AN IER SUBMISSION

# Submission to The Low Pay Commission consultation 2021

By

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## I Introduction

1. The Government has said 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.'[1] This IER response seeks to highlight how the incredible contributions of low paid workers are not matched by minimum wage protections which are sufficiently resilient and crisis proof. There are significant reforms to the minimum wage framework which should be made, in order that low paid workers are not subject to such vulnerability in future, if there is to be any prospect of the UK being 'the best possible place to live and work'.

2. The IER response below will focus on five main areas of concern in relation to the National Living Wage/ National Minimum Wage ('NMW'):

   a. Factors affecting low paid workers during the COVID-19 pandemic;
   b. The problems encountered by low paid workers under HM Treasury' furlough scheme;
   c. The impact of recent Supreme Court decisions, notably in the *Uber BV* and *Mencap* cases specifically;
   d. Compliance and enforcement concerns, particularly in the social care sector but which also have wider application; and
   e. The so-called 'domestic workers' exemption' under the NMW Act.

3. There are two broad concerns which the IER wishes to address in relation to the impact of the COVID-19 pandemic on low paid workers:

   - The first relates to low paid workers who have worked throughout this period. Their experience has exposed the serious limitations of the NMW infrastructure;
   - The second relates to low paid workers placed on furlough and the relative inadequacy of the protection for low paid workers in a moment of crisis – that is to say the NMW is not crisis proofed.

Together, these experiences represent fundamental problems for the operation of what was designed as a minimum labour standard.

## II NMW and COVID-19

4. 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.'[2] BFAWU carried out a survey of food sector

[1] BEIS, 'National Minimum Wage and National Living Wage: Low Pay Commission Remit 2021' (March 2021) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/966220/lpc-remit-2021.pdf accessed 17 June 2021

[2] BFAWU, 'The Right to Food: A law needed by food workers and communities across the UK' (2021) https://drive.google.com/file/d/1h_FU55hhDyVrCiocEsoJDklb1DYvqAkM/view accessed 16 June 2021

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.

5. 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.[3] 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.

6. 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 (are) mixing with more people and carrying out essential roles where prevention of transmission is particularly important.

7. 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, has left low paid workers bearing an undue share of the economic risks and consequences of the health crisis.[4] This serves to illustrate how the pandemic situation both highlights and exacerbates particular weaknesses in the NMW framework.

8. It is of course important to set the minimum wage at a level which ensures a living wage in order that it provide 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.

9. The framing of the minimum wage as an hourly rate may also serve to incentivize 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 wide spread 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 is all the more acute because opportunities to supplement low hours and low pay have been diminished.

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[3] Ibid

[4] Citizens Advice, 'Coronavirus – getting benefits if you're self-isolating' https://www.citizensadvice.org.uk/benefits/coronavirus-getting-benefits-if-youre-self-isolating/ accessed 16 June 2021

## III NMW and CJRS

10. 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. The CJRS permitted (and permits) employers to pay furloughed workers the lower of 80% of their wages or £2,500 even where the payment will fall below the minimum wage.[5] Beyond the profound problem of endorsing sub-minimum wage payment, this 80% of earnings calculation has two additional problems in the minimum wage context.

11. 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).[6] For workers on fixed and regular hours who earned above the NMW this would no doubt be challenging but savings may be possible through not incurring commuting costs and so forth. For workers earning the minimum wage this entails a reduction in earnings to below NMW level. There is 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.[7]

12. 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.

13. 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 have not been entitled to the annual NMW uplift in April 2021 because their pay entitlement and calculation was based on pre-pandemic earnings.[8] Thus their 80% of NMW became 80% of the previous NMW. This coincided with the point that inflation (RPI) returned to pre-pandemic levels.[9]

14. 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.[10] However, unions such as UNISON, have repeatedly raised concerns about the adequacy of the provision and specifically the failure to

[5] HMRC Guidance, 'Steps to take before calculating your claim using the Coronavirus Job Retention Scheme' (12 June 2020, updated 20 May 2021) https://www.gov.uk/guidance/steps-to-take-before-calculating-your-claim-using-the-coronavirus-job-retention-scheme accessed 16 June 2021

[6] Ibid

[7] Collins A, 'The government must ensure no one is paid below the minimum wage due to the furlough scheme' (3 November 2020) TUC https://www.tuc.org.uk/blogs/government-must-ensure-no-one-paid-below-minimum-wage-due-furlough-scheme accessed 16 June 2021

[8] ---- 'Minimum wage rises for two million workers' (1 April 2021) *BBC News* https://www.bbc.com/news/business-56594985 accessed 16 June 2021

[9] ONS, 'CPIH Annual Rate 00: All Items 2015=100' (16 June 2021) https://www.ons.gov.uk/economy/inflationandpriceindices/timeseries/l55o/mm23 accessed 16 June 2021

[10] Section 8, Employment Rights Act 1996

require that all hours reckonable for NMW purposes are provided in a transparent and verifiable way on payslips for workers.[11] 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.

15. 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, particularly 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 below regarding compliance and enforcement.

## IV NWM and Supreme Court cases

16. The issues addressed above relating to the failure to secure minimum hours guarantees and minimum income protection are highlighted further by the impact of Supreme Court decisions in *Royal Mencap Society v Tomlinson-Blake and Shannon v Rampersad & Another (T/A Clifton House Residential Home)* [2021] UKSC 8 ('*Mencap*') and *Uber BV & Others v Aslam & Others* [2021] UKSC 5 ('*Uber BV*').

17. The *Uber BV* decision has largely been met with approval, with workers stated to be entitled to receive the minimum wage 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. Nevertheless, the IER expresses concern and cautions that there remains a lack of clarity on the issue of how work time is to be treated in practice and that there are indications that the employer may seek to narrow the scope of the period for payment.[12]

18. The response of large corporations to NMW obligations have implications beyond one company. The normalisation of NMW *avoidance* as legitimate business practice – an attempt to reduce the scope rather than *evade* it entirely – seen elsewhere such as the social care sector, must be avoided 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.'

19. The IER is, however, deeply concerned and dismayed by the outcome of *Mencap* and the impact it has for low paid workers. The Supreme Court reasoning endorses and facilitates the fragmentation of work time leaving more workers unprotected as

[11] For example, see UNISON Evidence to Low Pay Commission for 2017/ 2018/ 2019:
https://www.unison.org.uk/content/uploads/2017/07/UNISON-evidence-to-Low-Pay-Commission-2017.pdf
https://www.unison.org.uk/content/uploads/2018/06/UNISON-evidence-to-Low-Pay-Commission-2018.pdf
https://www.unison.org.uk/content/uploads/2020/01/LPC-evidence-2019.pdf accessed 16 June 2021

[12] Ewing K, 'Don't be fooled, Uber is still dodging the minimum wage' (17 March 2021) Institute of Employment Rights https://www.ier.org.uk/comments/dont-be-fooled-uber-is-still-dodging-the-minimum-wage/ accessed 16 June 2021

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 applies 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.

20. 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. 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 above relating to the lack of clarity following *Uber BV*.

21. However, *Mencap* 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. We are likely to see more situations – as we do 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.[13]

22. It is important that the LPC reflect on the situation in the round. As noted above, 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. For home care workers, for example, this 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. This results in highly complex pay calculations, with hundreds of time fragments per pay period to be accounted for.

23. 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

[13] Ewing K, 'Tomlinson-Blake in the Supreme Court' (28 April 2021) UK Labour Law Blog https://uklabourlawblog.com/2021/04/28/tomlinson-blake-in-the-supreme-court-by-kate-ewing/ accessed 16 June 2021

transparency around pay calculations and data makes it virtually impossible for workers to verify payments received and establish that their pay is NMW compliant.

## V Compliance and Enforcement

24. The foregoing concerns are exacerbated by the lack of clarity in approach in terms of methodology and rigorous enforcement by HM Revenue & Customs. While better record keeping may not be a panacea it is concerning that there appears to be little motivation or diligence 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,[14] the crucial issue is the content of the records and their accessibility to workers.

25. Employers who fail to maintain NMW records should be prosecuted by HM Revenue & Customs under existing powers.[15] 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 for employers who fail to produce records requested by workers.[16] In the grand scheme of avoiding a successful claim for wider NMW breaches, £700 may be considered a small price to pay by some employers (because the absence of verifiable and accurate pay records makes opportunities for enforcement very difficult for workers as is illustrated by the Employment Tribunal case of *Harris & Others v (1) Kaamil Education Ltd (2) Diligent Care Services Ltd*, Case No. 1302183/2016 which took over four years of litigation and required the workers to develop a methodology for calculating arrears).[17]

26. Notably, the issue of record keeping has been raised on a number of occasions by UNISON in submissions to the LPC in previous years and is raised this year also. 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 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.

27. The IER notes the proposals from Government regarding a new labour market inspectorate.[18] Such proposals are at the time of submitting this response lacking in detail. There appears to be no plan for additional funding. Given that the Government recognises in the consultation response that ‘vulnerable workers across the county’ are

[14] Regulation 2(5), The National Minimum Wage (Amendment) Regulations 2021
[15] Section 31 (2), National Minimum Wage Act
[16] Section 11, National Minimum Wage Act - based on current NLW rate
[17]https://assets.publishing.service.gov.uk/media/5f6495f0e90e075a01d2f4d5/Ms_E_Harris_and_Others_vs_KaamilEducation_and_others._-_Judgment.pdf accessed 16 June 2021
[18] 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

owed money, this is not an adequate response or solution. 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 low paid, essential workers.

28. Workers need clear minimum wage protection which exists not simply in theory but in practice, in a way which is enforceable and enforced.

### VI The 'Domestic Workers' Exemption'

29. The Government seeks information and evidence on what is termed in the consultation[19] and LPC Remit[20] as 'the live in domestic worker exemption' to minimum wage entitlement[21]. The IER notes that the ILO Convention 189 (the Domestic Workers' Convention) provides under article 11 that minimum wage protections should apply to domestic workers. The United Kingdom should ratify this Convention. But a failure of ratification is no excuse for the so-called 'domestic workers exemption' in the NMW Act.

30. The use of the term 'domestic worker exemption' demonstrates a casual widening of the provision to include a range of workers, who should not be subject to the exemption. The recent Employment Tribunal case of *Puthenveettil v Alexander & Others*, Case No. 2361118/2013 (v) ('*Puthenveettil*') perhaps more properly refers to the 'family worker exemption', reflecting more accurately the wording of the provision which requires the worker in question to be treated akin to a family member. This is distinct from a domestic worker. The Tribunal in *Puthenveettil* disapplied the exemption on the basis that its application amounts to unjustified indirect sex discrimination. Live in domestic workers are predominately women and of ethnic minority or migrant origin.[22]

31. The vulnerability of low paid domestic workers to exploitation under misuse of the exemption is exacerbated by the inter-relation between immigration status and employment protection. The operation of the Overseas Domestic Worker visa and specifically changes made to the conditions of this visa in 2012 have created 'significant vulnerability to abuse and exploitation' which 'make it much more difficult for workers to change employers [who are exploiting them or not paying them correctly] or assert their rights.'[23]

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[19] Low Pay Commission, 'Consultation on April 2022 National Minimum Wage Rates' (24 March 2021)
[20] BEIS, 'National Minimum Wage and National Living Wage: Low Pay Commission Remit 2021' (March 2021) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/966220/lpc-remit-2021.pdf accessed 17 June 2021
[21] Regulation 57(3), NMW Regulations 2015
[22] Sedacca N, 'A crucial and long-needed step against the devaluation of domestic work: 'family worker' exemption disapplied in Puthenveettil v Alexander & ors' (1 March 2021) UK Labour Law Blog https://uklabourlawblog.com/2021/03/01/a-crucial-and-long-needed-step-against-the-devaluation-of-domestic-work-family-worker-exemption-dis-applied-in-puthenveettil-v-alexander-ors-by-natalie-sedecca/ accessed 17 June 2021
[23] Ibid

32. Thus, the exemption set out in Regulation 57(3) NMW Regulations 2015 should be removed and domestic workers entitled to at least the minimum wage. The minimum wage is the lowest legally permissible pay for work in the UK. If the minimum wage is to serve as a wage floor and a minimum protection, vulnerable workers should not, and must not, be excluded from this. Such a move would also be consistent with international standards.

## VII Summary of Recommendations

The IER calls on the Low Pay Commission to make the following recommendations in its report to Government:

- **Recommendation 1: the national minimum wage framework must be crisis proofed:**
  - Workers should be paid at least the minimum wage when required to self-isolate for public health reasons;
  - Sub-minimum wage payments should not be permitted under the Coronavirus Job Retention Scheme (and equivalents);
  - Workers on longer term furlough should be entitled to annual minimum wage rises which apply during that period.

- **Recommendation 2: vulnerable workers must not be excluded from protection within the national minimum wage framework:**
  - All hours where the worker is at the disposal and direction of the employer (such as sleep-in hours) should be reckonable for minimum wage purposes;
  - The overall framework should be reviewed to address provision of a minimum income so that workers are not plunged into crisis and poverty by irregular hours and payments;
  - The exemption in Regulation 57(3) should be removed and domestic workers entitled to at least the minimum wage.

- **Recommendation 3: national minimum wage enforcement must be strengthened:**
  - Regulations should be made under Section 12 of the NMW Act;
  - Workers should be entitled to minimum wage compliance statements from employers at the point of payment;
  - Employers who fail to maintain NMW records should be prosecuted under existing HM Revenue & Customs powers.