# Could the earnings threshold for benefits be in breach of EU law?

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**Immigration analysis: Is the UK discriminating against EEA migrants over benefits? Desmond Rutledge, a barrister at Garden Court Chambers, analyses the government's new minimum earnings threshold.**

## Original news

Earnings threshold for benefits could be in breach of EU law, LNB News 20/02/2014 28

*Financial Times, 20 February 2014: EU officials have warned Britain could be acting in breach of EU law in setting a minimum earnings cap before EU workers can qualify for in and out of work benefits.*

## What is the logic behind the creation of the threshold for determining whether a member of another member state is a 'worker'?

The minimum earnings threshold has been introduced by the Department for Work and Pensions (DWP) as a way of making decisions on whether an EEA national is a worker or self-employed person for the purposes of EU law. It does this by creating a two-tier process.

Under Tier 1 an EEA national who has worked as an employee or in a self-employed capacity will be automatically considered as a worker or self-employed person for the purposes of EU law if their average gross earnings were more than £646 per calendar month (£149 a week) in 2013/14 and the gross earnings were at, or above that level for a continuous period of three months immediately before the date from which benefit has been claimed.

Under Tier 2 in cases where an EEA national's average gross earnings fall below the minimum earnings threshold and/or their earnings have not been at that level for a continuous period of three months then the decision-maker must examine each case to determine whether the EEA national's activity was genuine and effective, and not marginal and ancillary.

The minimum earnings threshold is to be linked to the level of the Class 1 National Insurance Contributions 'Primary Threshold'. This is £149 a week (£7,755 a year) for 2013/14. £150 is equivalent to working 24 hours a week at the National Minimum Wage.

The background story to the introduction of the earnings threshold is the fact that EEA nationals in receipt of income related jobseeker's allowance (JSA(IB)) have a right to reside for an initial period of six months but this can be extended indefinitely if the claimant can show that they are genuinely seeking work and have a reasonable chance of being engaged (see *R v Immigration Appeal Tribunal, ex p Antonissen*: C-292/89 [1991] ECR I-745, [1991] 2 CMLR 373 and Directive 2004/38/EC, art 7(3)(b), (c)). In January this year the government announced a change of policy--namely that it was going to enforce the six months rule for EEA jobseekers. From now on, EEA nationals will only be allowed to remain on JSA(IB) for six months unless

they had compelling evidence and demonstrate that they have a genuine chance of finding work such as a job offer with a starting date.

## Have other EU jurisdictions imposed similar thresholds?

Not as far as I am aware. Unlike the UK, there does not appear to be any need for an earnings threshold to control access to benefits as an individual can only claim unemployment benefit in other EU counties if they have worked for a specific amount of time and thus contributed to the system or made a certain number of social security payments. This ranges from four months in France to one year in many countries, including Austria, Denmark, Germany, Italy, and Spain. For further details see 'Your rights: country by country' published by the European Commission.

## What are the legal concerns surrounding the threshold?

The primary legal concern over the threshold is that it purports to interpret the EU concept of a worker by reference to the national concept of the level of earnings needed to make Class 1 National Insurance Contributions. This would be in clear breach of EU law which has held that it is impermissible to define the EU concept of work by reference to national laws: see *Hoekstra v The Netherlands*: Case 75/63 [1964] ECR 177.

## Will this affect employers in any way?

The short answer is no. The earnings threshold is solely concerned with EEA nationals' access to welfare benefits. However, EEA nationals may be reluctant to accept jobs that fall below the DWP threshold in order to avoid becoming subject to the intensive review under Tier 2 of the new test.

## Does the UK government's position go further than creating a rebuttal presumption that persons earning less than that amount are not workers?

In my view, it does. Having an earnings threshold means the DWP can 'rubber stamp' cases that meet the threshold set by national law thereby relegating the others to a sub-category of doubtful or questionable cases. The following quote from the DWP Press release of 21 February 2014 appears to give a green light to decision-makers to apply a restrictive approach to those cases under the Tier 2 test:

'Under EU case law, work must be "genuine and effective" and not on so small a scale as to be "marginal and ancillary"--however there is not clear definition for what this means. Today's measure will bring greater clarity and robustness to decision-making in this area.'

## Could this be subject to legal challenge?

If the two-tier test for determining 'worker' status for EEA nationals means that it is inherently more difficult for EEA nationals to acquire the status of a 'worker', then it could be open to challenge on the following grounds:

- the EU concept of worker must not take it flavour from a national concept (*Hoekstra*)
- the effectiveness of EU law would be impaired if worker status is reserved solely for persons engaged in full-time work (*Hoekstra*)
- setting a threshold at the equivalent to 24 hours work a week is indirectly discriminatory against women as they are more likely than men to be in part-time work (*Levin v Secretary of State for Justice*: C-53/81 [1982] ECR 1035, [1982] 2 CMLR 454).
- the absence of any interim relief pending any appeal to a First-tier Tribunal (Social Entitlement Chamber) against a DWP decision on whether the EEA claimant is a 'worker' bearing in mind that obtaining a hearing date for a social security tribunal can take in excess of six months (*R v Transport Secretary ex parte Factortame Ltd (No 2)* [1991] 1 AC 603, [1991] 1 All ER 70)

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*Interviewed by Kate Beaumont.*

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