail regarding current experience of non-payment in Britain. The interviews took up to an hour each, and included
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Discussion of the forms of non-payment, employer strategies and motivation, worker consent, enforcement and restitution.

A detailed discussion of both literature and interviews will appear in the forthcoming Working Paper. Below the three main approaches to categorisation emerging from these sources are summarised.

Classification by the mechanisms of non-payment.

The manner in which workers are underpaid, not surprisingly, features heavily in both literature and interviews.

Activist Kim Bobo describes a variety of such mechanisms affecting workers in the USA. Some (failing to pay enhanced overtime rates as required by the federal Fair Labor Standards Act, for example) are specific to the US context, but others - employers not paying for all hours worked, stealing tips, or not understanding their legal obligations, for example - could just as easily apply in UK (Bobo 2008).

A survey of low paid workers conducted by Anna Pollert and others in 2004 (the Unrepresented Worker Survey) found that 36% of work-related problems experienced in the preceding 3 years concerned pay (Pollert 2007). She put the reports regarding pay into various categories, such as “pay calculation unclear” unpaid holidays or sickness, or “pay incorrect” (the most frequent).

Non-compliance with the National Minimum Wage is discussed in the Low Pay Commission’s annual reports, including the latest (LPC 2016). The government are reported to consider that the majority of non-compliance is “made up of inadvertent and/or accidental mistakes” (para 8.10), somewhat overegging the accident pudding, one might think, and quite possibly based on the 2011 BIS study cited on p. 7 below. Technical issues which might lead to non-compliance included not recording hours for those on apprentice rates, deductions associated with provision of childcare (in Early Years settings), and paying for time between assignments (for care workers). Other LPC concerns of particular note were the correct recording of hours worked in general, and the classification of employment status, in relation to so-called self-employment, and training, internship and volunteering where these terms were “applied to unpaid activities that looked like work and to which the NMW should be applied” (para 8.107).

Interviewees were most likely to mention “misunderstandings” relating to pay. These included workers not understanding some technical features of their employment, such as emergency taxes or the consequences of salary sacrifice for other payments, like maternity pay. They also included employers’ lack of clarity on other technical matters, such as inclusion of bonuses in holiday pay. Another key area was that of self-employment, both as a status particularly vulnerable to non-payment altogether, and (in its “bogus” form) as a means of denying workers entitlement to the NMW and holidays. A notable feature was the practice of employment through intermediary “umbrella companies”, which might charge workers for paying their wages.
Three other mechanisms were frequently discussed in interviews: failure to pay for all hours worked, failure to pay all or some of the legal holiday pay (particularly when workers change jobs) and workers undergoing training, trial shifts and induction without being paid.

**Causative factors**
The question as to why wages are unpaid is obviously a key one, with particular implications for developing strategies to reduce non-payment.

Payment of wages through “truck” (i.e. payment with goods, or credit in the employer’s shop, rather than cash) up to the nineteenth century was examined in a historical study (Hilton 1960). This practice often resulted in workers receiving less than was specified in law or agreements, and Hilton suggests several underlying reasons for this such as “simple criminality” on the part of employers, and labour hoarding (preventing workers from moving to other jobs, because of debts owed to the company shop). His favoured explanation was employers circumventing statutory pay rates supposedly set above the level of the market – an argument advanced at the time by economist (and MP) David Ricardo.

Tax evasion by employers might display features comparable to non-payment of wages, so HMRC’s typology of SMEs\(^5\) preparedness to pay tax was considered (HMRC 2010). Six dimensions were used to construct types - “awareness” (of obligations); “acceptability of evasion”; “ability” (capacity to assess and make required payments); “perception of risk” (of detection of non-compliance); “HMRC payments prioritised” (above those to other creditors) and “ongoing cash-flow difficulties” (self-explanatory). The seven types of company identified included the “willing and able” (and therefore compliant), “unaware”, and potential and actual “rule breakers”. These types were used in a Department of Business Innovation and Skills (BIS) study of NMW non-compliance (Patel 2011).

However since, “intentionally non-compliant employers are unlikely to take part in the research”, the businesses studied fell solely into “unaware” and “willing, but needed help” groups. Patel goes on to discuss in some detail a number of “inadvertent” underpayments. Failing to keeping a count of hours of “salaried” staff and those paid by results was one contributory factor, while others were related to handling deductions (for meals or uniforms, for example) and not recording birthdays (to ensure that appropriate age-related rates were paid).

A further informative categorisation is that associated with the legal notion of “Unjust Enrichment”, a concept developed to deal with legal cases where there was no contract, but where one party had unjustly obtained (or retained) benefit at the expense of another (Birks 2005). Factors considered to determine if a gain is “unjust” include whether it resulted from a mistake, failure of the other side of a bargain to be met, duress or undue influence (use of pressure, threats or imbalance of power to secure action from the weaker party), or unlawful gain of benefit by a public authority (probably of less interest in our context.

Bobo proposes many causes, including competition intensified by globalisation, labour market trends (such as insecure employment, unemployment, undocumented migration), and the “sins” of greed, sexism and racism. However, other US researchers suggest that the identity of employer is

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\(^5\) Small and Medium-sized Enterprises: businesses with up to 250 employees and an annual turnover of between £15,000 and £42 million.
more important in predicting rights abuse than the race or gender of the workers (Bernhardt et al 2013).

Unpaid wages alone do not constitute forced labour, but forced labour will usually including an element of unpaid or underpaid wages. Allain et al (2013) conducted a detailed study of forced labour in three sectors (construction, food and cannabis cultivation) for the Joseph Rowntree Foundation. They identified two types of approach to financial benefit: minimising costs (particularly labour costs) and revenue generation (such as charging or making deductions for “ancillary services” like accommodation or travel, or controlling workers’ in-work state benefits), and two types of employer: producers engaged in the manufacture of a product or delivery of a service, and intermediaries such as temporary labour agencies and payroll companies. Combining these two categories gave them four business models of forced labour, but these seem more specific to the forced labour practices they identify than to unpaid wages in general.

Other aspects which arose in the interviews (some are discussed later in this paper) included the practice of speculative deductions, where payment was only made (say for holidays) where workers specifically requested it. Several suspected that some employers used company insolvency to evade obligations such as those for pay, but continue to trade under other names (“phoenixing”). Genuine errors were thought by some to account for some complaints, but others interviewees reported the practice of making penalty deductions, for example for late arrival.

Motivation or consent of the worker
Workers, for a variety of reasons, may accept or agree below minimum wage pay and long, indeterminate hours, according to Ram et al (2007) in their examination of NMW non-compliance in SMEs (with a particular emphasis on BME-owned businesses). The researchers describe the arrangements they found between workers and their employers as “a complex blend of co-option and coercion, voluntarism and arm twisting” (p. 131). This is likely to lead to difficulties in identifying breaches of such contracts. Whether workers really have the freedom not to accept such terms is open to question, for example because of family obligations or immigration restrictions on working⁶ (see discussion of consent below). Nonetheless, it may not be accurate to describe underpayment in such circumstances as unpaid wages, since both sides to the contract may consider the terms to have been complied with. Interviews also highlighted collusion (where workers might agree underpayment in order not to impact on benefits), fear of making complaints (where workers tolerated evident partial non-payment for fear of losing all work) and discouragement where claims were discontinued, even though they were valid.

⁶ To be fair, the authors recognise this and point out “low paid informal workers are subject to the ultimate sanction of lack of any viable alternative” (p. 332)
Factors considered in constructing a typology

There are clearly a number of ways of categorising non-payment, some simply descriptive of non-payment in practice, some relating to the characteristics of workers or employers, and others to the underlying causes or motivations. What is also clear is that there is not (as yet) any consensus over the best approach.

In order to visualise the way in which the various factors might interact, the types of factors were listed under main headings:

A. Form or means of non-payment (e.g. unpaid hours, unpaid holiday pay, unauthorised deductions, failure to pay statutory pay)
B. Personal characteristics of worker (age, gender, ethnicity, immigration status for example)
C. Type of work contract (agency, self-employed, part-time, zero-hours, undeclared, etc.)
D. Characteristics of employer (size, sector, registered?)
E. Timing and frequency of non-payment (late, one-off, occasional, regular/frequent),
F. significance of disputed sums, (minor sums, intermediate, major/all pay)
G. Causative factors (e.g. insolvency, employer motivation, error)
H. Worker consent & collusion
I. Outcome (no recovery, partial or full recovery)

These were then cross referenced against each other in a series of grids to understand how they might, in combination provide useful analytical tools.

It quickly became clear that some categories were not truly independent of one another, for example, frequency of non-payment and type of contract. The genuinely self-employed might experience unpaid wages, but they would not be entitled to holiday pay. Challenges regarding non-payment of holiday pay reportedly mostly arise at the end of the employment relationship, and are therefore only one-off. Statutory payments such as SSP, maternity pay etc. are by definition extraordinary, and therefore also likely to be one-off (for a specific worker, anyway). Furthermore, for temporary workers undertaking multiple assignments, failure to pay holiday pay might arise at the end of the assignment (and thus be one-off), but in fact also occur repeatedly (and thus be regular).

In another example, when it comes to the issue of outcomes, the argument that “Restitution, like compensation, is a category of response, not a category of causative event” (Birks 2005 p. 17) seems persuasive. The efficacy of systems for rectifying the wrong is crucial and will be one of the factors we examine in the case studies, but the success or otherwise of recovery will come after the event, so cannot usefully form part of the typology at this stage.

It was also helpful to examine both the research of US scholars (for example Bernhardt et al) and the comments of our interviewees in deciding if the demographics of the workers were likely to determine the type of non-payment. While it may be that certain groups of workers (new entrants to the British labour market, for example) are over-represented amongst those whose wages are unpaid, this is likely to be more closely related to the identity of their employer.
These are only a few examples from an exhaustive process of cross-referencing, through which it emerged that using descriptive factors was likely to generate a large number of categories but offer little in the way of diagnosis. The factors which proved to be the more meaningful in this exercise were those that reflected the agency of the principal actors, the parties to the work relationship – the employer and the worker. 7

Worker consent
Taking into account points made by Ram et al, by Birks in his discussion of unjust enrichment, and by some of our interviewees, the dimension of consent on the part of the worker seems to be a crucial factor. But the issue of whether that consent is informed is vital. As O’Connell-Davidson has pointed out “The meaning of “consent” is not fixed. It is imagined in relation to wider ideas about free will, volition and responsibility...” (O’Connell Davidson 2015).

One extreme of the consent continuum is a fully-informed worker freely agreeing an employment contract. Since for most workers the alternative to participation in the labour market is not survival by some other means but destitution, this notion is somewhat idealised. At the other end is the range of practices now labelled as “modern slavery”, such as debt bondage, indenture, forced labour where the worker is compelled by force or threat of force to accept the conditions of work. But in between lie several other statuses. One is “uninformed consent”, where a worker may agree to terms below their legal entitlement as a consequence of them being unaware of that entitlement. An example would be part-time workers accepting that they do not receive holiday pay, or workers accepting their employers’ assertion that they are self-employed and therefore not entitled to the NMW. Another status might be “coerced consent” where a worker accepts terms they know to be below their entitlement because, for example, they face benefits sanctions for refusing an offer of employment, or they fear losing a much-needed job altogether if they complain. Then there is “collusion”, where the worker accepts sub-legal terms because they have concluded an unlawful contract in order to avoid PAYE, sustain levels of in-work benefits or evade immigration-related curbs on the right to work. Another form of collusion is the voluntary deferral of wages to help a business start up, or get over a tough patch.

There may be other interim conditions, but the key for our work is that where consent has been given to the non-payment of part of the wage, complaint on the part of the worker is unlikely, although regulators such as the NMW or the GLA could require restitution if the non-payment was detected by them. Similarly, if consent was uninformed, it is only in the event that the worker realises their entitlement that the possibility of complaint arises.

Employer intent
There are clearly circumstances in which wages are not paid because of matters beyond the employer’s control. Catastrophic failure of a bank’s computer systems could result in wages being unpaid. The failure of a key customer could leave a business so overstretched financially as to lead to insolvency with wages outstanding.

There are also circumstances where wages are unpaid or underpaid as a result of error: the wrong figure entered in a wage run, or a bank account number being incorrectly entered, for example.

7 Given the significance of questionable “self-employment”, and differing legal rights for employees and workers these are used here as generic categories rather than precise legal categories.
Other errors might include the previously mentioned failure to record birthdays and therefore not pay correct age-related NMW. There could also be misunderstandings, such as not correctly reflecting bonus pay in holiday pay calculations or a worker not being clear about PAYE and pension deductions. These may be within the employer’s control, but are not the result of any malicious intent.

However, repeated errors or delays in payment say, related to IT or admin systems for clearing payments, indicate either deliberate policy, or negligence. From the point of view of the worker who is waiting for wages, the two are all but indistinguishable, but they might be considered differently from an enforcement point of view. From a health and safety point of view, however, the consequences of negligence may be fatal, and as Tombs & Whyte\(^8\) comment, “accident” is a term loaded with ideology. It implies that the event could have been neither foreseen nor avoided – which is questionable for both health and safety issues and non-payment of wages.

While we do not know the extent of deliberate non-payment, it certainly occurs. Papers produced regarding NMW non-compliance (Patel 2011, BIS 2014) and reports from interviewees suggest that deliberate non-payment may itself divide into two categories: one which is sustainable in the long term, the other less so, as it relies on total non-payment.

The first, sustainable, model would be one that aims to underpay without either displacing the workforce or attracting unwanted regulatory attention. Failing to pay holiday pay on workers’ departure or regularly “losing” a couple of hours per week, but resolving these deficiencies in the event of formal complaint, would fit this category – which was variously described in interviews as “don’t ask don’t get” or “a numbers game”, but might also be described as offering “plausible deniability”.

Employers disappearing while owing wages (known as “knocking” in the construction industry), or dissolving a company which owes wages in order to start up afresh with a new company (“phoenixing”) would fit into the second category.

There may be a further dimension which is that of disputed interpretation of contract, agreement, law or indeed fact. This could include for example the payment of travelling time for care workers, which (at least up until there was a judgement on it) could be subject to interpretation, or be a dispute regarding the number of hours actually worked. How these issues might be categorised is a point for discussion at the workshop.

**Proposed typology**

Taking into account the various discussions and caveats above, we find that there are four key dimensions to unpaid wages:

Consent; Intent; Means & Magnitude

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Means (the way in which the wage has not been paid) and magnitude (the size of the sum involved relative to normal earnings) are clearly important. They might determine whether restitution is pursued by the worker, the route by which this occurs, whether there is a role for regulators, and the impact of the non-payment. But they are descriptive, and determined by the circumstances and intent of the employer, and the degree to which workers’ consent may have been given.

There are clearly circumstances where non-payment occurs without there having been a decision to that effect – when imposed by circumstances (absence of funds, or catastrophic failure of payment systems, for example) or as a result of error (data recording mistake), or misinterpretation (of minimum wage regulations for example).

This is distinct from circumstances where there has either been a decision not to pay, or one (even by default) not to rectify systemic problems which result in non-payment. Interviews suggested strongly that plausible deniability was common, but difficult to detect in official and administrative statistics, because it is feasible to rectify any loss in individual cases without disrupting the model or incurring penalties. This differs from the construction industry “knocking”, deliberate insolvency associated with phoenix companies, in that those are detectable, and (in theory at least) subject to penalties and thus less sustainable as a business model. This could also apply to extreme examples such as forced labour or criminal extortion. These are evident non-payments.

Consent is not a relevant consideration when non-payment is imposed by circumstances, or where there is error or misunderstanding, but is of significance for purposeful non-payment. Rather than using the range of categories of consent discussed above, the proposed typology only separates informed consent, which might include some unlawful, but voluntary contracts (i.e. those that are collusive) and agreed delays to payment, from without consent, which would include all other categories (such as not receiving entitlements of which the worker was unaware, as well as the more blatant unauthorised deductions of which they were fully aware).

Finally we come to a graphical proposal for the typology. It has six categories, as below. This is few enough to allow a range of case studies to be selected, but still retain some descriptive power. This is what we will be considering on 9th May.
Testing & using the typology

The workshop will be a first chance to test out the above proposal. Participants will be asked to consider some practical examples of non-payment, as well as examples from their own experience, and decide if they could be adequately categorised with our typology. Participants might suggest other types or even a totally new structure.

A revised (or if necessary, new) typology will be produced in the light of those discussions, and in consultation with the Project Advisory Group, we will identify potential case studies which seem to fit each of the types. Most of these will be located in London, although some will be national in their coverage. It is possible, likely even, that during the case study phase of the research we discover that our types are not quite right. The model may therefore be revised again in the light of experience, and we may select further case studies which illustrate the revised (or new) types.

The purpose of the case studies will be to understand better the processes which lead to wages not being paid, the consequences of non-payment for employers and workers, the decisions made by the various actors, particularly regarding restitution, and the effectiveness of systems for recovery of the unpaid sums. We will interview workers, employers, and advisors or representatives involved in the cases, as well as examine any documentary evidence. For this reason, they are likely for the most part to be cases which have come to a conclusion.

Case studies will be conducted during the autumn and winter of 2016, and the early part of 2017. Working papers will appear on the project blog (http://unpaidbritain.org) and a final report will be presented at a conference in summer 2017.
References


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9 Mostly SSP and SMP cases
10 “simple” cases such as unpaid wages and holiday pay. This is the first full year for obligatory conciliation before ET claims.
11 Mostly for holiday pay