

Workers Not Paid for Travel Time under Minimum Wage Regulations

The proper interpretation of the working hours of employees that are counted under the National Minimum Wage Regulations 2015 (“the Regulations”) has long been acknowledged to be a difficult task, chiefly due to the wide variety of situations to which the Regulations must be applied. Much of the jurisprudence surrounding the national minimum wage (“NMW”) and the Regulations has, historically, focused on reg. 32 (dealing with waiting time and the “sleep-in” exception). *The Commissioners for HM Revenue and Customs v Taylors Services Ltd* [2025] EWCA Civ 956 provides an opportunity for the Regulations to be examined outside of that specific context. The Court of Appeal’s decision includes some close analysis of the regulations that have general applicability to NMW cases, including issues of where the burden of proof lies in these claims, and how *Royal Mencap v Tomlinson Blake* [2021] UKSC 8; [2022] 1 All E.R. 497 is to be interpreted. This note will conclude that it may have been inappropriate to apply the reasoning in *Mencap* to the present case, and that the differences between regs. 32 and 34 were not appreciated.

Taylors Services Ltd employed “flock technicians” and provided services to farms with poultry. The nature of the work meant that long distances had to be travelled by the technicians, at early hours, and to rural locations. The business, therefore, provided transportation in a minibus for the workers that would take them to the farm that they were to work on for that day. The “official line” was that employees were supposed to meet the bus at the premises of the employer, although the actual practice of the employer was (where convenient to the employer) to send the driver of the bus to the houses of the employees who were to work that day. These journeys could take up to four hours each way. HMRC, after conducting an investigation, issued a Notice of Underpayment on the NMW officer’s understanding that the workers were required to be paid for the time spent travelling to the sites. The employer appealed; at issue was whether the travel that the technicians were undertaking could be described as work for the purposes of the NMW calculation. The Court of Appeal ultimately held that on the proper construction of the regulations, the technicians were not completing work whilst travelling, and were therefore not entitled to be paid for that time.

The Regulations articulate how NMW calculations are to be completed. Regulation 17 provides that the hours to be included in a calculation are those hours “worked or **treated** as worked” (emphasis added). This appeal deals with “time work”, which is defined in reg. 30 as work (other than salaried hours work) which a worker is entitled to be paid under their contract by reference to the time worked by the worker. For each type of work, the Regulations provide a primary definition, followed by provisions that clarify the primary definition or specify that certain hours are to be “treated as worked”. These have frequently been referred to as “deeming provisions” as they deem hours (other than hours worked) to be included in an NMW calculation.

In *British Nursing Association v Inland Revenue* [2002] EWCA Civ 494; [2003] I.C.R. 19, the Court of Appeal applied the regulations in a sequential way. They asked first whether nurses waiting for a call at home were working. As the tribunal answered this in the affirmative, the Court held (at [14]) that as the nurses were actually working, they did not need to be deemed to be working. Thus, reg. 32 (or reg. 15 in the NMW Regulations 1999 in force at the time) did not need to be considered. In *Mencap* the Supreme Court held that *British Nursing* should no longer guide the application of the Regulations (Lady Arden at [56] would have held it expressly overruled, whilst Lords Carnwath and Wilson [78] and Lord Kitchin [83] held it to be no longer authoritative); the Court of Appeal should have interpreted reg. 30 in light of reg. 32 (which provides, in part, that hours are not counted for NMW purposes where a person is required to be available to work but is allowed to be at home). Lady Arden reasoned (at [42]), therefore, that there was a necessary inference that the concept of “work” in reg. 30 could not include time at home (as in *British Nursing*) or time asleep at an employer’s premises (as in *Mencap*). The Regulations, thus, could not be applied sequentially.

Relevant to this appeal is reg. 34, which is a deeming provision that requires hours spent travelling for work to be treated as worked for NMW purposes. This is subject to the exception that travel between home and a place of work will not be included. I will refer to this as the “commuting

exception”, although such a name does not capture the full meaning of reg. 34. At issue in this case was whether, notwithstanding the existence of the “commuting exception”, workers could still be completing “time work” whilst sat in the back of a bus travelling from their home to a place of work.

The employment tribunal (2604226/2020) applied the Regulations in a sequential way, finding (at [252]) that the workers were completing “time work” owing to the level of control that the employers had over them when they were being transported. The tribunal also noted (at [272]) that if it was wrong about the time being “time work” then the “commuting exception” would apply, with the result that the time should not be included in an NMW calculation. This was because the workers were travelling between their home and a place of work. It did not consider that this conclusion required the appeals against the notices of underpayment to be allowed as it had already concluded that the workers were completing “time work” whilst travelling.

The EAT ([2024] EAT 102; [2024] I.C.R. 1171) reversed the tribunal’s decision, with Judge Stout finding (at [45]) that the effect of reg. 34 was to create the necessary inference that “work” within reg. 30 could not have included travel time – otherwise a deeming provision would not have been necessary. Judge Stout further held (at [42]) that the tribunal should have followed the approach in *Mencap* and applied the Regulations in a holistic rather than a sequential way.

The Court of Appeal (Elisabeth Laing L.J. giving the lead judgment, Underhill L.J. giving a short concurring judgment and Baker L.J. agreeing with both) refused HMRC’s appeal from the EAT with Elisabeth Laing L.J. holding (at [64] and [74]) that the approach taken in *Mencap* was applicable, and thus the tribunal should have considered whether the technicians were entitled to be paid in one question rather than approaching regs. 30 and 34 sequentially as it did. The tribunal should have interpreted reg. 30 in light of reg. 34 and found that the travelling time did not count as “time work” under reg. 30. As the travel was within the “commuting exception”, the hours spent travelling did not count in an NMW calculation.

As said at the outset of this note, appellate cases focussing on NMW calculations deal mainly with reg. 32 (or its predecessor). This case presents an opportunity for fresh analysis of the regulatory scheme through a different perspective. Elements of both the EAT and the Court of Appeal decisions are illuminating. Specifically, the Court of Appeal and EAT’s interpretation of the role that the First Report of the Low Pay Commission (LPC) played in the *Mencap* decision are to be welcomed as clarifying the position, along with the rejection in all three decisions of the “purposive construction” submissions made by HMRC. However, the applicability of the approach taken in *Mencap* to this case should be analysed closely, as key differences between regs. 32 and 34 were unfortunately not appreciated by the EAT or the Court of Appeal. Finally, the EAT’s passing comment on the burden of proof in these cases ought to be approached with caution; the tribunal’s decision on this point should be preferred. These issues will now be examined in four stages.

First, the interpretation of *Mencap*. HMRC submitted to the EAT that because Lady Arden in *Mencap* had used (at [10]) the LPC’s First Report as an important aid in the interpretation of the Regulations, *Mencap* should be limited in application to cases where the LPC’s First Report contained relevant material. The present case was not one. Judge Stout found at [41] that the Supreme Court in *Mencap* would have reached the same conclusion on the interpretation of the Regulations even in the absence of the LPC’s report. She therefore rejected HMRC’s submission that the approach taken in *Mencap* was limited to such cases. Elisabeth Laing LJ concluded similarly at [68]. This conclusion is to be welcomed as representing an accurate understanding of the *Mencap* decision. This is because Lady Arden in *Mencap* reasoned (at [43] and [44]) that “[the regulations] must be read together so that the rules produce a harmonious whole” and thus reg. 32(2) had the effect that it was impossible to hold that a person was working whilst asleep. She therefore reached her conclusion on interpretation from first principles, and drew support from the fact that the interpretation was consistent with the LPC’s recommendations (see [46] where “the drafter of the 1999 regulations [...] took the same view”). It was right, therefore, that *Mencap* was not limited in the way suggested.

Second, the availability of a “purposive construction”. In the alternative to HMRC’s submission that *Mencap* could not be applied to the present case, HMRC submitted that the “commuting exception”

could be given a purposive construction such that it only attached to ordinary commuting. The tribunal (at [269]) rejected that submission holding that the words of the Regulations were clear, and that there was no basis for taking a purposive approach. Elisabeth Laing L.J. held similarly at [70] where it was said that HMRC's submission on this point should be rejected for two reasons. First, there was no guidance about the basis of the approach other than to acknowledge that the National Minimum Wage Act 1998 (NMWA) was intended to protect workers from exploitation. Second, within the constraints of the NMWA the Secretary of State may make regulations as he sees fit, whether or not the LPC recommends them.

This clarification is to be welcomed. Although there was a purposive element to the reasoning of the Supreme Court in *Mencap* in so far as it considered the LPC's report, reliance was placed predominantly on first principles of statutory interpretation (see above). HMRC's submissions on the purposive construction to be applied went much further than traditional examples of giving a purposive construction. It would have entailed the tribunal reading into the "commuting exception" that only travel that was within the scope of "ordinary commuting" (a phrase not used by the Regulations) was excluded from reg. 34. The tribunal would then have had to consider what the limits to "ordinary commuting" might be, in the absence of any statutory guidance. Tribunals would also have to apply their minds to the question of what activities entitle a person to a wage in order to answer the question of whether there was exploitation in a case (something that Lady Arden warned against at [35] and [36] of *Mencap*). Had the Court of Appeal accepted HMRC's submissions in this regard, an already complex area of the law would have become even more uncertain.

Third, the difference between regs. 32 and 34. Whilst HMRC's attempt to distinguish *Mencap* - on the ground that the LPC did not consider the issue of travel time - was rejected, there may be other significant features that distinguish this case. *Mencap* was decided in the context of reg. 32, which reads "time work **includes** hours when a worker is available...to work" (emphasis added). Regulation 32 addresses the definition of "time work" - it tells us what "time work" includes, in the same way that reg. 30 tells us the primary definition of "time work". The distinction between time when actual work is completed and time when a worker is available to work (as was noted by Lady Arden at [57] of *Mencap*) is important in the sleep-in cases as it dictates whether the time is included by the primary definition contained at reg. 30 or by the supplemental definition contained at reg. 32. If it is the latter, a tribunal would be ignoring the definition of "time work" if it were not to consider the sleep-in exception. Here, the *Mencap* approach of interpreting the regulations holistically works - as reg. 32 is definitional, it would not make sense to reach a conclusion on the first part of the definition before considering the second part. In other words, the sleep-in exception is an exception to the rule that waiting time **is** "time work". To ignore such an exception would be incorrect (as the Supreme Court held).

This contrasts to the operation of regs. 33 and 34, where the language changes from "time work **includes**" to hours being "**treated** as hours of time work" under an NMW calculation (emphasis added). Regulations 33 and 34 do not suggest that time spent training or travelling is "time work" in the same way that reg. 32 tells us that time spent waiting **is** "time work". Instead, regs. 33 and 34 require hours spent training and travelling to be included in an NMW calculation. Regulations 33 and 34 therefore provide an exception to the general rule that only hours falling within the definition of "time work" are included in an NMW calculation.

Thus, the "commuting exception" provides an exception to the exception. The general rule is only hours falling under "time work" are included in an NMW calculation. This is subject to the exception that travelling time is also included, which itself is subject to the exception that it is not included if the travel is between home and a place of work. This contrasts with the sleep-in exception which is an exception to the definition as discussed above.

Whilst Lady Arden was therefore correct to hold that the sequential application of the Regulations was incorrect in sleep-in shift cases (as that would be to ignore an element of the definition of "time work" as contained within reg. 32), the situation in *Taylor's* is not directly analogous. Regulation 34 is not definitional in the way that reg. 32 is definitional. This was not something that was appreciated by either Judge Stout or Elisabeth Laing L.J.. The Court of Appeal has extended the

approach of the Supreme Court in *Mencap* to include elements of the Regulations that are not definitional in the way that reg. 32 is definitional.

There may be good reasons for such an extension – indeed, it seems sensible to infer from the existence of reg. 34 that the draftsman did not consider that time spent travelling would always be included in either regs. 30 or 32. However, the position is not (as the Court of Appeal suggested at [74]) that travelling time can never constitute “time work” in the same way that sleep-in shifts can never constitute “time work” in light of the exception to the definition of “time work” provided at reg. 32. In other words, it **was** open to the tribunal to take the regulations sequentially in this case, and first consider whether the workers were completing “time work” when sat in the minibus. In taking this approach, the tribunal would not be ignoring an essential part of the definition of “time work”, unlike in *British Nursing* where when taking the regulations sequentially, an element of the definition of “time work” was ignored when determining whether workers were completing “time work”.

Indeed, such a conclusion seems to have been acknowledged by both the EAT (at [44]) and the Court of Appeal (at [51]). In the case of a worker driving a train, or a bus, or a lorry, it was acknowledged that clearly that worker would be completing “time work”. It would be wrong to suggest that the only reason that the time spent driving was counted was because they were not travelling between home and a place of work – indeed, in the case of lorry drivers, it may be that they did start driving from their home. The reason the hours are included in an NMW calculation is because they fall under the definition of “time work” contained in reg. 30 – it is work that they are contractually entitled to be paid by reference to the time worked. Thus, a tribunal would be entitled to ask first the question whether the drivers’ travel was their work– if the answer to that was yes, neither the EAT nor the Court of Appeal would take issue with the tribunal failing to consider reg. 34. The effect of reg. 34 is therefore not to create the same “bright line” rule that the Supreme Court found (at [46] and [87]) to exist in *Mencap*.

It may be that, in this case, the Court of Appeal was right in its conclusion that the hours of travel ought not to have been included in an NMW calculation due to the level of freedom the workers had whilst in the bus (see the EAT at [50]). Nevertheless, the use of the style of application adopted by the Supreme Court in *Mencap* ought to be the subject of detailed analysis in subsequent cases not involving reg. 32.

Finally, the issue of the burden of proof. At first instance, the employers’ second ground of appeal against the Notice of Underpayment was that HMRC had incorrectly calculated the arrears – the employers “[put] the Respondent to strict proof as to the basis of calculations and the accuracy of those calculations” (see the tribunal at [121]). The tribunal considered the issue of the burden of proof (in the absence of argument) and stated that HMRC’s National Minimum Wage Manual states that there is no reverse burden of proof (see the tribunal at [195]).

This point seems not to have been pursued further before either the EAT or the Court of Appeal. However, Judge Stout made a passing comment (at [18]) which suggests that the burden of proof is reversed in appeals against Notices of Underpayment. With respect, the legislation does not provide for this conclusion. Whilst s. 28(1) NMWA provides that there is a reverse burden of proof in all civil proceedings where a question arises as to the entitlement of a worker to the NMW, s.28(2) is clear that the reverse burden over questions of underpayment relates only to complaints made to employment tribunals. An appeal against a Notice of Underpayment is not a complaint to an employment tribunal – it is an appeal made under s.19C. In appeals against an HMRC decision, therefore, the reverse burden of proof ought to operate when it comes to entitlement to NMW (under s.28(1)) but ought not to operate when it comes to a question of underpayment. In this respect, Employment Judge Broughton’s decision is to be preferred to that of the EAT.

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