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RECENT CASES

CASE NOTE

Travel Time and the National Minimum Wage: *Revenue and Customs Commissioners v Taylors Services Ltd (dissolved)*

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1. INTRODUCTION

In *Taylors Services*, HMRC was unsuccessful in an attempt to persuade the Court of Appeal that time spent travelling to and from a place of work could, in some circumstances, be treated as working time for the purposes of entitlement to the National Minimum Wage (NMW).[1] In simple terms, the law draws a distinction between time spent commuting to work—for which there is no NMW entitlement—and time spent travelling during the working day, for example, between different work locations—for which there is a NMW entitlement.[2] While this is, in itself, a reasonable policy position for the law to adopt, it generates an anomaly. If the employer requires workers to commute to its premises and then provides transport to a place of work, there is likely to be an entitlement to the NMW for the time spent travelling from the employer's premises to the workplace, provided other conditions are met. But if—as in *Taylors Services*—the employer's transport picks the workers up from home and takes them straight to the workplace, the time spent travelling can be construed as commuting time not covered by the NMW. HMRC proposed a creative interpretation of the National Minimum Wage Regulations 2015 ('the Regulations') which would have addressed this anomaly in some circumstances, including those in *Taylors Services*. While this was

[1] *Revenue and Customs Commissioners v Taylors Services Ltd* (dissolved) [2025] EWCA Civ 956.

[2] National Minimum Wage Regulations 2015 (SI 2015/621), reg 34, discussed further below.

accepted at first instance by the ET, it was firmly rejected by the EAT and the Court of Appeal.

In this note, I offer an overview of the relevant provisions of the Regulations, before examining in detail the decisions of the ET, EAT and Court of Appeal. I then analyse the policy of the NMW on travel time, before considering whether there were any legitimate interpretations open to the courts to offer greater protection to the workers in *Taylors Services* by ensuring that they were entitled to the NMW for the time they spent travelling. Having argued that the case exposes a problem with the Regulations themselves, rather than with the courts' interpretation, I consider some options for amendment.

2. THE REGULATIONS

The Regulations classify work as salaried work, time work, output work or unmeasured work for the purposes of laying down a methodology for calculating the worker's entitlement to the NMW.[3] *Taylors Services* involved 'time work' under regulation 30. This applies where the worker is contractually entitled to be paid 'by reference to the time worked' during the pay reference period. Importantly, under regulation 31, 'time work' includes time actually worked by the worker, and time 'treated … as hours of time work' under the Regulations. The provisions describing situations in which time should be 'treated … as hours of time work' are often referred to as the 'deeming' provisions.[4]

Regulation 32(1) makes clear that a worker does not need to be continuously engaged in work tasks in order to be entitled to the NMW. Time spent at the employer's disposal is also included:

> Time work includes hours when a worker is available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home.

This is important because it precludes arguments that workers who are in the workplace are not entitled to be paid the NMW when there are no work tasks to perform: for example, a call centre worker who is not taking a call, or a supermarket checkout worker who does not have anyone at their checkout. Of course, one of the defining features of gig economy work is that the employer seeks to avoid paying workers for time in between 'gigs' or work

[3] Ibid, reg 17.
[4] Above n.1, [74].

tasks.[5] The implications of this for the NMW have not been much litigated for the obvious reason that many such workers face an uphill struggle to prove that they have 'worker' status for the purposes of a NMW claim. However, in the *Uber* case, the Supreme Court, having found that the drivers were workers on a purposive construction of the legislation, upheld the tribunal's original finding that they were 'working' for NMW purposes whenever they were logged on and waiting in the relevant area for customers, not just when they had a customer in their vehicle.[6] This decision reflects the clear inclusion of 'available' time in regulation 32(1). The employer in *Uber* derived benefit from having workers at its disposal because a key feature of its business model was to have cars available to respond promptly to requests from customers for rides.

Although regulation 32(1) is expansive, regulation 32(2) excludes from NMW entitlement the scenario in which the worker is required to be available at the workplace but is permitted to sleep when they are not required to engage in work tasks:

> In paragraph (1), hours when a worker is 'available' only includes hours when the worker is awake for the purposes of working, even if a worker by arrangement sleeps at or near a place of work and the employer provides suitable facilities for sleeping.

This was the provision at issue in *Royal Mencap Society v Tomlinson-Blake* ('*Mencap*').[7] The key question was whether workers who were required to stay overnight at their employer's premises in case of an emergency, but were permitted to sleep when they were not required, were entitled to the NMW only for the time spent actively engaged in work tasks or for the whole shift, including the time spent asleep. In a number of cases prior to *Mencap*, the EAT had held that 'sleep-in' workers were entitled to the NMW for the whole shift, applying regulation 32(1), because they were 'available' to the employer throughout and could be considered to be working simply by being present.[8]

[5] For discussion, see A.C.L. Davies, 'Wages and Working Time in the Gig Economy' (2020) 31 *King's Law Journal* 250.

[6] *Uber BV v Aslam* [2021] UKSC 5, [2021] ICR 657, [121]–[138].

[7] *Royal Mencap Society v Tomlinson-Blake* [2021] UKSC 8, [2021] ICR 758. For critique, see L. J. B. Hayes, 'Discrimination by Legal Design? UK Supreme Court in *Mencap v Tomlinson-Blake* Finds Care Workers are not Protected by Minimum Wage Law for Sleep-in Shifts' (2022) 51 *ILJ* 696. On the Court of Appeal's decision in the case, see A. C. L. Davies, ''Sleep-in' Shifts and the National Minimum Wage: *Royal Mencap Society v Tomlinson-Blake, Shannon v Rampersad*' (2018) 47 *ILJ* 553.

[8] The Supreme Court overruled *Burrow Down Support Services Ltd v Rossiter* [2008] ICR 1172 in the EAT and *Scottbridge Construction Ltd v Wright* [2003] IRLR 21 in the Court of Session. Other examples include *Smith v Oxfordshire Learning Disability NHS Trust* [2009] ICR

It seems likely that some judges thought that workers were being exploited by being required to be on the employer's premises for long hours with no NMW entitlement, particularly where the employer was obliged to have a person present for regulatory reasons and thus derived a clear benefit from the worker's availability. However, in *Mencap*, the Supreme Court rejected this approach, holding that it was not appropriate to interpret the Regulations as they related to 'sleep-in' shifts without considering the whole of regulation 32.[9] This meant that the specific exclusion of time spent asleep in regulation 32(2) could not be disregarded by stating that the worker was working within regulation 32(1) and that therefore no other part of the legislation needed to be considered. As discussed in more detail below, although *Taylors Services* was concerned with travel time rather than time spent asleep, the *Mencap* decision was treated by the Court of Appeal as crucial in determining the correct interpretation of the travel time provisions.[10]

Travel time (as broadly defined in regulation 20) may be time 'treated … as hours of time work' in the circumstances set out in regulation 34:

> (1) The hours when a worker is travelling for the purposes of time work, where the worker would otherwise be working, are treated as hours of time work unless the travelling is between –
> (a) the worker's home, or a place where the worker is temporarily residing otherwise than for the purposes of working, and
> (b) a place of work or a place where an assignment is carried out.
>
> (2) In paragraph (1), hours treated as hours when the worker would 'otherwise be working' include –
> (a) hours when the worker is travelling for the purposes of carrying out assignments to be carried out at different places between which the worker is obliged to travel, and which are not places occupied by the employer;
> (b) hours when the worker is travelling where it is uncertain whether the worker would otherwise be working because the worker's hours of work vary either as to their length or in respect of the time at which they are performed.

The starting-point in regulation 34(1) is that travel time is working time 'where the worker would otherwise be working'. In most cases, this test will produce the answer that travel time during the working day is working time.

1395; *Esparon v Slavikovska* [2014] ICR 1037; *Whittlestone v BJP Support Ltd* [2014] ICR 275; *Governing Body of Binfield Church of England Primary School v Roll* [2016] IRLR 670; *Abbeyfield Wessex Society Ltd v Edwards* [2017] UKEAT 0256/16.

[9] Above n.7, [43].

[10] Above n.1, [67].

This general test is subject to one exception and two express inclusions. The exception is for travel between the worker's home (or temporary home) and the employer's premises or another place at which work is to be carried out. Arguably, this express exclusion is unnecessary because the worker would not 'otherwise be working' on their commute. However, one possible reason for including it, according to Underhill LJ in *Taylors Services*, is that it serves to exclude commuting time from NMW entitlement in the situation in which a worker who normally works at home is called in to the office to attend a meeting at the last minute, and therefore travels from home to work during what would otherwise be their normal working day.[11]

The two express inclusions in regulation 34 are for what we might loosely term travel time between assignments and travel time for workers with uncertain working hours. Regulation 34(2)(a) deals with the situation of workers who travel between customers' premises, such as a carer driving between clients' homes, or a service engineer going from factory to factory. The exclusion of 'places occupied by the employer' might suggest that time spent travelling from the employer's premises to the customer might not be covered, but the better view is that this travel—which might occur at the beginning and end of the working day, or during the day if the worker needs to collect supplies—is time when the worker would 'otherwise be working' and is thus included by virtue of the general rule. The worker's NMW entitlement should not vary according to how far the first client is from the depot, for example. An attempt by an employer to argue (under an older version of the legislation with different wording) that each of a carer's assignments was a separate 'shift', so that she was not entitled to the NMW for travel time between them, was rejected by the EAT.[12] Such time would only be excluded from NMW entitlement where the gap between assignments was such that the worker could, and in practice did, return home.[13] The second express inclusion, in regulation 34(2)(b), is intended to preclude any attempt by an employer to argue that a worker should not be treated as 'otherwise working' during travel time because of variability in that worker's hours of work. For example, it closes off an argument that a worker with a zero-hours arrangement could

[11] Above n.1, [97], citing *Harvey on Industrial Relations and Employment Law* (London: Butterworths 1972-), para B218.03.

[12] *Whittlestone v BJP Home Support Ltd*, above n.8, [61]–[62] (note that the treatment of sleep-in shifts in this case can no longer be regarded as good law after *Mencap*, above n.7.

[13] The LPC's annual reports indicate that although the law in this area is clear, there is widespread non-compliance with the requirement to pay NMW for travel time in the social care sector. See e.g. Low Pay Commission, *National Minimum Wage Report 2024*, paras 8.53, 9.3-9.5.

never be said to be 'otherwise working' because there is no regular or predictable pattern to their hours of work.

In general terms, then, there is NMW entitlement for time spent working, which includes time spent at the workplace and available for work, as well as time spent actively engaged in work tasks. Where the worker is at the workplace and available for work but permitted to sleep, however, there is no NMW entitlement. Time spent travelling attracts NMW entitlement where it is time that would otherwise be spent working, such as time spent travelling during the working day from the employer's premises to a client, or between the premises of different customers. But time spent travelling from home to work does not attract NMW entitlement for two reasons: because it is not normally time in which the worker would otherwise be working, and because of the specific exclusion in regulation 34(1).

3. FACTS AND ET DECISION

Taylors Services were engaged in the business of providing workers, referred to in the case as 'flock technicians' but more commonly known as 'poultry technicians', to poultry farms.[14] They hired workers on zero-hours contracts and supplied them to farms for tasks such as catching, loading and unloading chickens, administering injections and grading. The firm provided a minibus to transport the workers to different farms. It was accepted that the workers' travel time could be considerable:

> … sometimes those journeys could be very long, up to about four hours each way, so that the workers could be travelling for up to eight hours on top of a "normal" working day, or that they may sometimes have been collected from their homes in the middle of the night in order to reach the assignment sites in time for a morning's work.[15]

Importantly, although the firm had premises near the workers' homes, the workers were not normally expected to present themselves at the employer's premises in order to get on the minibus to travel to that day's place of work. Instead, the minibus collected them from their homes.

[14] *Taylors Services Ltd and Mr I Taylor and Mr E Taylor T/a Taylors Poultry Services v Commissioners for HM Revenue and Customs*, ET decision 2604226/2020 (8 September 2021). The facts and evidence are at [19]–[116].

[15] *Taylors Service Ltd v Revenue and Customs Commissioners* [2024] EAT 102, [2024] ICR 1171, [29].

HMRC took the view that the workers' travel time should be treated as 'time work' and that the workers were therefore entitled to the NMW for the time spent travelling. The employer was issued with notices of underpayment and penalties.[16] The employer appealed to the ET.

In the ET, HMRC argued that regulation 34 should not be treated as excluding NMW entitlement in the specific circumstances of *Taylors Services*. It made two points: that the travel was controlled by the employer and was more 'arduous' than ordinary commuting, and that the 'true agreement' between the parties was that the workers would travel to the employer's premises to board the minibus, but that this requirement was dispensed with for reasons of convenience. It also pointed out the anomaly that would arise if some workers got on the minibus at the employer's premises (for example, because they lived close by) because they would be entitled to the NMW when the workers picked up from home would not.

The ET upheld the notices of underpayment by adopting a strategy familiar from the pre-*Mencap* cases discussed above:[17] to treat the disputed time as 'time work' in its own right under regulation 30, so that there was no need to consider the provision in regulation 34 on what should or should not be 'treated as' time work.[18] The judge accepted that the workers were not performing their duties as 'flock technicians' while they were travelling on the minibus. But the judge was willing to regard the travel time as 'part and parcel' of the workers' roles. They could not have performed their jobs without undertaking lengthy journeys to different farms, and the whole process was heavily controlled by the employer:

> The length of the journeys and the type of client is particularly important in this case because it meant that the claimants had to control the arrangements for travel and dictate the mode of transport, collection times and route. They had to exert an unusual amount of control over the method and arrangements for travel.[19]

The employer paid the workers an allowance in respect of the travel time, albeit not at NMW rates. There was some evidence to the effect that higher sums were paid when the workers undertook particularly long journeys. The judge was at pains to emphasise that the facts of the case were unusual and that the travel could not be regarded as 'normal' commuting.

[16] The arrears totalled £62,388.26 and the penalties £58,845.44: above n.1, [38].
[17] Above n.8.
[18] Above n.14, [247]–[252].
[19] Ibid [248].

The ET noted that, had it not found the travel time to be time work under regulation 30, it would have had to consider regulation 34.[20] On this basis, it would have held that the workers were *not* entitled to the NMW for the time spent travelling because of the clear exclusion of time spent commuting from home to work in regulation 34(1). Thus, the validity of the notices of underpayment depended entirely on the ET's construction of regulation 30.

The ET also rejected some alternative, more creative, arguments presented by HMRC.[21] One was a 'true agreement' argument, drawing on ideas from *Autoclenz* and *Uber*.[22] The suggestion was that the 'reality' of the parties' arrangement was that the workers were or could be required to go to the employer's premises to get the bus. The judge should have focused on this reality (which offered better NMW protection) and should have disregarded the fact that the workers were usually picked up from home. Although this argument referenced *Autoclenz* and *Uber*, it did not involve taking the same approach. In those cases, the courts were willing to disregard written contracts which presented the workers as self-employed, and to focus instead on factual indications that they were, in reality, workers. Otherwise, employers would be able to use their superior drafting skills to determine working people's statutory entitlements. In *Taylors Services*, HMRC was trying to persuade the ET to disregard the factual indications that the workers were picked up from home, and to focus instead on the written contracts which required them to travel to the employer's premises first. Not surprisingly, this argument did not find favour with the ET. The other creative argument advanced by HMRC was that regulation 34 should be construed purposively so that it did not exclude NMW entitlement where workers had long or arduous travel, going beyond an ordinary commute, or so that it did not apply where the employer had arranged things so that workers were picked up from home rather than from the employer's premises. These ways to address the anomaly presented by the facts in *Taylors Services* were rejected by the ET on the basis that they would have required it to go too far beyond the bounds of ordinary statutory construction.

[20] Ibid [256]–[262].
[21] Ibid [268]–[273].
[22] *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] ICR 1157; *Uber*, above n.6.

4. EAT

The EAT upheld the employer's appeal on the basis that the tribunal had erred in law in treating the workers' travel time as 'time work' for the purposes of regulation 30.[23] The EAT relied heavily on the *Mencap* case to support the proposition that it was important to read the National Minimum Wage Regulations as a whole, rather than looking at each provision separately.[24] On this basis, the judge should have considered regulation 34, dealing specifically with travel time, when considering the meaning of 'time work' under regulation 30. The Supreme Court's point in *Mencap* was that it was not legitimate to treat sleep-in shifts as 'time work' under regulation 30 when the Regulations made specific provision elsewhere for time spent on call at the workplace but asleep. The EAT rejected HMRC's argument that the same approach should not be read across to travel time.[25] Taking a holistic approach to the construction of the Regulations, it could not be argued that time spent travelling from home to a place of work was 'time work' under regulation 30 because it was expressly excluded by regulation 34. The fact that the employer exercised substantial control over the travel time, for example, by making the travel arrangements and determining the start time, was not sufficient to convert time when the workers were not working into 'time work'. As the EAT explained, by analogy with *Mencap*, not all time spent under the control of the employer is treated as 'time work' by the Regulations. It was not relevant that the workers spent a long time travelling or that the travel was arduous.[26] Any anomaly generated by the distinction between travel from home and travel from the employer's premises to a work site under the Regulations was for Parliament to resolve.[27]

5. COURT OF APPEAL

In the Court of Appeal, HMRC advanced four arguments in support of the ET's original decision:

- The Regulations should have been construed purposively, following *Uber*

[23] Above n.15.
[24] Ibid [42]; [49].
[25] Ibid [41].
[26] Ibid [50].
[27] Ibid [48].

- The *Mencap* case should have been disregarded as it was only relevant to sleep-in shifts, not travel time
- The EAT should have taken into account the control exercised by the employer during the workers' travel time
- The EAT should not have overturned the tribunal's finding of fact that the workers were engaged in 'time work' when travelling.

The first argument had been rejected by the ET and not challenged in the EAT. But rather than dismissing it on procedural grounds, the Court of Appeal did give it some brief substantive consideration. This amounted to saying that the ET had been right to refuse attempts to persuade it to go beyond the statutory wording.[28]

The Court of Appeal then went on to deal with the construction of the Regulations. Its approach to this task is instructive.[29] Elisabeth Laing LJ, giving the leading judgment, identified four 'starting points' for interpreting the Regulations: that the court lacked expertise on social policy questions; that the Low Pay Commission (LPC) could propose reforms where necessary; that the Regulations are 'technical provisions designed to achieve uniform treatment, for the purposes of the NMW, of a wide range of different facts'; and that there were no anti-avoidance provisions relevant to the case. This is a clear indication that the Court of Appeal wanted to treat the case as a technical exercise in statutory construction without having any particular regard to the purposes the legislation was seeking to achieve. If the clear meaning of the legislation gave rise to a problem, this was not for the courts to resolve by means of creative interpretation.[30]

The Court of Appeal then turned to the specifics of the case. It found that, although the context was different, *Mencap* did lay down a generally-applicable approach to the interpretation of the Regulations which was not confined to its own facts: all the relevant provisions of the Regulations had to be read together in order to ascertain their true meaning.[31] On this view, regulation 30 could not be treated as a free-standing provision but must instead be read together with other related provisions such as regulation 20 and regulation 34.

The Court of Appeal then examined regulation 34 in detail. Elisabeth Laing LJ summarised it as follows:

[28] Above n.1, [87]–[88].
[29] Ibid [61].
[30] Ibid [62].
[31] Ibid [64].

> The effect of the rule and that exception, therefore, is that time travelling is not treated as hours of time work if (a) it is not for the purposes of time work, or (b) it not done at a time when the worker would otherwise be working, or (c) it is travel between the worker's home and the place where he carries out an assignment.[32]

She held that the ET had been correct to find that the workers were not engaged in work deemed to be 'time work' under regulation 34 while they were travelling, for two reasons.[33] First, the time was not time when they would 'otherwise be working', because their work with the poultry did not begin until they arrived on the farm. The workers were usually told what time they could expect to start work on a particular farm. Second, the time was excluded in any event by virtue of regulation 34(1) because, in most cases, the time was spent travelling between the workers' homes and the place where they were due to carry out their work.

Elisabeth Laing LJ concluded by pointing out the potential injustice that the workers might have to travel for up to eight hours a day without NMW entitlement for that time.[34] She also discussed the anomaly identified at the outset: that a worker picked up from home has no NMW entitlement, whereas a worker required to travel first to the employer's premises before being transported to an assignment would be entitled to the NMW. However, she also noted an argument on behalf of the employer that the arrangement of picking workers up from home suited them because many of them could not drive and would have found it difficult to 'commute' to the employer's premises. She regarded these issues as matters for the LPC and the Secretary of State to resolve.

Underhill LJ gave a short concurring judgment in which he focused on the question whether the workers would 'otherwise be working' while they were on the bus travelling to the farm.[35] As he put it, the workers were not 'working' in the basic sense of carrying out tasks relating to poultry while they were on the bus. HMRC's argument that they were 'working' in a broader sense did not fit with the definition in the Regulations. As he put it:

> HMRC's case, which the ET accepted, is that they were nevertheless working in a broader sense because their time was not wholly their own: they were making a journey, in transport provided by their employer and which they were obliged to use, for the purposes of being able when they got there to do what I might call

[32] Ibid [75].
[33] Ibid [73]–[90].
[34] Ibid [91].
[35] Ibid [94]–[100].

> (without prejudging the question) their "actual work". But, for the reasons which follow, if the regulations in Chapter 3 are read as a whole, and in particular if regulation 30 is read in the light of regulation 34, it is clear that that is not the sense in which the word "work" is used in this context.[36]

As I explain below, the argument that the travel time in *Taylors Services* could have been regarded as time during which the workers would 'otherwise be working' is, with respect, more plausible than this suggests, because NMW entitlement attaches to being 'available' for work as well as to the performance of work tasks under regulation 32. It is the express exclusion in regulation 34 that is fatal to the claim.

6. DISCUSSION

I consider three questions arising out of the decision in *Taylors Services*: whether it is unfair to exclude 'commuting' time from NMW entitlement in all circumstances; whether there were any arguable grounds on which the ET decision could have been upheld; and what policy options are open to the LPC and the government in the light of the Court of Appeal's decision.

The policy underlying the NMW's treatment of travel time is relatively clear and uncontroversial: it is the worker's responsibility to get themselves to the workplace, and their NMW entitlement begins once they have arrived and started work. This is a commonsense approach in the vast majority of situations. It is up to the worker to decide where to live and how to get to work, and most people would regard it as unfair to require the employer to pay the NMW for the duration of the worker's commute where the employer (rightly) has no control over the length of that commute.

The unfairness in *Taylors Services* arose because the job required often lengthy travel to different places of work before the day's work could begin. This gave rise to two problems. First, the workers had to put themselves at the employer's disposal for long periods of time without NMW entitlement. This was not time during which they could take on another job to earn money, nor could it be regarded as proper rest time away from work. This is but one example of a much more widespread problem in the economy, that working people make themselves available to employers—by doing sleep-in shifts, or by waiting around to be assigned gig work—without getting anything in

[36] Ibid [96].

return.[37] In all these cases, the employer obtains some benefit from having the workers at its disposal: reassurance that the workers will arrive on time at the farm, a guarantee that someone is available to deal with emergencies at night, and prompt availability of a choice of workers when a customer wants to use the relevant service. Of course, in some cases, the employer makes a payment to the workers in respect of sleep-in shifts or travel time—this was the case in *Taylors Services* itself—but since this is not covered by NMW entitlement, it may be a relatively small sum. It is unlikely that the workers will be well-placed to bargain for a better rate of pay. Second, the exclusion of commuting time gives the unscrupulous employer a simple strategy for reducing its NMW liability: collecting workers from their homes rather than requiring them to come to its premises first. The employer in *Taylors Services* argued that it collected workers from their homes because it was more convenient for the workers, some of whom could not drive and would have found it difficult to get to a designated pick-up point.[38] Nevertheless, it seems arbitrary that those workers on the minibus who did travel to the employer's premises were entitled to an extra few hours' NMW each day, whereas those picked up from home were not.

Was there any scope for the Court of Appeal to have upheld the ET's decision in *Taylors Services*? To do so would have required two decisions: that the claimants were engaged in time work while they were on the minibus, and that (having reached that conclusion) there was no need to consider r. 34. Because the second of these points is very difficult to argue, little attention was devoted to the first, and some of the dicta in the case suggest that the judges were taking a narrow view of the definition of time work. This may have unfortunate consequences in future litigation.

The obvious problem with the time work argument is that the claimants were not engaged in their core work tasks, dealing with poultry, while they were sitting on the minibus travelling to the farm. However, NMW entitlement does not generally depend on the worker being actively engaged in work tasks. The relevant provision is regulation 32(1), which includes 'hours when a worker is available, and required to be available, at or near a place of work for the purposes of working'. The idea of being 'available' to an employer suggests placing oneself at the employer's disposal or under the employer's control. As HMRC argued, the employer controlled every aspect of the

[37] ACL Davies, 'Getting More than you Bargained for? Rethinking the Meaning of Work in Employment Law' (2017) 46 *ILJ* 477.
[38] Above n.14, [56].

workers' travel time in *Taylors Services*: the mode of transport, the start time of the journey, the destination and the route. It is not clear that a worker who had their own vehicle would have been allowed to make their own way to work each day. Moreover, had there been any tasks capable of being performed on the minibus, such as paperwork, the employer could have directed the workers to perform them.

There is also precedent for a generous interpretation of this provision: the Supreme Court in *Uber* upheld the tribunal's conclusion that the drivers were 'working' for the purposes of NMW entitlement when they were logged in to the app and waiting in their vehicles in their designated area for a customer to request a ride.[39] The employer's arguments that they were only working when they had a passenger in the vehicle, or at least when they were travelling to pick up a passenger, were rejected. Arguably, the workers in *Taylors Services* were similarly available to the employer while waiting to start work. Although the journeys were timed to get them to the farms at particular times, it seems likely that they would have started work as soon as they arrived, even if that was earlier or later than planned.

However, there are some difficulties with these arguments and with the *Uber* analogy in particular. One is that it is hard to argue that a worker is 'at or near a place of work' when they are travelling to a place of work. The other is that the benefit to the employer of having the workers at its disposal in *Taylors Services* is perhaps a little less obvious than it was in *Uber*. In the *Uber* case, the drivers were 'working by waiting' in the sense that the firm's business model depended on having drivers visible on the app to reassure customers that a car would arrive when they needed one. In *Taylors Services*, the employer benefited from knowing that the workers on the minibus would arrive in the right place at the right time, but it is harder to say that they were 'working by waiting'.

To sum up, the Regulations make it clear that a worker who is 'available' to an employer is engaged in time work even if they are not actively engaged in core work tasks, but there is still some uncertainty about how best to identify 'available' time. I have suggested here two of the factors that may be relevant: the extent of the control the employer exercises over the worker during 'available' time, and the benefit the employer derives from having the worker 'available' to them, but it remains to be seen how this concept will be interpreted in the future. It is important that a generous view is taken, so as

[39] Above n.6.

not to deprive workers of the benefit of the NMW when they are not, in practice, free either to rest or to earn money elsewhere.

Even if it could have been argued that the claimants in *Taylors Services* were engaged in time work, the real obstacle facing the Court of Appeal was, of course, the effect of regulation 34 on the basic definition of time work. Although the *Mencap* case was not, strictly speaking, binding, because it addressed the impact of regulation 32(2) on the definition, the approach of construing the legislation as a whole is clearly correct as a general principle of statutory interpretation. The specific inclusion or exclusion of a particular fact situation in the Regulations—in this case, travel from home to a place of work—cannot be ignored. Thus, although the ET's decision was well-intentioned, it is difficult to see how the Court of Appeal could have upheld it.

Having (reluctantly) reached this conclusion, a further question arises: if the unfairness cannot be solved by the courts, what, if anything, could the legislature do about it? One option might be to continue to exclude commuting from home to the employer's premises from NMW entitlement, but to include commuting from home to a place other than the employer's premises at which work is to be performed. On this approach, the workers in *Taylors Services* who were collected from home would be entitled to the NMW for the time spent travelling from home to the farm at which they were to work, and any workers who went first to the employer's premises would be entitled to the NMW for the travel time from there to the farm. If employers responded by insisting that workers came to its premises first, they would still have some NMW entitlement for travel time. This would also give the employer a way of avoiding a substantial NMW liability where a worker chose to live far away from where most jobs were located, by insisting that workers came to its premises first.[40] One way to justify this approach might be to suggest that where the worker's job involves travelling to a fixed starting-point each day, they can plan their life accordingly: by trying to find somewhere to live that is not too far away, or where there is a good bus service. The worker can take some steps to minimise their commute, or decide that the job is worth taking anyway. Where there is no fixed starting-point, the worker is entirely at the employer's mercy in terms of how far they have to travel to start work each day. The employer chooses which jobs to take on and which workers to send to each place of work. The worker has no option (other than not taking the

[40] This would, of course, not be possible for employers with no physical premises.

job at all) for managing the risk of a long commute. Requiring the employer to pay NMW for this time is, arguably, a reasonable mechanism for compensating workers for placing themselves at the employer's disposal in this way.

The approach suggested here is, of course, familiar from the Working Time Directive.[41] In *Tyco*, the employer had moved from a system in which workers went to a depot where they were assigned jobs for the day, to one in which the workers were sent the location of their first job by electronic means and were required to travel straight to the job from home.[42] The Court held that the time spent travelling from home to the first job and from the last job back home again counted as working time. Of course, even when the UK was in the EU, this approach did not apply under the separate NMW regime. It reflects the Court's consistent view that time is either 'work' or 'rest' for the purposes of the Directive, with no 'in-between' concept.[43] This means that if the worker is at their employer's disposal, the time is likely to be treated as work, because it is clearly not time during which the worker is able to rest. Since the purpose of the Directive is to protect workers' health and safety, the Court has adopted an expansive definition of 'work' to ensure that workers are only treated as 'resting' when they are genuinely able to pursue activities of their own choosing. The use of the same approach in the NMW context requires a slightly different justification, as outlined above.

If this solution is thought to expose employers to an excessive NMW liability, an alternative solution would be to rethink the legislation's insistence that the NMW should be a single rate. When introducing the NMW, the government was keen to keep it as simple as possible, so that it would be largely self-enforcing.[44] The statutory duty to publicise the Act would ensure that workers and employers would be aware of their respective entitlements and liabilities.[45] This would encourage compliance without the need for litigation by individual workers or enforcement by HMRC. It is open to debate whether the 'simple' and 'self-enforcing' goals have been achieved. The simplicity of the single rate has been undermined in many ways, for example, by the age bands[46] and by the complexities of calculating the worker's entitlement. And

[41] Directive 2003/88/EC.

[42] (C-266/14) *Federacion de Servicios Privados del sindicato Comisiones obreras (CC OO) v Tyco Integrated Security SL* EU:C:2015:578, [2015] ICR 1159.

[43] Ibid [25]–[26], and see e.g. (C-151/02) *Landeshauptstadt Kiel v Jaeger* EU:C:2003:437, [2003] ECR I-8389.

[44] See Low Pay Commission, *The National Minimum Wage* (Cm 3976, 1998), para 8.11.

[45] National Minimum Wage Act 1998, s 50.

[46] The present government is seeking to remove the age bands: Department for Business and Trade, *Low Pay Commission Remit 2024*.

the failure to enact Regulations to give effect to the entitlement to an itemised NMW statement has hindered the objective of making the legislation 'self-enforcing'.[47] But there is also a significant downside to the single rate, as illustrated by *Taylors Services* and *Mencap*. The worker is either entitled to the NMW at the single rate, or they are not. There is no intermediate position to protect the worker who is available to the employer but not engaged in core work tasks, for example, because they are travelling to a work location or doing a sleep-in shift. A lower NMW rate for 'available' time could be used to ensure that workers received decent pay in these scenarios, without forcing the employer to pay the full NMW rate for time not spent working.

While this suggestion is certainly worthy of further investigation, it has obvious potential to create more problems than it solves. Unscrupulous employers would, no doubt, seize upon the opportunity to pay a lower rate for 'available' time in order to reduce their NMW liability for working people who would otherwise have received the NMW for their whole shift. Any worker whose work does not involve continuous performance of work tasks would be vulnerable to an argument that some of their time should only be paid at the lower rate. This would add complexity to the process of calculating entitlement, making it less likely that workers would realise that they were being underpaid, and would give the courts an additional set of boundaries and definitions to interpret.

7. CONCLUSION

When the Act was passed, some concern was expressed about the choice of HMRC, rather than a dedicated wages inspectorate, as the enforcement body.[48] It was feared, not unreasonably, that HMRC would not give sufficient priority to the NMW given its other responsibilities. However, *Taylors Services*, like *Mencap* before it, suggests a bold enforcement strategy in which HMRC is not afraid to push the boundaries of the legislation when it perceives that workers may be being exploited. Admittedly, these cases have not succeeded, and there is some force in the criticism that litigation creates uncertainty for well-intentioned employers while the legal process works

[47] National Minimum Wage Act 1998, s 12.

[48] B. Simpson, 'A Milestone in the Legal Regulation of Pay: the National Minimum Wage Act 1998' (1999) 28 *ILJ* 1, 25-26. Simpson was more positive about HMRC in a later article on the legislation: B. Simpson, 'The National Minimum Wage Five Years On: Reflections on Some General Issues' (2004) 33 *ILJ* 22, 38.

itself out. This was particularly the case in relation to *Mencap*, which had a wide-ranging impact on an already financially-stretched sector, and led to the suspension of HMRC enforcement activity until the Supreme Court produced a definitive interpretation of the law.[49] Nevertheless, HMRC's approach to litigation is to be welcomed: even if it does not win all of its cases, it serves to highlight potential loopholes which can be examined by the LPC and, potentially, redressed in legislation. *Taylors Services* is in this category: the general treatment of commuting time in the Regulations is sensible and the Court of Appeal's application of that treatment to the facts is correct. But the provisions can operate harshly for workers with no fixed workplace who travel from home to a different place of work determined by the employer each day, particularly when compared with workers who travel from the employer's premises to a place of work. The LPC could usefully consider whether giving workers in the former category NMW entitlement for their travel time would be a fairer solution. It is to be hoped that HMRC's approach to litigation will be continued once the NMW enforcement officers are incorporated into the Fair Work Agency, another body which will have a wide range of competing priorities.[50]

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[49] Department for Business, Energy and Industrial Strategy, *Enforcement of the National Minimum Wage in the Social Care Sector* (July 2017).
[50] Employment Rights Bill, Part 5, and see Department for Business and Trade, *Fair Work Agency*, available at https://www.gov.uk/government/publications/employment-rights-bill-factsheets.