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‘A just share’
the case for minimum wage reform

by Kate Ewing

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ISBN
978-1-906703-53-0
November 2021

published by the Institute of Employment Rights
4th Floor, Jack Jones House, 1 Islington, Liverpool, L3 8EG

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office@ier.org.uk
www.ier.org.uk

Design and layout by Upstream (TU)
www.upstream.coop

Printed by Rap Spiderweb (www.rapspiderweb.com)

£8 for trade unions and students
£20 others

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CHAPTER ONE

introduction

The COVID-19 pandemic has demonstrated more than ever that some of the most important workers for a functioning society are those subject to disproportionately poor working conditions in terms of pay and fragmented and precarious work practices. Workers who have been expected to stand on the front line in the face of real danger, initially unprotected or under-protected from the risk posed by the virus, and who all too often in return could not and cannot even expect to receive the lowest legal minimum in respect of wages.

This is highlighted by recent TUC research which found that one million children in key worker households are living in poverty. The TUC attribute this to 'low pay and insecure hours – factors that often coincide in occupations such as care workers, delivery drivers or supermarket staff.'[1] The TUC has called on the government to guarantee a decent standard of living for key workers and their families and has put forward proposals such as raising the national minimum wage ('NMW') to £10 per hour,[2] ending public sector worker pay freezes and adequately funding the public sector so that outsourced workers are paid at least the actual living wage. They additionally called for cancellation of the planned cut to Universal Credit, which took effect in October 2021.

The long delayed Employment Bill was to contain provisions, amongst others, to improve minimum rights enforcement through the setting up of a single labour enforcement body and the introduction of a right for workers who work variable hours to request a predictable and stable contract after 26 weeks in order that they have a better idea of what they are likely to be paid.[3] The Government claim that it 'wants to make the UK the best possible place to live and work'. It further notes that '[l]ow paid workers, including many key workers, have made incredible contributions during the Covid-19 pandemic.'[4] The delaying of the Bill perhaps tests the credibility of that government claim somewhat.

This publication will argue that significant reforms to the NMW framework and the way in which minimum wages are secured are necessary in order that all workers enjoy a decent wage and to

ensure that all workers enjoy pay security and dignity in line with the internationally recognised standards to which the UK is a signatory. This commitment has been renewed and further embedded into the UK's post-Brexit future.[5] While an immediate increase to the minimum wage of £10 per hour as proposed by the TUC,[6] or the government proposal to grant workers a right to request a stable contract after 26 weeks should not be rejected out of hand, this publication argues that such measures are too modest to have the impact needed to address the issues faced by low paid workers. Increasing the minimum wage must be backed by measures which ensure that the minimum wage is actually being paid to, and received by, workers. A right to request a stable contract so that a worker can understand the 'likely' wages they will earn is not good enough. This would not even constitute a right to receive such a contract. It should unsettle and concern all workers and their representatives that a normative position exists whereby workers undertaking work might not know as a matter of course what hours they are likely to work or what they are likely to earn.

This publication argues that the problems within the existing minimum wage framework are profound and contribute directly to the ongoing vulnerability and exploitation of low paid workers. The way in which the NMW operates in practice and the way in which some employers engage with the NMW, and are permitted to engage with the NMW, are at the heart of the issues to be considered. This will be illustrated using three case study examples to demonstrate three specific barriers for workers seeking NMW protection: entitlement as workers, reckonable work time and enforcement. These are not the only problems within the legal protection of low paid workers, but rather they represent three key vulnerabilities which contribute to the need for urgent reform.

The exceptional contributions of low paid workers throughout the pandemic are not matched by minimum wage protections which are sufficiently resilient and crisis proof. Significant reforms to the minimum wage framework are needed in order that low paid workers are not subject to such vulnerability in future. As talk turns to the rebuilding process post-pandemic or the 'new normal', it is important that low paid, key workers are not consigned to the 'old normal' or worse. It is vital that, at the very least, minimum labour standards, such as the national minimum wage provide a genuine and secure rights floor if there is to be any prospect of the UK being 'the best possible place to live and work'.

CHAPTER TWO

three case studies

key barriers to workers' right to a minimum wage

In the past year three important cases were decided which directly touch on key issues relating to the national minimum wage and its viability as currently constructed as a minimum labour standard. Two are landmark Supreme Court cases: *Uber BV & Others v Aslam & Others ('Uber BV')* [2021] UKSC 5 (judgment handed down on 19 February 2021) and *Royal Mencap Society v Tomlinson-Blake ('Mencap')* [2021] UKSC 8 (judgment handed down on 19 March 2021). The third case is less known, *Harris & 8 Others v (1) Kaamil Education Ltd (2) Diligent Care Services Ltd ('Harris')* Case No. 1302183/2016 & others. This latter case was settled at employment tribunal level, confirmed by a consent order or judgment dated 3 September 2020. All three cases were union backed.

After briefly setting out key provisions of the NMW framework, this section will take each case in turn to demonstrate the way in which employers attempt to limit the scope and application of the NMW for certain workers and the resulting implications. The approaches taken by the employers in these cases demonstrate a three-stage process in attempts to circumvent NMW obligations which leave workers vulnerable and underpaid. The first step is to simply seek to remove the worker from the scope of protection altogether on grounds of employment status – as showcased by *Uber BV*. This could be seen as a form of liability evasion on the part of employers. Where this does not apply and a worker falls within the protection, an alternative approach may be seen where there is an attempt to redefine or limit the scope of the protection (and thus employer liability), narrowing the work reckonable to be subject to NMW compliance, as successfully argued by the employer in *Mencap*. Perhaps this should be seen akin to a form of liability avoidance rather than wholesale evasion. Finally, where a worker falls within the protection and the work time reckonable is clear and/or has been narrowed, a further approach to further limit NMW liability is observed where a lack of transparency and the development of extremely complex systems for payment render the right almost unenforceable. This is demonstrated by *Harris*, and whether it could be said to amount to avoidance or to evasion is unclear. All three approaches serve to undermine the

minimum wage as a wage floor and a key labour standard.

the national minimum wage: key provisions

In the UK the substantive right to a minimum wage is set out in the National Minimum Wage Act 1998 and implemented in practice by the National Minimum Wage Regulations 2015 (which consolidate amendments to the National Minimum Wage Regulations 1999). Individuals who are categorised as either workers or employees are entitled to be paid at least the NMW. The protection does not extend to contractors and genuinely self-employed people. This issue of employment status is the first barrier which will be explored through the example of *Uber BV*.

The UK NMW system is complex and based on an hourly rate of pay. What constitutes an hour under the minimum wage regulation is thus integral to the determination of the pay received by a worker. Hours to be regulated are categorised in four different ways depending on the payment system used by the employer:

- Salaried hours: based on an annual salary and an annual number of hours to be worked. Payment is made in regular instalments and not tied to the precise hours worked in that pay period.[7]
- Time work: based on the actual time worked or considered to be worked for the purposes of the legislation.[8]
- Output work: based on the output of the worker (which is not time work) and measured by the number of pieces made or processed or tasks performed.[9]
- Unmeasured work: this is work which is not salaried, time or output work.[10]

The category of work relevant to the issue contested and explored in the *Mencap* case study is time work. The meaning of time work is defined by Regulation 30 as:

> '…work, other than salaried hours work, in respect of which a worker is entitled under their contract to be paid –
>
> (a) by reference to the time worked by the worker;
>
> (b) by reference to a measure of output in a period of time where the worker is required to work for the whole of that period; or

(c) for work that would fall within sub-paragraph (b) but for the worker having an entitlement to be paid by reference to the period of time alone when the output does not exceed a particular level.'

Under Regulation 31, 'the hours of time work in a pay reference period are the total number of hours of time work worked by the worker or treated under [the Regulations] as hours of time work in that period.'

Regulation 32 in turn addresses time work where a worker is available at or near a place of work:

(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 time spent by a worker undertaking training[11] and travelling for the purposes of work between assignments (but not to/from home to/from an assignment)[12] is reckonable work time for the purposes of the NMW. The NMW can be enforced either through HM Revenue & Customs or by an individual worker bringing a claim in the employment tribunal. An interesting feature of the enforcement regime is that there is a reverse burden of proof in relation to the NMW.[13] This means that it is for the employer to demonstrate they have paid a worker at least the NMW, it is not for the worker to prove that they have not been paid correctly. Highly relevant to enforcement action are NMW records. Employers are required to maintain records for each worker for a minimum of six years.[14] They must show per worker, per pay period, how it is said they have paid in compliance with the NMW. The failure to maintain or retain NMW records is a criminal offence.[15] Workers in turn have a right to inspect their NMW records.[16] These are all issues which arise in the third case study, *Harris*.

UBER BV: employment status as a barrier to protection

Uber BV concerned private hire drivers working for app-based Uber and focused on the issue of their employment status. The issue of

employment status has been highly contested and litigated in relation to gig or platform economy workers in recent years, in many countries. Corporations such as Uber have sought to present this as a new way of working, with mutually beneficial flexibility which delivers both a service desired by customers and an approach to work enjoyed by workers. In this highly flexible system, workers are very expendable and vulnerable to exploitation largely because their status is constructed by the companies as being one of private contractor and thus falling outside of many core labour protections. In this regard the decision of the UK Supreme Court was of critical importance. If an individual can be deemed to be an independent contractor they are not entitled, for example, to pay of at least the NMW. If they are however found to be at least a worker then this protection applies to them.

While worker status is a gateway to some core labour protections, employee status is the gateway to the fullest labour protections in the UK. Thus, the first step, the widest step, companies and employers may take to limit their obligations and liabilities in respect of their workforce is by articulating an independent contractor status for those working for them. Where this is contested by those doing the work, they are required to litigate the issue to establish their status and thus the rights that they were and are entitled to as a consequence. This can be a particularly long and arduous task for low paid and vulnerable workers if their claim is contested and appealed by the employer. The case in *Uber BV* was lodged in 2015 and heard in the first instance Employment Tribunal in 2016. The matter continued to be contested until the UK Supreme Court ruled in February 2021 that drivers were not independent contractors but rather were workers and thus entitled to key minimum protections such as the NMW and holiday pay.

The *Uber BV* decision has largely been met with approval, with workers also stated to be working under the Working Time Regulations for all time that they are within the territory in which they are licenced to operate, and they are ready and willing to accept trips.[17] The Court goes on to conclude that the workers, for the purposes of NMW, were not undertaking time work but rather were undertaking the work in the more expansive category of unmeasured work. This is clearly an important and welcome step towards protecting these workers' rights because it opens up the analysis that the workers are entitled to receive the NMW for all the time that they are undertaking

unmeasured work – that is to say the time spent within the territory in which they are licenced to operate, and they are ready and willing to accept trips. However, despite this there continues to be a lack of clarity on the issue of how work time is to be treated in practice in relation to pay and the unmeasured work provisions. There are indications that the employer may seek to narrow the scope of the period for payment and contest the scope of their liability.[18] There are also suggestions in the subsequent *Mencap* decision that the Supreme Court may take a narrow view on the construction of work time reckonable for NMW purposes.

This goes to the argument, developed further below in relation to *Mencap*, that where an employer cannot simply remove a worker from the scope of protection and themselves from obligations in relation to NMW, they then may turn to seek to narrow the scope of the right in practice. For instance, Uber's proposal on minimum wage payment following the decision[19] bore a striking similarity to their submissions on the issue at the Employment Tribunal.[20] Drivers' earnings are to be calculated on the basis of a 'driver's 'engaged' time in the Uber app – defined as time spent assigned to, or travelling with a passenger. Anytime waiting for customers would not be included.'[21] This was an approach which was decisively rejected by the Tribunal whose decision on this was upheld by the Supreme Court. It could be said that Uber's post-judgment proposal goes slightly further than the submission that should be in respect of the time spent actually carrying a passenger –now workers are to receive payment for the time spent between accepting the trip and the passenger physically entering their vehicle as well. The effect, however, is this simply appears to be a slight tweak to their submission that Uber workers engage in 'time work'.

At the heart of the Tribunal decision on the issue, upheld by the Supreme Court, was the finding that the workers undertake 'unmeasured work' and the of Uber's argument they are engaged in 'time work' as defined in the National Minimum Wage Regulations 2015. Unmeasured work is a catch all, residual category of work which is not salaried, output, or time work. Importantly, in the absence of a specific mechanism (a daily average hours agreement) all such time is subject to national minimum wage compliance when it is unmeasured work. The Tribunal, upheld by the Supreme Court, defined working time under the contract and the Working Time Regulations of the Uber drivers as the time spent when the worker is logged into the

app, the worker is within the territory in which they are licenced to operate, and they are ready and willing to accept trips. There may be scope for extending this in relation to out of territory work and some consideration may need to be given to workers who are logged into multiple ride sharing apps at the same time. Each case would be individually, fact specific.

What is clear is that this definition creates a definable and recognisable 'virtual work environment', a digital or virtual version of, for example, the supermarket worker who clocks into their store for their work and waits at the check-out for customers to serve. We accept in both scenarios that in clocking in/logging in (to the shop or app) and attending the place of work (the shop or territory) and being ready to undertake activity (serve a customer or accept a trip) that the worker is working. Where workers are engaged in unmeasured work, then all this time is subject to NMW compliance. By contrast, the approach advanced by Uber is actually more akin to 'time work' as has been noted above. This is where alarm bells ought to sound. As will be discussed below, there are lessons to be learnt from the care sector[22] which tell us that this category of work and approaches to fragmenting periods of time subject to minimum wage payment leads to significant non-compliance by employers and results in minimum wage violations.

MENCAP: time that counts

Mencap illustrates well the problems workers continue to encounter when the issue of their employment status is not in question and a direct barrier to entitlement to NMW. It demonstrates how even where workers have established entitlement to the minimum wage there continue to be barriers in their way to decent wages. *Mencap* concerned social care workers who perform sleep-in shifts as part of their duties. The appellants in this case were arguing that they were entitled to be paid for the entirety of their sleep-in shifts. They were appealing decisions of the Court of Appeal which had held against them.

The work of the first appellant, Ms Tomlinson-Blake, was described as falling in two parts. She undertook 'day care' for which she was salaried. She undertook 'sleep-ins' for specified hours which were to be dealt with under the time work provision in the Regulations. The sleep-in was described by the Court as time when the worker was permitted to sleep, required to remain on the premises and time in which she had

no duties except to keep a listening ear out (including when she was asleep) as well as attend emergencies. For this Ms Tomlinson-Blake was paid an allowance of £22.35 plus one hour's pay in anticipation of needing to routinely respond to the needs of the people she cared for during the sleep-in, giving a total payment per sleep-in of £29.05. The sleep-in shift was nine hours in duration between 10pm and 7am. The sleep-in shift was frequently conducted between two day shifts meaning that Ms Tomlinson-Blake was effectively 'on duty' for up to thirty hours continuously.[23] The position of the other appellant, Mr Shannon, was somewhat different. He was an on-call night care assistant, and was provided with free accommodation and utilities and required to be in this accommodation from 10pm to 7am and permitted to sleep. He was to be available to attend any emergency if called upon by the on duty night care worker, and was paid £50, and then later £90 per week for this.

In dismissing the appeals, the Supreme Court found that the workers were not 'available' for work for the duration of their sleep-in shifts within the meaning of Regulation 32(1) and therefore not entitled to NMW for the entirety of the shift. This is because they had an arrangement by which they could sleep at the employers' premises. Even if awake during this time, it was said that they were not awake for the purposes of work (as required by Regulation 32(2)) and thus not 'available' for work as defined by the Regulation. They were only entitled to be paid the NMW for the time spent actively responding to an emergency or incident during the sleep-in shift because during this time they would be awake for the purpose of work. The Court noted that the pertinent question was not whether the worker is working but how her hours of work are to be determined for NMW purposes. The Supreme Court accepted that it is possible to be available for work, be permitted to sleep, and not be a sleep-in worker for the purposes of Regulation 32. In such cases the worker would be entitled to be paid for the period during which she is asleep. What distinguishes a sleep-in worker under Regulation 32 is where *the principal purpose and object* of the arrangement is that the worker will sleep at or near the place of work. Responding to any disturbance during the time allocated for sleep must be subsidiary to that purpose or objective. This also means that not every worker permitted to take a nap in between intermittent tasks is necessarily a sleep-in worker. They may, depending on the facts, be working.

It is important to note the nuance of the Court's position. Under

Regulation 32(2) a worker is available for work only if she 'is awake for the purposes of working, even if [the] worker by arrangement sleeps at or near a place of work and the employer provides suitable facilities for sleeping'. The issue for the Supreme Court, however, is not whether the worker in fact sleeps, or indeed is even expected to sleep, but rather whether there is an arrangement under which she *may* sleep at or near the employer's premise. (Nor does it seem to be relevant for the purposes of the Court that even if asleep the worker may still be on duty by virtue of the obligation to sleep with a 'listening ear'.) By making the foregoing distinction the Court broadens the scope of the sleep-in provision to any worker who is provided with an arrangement whereby it is said they may sleep at the employer's premises. What the worker does in fact do is not relevant. Nor does the Court appear to consider it relevant what it is that the worker is expected to do, or that the arrangement may be imposed by the employer for their own benefit in terms of limiting the application of NMW protection.

The Supreme Court reasoning endorses and facilitates the fragmentation of work time leaving more workers unprotected as elements of their work are determined to be outside the scope of the NMW, the lowest legal pay minimum. In seeking to avoid a construction of a sleep-in as work (and thus grant workers greater protection) the Court replace with has chosen to apply a narrow construction of work time subject to NMW defined as time spent undertaking active tasks. This is despite a situation whereby a worker is obliged, at risk of disciplinary action, to remain on the employer's premises and at the employer's disposal, serving a function which permits the ongoing operation of the employer business and the labour saving practices of the employer. It is also in the context of a labour relationship where the employer defines the method of payment, the labelling of the shift and activity and has a vested interest in limiting the extent of their pay liabilities. Such a construction results in the worker not being entitled to have all these hours subject to national minimum wage compliance requirements.

Furthermore, a narrow framing of the NMW by the Supreme Court in *Mencap* as a market failure initiative contrasts with the approach taken by the Supreme Court in *Uber BV* (a unanimous judgment before a panel of judges which contained two of the same judges as in *Mencap*). There, the Court recognised that 'Laws such as the National Minimum Wage Act were manifestly enacted to protect those whom

Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it.'[24] Although the Court in *Uber BV* refers to the categorisation of worker status, the same analysis can be applied to the way employers may seek to construct time and label activity in a way which determines if it is treated as work or as a sleep-in exempt from NMW scope – ultimately for the employer's benefit.

UK minimum wage law, in its use of the concept of 'available for work' in the time work category creates an interim status between work and rest which leaves workers vulnerable and subject to the vagaries of judicial interpretation. This issue is explored in Deirdre McCann's work where she utilises a theoretical framework model for her analysis.[25] McCann refers to this status as temporal casualisation and notes that 'excising genres of slack time from the legal protection is inherently dangerous. Periods of "availability" are difficult to distinguish from other varieties of slack time… Once unleashed, legalised conceptions of availability time are at hand for further attempts to drain time from the working day', which can undermine a range of protections including minimum wage laws.[26]

This is because of the creation of a faux distinction between hours actually worked and hours worked subject to NWM regulation. This is noted by the Supreme Court in relation to their analysis of the wording of Regulation 17 of the 2015 Regulations, whereby the NMW is calculated on the basis of hours worked or 'treated as worked'. According to Lady Arden in *Mencap*, the use of the word 'treated' indicates that a 'counterfactual situation may arise' whereby 'there will be occasions when hours are not treated as hours worked for the purposes of the Regulations even though a different number of hours might have been determined to be worked in the absence of that provision.'[27] This means as a result, that there can be periods of time undertaken by a worker, under the control and direction of the employer, which are not subject to minimum wage protection. The effect is to create a category of work which falls outside minimum protection and therefore for which potentially no wage is due. It is a fundamental and major weakness of the regulatory framework, if it is to serve as a wage floor, that elements of work time can be excluded from protection in this way. And, as is noted by McCann, it embeds 'a legislative vulnerability' for workers.

In many ways the *Mencap* judgment reflects prevailing practices where work time is increasingly broken up and work constructed

narrowly in exclusively economically productive terms, too often at the cost of workers' rights and dignity. Work time is fragmented and reconceptualised so as to remove it from the scope of key labour protections such as the minimum wage, which is being increasingly used as a ceiling rather than a floor. And this ceiling is in turn seen as something to be limited in application. These issues are perhaps sometimes considered to be the preserve of newer platform-based sectors and the so-called gig economy, hence the concerns outlined earlier relating to the lack of clarity following *Uber BV*. *Mencap* however, highlights that the underlying work practices extend beyond the gig economy and either infect or underpin attitudes to minimum wage protection more widely, including in the public sector and essential front-line services. It is in this regard that the Supreme Court's decision and its likely contribution to the ongoing fragmentation of work time is deeply troubling. There are likely to be more situations – as seen with home care workers – where workers may be continuously working and yet work time is constructed for the purposes of minimum wage so that they are only deemed working for certain purposes for part of that time.[28]

It is also important to reflect on the situation in the round. Workers in the care sector have consistently suffered from increasingly fragmented work time practices by employers over recent years. The effect of this is to remove elements of work time from the pay calculation so that less and less time is subject to NMW compliance calculation. In home care the problem has typically entailed the failure to pay travel and waiting time (in full or at all) or to pay only for 'contact time', per minute, spent actively caring. Fragmentation of work time to limit or seek to circumvent these liabilities results in highly complex pay calculations, with hundreds of work time fragments per pay period to be accounted for. The scope for omission, deliberate or accidental, of work time by employers in NMW calculation is very high. Further, the sheer volume of entries, the employer lack of transparency around pay calculations and data makes it virtually impossible for workers to verify payments received and establish that their pay is NMW compliant. This leads to the third case study in which the practical impact of the work time fragmentation is demonstrated.

HARRIS: enforcement

Even where workers have established entitlement to minimum wage, and where the time which is to be considered subject to minimum

wage is ostensibly clear by law, there are considerable barriers to realising the right, as demonstrated by the third case study. This is because of problems relating to enforcement – specifically in terms of maintenance and access to pay records and the way in which employers fragment work time. Despite the existence of a reverse burden of proof in the legislation, where employers fail to maintain (adequate or at all) NMW records, in practice workers still have to be able to demonstrate to a Tribunal what they claim they should have been paid in order to secure a judgment in their favour for the sum owed.

The *Harris* case serves as an important and sobering example of the challenges that low paid workers face in reality when seeking to enforce their right to receive pay which is compliant with the legal wage floor. The case was lodged, with the support of the workers' trade union, in 2016. Owing to a long running dispute as to who was the correct Respondent to the proceedings – there had been a transfer of contracts shortly before the claims were filed – involving multiple preliminary hearings, the workers did not secure an outcome at first instance to their substantive wages claims until September 2020. The matter in fact settled at the Tribunal door by agreement and the Tribunal consent order or judgment (unusually, perhaps, the terms were not confidential) records awards to nine workers totalling in excess of £100,000.[29] Low paid workers had to battle and wait for four years to secure significant sums of money that the employer ultimately agreed they were owed.

What is even more remarkable is that these workers faced this uphill battle to secure what was theirs, by law, in a context in which the employers' defences had been struck out in a hearing in 2017 owing to non-compliance with Tribunal orders.[30] That means that their claims on liability were uncontested. This is also in a context in which it should be recalled again that the applicable law was framed with a reverse burden of proof. That is to say, unless evidence is provided that the NMW has been paid the presumption is that it has not been paid. Given the employer had no admitted defence to the workers' claims of underpayment (because the defence had been struck out) there was no evidence before the Tribunal of NMW compliance by the employer. In the absence of that, the workers' claims on liability and NMW underpayment were made out.

It is also evident that the *Harris* workers used the existing legislative tools at their disposal in order to try to secure their rights. Applications

were made under Section 10 of the NMW Act which gives workers a right to inspect the employers NMW records. That is to say, NMW records which employers are required to maintain as a matter of law. The employers in this case failed to produce the records as required – this is documented in Tribunal judgments for awards of compensation to the workers as provided for under the legislation.[31] However, this leaves a fundamental difficulty. Despite having an uncontested NMW claim against the employer and a right to access NMW records, where no records are produced (or retained or provided in the course of a transfer of contracts), the worker cannot easily demonstrate the NMW shortfall (and thus the sum they are owed) in a context where a pay system has been developed which is highly complex.

This is because it is not the case that workers have not been paid for entire shifts which can be easily identified as (for example) eight-hour blocks of work time done on a specific day which is unpaid. Rather what happens in the social care sector, in home care in particular, is that elements of time – usually some or most of active care time - is paid for. The problem for NMW compliance (and thus receipt) lies in the work time, reckonable according to NMW legislation, which surrounds the active care time – travel and waiting time. Workers are presented with payments per pay period where they are unsure what has been factored into the pay calculation (how much, if any travel time and waiting time has been treated as reckonable by the employer?). They are unable to verify their pay on receipt. Furthermore, maintenance of their own records so that the individual worker can decipher their pay is very difficult in a context where some workers are working 20 or 30 different care appointments a day. Quite simply there is not time to keep track of each fragment of work time.

This is where the *Harris* judgment is particularly illuminating in demonstrating the complexity of the pay systems and the fragmentation of work time within the social care sector. The narrative element of the judgment sets out a summary over two and a half pages on how a methodology was developed by the workers and their representatives in order to provide a reasoned best estimate, in the absence of lawfully maintained NMW records, of the workers' likely earnings and thus arrears. It is here that the third manifestation of the barriers placed in the way of workers realising NMW rights can be seen very starkly – having gone from preventing workers accessing the right by virtue of employment status, to restricting the scope of the right by the definition of 'time' for which payment is due, a third phenomenon is seen, namely, the tacit denial of the right by

making it disproportionately difficult to enforce. Difficult to the point that for many, particularly non-unionised workers, it is virtually unenforceable. The *Harris* workers were unionised and supported by an active local branch and provided with legal representation. They cannot be considered to be typical. Nor can litigation spanning four years and the associated costs of multiple hearings with the legal costs of representation be considered proportionate. In this regard the *Harris* case and judgment is noteworthy simply because it exists at all. This is why the insight that gained from the case is important.

A genuine question must be raised – had the *Harris* workers not been in a union and had they not been provided with intensive legal and industrial support – would it have been possible for them to effectively recreate a model of the employer's pay system in order to determine what they were likely to have been owed? This leads to an obvious follow-on question: how can it be acceptable or sustainable in relation to a minimum labour standard that workers have to recreate a complex employer pay system which by design or default circumvents NMW compliance? If the practice as documented so clearly in the judgment is normalised, this will entail a requirement being placed on the shoulders of low paid workers – owed thousands of pounds – who carry out some of the most essential work in society that they individually enforce the NMW. And not only that, because employers in the sector have pay systems so complex, it requires workers to deconstruct and reconstruct the employer pay model in order to individually calculate their arrears, minute by minute. It is no exaggeration to say that for a worker working full time, 20 or 30 care appointments a day, with associated travel time this will require analysis of thousands of fragments of time. It is a gross injustice and affront to any suggestion of dignity and decency for these workers and it is hard to see how the current system when applied in this way can be supported. It is simply not fit for purpose.

CHAPTER THREE

minimum wage and COVID-19

While the three case studies were all decided in the first year of the COVID-19 pandemic, they relate to pre-pandemic work. All three also relate to groups of workers who continued to work, in person, throughout the most acute moments of the pandemic, providing essential frontline services. The problems these workers experienced prior to the pandemic have not gone away. Both their importance to society and the dedicated work they undertook in a period of national and international crisis has not resulted, beyond short lived gestures such as hand clapping, in meaningful recognition of their rights and of the importance of ensuring they enjoy decent and dignified working terms and conditions. On the contrary, the problems identified and illustrated in the case studies, are now even more acute. That '[t]he impact of the Covid-19 pandemic has highlighted further potential risks and exposure of workers to exploitation' has been acknowledged by the Government.[32] The following section sets out how low paid workers have been subject to an institutionalised disrespect[33] – for their rights and for them as workers during the pandemic.

NMW and the COVID impact

Research undertaken by the Bakers Food and Allied Workers Union (BFAWU) on in-work poverty and specifically food poverty, indicates that 'many food workers are struggling to afford basic foodstuffs.'[34] BFAWU carried out a survey of food sector workers between February and March 2021 – when the UK was experiencing the full impact of the COVID-19 pandemic. These food workers were for the most part working throughout the pandemic period, on the front line, ensuring that food production and supply continued during the global crisis.

The BFAWU research found that 40% of respondents to the survey had 'eaten less than they thought they should have at some point during the pandemic, due to a lack of money.' 20% reported 'a time during the pandemic where their household had run out of food due to a lack of money.' The very people who were responsible for keeping the nation fed, were themselves experiencing food shortage because of a lack of sufficient income during this period of crisis.[35] Factors behind this food poverty relate to low wages – either because the hourly rate was so low or because of uncertainty

around the number of hours of work available.

A second factor relates to the inadequacy of protection and pay for workers who had to take time off to self-isolate due to (potential) COVID-19 exposure. Workers who continued (and continue) to work during the pandemic and attend workplaces – such as those in the food industry or care sector for example – would be both at greater risk of COVID-19 exposure because they were mixing with more people and carrying out essential roles where prevention of transmission is particularly important. Having reliable self-isolation support is all the more essential in these cases. The failure to ensure ongoing wage payment at least commensurate to the legal wage floor in order to ensure that those undertaking this work but required to stop and self-isolate for public health reasons, left low paid workers bearing an undue share of the economic risks and consequences of the health crisis.[36] This serves to illustrate how the pandemic situation both highlights and exacerbates particular weaknesses in the NMW framework.

It is of course important to set the minimum wage at a level which ensures a living wage in order that it provides a genuine wage floor which protects low paid workers. However, setting the rate appropriately is only part of the issue. The other part, and where the framework is particularly weak, lies in the failure to ensure an overall basic minimum income is received. The continuing widespread use of zero hours contracts where no minimum hours of work are guaranteed is highly problematic and can and does leave workers with insufficient hours to earn enough to feed their families. The framing of the minimum wage as an hourly rate under NMW legislation may also serve to incentivise the fragmentation of work time by employers and/or where not all work time is properly included in minimum wage calculations, a problem which is widespread in the care sector (see further below). Workers who do not have enough paid hours – either due to a lack of hours or a lack of payment for those hours are vulnerable to in-work poverty and food poverty. In the crisis of the pandemic this has been all the more acute because opportunities to supplement low hours and low pay have been diminished.

NMW and the Coronavirus Job Retention Scheme

The brittleness of the NMW protection in crisis is further highlighted by the failure to ensure that the Coronavirus Job Retention Scheme (CJRS) protected earnings at least at the level of NMW for those

workers who were not working for periods due to the pandemic. The CJRS permitted employers to pay furloughed workers the lower of 80% of their wages or £2,500 even where the payment would fall below the minimum wage.[37] Beyond the profound problem of endorsing sub-minimum wage payment, this 80% of earnings calculation has two additional problems in the minimum wage context. Firstly, it is based on 80% of earnings worked in a previous period (the system of calculation is somewhat complicated and varies for different workers).[38] For workers on fixed and regular hours who earned above the NMW this would no doubt have been challenging but savings may have been possible through not incurring commuting costs and so forth. For workers earning the minimum wage this entailed a reduction in earnings to below NMW level but with no commensurate reduction of rent and bills. Further, TUC research suggests that low paid workers were five times more likely to be furloughed on reduced pay.[39]

Additionally, for those workers on variable hours if their furlough payments were calculated based on a reference period where their hours happened to be lower this would be reflected in their furlough payment and further sustain periods of low payment (at an even lower level). That is to say that their income was protected at a level which was effectively a snapshot in time which may not have reflected what they would have earned, but for the pandemic. The situation also assumes that pre-pandemic pay for workers on variable hours was NMW compliant and all hours paid for correctly. Something which is, regrettably, not the experience of all workers (see below). Furthermore, those low paid workers who remained on furlough throughout the pandemic were not entitled to the annual NMW uplift in April 2021 because their pay entitlement and calculation was based on pre-pandemic earnings.[40] Thus their 80% of NMW became 80% of the previous NMW. This coincided with the point that inflation (RPI) returned to pre-pandemic levels.[41]

It is also noted that Government guidance on calculating furlough payments refers to hours worked as being recorded on payslips following the 2019 amendment to the Employment Rights Act 1996.[42] However, unions such as UNISON, have repeatedly raised concerns about the adequacy of the provision and specifically the failure to require that all hours reckonable for NMW purposes are provided in a transparent and verifiable way on payslips for workers.[43] As explained above, this is a particular concern in sectors such as the social care

sector where travel and waiting time is frequently not paid, or is under paid. The ongoing failure to make regulations under section 12 of the NMW Act requiring a verifiable NMW compliance statement to be provided to workers by employers at the point of payment is a glaring omission and undermines the protection of workers. This is particularly true in times of crisis where pay protections have been predicated on an assumption that previous hours and work had been paid lawfully. There is a risk that vulnerability is further embedded as a result. This issue feeds into concerns raised regarding compliance and enforcement in the *Harris* case study.

CHAPTER FOUR

reform and the role of trade unions

A key feature of the three case studies discussed is that all the workers were in a trade union and their claims backed by trade union support. To this extent, it can be said that these workers as a result enjoyed greater protection and had more options than non-unionised workers. Despite this they remained and remain critically disadvantaged. Consequently, small scale refinements of the current system which leaves low paid workers, even if backed by trade unions, to shoulder the burden of NMW enforcement in an increasingly complex regime is not a viable solution. This section will firstly identify measures which could be adopted immediately or relatively rapidly to reform and improve the existing framework. But a note of caution is necessary.

It is necessary to avoid the temptation to 'make things better or more efficient' by way of changes to the tribunal system, which could ultimately leave workers even worse off. Whilst alternative measures are proposed it is important to be clear from the outset that these should be considered interim proposals and 'trade unions and their members must have the aspiration of making the rules, not simply enforcing the rules made by employers or by Parliament.'[44] As long as labour is 'so cheap, flexible and disposable'[45] low paid workers remain vulnerable to exploitation and poverty. It is proposed, therefore, for long term, sustainable improvement for low paid workers an alternative approach should be taken which requires significant commitment: sectoral collective bargaining.

Turning first to changes which can be made to improve the situation of low paid workers. Taking the three issues identified in this publication in turn – what changes or reforms can be proposed to make what already exists better applied?

employment status

In the Labour Party's 2021 Employment Rights Green Paper it is noted that the 'injustice of insecure work, lacking basic rights and protections' ought to be 'rectified by the creat[ion] of a single status of 'worker' for all but the genuinely self-employed' so that'[a]ll workers, regardless of sector, wage, or contract type [are] afforded the same basic rights and protections.'[46]

The *Uber BV* case has clearly been important in setting out the issue of employment status for those workers involved. From that case key principles can be drawn on the issue of false self-employment and status more generally. However, in order to embed this and ensure easier and wider application for workers, proposals such as those put forward by Chris Stephens MP in the Workers (Definition and Rights) Bill[47] and by Lord John Hendy QC in the Status of Workers Bill[48] are important. The proposals in both Bills would seek to address issues such as employment status and the consequential rights which then apply, to whom and when. This is significant because these proposals would codify and make concrete the issues addressed by the *Uber BV* case for a wider group of workers.

The Status of Workers Bill in particular contains clear proposals which grant worker status to all but the genuinely self-employed and thus access to key labour protections such as the minimum wage. Further, of critical importance in the Bill is the provision of a presumption that a person working for another is a worker or an employee unless it can be shown by the 'employer' in legal proceedings that they are not the employer of the individual in question. This would mean that by law the starting position would be the (rebuttable) presumption that one person working for another was a worker or employee working for their employer. Such a presumption addresses the imbalance which currently exists where wrongly classified workers must litigate, sometimes for years at considerable expense, to establish their status (after which substantive rights may still require further enforcement). Removing ambiguity by providing that all workers other than those who are genuinely self-employed is a critical step to eliminating the first barrier to workers enjoying core labour protections, such as the NMW as identified in this publication.

reckonable work time

As the Labour Party Green Paper notes, addressing employment status 'only solves part of the problem'[49] for workers in insecure and precarious working arrangements. Another part of resolving the problems faced by such workers relates to addressing the way in which their working time is dealt with and considered. Addressing the hyper-flexibility which has become all too common and customary for many workers is one critical issue, particularly for workers who are employed on zero hours or no/low minimum guaranteed hours contracts. Why is extreme flexibility both tolerated and not specifically compensated? Why is there no requirement to pay a premium rate

in return for flexibility and why are limits not placed on the degree of flexibility an employer can expect from a worker? It is simply not credible that a reputable and functioning business is incapable of any forward planning in terms of the organisation of their staffing needs. This is particularly the case when balanced against the importance of dignified and predictable working conditions for those carrying out the work.

In certain sectors there may well be elements of unpredictability which require flexibility on the part of the workforce which genuinely cannot be foreseen by the employer. However, even in such cases there is likely to be a core element to the work which is likely to be more predictable and ought to be planned and workers provided with predictable work schedules and in turn consistently guaranteed core pay. This could then be topped up with a (limited) percentage of agreed flexible hours provided such hours are subject to a premium rate, which must not be factored into NMW compliance calculation (that is to say premium rates must not be used to subsidise sub-minimum wage core work rates). Under the current NMW legislative regime there is no incentive to make employers think whether the flexibility is really necessary, whether it could be limited, or if is just something they use because they can with little regard to those doing the work. As such it could be said that the existing legislative framework for NMW fails to disincentivise and may in some cases incentivise the use of exploitative contracts and labour practices. Reform to existing provisions must incentivise better, more consistent employment practices and disincentivise fragmentation in order that workers are not subject to the hyper-commodified, expendable status they all too often experience.

The case of *Mencap* (amongst others) also raises questions relating to how reckonable time for NMW ought to be considered and constructed. Is there a fundamental flaw in the framework of the NMW legislation which leaves certain workers especially vulnerable? Should definitions of work time be changed or amended? And if so, how? For instance, one measure could be the introduction of regulations which expressly state that time spent at the disposal of the employer is to be treated as work time. In this regard examining and learning from the operation of legislated minimum wages in other jurisdictions would be valuable. For instance, to what extent does the hourly rate of pay under the UK NMW regime contribute or create vulnerabilities for low pay workers? What lessons can be learnt from countries such as Spain which operate monthly minimum

wages? How does the construction of reckonable work time impact the fragmentation of that work time and the undermining of the minimum wage as a protection? Does a weekly or monthly model of pay disincentivise fragmentation and incentivise employers to more efficiently organise workers and their work time in order to 'get their monies-worth'? Can the way that reckonable time is structured act as a potential further check on employer excess and limit worker commodification?[50] Drawing on lessons to be learned from the existing weaknesses of the UK NMW model and elsewhere is likely to serve as illustrative for further proposals for amendments to the current legislative framework in order to more adequately protect low paid workers. It would also address the second barrier identified: employer attempts to limit the scope of NMW protection (and thus their liabilities) by fragmenting reckonable work time.

enforcement

In terms of the third identified barrier: circumventing enforcement, a starting point would be better and more aggressive enforcement of the NMW by the statutory enforcement agency HM Revenue & Customs. Emphasis is placed on the need to 'help' employers better understand their obligations in the Governmental consultation response on the creation of a single enforcement body.[51] However, HMRC already provides a range of guidance, webinars and other means for supporting employers. The NMW Act is over twenty years old. At least some employers appear to understand their obligations sufficiently well that they are designing mechanisms to circumvent them. Meanwhile low paid workers are being expected to engage in highly complex and long-running litigation in order to recover the minimum wage payments they are owed.

HM Revenue & Customs (and any subsequent enforcement agency) must demand more clearly and enforce more actively, provisions relating to record keeping. While better record keeping may not be a panacea it is a matter of concern that there appears to be little motivation, diligence or transparency in enforcing record keeping requirements by employers on the part of HM Revenue & Customs. While increasing the period of time that records must be retained is to be welcomed,[52] the crucial issue is the content of those records and their accessibility to workers. Employers who fail to maintain NMW records should be prosecuted by HM Revenue & Customs under existing powers.[53] It is not sufficient or defensible to rely on worker enforcement on pay records through the Employment Tribunals

which results at best in a maximum penalty of £712.80 (based on the applicable NMW rate at the time of writing) for employers who fail to produce records requested by workers.[54] In the grand scheme of avoiding a successful claim for wider NMW breaches, £712.80 may be considered a small price to pay by some employers (because the absence of verifiable and accurate pay records makes opportunities for substantive wage enforcement very difficult for workers as illustrated by *Harris*).

Where employers can avoid responsibility and NMW compliance by simply ignoring legal requirements or hiding behind complex and/or inadequate pay systems and this serves to impede the enforcement of the rights of workers then the NMW regime cannot be said to be fit for purpose. It is not sufficient to have legal protection on paper. Such protection must be capable of enforcement. Where employer attempts to avoid legal compliance place barriers in the way of enforcement this should not simply be brushed off as too complicated or unfortunate. It must be taken very seriously as it substantially undermines the very right itself. An immediate reform which ought to be implemented is the requirement that employers produce a minimum wage compliance statement which workers can verify at the point of payment. This would not require primary legislation but rather could be achieved by way of the making of regulations under the existing NMW Act.[55] This should not be a burdensome requirement for already compliant employers because this ought to entail a compliance calculation already being carried out in order to satisfy themselves of the lawfulness of the payments they make to their workers. Any provision of a compliance statement would simply entail said calculation to be passed on to workers at the point of payment in a transparent way.

It is worth noting at this point the proposals from Government regarding a single enforcement body.[56] The proposals set out in the Government's consultation response are lacking in detail and substance. It is unclear when they will be acted upon and how they will be funded. Further, one important issue which remains to be resolved is whether or not the newly formed single body will have the powers necessary to compel compliance by employers. Without adequate powers the body will be toothless and will not serve to protect low paid workers and their rights. What is striking is that the Government recognises that the enforcement landscape is 'deeply fragmented' and a new inspectorate is needed so that 'more vulnerable workers across the country will receive money that is owed to them.'[57] The

Government acknowledges that vulnerable workers 'across the county' are owed money and that enforcement is not working. Yet, the Government consultation response is palpably lacking in concrete proposals and the delay to Employment Bill suggests a lack of commitment to the plight of such workers irrespective of the claims of the Secretary of State for Business, Energy and Industrial Strategy in his explanation for the delay in May 2021 and his commitment to act 'when the time is right.'[58] The 'time is right' now to address the needs of vulnerable workers owed money. Problems are being experienced by workers now, acutely and involve, as seen above, in-work poverty at a level where people carrying out essential work simply do not have enough to eat. The UK is far from being 'the best possible place to live and work' for these low paid, essential workers.

One area where real caution must be taken in relation to NMW protection is where suggestions are made, in conjunction with attempts to address employment tribunal delays and backlogs, for tribunal reforms. For example, suggestions that wages cases can be dealt with 'on the papers' and by tribunal caseworkers rather than being dealt with before an Employment Judge at a hearing are mooted from time to time in relation to tribunal reform. NMW cases may be perceived to be of low value and thus less worthy of extensive tribunal and judicial time. However, there are two fundamental problems with such an approach. Firstly, it fails to recognise the importance of the right. An allegation of failure to pay NMW is an allegation that the employer has failed to pay a worker the lowest legal sum permitted. Secondly, it fails to recognise the complexity of both the legislation and the facts which may apply in some NMW cases, often as a result of employer pay systems and approaches to the law. This leaves workers doubly vulnerable to exploitative employer practices and at risk of cursory justice with claims being dealt with as simple administrative matters and not given the insight and expertise merited by the complexities of the work arrangements and resulting interrelation with the complex NMW framework.

longer term measures

In the longer term, serious questions need to be considered, such as what is the correct level for a national minimum wage? How ought it be calculated so that it is a genuine living wage and complies with ILO standards? And who should set the minimum wage and how? Proposals have been made for an immediate raising of the NMW to £10 per hour. What is the basis for this figure? Given the mounting

evidence that key workers are facing increasing poverty and are enduring food poverty, the current rates are insufficient as applied under the existing NMW framework. The overlap between the use of an hourly rate and the absence of minimum guaranteed hours and use of zero hours contracts exacerbates this issue. The combination of the two may encourage or reinforce fragmentation which is so damaging for low paid workers. As has been noted, an hourly rate in a context of zero hours contracts does not incentivise employers to use or plan labour efficiently or in a way which maximises the dignity of those undertaking the work.

For sustainable improvement for low paid workers reforms need to engage with the interrelated complexities of the vulnerabilities they face. Solutions will not be found in sticking plaster sound-bites. It is likely that there will always be a role for a legislated minimum wage given the existing NMW framework. This would be consistent also with the way in which discourse around this minimum labour standard is developing elsewhere. The recent EU proposals for an EU wide minimum wage include both provision for minimum wage to be protected via legislated minimums and also through the promotion of collective bargaining.[59] It has been noted that workers, particularly those in the care sector, are subject to unilateral contracts where the terms and conditions are set by the employer and presented on a take it or leave it basis.[60] Workers have no say in the matter. The TUC noted in research in 2018 that the nature of supply chains in private and privatised sectors where work is carried out by contractors means that the terms offered by the contracting party may well be set and demanded by actors further up the supply chain who do not engage the worker directly.[61] It is this reality that needs to be the focus of attention when setting out proposals for reform.

The reason that take-it or leave-it contracts are so damaging is that they remove agency from workers, and cast them from the outset in a position of weakness and vulnerability. It is not just that they have little bargaining power, they have no bargaining power. Without bargaining power and an ability to engage the employer in setting terms and conditions workers have no dignity and cannot secure decency in the terms of their work. This is where sectoral collective bargaining is important. Sectoral collective bargaining 'puts democratic participation and decision-making into action in the economy.'[62] The interests of both workers and employers are represented in negotiations and a legally enforceable collective agreement setting out the minimum standards which will apply across the sector is

agreed. It is not only workers who benefit from such an agreement, but also decent employers because it reduces the risk of them being undercut by unscrupulous competitors. Agreeing terms at a sectoral level is important because it allows the complexities and elements of the specific industry to be taken into account and addressed in a way that generalised legislated minimum rights cannot.

In conceiving the baselines for dignity and decency of wages and terms and conditions there must also be resistance to reducing work time to the basest of levels, to framing it only as exclusively economically productive time as determined and defined by the employer. Any sectoral collective bargaining should embed the idea that work time (and thus work) goes beyond purely economically productive time and in sectors where levels of activity may fluctuate the way in which this issue is addressed should be negotiated and agreed between workers and employers. A further important aspect of sectoral collective bargaining would be that any breach of the terms could be enforced by unions on behalf of their members rather than individual workers having to take individual claims, reinventing the wheel multiple times.[63] In order to be ambitious and to seek meaningful reform which will protect workers it is important that sectoral collective bargaining is not framed as the gold standard to which to aspire. Rather it must be seen as the minimum that working people should demand in order that key, minimum labour standards are implemented and adhered to.

It is welcome that the Labour Party's 2021 Employment Rights Green Paper puts sectoral collective bargaining at the heart of suggested labour protection reforms with their Fair Pay Agreement proposals.[64] The intention to also 'consult widely on the design and implementation of Fair Pay Agreements, learning from those economies where they already operate successfully'[65] is also positive. There is also value in learning from economies where challenges are encountered or where problems remain despite collective bargaining protections. Learning lessons from both success stories and where there are pitfalls and seeking to avoid them will be equally informative.[66]

What is also clear is that in order to be successful, and achieve the objective of giving working people a voice, of protecting workers from being exploited and that such agreements serve as a genuine floor, the framework for sectoral collective bargaining must be based on addressing the realities of modern economic and labour practices. Sectoral collective bargaining is not only needed to stem the tide and

reverse the direction of exploitative practices but should also seek to build in mechanisms to try to prevent future deconstruction and undermining of rights. It should also offer a basis as a genuine rights floor upon which further improvements and enhanced terms and conditions can be negotiated. As important as it is to secure, the end goal can never be the wage floor.

CHAPTER FIVE

conclusion

Workers need clear minimum wage protection which exists not simply in theory but in practice, in a way which is enforceable and enforced. Examining key issues with the current NMW framework in the UK via three case studies has enabled exploration of three key themes – access to the right, challenges determining the right, and enforcing the right. Attempts to evade NMW obligations must be stopped. Furthermore, the normalisation of NMW *avoidance* as a legitimate business practice – an attempt to reduce the scope rather than *evade* it entirely – must be addressed if the NMW is to serve a protective purpose and be consistent with the Supreme Court finding in *Uber BV* that '[l]aws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it.'

Each case study also demonstrates the very real value of unions in supporting workers. The unions involved in the case studies were of varying sizes and resources, use different tactics for organising and strategic litigation to advance wider objectives for their members. Consequently, while the case studies demonstrate that union involvement is integral the fact that each case took four or five years simply to establish basic principles in terms of entitlement to minimum wage and basic articulation of what minimum wage entails, demonstrates that the current system is unsustainable and unfair. Steps short of the implementation of sectoral collective bargaining run the risk of being mere window dressing. Reform, of a significant nature, is urgently needed to protect low paid workers in the UK to ensure dignity and decent wages for all.

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53 NMW Act 1998, Section 31 (2)

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55 NMW Act 1998, Section 12

56 BEIS, 'Establishing a new single enforcement body for employment rights: Government Response' (June 2021) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/991751/single-enforcement-body-consultation-govt-response.pdf accessed 12 October 2021

57 BEIS, 'Establishing a new single enforcement body for employment rights: Government Response' (June 2021) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/991751/single-enforcement-body-consultation-govt-response.pdf accessed 16 June 2021 It is also worth noting here the credibility of the Government's commitment to the issue is further tested by the fact that it has not seen fit to appoint a replacement Director of Labour Market Enforcement for ten months (at the date of writing) – nor apparently accept the offer of the outgoing post holder to continue in the role for free pending appointment of a new candidate see https://twitter.com/frsamatthew/status/1356326072007217153?lang=en accessed 11 October 2021

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The Institute of Employment Rights seeks to develop an alternative approach to labour law and industrial relations and makes a constructive contribution to the debate on the future of trade union freedoms.

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Institute of Employment Rights

This publication is a timely contribution to the debate on the UK's national minimum wage (NMW) laws. The author, Kate Ewing, starts by identifying three key shortcomings in the NMW framework – access to the right, challenges determining the right, and enforcing the right – before exploring and explaining the problems via three important case studies. She argues that weaknesses in the legislation must be addressed if the NMW is to serve a protective purpose and be consistent with the Supreme Court finding in *Uber BV* that '[l]aws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it.'

The author notes that the case studies demonstrate the very real value of unions in supporting workers. But, even with union support, the fact that each case took at least four years simply to establish basic principles in terms of entitlement, demonstrates that the current system is unsustainable and unfair. Ewing concludes that steps short of the implementation of sectoral collective bargaining run the risk of being mere window dressing. Reform, of a significant nature, is urgently needed to protect low paid workers in the UK to ensure dignity and decent wages for all.

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