'Sleep-in' shifts and the National Minimum Wage
Royal Mencap Society v Tomlinson-Blake; Shannon v Rampersad [2018] EWCA Civ 1641

There are many workplaces in which it is necessary or desirable to have someone on the premises overnight in case of an emergency. The most obvious examples are in the care sector, where the employer running sheltered housing or a residential home might want to have a 'night warden' in case a resident is taken ill or some other difficulty arises during the night. It is often the case that there is no need for the worker to perform work tasks continually throughout the night, so the employer provides him or her with somewhere to sleep.[1] The worker's job is to be present on the premises overnight, and to get up and deal with emergencies as and when they arise.

This kind of 'sleep-in shift' presents difficulties from the perspective of the worker's entitlement to the National Minimum Wage (NMW). In non-technical terms, there are two options. One is to say that the worker should be paid the NMW for each hour he or she spends at the employer's premises, even though some of that time may be spent sleeping. The other is to say that the worker should only be paid the NMW for time spent awake and performing work tasks, such as responding to an emergency. The choice between these two options is highly significant in terms of the worker's earnings and, correspondingly, the employer's liability to pay. For example, at the current over-25 NMW rate of £7.83 per hour, an eight-hour sleep-in shift would be worth £62.64 on the former calculation but might attract no remuneration at all on the latter if the worker is not called upon to perform any work tasks during the night.[2]

Practice in the social care sector has tended to favour the second option, paying the worker the NMW only for time spent performing work tasks. This was supported by the online government guidance prior to February 2015. However, while there is one significant line of EAT authority adopting this approach, there is another equally significant line of authority holding that the worker should receive the NMW for every hour spent on the employer's premises, even if some of that time is spent asleep. Indeed, in July 2017, the situation became so confused that the government was forced to direct HMRC to suspend its enforcement of the NMW in relation to sleep-in shifts while it consulted employers and awaited the outcome of further litigation.[3] The concern was that some social care providers might not be able to meet their liabilities if they were forced to pay arrears to workers calculated on a 'whole-shift' basis. In November 2017, a Social Care Compliance Scheme was put in place which allowed employers twelve months to review their compliance with a further three months to pay any arrears owed to workers, and an exemption from liability to pay a penalty to the Secretary of State.[4]

The Court of Appeal's decision in the *Tomlinson-Blake* and *Shannon* cases has resolved the matter against the 'whole-shift' interpretation, by holding that workers on sleep-in shifts are only entitled to the NMW for time spent awake and performing work tasks.[5] In this note, I will explain each of the competing interpretations in greater detail, before turning to a critique of the reasons given by the Court of Appeal for preferring the 'time spent working' interpretation.

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[1] The terminology I use in this note draws on my earlier work: A.C.L. Davies, 'Getting More than you Bargained for? Rethinking the Meaning of Work in Employment Law' (2017) 46 ILJ 477.
[2] National Minimum Wage (Amendment) Regulations 2018 (SI 2018/455), r. 2.
[3] Department for Business, Energy and Industrial Strategy, Enforcement of the National Minimum Wage in the Social Care Sector (July 2017)
[4] Department for Business, Energy and Industrial Strategy, Interim Enforcement of the National Minimum Wage in the Social Care Sector: "sleep-in" shifts (November 2017) and see https://www.gov.uk/guidance/tell-hmrc-if-youve-underpaid-national-minimum-wage-in-the-social-care-sector (last accessed 29 August 2018).
[5] *Royal Mencap Society v Tomlinson-Blake*; *Shannon v Rampersad* [2018] EWCA Civ 1641.

The legislative provisions

It will be recalled that, for the purposes of calculating the NMW, different provisions apply depending on whether the worker is engaged in salaried hours work, time work, output work or unmeasured work.[6] For present purposes, it is sufficient to focus on the provisions relating to time work. Under r. 30 National Minimum Wage Regulations 2015 (hereafter NMWR), time work is defined as 'work… in respect of which a worker is entitled under their contract to be paid… by reference to the time worked by the worker'.

The interpretive problem concerns r. 32, which is worth quoting in full:

(1) 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.

(2) 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.

The basic thrust of r. 32 is to *extend* the concept of 'time work' by making it clear that a worker who is not actively engaged in work tasks but is required by the employer to be available 'at or near a place of work' and is so available is engaged in time work and therefore entitled to the NMW for the whole of that time. This prevents any possibility of an employer having recourse to an argument that the worker who is, for example, standing behind the counter in a fast-food outlet but not flipping burgers or serving customers at a particular moment is not entitled to the NMW during that time.

However, there are two exceptions to the concept of 'availability' in r. 32. One, in paragraph (1), is where the worker is 'at home', and the other, in paragraph (2), is when the worker is asleep. It is important to note that both of these exceptions apply when the worker is available (and required to be so) at or near the workplace. For the first to apply, it is also necessary to be able to say that the worker is 'at home', so we can infer that this provision is designed to deal with people who are provided with long-term living accommodation at the workplace. The second applies where the employer provides suitable sleeping facilities at the workplace and the worker is using them to sleep. This is the provision at issue in *Tomlinson-Blake*.

It may be worth noting that the precise formulation of what is now paragraph (2) has varied over time. The original drafting in the 1999 Regulations made no reference to the provision of facilities by the employer:

In addition to time when a worker is working, time work includes time when a worker is available at or near a place of work, other than his home, for the purpose of doing time work and is required to be available for such work except that, in relation to a worker who by arrangement sleeps at or near a place of work, time during the hours he is permitted to sleep shall only be treated as being time work when the worker is awake for the purpose of working.[7]

The Amendment Regulations, which came into force in 2000, introduced the reference to facilities:

[6] National Minimum Wage Regulations 2015 (SI 2015/621), as amended.
[7] National Minimum Wage Regulations 1999 (SI 1999/584), r. 15(1).

In relation to a worker who by arrangement sleeps at or near a place of work and is provided with suitable facilities for sleeping, time during the hours he is permitted to use those facilities for the purpose of sleeping shall only be treated as being time work when the worker is awake for the purpose of working.[8]

This was an important change for workers because it means that the employer cannot invoke the exception without making available somewhere 'suitable' to sleep. Although there is no indication of what might be 'suitable', it does at least open up the possibility of arguing that the employer should not be allowed to rely on the exception because the facilities provided are not 'suitable'.[9] The 2015 Regulations are stated to be consolidating legislation, so even though they reformulate the provision again, the usual assumption would be that no substantive change was intended.[10]

The competing interpretations

Prior to *Tomlinson-Blake*, there were two broad lines of case-law on this issue, which might conveniently be labelled the 'whole shift' interpretation and the 'time spent working' interpretation.

The 'whole shift' interpretation – in which the worker is entitled to the NMW for the whole shift, even if he or she spends some or all of it asleep – focuses on the meaning of 'time work' in r. 30. If a worker is found to be engaged in time work for the whole of his or her shift, there is no need to invoke the extension in r. 32 to entitle him or her to payment for time spent being 'available' for work. And, in turn, if r. 32 is not required, the exceptions it contains (for being at home or being asleep) do not apply. As the drafting makes clear, they are exceptions to being 'available' under r. 32 and not exceptions to the general concept of time work in r. 30.

Cases in which this approach has been taken have tended to treat the worker as working simply by being present at the workplace, regardless of what he or she is doing (or not doing) during that time. For example, in the *Burrow Down* case, the worker was described as a 'night sleeper' and he was required to be present in a care home overnight.[11] He had duties to perform for a small proportion of the time and was permitted to sleep for the remainder unless there was an emergency requiring his attention. The EAT took the view that he was engaged in time work throughout: 'even during the time when he was permitted to be asleep, he was still required to deal with anything untoward that might arise in the course of his shift'.[12] Elias J (as he then was) for the EAT noted that there was 'some artificiality in saying that someone is working when he is sleeping', but suggested that the employer might address this by giving the worker more tasks to perform during the quieter periods of the shift.[13] A number of cases have followed this approach including, for example, *Esparon*, in which it was held that the fact that the employer was required by law to have someone on the premises in case of emergencies pointed towards the individual being engaged in 'time work' throughout,[14] and *Scottbridge*, in which it was held that a security guard was at the employer's disposal to deal with phone calls and emergencies (and therefore

[8] National Minimum Wage Regulations 1999 (Amendment) Regulations 2000 (SI 2000/1989), r. 6.
[9] Underhill LJ offers a brief but important view in *Tomlinson-Blake*, [79].
[10] Above n 6, Explanatory Note, and see *Tomlinson-Blake*, [40].
[11] *Burrow Down Support Services Ltd v Rossiter* [2008] ICR 1172.
[12] ibid [24] (Elias J).
[13] ibid [25], citing the EAT decision in *Scottbridge Construction Ltd v Wright* [2001] IRLR 589.
[14] *Esparon v Slavikovska* [2014] ICR 1037.

working) while sleeping.[15] It was also the approach of the EAT in *Tomlinson-Blake* and joined cases.[16]

The alternative view – and the one ultimately favoured by the Court of Appeal in *Tomlinson-Blake* – is that a worker doing a 'sleep-in' shift is not engaged in time work within r. 30 unless he or she is called upon to work because of an emergency or for some other reason. For the rest of the time, he or she is merely 'available' at or near the workplace. This would entitle him or her to the NMW under r. 32 unless one of the exceptions applies. Thus, a worker who is provided with and makes use of a place to sleep during the shift would be excluded from NMW entitlement by virtue of r. 32(2).

An example of this provision being invoked in practice is *South Manchester Abbeyfield Society*.[17] The claimant was a housekeeper in a nursing home. She worked during the day and was required to be 'on call' on the premises overnight for four nights per week. She was provided with sleeping accommodation and was permitted to sleep during the nights unless there was an emergency. The EAT held that in this situation, she was only entitled to be paid the NMW for any hours spent actively working during the 'on call' periods. A similar result was reached in *Lauder*, concerning a warden in sheltered accommodation with a working arrangement very like the one just described,[18] and in *Wray*, concerning a pub manager who was required to sleep on the premises overnight for security reasons.[19] It was also the EAT's approach in *Shannon v Rampersad*, also concerning a worker in a care home, which was the case heard with *Tomlinson-Blake* in the Court of Appeal.[20]

The reasoning in Tomlinson-Blake

Underhill LJ, with whom the other members of the court agreed, began by offering his own formulation of the fact situation with which the case was concerned:

> The decided cases display considerable variations in their detailed facts, but the essentials of the situation which falls to be considered are that the worker is contractually obliged to spend the night at or near their workplace on the basis that they are expected to sleep for all or most of the period but may be woken if required to undertake some specific activity; and when I refer to "sleeping in" or cognate terms that is what I mean.[21]

The reference to the expectation that the worker will sleep for 'all or most' of the time in question is potentially significant and I will return to this below.

His Lordship then analysed the Regulations without reference to the two lines of case-law adverted to above. He regarded them as delineating two 'separate kinds' of time work, namely 'work' and 'availability for work',[22] and identified the key issue in the appeals as being 'how the dividing-line between actual work and availability for work applies in sleep-in cases'.[23] He

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[15] *Scottbridge Construction Ltd v Wright* 2003 SC 520 (Court of Session (Inner House, First Division)). See also *Smith v Oxfordshire Learning Disability NHS Trust* [2009] ICR 1395; *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.

[16] The joined cases were *Focus Care Agency Ltd v Roberts*, *Frudd v Partington Group Ltd* and *Royal Mencap Society v Tomlinson-Blake* [2017] ICR 1186.

[17] *South Manchester Abbeyfield Society Ltd v Hopkins* [2011] ICR 254.

[18] *Edinburgh City Council v Lauder* (EAT (Scotland), 20 March 2012).

[19] *Wray v JW Lees & Co (Brewers) Ltd* [2012] ICR 43.

[20] *Shannon v Rampersad* [2015] IRLR 982 (EAT).

[21] Above n 5, [6].

[22] ibid [34].

[23] ibid.

addressed that issue most comprehensively in paragraph 43 of the judgment. Whilst he accepted that it was logically necessary to distinguish between workers who were 'working' or 'available for work', he argued that this was 'unnecessarily elaborate' in practice because 'sleep-in' workers were expressly dealt with in r. 32(2). Because the reference to sleeping had been included within the provisions on availability, this must mean that 'sleep-in' workers were to be regarded as available for work (and then excluded from NMW entitlement) and not as working. As Underhill LJ put it:

> … it would not be a natural use of language, in a context which distinguishes between (actually) working and being available for work, to describe someone as "working" when they are positively expected to be asleep throughout all or most of the relevant period.[24]

Inevitably, this involved holding that *Burrow Down* and cases in which it had been followed were wrongly decided.[25] A more difficult case to deal with was *Scottbridge*.[26] Although this was a decision of the Inner House and therefore of persuasive authority only, Underhill LJ was reluctant to depart from it in construing a UK statute.[27] He therefore distinguished it, largely by finding that the situation of the 'nightwatchman' in the case would have fallen on the 'work' side of the line because he had more duties to perform during his shift, and less opportunity to sleep, than someone on a genuine 'sleep-in' shift.

Underhill LJ was reinforced in his interpretation by two reports of the Low Pay Commission (LPC).[28] These are of significance because under s. 5 National Minimum Wage Act 1998, the government was required to seek the LPC's advice on various matters before making the first set of Regulations under the Act, and to provide a report to Parliament on any matters on which it did not intend to follow the LPC's recommendations. Since the government had not differed from the LPC's recommendations in any respect, it was common ground in the Court of Appeal in *Tomlinson-Blake* that the LPC reports could be used as an aid to construction.[29] The LPC's first report recommended as follows:

> For hours when workers are paid to sleep on the premises, we recommend that workers and employers should agree their allowance, as they do now. But workers should be entitled to the National Minimum Wage for all times when they are awake and required to be available for work.[30]

This does indicate that an exclusion for sleeping was intended, though there is more to be said both about the scope of that exclusion and the assumption on which it was based.

Finally, Underhill LJ (briefly) rejected some of the arguments about the potential for the sleep-in exception to allow unscrupulous employers to escape their NMW obligations. In particular, he emphasised that the decision in *Tomlinson-Blake* did not cast any doubt on the principle first laid down in the *British Nursing* case: that if a worker was engaged in 'time work', he or she should be paid the NMW for the whole of the shift, even in cases in which work tasks were intermittent and he or she was permitted to do other things (including sleeping) during the gaps between work tasks.[31] He regarded this situation as distinct from that in *Tomlinson-Blake* in which the

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[24] ibid [43].
[25] ibid [77], [83].
[26] Above n 15.
[27] Above n 5, [79]-[82].
[28] ibid [44]-[46].
[29] ibid [10]-[16].
[30] Low Pay Commission, *The National Minimum Wage: First Report of the Low Pay Commission* (Cm 3976, HMSO 1998), para 4.34.
[31] Above n 5, [88]-[90]. *British Nursing Association v Inland Revenue (National Minimum Wage Compliance Team)* [2002] EWCA Civ 494, [2003] ICR 19.

workers were positively expected to be able to sleep for all or most of the shift. *Scottbridge* (mentioned above) was an example of a case in which a fine factual distinction might need to be drawn between the two types of situation.[32]

In relation to the cases themselves, the Court of Appeal found that both workers were engaged in sleep-in shifts within r. 32(2) and were thus excluded from entitlement to the NMW.[33] This meant overturning the EAT in *Tomlinson-Blake* but upholding its decision in *Shannon*. In *Tomlinson-Blake*, the worker looked after two men with learning disabilities who lived in their own home but needed 24-hour support. She typically worked a day shift, then a sleep-in shift, then another day shift. She was paid a retainer plus an hour's pay for the sleep-in shift, amounting to £29.05 for nine hours on the premises. The evidence indicated that she had been woken six times in the preceding sixteen months. In *Shannon*, the worker was provided with free accommodation in a flat above a care home, was paid a weekly retainer (initially £50 and later £90) and was required to be on the premises between 10pm and 7am. He was expected to assist the night staff in the care home if an emergency arose, though the evidence suggested that he had 'very rarely' been called upon to do so. The case had the added complication that it could have been (and was in the ET) decided on the basis of the 'at home' exception in r. 32(1), but had been decided under r. 32(2) in the EAT. In both cases, the Court of Appeal appeared to be persuaded that both workers could be expected to be able to sleep for all or most of the shift.

Discussion

Given the apparent policy and the drafting of the Regulations, it is difficult to avoid the conclusion that neither the 'whole shift' interpretation nor the Court of Appeal's approach in *Tomlinson-Blake* is entirely satisfactory.

The attraction of the 'whole shift' interpretation is that it ensures that the worker gets paid for agreeing to spend the night at the employer's premises, ready to work at a moment's notice. It is important to acknowledge that this is a restriction on the worker's liberty: he or she is not free to leave the premises or, for that matter, to take a sleeping tablet and put in some earplugs. Even if there is no 'active' work involved, it is not the same as spending the night at home, free from any obligations to the employer.

The 'whole shift' interpretation also fits with the way we usually think about 'work' and 'availability'.[34] It is not generally the case that a worker is required to be engaged in core work tasks continuously in order to be entitled to the NMW. If we think about cases that do not involve overnight work for a moment, it is abundantly clear that almost no-one works actively all the time. A call centre worker might not have a constant flow of calls, and a checkout operator might not always have a customer at the till. But we would not say that these workers were not entitled to the NMW for the whole of their shift. Indeed, we would probably regard an employer which attempted to argue that they should only be paid for time on the phone or time serving customers as trying to engage in sharp practice.

One response to this would be to say that it is unfair to force employers to pay the NMW to someone who is asleep, and from whom they are not getting good value for money. But it is important to remember the role of managerial prerogative in these situations, as noted by Elias J in *Burrow Down*.[35] The worker makes him- or herself available for work for a period of time as

[32] ibid [79].
[33] ibid [91]-[102].
[34] Above n 1.
[35] Above n 11, [25].

specified in his or her contract and agrees to obey the employer's reasonable instructions, but it is up to the employer to direct what the worker should do during that time. If the employer does not provide any (or enough) tasks to perform, and thus does not appear to get a good return from the transaction, that is the employer's choice. It is not for the worker to prove, in addition, that he or she has somehow 'earned' his or her wage in a particular way.

The difficulty with the 'whole shift' interpretation is that it becomes hard to say when r. 32 will apply. If a worker can be engaged in time work when he or she is merely available or even asleep, it becomes difficult to identify situations in which it is necessary to rely on the 'availability' extension in r. 32 (and thus to trigger the exceptions for being at home or being asleep). Of course, one could take the view that if the courts' broad understanding of 'work' renders r. 32(2) otiose, this is a drafting problem for Parliament to sort out. But it is still somewhat unsatisfactory to leave the provision with no useful role.

The problem with the Court of Appeal's decision in *Tomlinson-Blake* is that it remains unclear when exactly the employer can rely on the 'sleep-in' exception. This is problematic for obvious reasons: it is difficult for employers to know their duties or workers their rights. There is also scope for abuse by unscrupulous employers to treat workers as being subject to the exception when it should not be applied to them.

It seems that what the Court of Appeal may have been attempting to do was to give effect to r. 32(2) but only in a narrow set of circumstances in which the expectation is that the worker will normally have an uninterrupted night during the sleep-in shift. This appears to follow from the LPC's proposed approach to the matter. Although the Court of Appeal relied principally on its first report,[36] its fourth report, published in 2003, offers the clearest statement of its thinking:

> In our earlier reports we concluded that for 'sleepovers', where the assumption is that the worker will not normally be woken, the National Minimum Wage should not apply (in practice an allowance is usually paid) but workers should be entitled to the National Minimum Wage for the times when they were awake and required to be available for work. We noted the difference between these 'sleepovers' and on-call or standby arrangements where a worker is required to be at the workplace outside of normal working hours with the expectation that he or she will be required to work, for which the National Minimum Wage is payable.[37]

The idea appears to be that there is a valid reason for not paying the NMW when the worker is not expected to have to work at all, other than in exceptional cases. It is not entirely clear what the reason for this might be, given that the worker is still restricting his or her liberty by placing him- or herself at the employer's disposal, a point I return to below. However, if the intention is to exclude *some* such situations, the scenario in which the worker is mostly asleep seems to be the best option.

The question then becomes whether the Regulations achieve that effect, or perhaps more precisely whether the Court of Appeal's reading of them achieves that effect. Underhill LJ's definition of a 'sleep-in shift', quoted above, referred to a worker who was 'expected to sleep for *all or most* of the period'.[38] Later in the judgment, he put the point again, perhaps even more strongly:

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[36] Above n 5, [10]-[16], [44], [47], [68], [77], [80].
[37] Low Pay Commission, *The National Minimum Wage : Fourth Report of the Low Pay Commission: Building on Ssuccess* (Cm 5768, HMSO 2003), para 3.56. This was quoted in *Tomlinson-Blake*: above n 5, [15], though the other references in the judgment (above n 36) are to the First Report.
[38] Above n 5, [6] (emphasis added).

The amended language seems to me clearly to connote a situation where the worker is positively expected to sleep and thus to perform no substantive activities: the only obligation is to be available to work if called on.[39]

But how do we identify a situation in which a worker is not expected to have to work during the night shift, other than in exceptional cases? The obvious starting-point is, of course, the worker's contract, but care must be taken here to avoid a situation in which the employer can stipulate away the worker's NMW entitlement by means of a simple statement in the contract that he or she is not normally expected to have to work during the night. Applying *Autoclenz*, it is necessary also to examine what went on in practice in order to be sure of correctly identifying the 'true agreement' between the parties.[40] Employment judges will need to be alert to this issue when applying *Tomlinson-Blake* in future cases.

However, even with this caveat, my concern is that the line between 'sleepovers' and 'on-call' shifts (to use the LPC's language) is not an easy one to draw, and the decision in *Tomlinson-Blake* offers limited guidance. One factor that appears to be important is the frequency with which interrupted nights occur over a reasonably long period of time. The Court of Appeal noted in *Shannon* that the worker had been woken 'very rarely' and in *Tomlinson-Blake* that the worker had been woken six times in sixteen months.[41] But it is far from clear at what point the frequency of interruptions would be such as to cast doubt on the idea that the worker's shifts could properly be regarded as sleepovers. For example, in a case in which half the worker's shifts had been interrupted over the course of the year, there would be plausible arguments for both interpretations. Moreover, this is particularly problematic because of the – not implausible – scenario in which the frequency of interrupted nights fluctuates over time. For example, a sleep-in worker in a care home might go through periods of not being woken at all, because all the residents in the home at that time are able to sleep through the night without incident, and other periods of being woken regularly, because a particular resident has complex needs and requires assistance. In this situation, the worker's shifts could start out as sleepovers but turn into on call shifts, making it difficult for the employer to know how to ensure it was compliant with the NMW.

Another area of uncertainty is how the ruling applies to shifts in which it is anticipated that there will be a combination of working time and sleeping time. It will be recalled that this was the case in *Scottbridge*.[42] The nightwatchman in that case had duties at various specific points in his shift, but was generally able to sleep for four or five hours unless there was an emergency. He was found to be entitled to the NMW for the whole shift, applying *British Nursing*.[43] The case was distinguished in *Tomlinson-Blake*, in part on the basis that it would not have been 'a natural characterisation' of the nightwatchman's job to regard him as doing a sleepover shift.[44] One (attractive) reading of this might be that it is impossible to characterise a shift as a sleepover unless the whole shift is presented as a sleepover with no duties at all. But this might present problems in cases where the shift begins and ends with relatively minor duties. For example, a night sleeper in a care home would normally be expected to complete a handover process with the daytime staff (for example, to identify any residents who have had problems during the day) and might be required to ensure that the premises are secure before going to bed. It is unclear whether it is still open to the employer to argue that this is a sleepover, and whether in doing so it is the nature of the duties or the duration of the uninterrupted sleeping time, or a combination of the two, that will determine the outcome.

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[39] ibid [40].
[40] *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] ICR 1157, [35] (Lord Clarke).
[41] Above n 33.
[42] Above n 15.
[43] Above n 31.
[44] Above n 5, [79].

Of course, one response to this might be to say that it is inherent in any definition that there will be areas of uncertainty. Guidance will no doubt develop over time as more cases reach the courts. However, the financial and reputational consequences of non-compliance with the NMW are potentially serious for employers, and it is for this reason that we should always seek to make the law in this area as straightforward for well-meaning employers to apply as we possibly can.

Thus, the Court of Appeal faced a genuinely difficult decision in *Tomlinson-Blake*. The 'whole shift' interpretation is more generous to workers, easier to apply and less open to abuse, but appears to render r. 32(2) otiose. The 'time spent working' interpretation seems at first sight to make more sense of the drafting, by identifying a category of people to whom r. 32(2) applies, but on closer inspection there are serious doubts as to whether that category is – or could be – delineated with sufficient precision to be applied effectively in practice. It is too much to expect the judiciary to formulate useful tests for the application of statutory provisions in their judgments where the drafters of those provisions have failed to do so. Faced with this dilemma, it is respectfully submitted that it would have been preferable to have given no effect to r. 32(2), with a view to forcing Parliament to take another look at the provision and to clarify what it was attempting to achieve.

Policy issues

There is, of course, a much broader policy issue underlying the *Tomlinson-Blake* litigation: what should a worker who is required to spend the night at the employer's premises and to deal with emergencies when called upon to do so be paid for that shift? Should it matter if he or she is given a place to sleep when there is no work to do?

The LPC based its view on the assumption that employers typically provided workers in this situation with some kind of payment in respect of the sleep-in shift.[45] This payment would not necessarily amount to the NMW for the whole shift, but would offer the worker some recompense for the time spent at the employer's premises and available for work. Any 'actual' work done by the worker would, of course, be paid at an hourly rate subject to the NMW. The LPC did take a great deal of evidence during the course of its work and there is no doubt that some employers do approach sleep-in shifts in this way.[46] Moreover, market forces may come into play: it may not be possible to get workers to do 'sleep-in' shifts if they do not receive any remuneration unless they are called upon to work. But it is important to remember the context of these cases. Most of them concern care workers whose work is poorly paid and socially undervalued because of its heavily gendered dimension, and who often have other indicators of disadvantage, for example, as recent migrants to the UK, as workers supplied via an agency, or as workers with no union representation.[47] It is not difficult to envisage circumstances in which an employer makes clear to a worker, formally or informally, that a 'day job' paid at NMW rates is conditional on taking on a number of unpaid sleep-in shifts. These workers are unlikely to be able to negotiate a better deal for themselves.

It seems unfair to deny workers the NMW for these shifts on the basis of a payment that the employer may or may not decide to make. It would clearly be preferable to amend the legislation to require a payment, though this would involve compromising one of the fundamental

[45] Above n 37.
[46] Above n 30. Nine volumes of written evidence were published alongside this report.
[47] For detailed insights, see LJB Hayes, *Stories of Care: A Labour of Law Gender and Class at Work* (Palgrave 2017).

principles of the NMW, that it operates as a (relatively simple) set of rates payable per hour.[48] But this 'middle way' still does not fully compensate the worker for the restriction on his or her liberty inherent in being at the employer's premises overnight. It is worth reminding ourselves that there is a material difference between being at work and being at home, even if the worker is provided with somewhere to sleep. He or she must still be ready to work at a moment's notice, and may not be able to get a proper rest, however good the sleeping facilities are. The employer gains the benefit of the worker's presence without having to pay anything in return.

More profoundly, the approach challenges the proper understanding of work itself.[49] The worker's obligation is to be at the employer's disposal and to obey reasonable instructions, not to work continuously (not least because most work is discontinuous by nature). It is the employer's managerial prerogative that enables it to get value from the transaction. Denying workers on sleep-in shifts the NMW implies that some workers need to do more than just be available in order to 'earn' their money, in a way that would cause profound problems for the labour market if it were to be applied more broadly. It is yet another example of a way in which risk can be inappropriately shifted from the employer onto the worker.

Conclusion

It would not be appropriate to leave this topic without noting the profound economic problems faced by the social care sector. The UK has an ageing population with increasingly complex care needs, but the capacity of the care sector is shrinking because of funding shortages. Around 65% of social care is funded by local authorities, but the National Audit Office estimates that their spending on social care has fallen by around 5% in real terms since 2010.[50] There is already concern that providers are either refusing to contract with local authorities or exiting the sector altogether. From the perspective of at least some providers, a major concern about the *Tomlinson-Blake* litigation was the affordability of the 'whole shift' approach, particularly given the right of workers to claim six years' worth of back pay at current NMW rates.[51] A provider going out of business is, of course, bad news both for its workers and for those to whom it provides care. However, it is equally clear that workers in the sector experience very poor terms and conditions of employment and that this has a negative effect on the overall quality of care being provided. In 2016-17, the median hourly rate of pay for a worker in the sector was £7.50, and the turnover rate in the sector is around 30% compared to a national average of around 15%.[52] High turnover has a variety of obvious effects on service quality: for example, there may be gaps in provision while new staff are recruited and trained, and those receiving care (which is usually highly personal) see different workers every day, with no continuity of provision. There is a clear link between low pay and high turnover, with the obvious implication that better pay would give rise to a happier and more stable workforce, and an improved experience for service users.[53] Indeed, reports suggest that some providers have not taken the opportunity afforded by *Tomlinson-Blake* to stop paying the NMW on a 'whole shift' basis.[54]

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[48] This is a nice example of the disadvantages of relying on universally applicable statutory provisions to deal with the complexities of the labour market, disadvantages that would not have arisen in a system based on sectoral collective bargaining.

[49] Above n 1.

[50] National Audit Office, *The Adult Social Care Workforce in England* (HC 714 Session 2017–2019, February 2018), para 1.10.

[51] See, for example, Local Government Association, *Update on Payment for Sleep-In Shifts in Social Care* (May 2018).

[52] Above n 50, paras 1.7-1.9, 2.7.

[53] ibid para 2.9.

[54] This is the case for Mencap itself: statement by Derek Lewis, 23 August 2018, available at https://www.mencap.org.uk/advice-and-support/stopsleepincrisis (last accessed 6 September 2018).

In sum, the Court of Appeal in *Tomlinson-Blake* was faced with a difficult question of statutory construction to which there was no perfect solution. It is respectfully submitted that the 'whole shift' approach would have been preferable, because even though it does some damage to the Regulations, it offers greater certainty to employers and workers. Moreover, although it may be tempting to conclude that *Tomlinson-Blake* is the best decision on policy grounds, given the problems facing the social care sector, this view can also be questioned. It is to be hoped that the Supreme Court will have an opportunity to reverse the decision.

A.C.L. Davies[55]

[55] Professor of Law and Public Policy, Faculty of Law, University of Oxford. I am grateful to Alan Bogg for comments on an earlier draft of this note. Responsibility for errors and opinions remains my own.