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Temporal Casualisation and 'Availability Time': *Mencap*, *Uber* and the *Framed Flexibility Model*

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Abstract

In 2020, the UK Supreme Court will hear an appeal in the *Uber* case, which has become a bellwether for labour rights in the 'gig economy.' Less celebrated is another appeal – *Mencap* – that will determine care workers' entitlement to the minimum wage in overnight shifts. This paper contends that *Mencap* and *Uber*, although superficially distinct, respond to a common drive towards the temporal casualisation of the UK labour force. Both showcase strategies to drain vulnerable time from protected work. Both are centred on notions of 'availability.' The paper suggests that McCann and Murray's *Framed Flexibility Model* is useful for conceptualising working time in these cases. While the Court of Appeal judgment in *Uber* has adopted a protective 'unitary approach', at least in gauging contractual duration, the Court's judgment in *Mencap* embodies a 'productivity regulation' model that poses a particular risk to jobs in which there is an opportunity to sleep. The paper argues that *Mencap* and *Uber* are exposing and exacerbating crucial fractures – between legal frameworks on working time and wages and through a sectoral/gendered treatment of working hours – and highlights the *Framed Flexibility Model's* 'unity of labour law' principle.

Keywords: *Mencap*, *Uber*, labour law, care work, working time, casual work, gig economy

JEL Codes: J45, J80, J81, J83, J88, K31

1. INTRODUCTION

In 2020, the UK Supreme Court is hearing appeals against two decisions of the Court of Appeal, in *Mencap*¹ and *Uber*.² These cases prominently juxtapose two apparently dissimilar segments of the labour force – drivers and carers. *Mencap* and *Uber* have tended to be analysed separately.³ This paper instead adopts a holistic analysis.⁴ It argues that *Mencap* and *Uber*, while superficially distinct and of contrasting outcomes so far, should be understood as emanations of a common drive: towards the further temporal casualisation of the UK labour force. Both showcase strategies designed to drain vulnerable periods – of different genres – from protected time. Both are centred on the notion of ‘availability’ at work. The Supreme Court appeals therefore offer an opportunity to reflect on the evolving role of legal regulation in structuring the temporal dimension of casualisation.

The paper suggests that a regulatory framework proposed in earlier contributions – McCann and Murray’s *Framed Flexibility Model* – is useful for conceptualising working time in *Mencap*, *Uber* and more broadly.⁵ It contends that the judgments each embody one of the two principal models of working time regulation: productivity regulation and

¹ *Royal Mencap Society v Tomlinson-Blake; Shannon v Rampersad* [2018] EWCA Civ 1641.

² *Uber BV (UBV) v Aslam* [2018] EWCA Civ 2748.

³ On *Mencap*, see ACL Davies, ‘“Sleep-in” Shifts and the National Minimum Wage: *Royal Mencap Society v Tomlinson-Blake, Shannon v Rampersad* (2018) 47(4) *Industrial Law Journal* 553-566; LJB Hayes, ‘Three Steps Too Far in the Undervaluing of Care: *Mencap v Tomlinson-Blake*’ (*UK Labour Law*, 15 August 2018), at <https://uklabourlawblog.com/2018/08/15/three-steps-too-far-in-the-undervaluing-of-care-mencap-v-tomlinson-blake-ljb-hayes/> (last accessed 4 April 2020); LJB Hayes, ‘Restricting Minimum Wage Protection on Social Care “Sleep-in” Shifts’ (2019) 135(Jul) *Law Quarterly Review* 353-358. On *Uber*, see Guy Davidov, ‘The Status of Uber Drivers: A Purposive Approach’ (2017) 6(1-2) *Spanish Labour Law and Employment Relations Journal* 6-15; ACL Davies, ‘Getting More Than You Bargained For? Rethinking the Meaning of “Work” in Employment Law’ (2017) 46(4) *Industrial Law Journal* 477-507; Mark Freedland and Nicola Kountouris, ‘Some Reflections on the “Personal Scope of Collective Labour Law’ (2017) 46(1) *Industrial Law Journal* 52-71; Jeremias Prassl, ‘Who is a Worker?’ (2017) *Law Quarterly Review* 366-372; Simon Deakin and Christopher Markou ‘The Law-Technology Cycle and the Future of Work’ (May 2018) Legal Studies Research Paper Series/University of Cambridge Faculty of Law Paper No. 32/2018, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3183061 (last accessed 4 April 2020); Ewan McGaughey, ‘Uber, the Taylor Review, Mutuality and the Duty Not to Misrepresent Employment Status’ (2018) 48(2) *Industrial Law Journal* 180-198; Sandra Fredman and Darcy Du Toit, ‘One Small Step Towards Decent Work: *Uber v Aslam* in the Court of Appeal’ (2019) 48(2) *Industrial Law Journal* 260-277; Jeff Kenner ‘Uber Drivers are “Workers” – The Expanding Scope of the “Worker” Concept in the UK’s Gig Economy’ in Jeff Kenner, Izabela Florczak, and Marta Otto (eds) *Precarious Work. The Challenge for Labour Law in Europe* (Cheltenham: Edward Elgar, 2019) 197-221.

⁴ The holistic approach is derived from D McCann, ‘New Frontiers of Regulation: Domestic Work, Working Conditions, and the Holistic Assessment of Nonstandard Work Norms’ (2012) 34 *Comparative Labor Law and Policy Journal* 167–92, where it was advanced to contend that labour law as a whole should be understood as in part defined by the legal treatment of non-standard workers.

⁵ Deirdre McCann and Jill Murray, ‘Prompting Formalisation Through Labour Market Regulation: A “Framed Flexibility” Model for Domestic Work’ (2014) 43(3) *Industrial Law Journal* 319-348. See also *Model Law on Working Time in Domestic Work*, at <https://www.dur.ac.uk/resources/law/UFW/ModelLawonWorkingTimeinDomesticWorkBriefing.pdf> (last accessed 4 April 2020); Deirdre McCann and Jill Murray *The Legal Regulation of Working Time in Domestic Work* (Geneva: ILO, 2010), at https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_150650.pdf (last accessed 4 April 2020); <https://www.dur.ac.uk/law/policyengagement/ufw/publications/framedflexibility/> (last accessed 4 April 2020).

the unitary approach. The paper has a particular focus on *Mencap*, evaluating the Court of Appeal judgment as epitomising productivity regulation. The *Framed Flexibility Model* is suggested to be a regulatory framework apt for both cases, as a location-based unitary approach applicable to both working time and wage regulation that readily encompasses ‘availability periods’ of all genres.

Towards judicial decision-making, the paper contends that the Supreme Court should uphold and clarify the Court of Appeal’s decision in *Uber* and overturn the judgment in *Mencap*. For the scholarly debates, the paper explores the pertinence of the two decisions to the evolution of temporal casualisation. It identifies two evolving trends: that wage regulation is being conceptualised as inevitably distinct from working time law and has been confirmed as a crucial site of temporal fragmentation; and that sectoral/gendered fractures in the regulation of working time are being exacerbated. The paper proposes that, to avert regulated time-drainage, legal analyses would benefit from adhering to a ‘unity of labour law’ principle, which underpins the *Framed Flexibility Model* and calls for systems of regulation to be conceptualised as an integrated whole.

Section 2 outlines the *Framed Flexibility Model*, highlighting its renditions of productivity regulation and the unitary approach. Sections 3 and 4 analyse the Court of Appeal judgments in *Uber* and, in more depth, *Mencap*. The decision in *Uber*, it is argued, signalled a welcome judicial grasp of the unitary approach. It also confirmed that casualisation must be recognised as equally contractual and temporal and that, in the contemporary dynamics of labour market casualisation, these twin dimensions are increasingly intertwined. The Court of Appeal judgment in *Mencap*, in contrast, is argued to embody the productivity regulation model, posing a particular risk to jobs in which the opportunity to sleep is an element of the employer’s work organisation. The paper identifies an obligation-oriented unitary approach, reflected in the pre-*Mencap* case law and elaborated with most precision by the Employment Appeal Tribunal in *Mencap*. Section 5 examines what *Mencap* and *Uber* reveal for the regulatory dimensions of temporal casualisation. It argues that the cases are exposing and exacerbating crucial fractures – between legal frameworks on working time and wages and a sectoral/gendered treatment of working hours – and highlights the pertinence of the *Framed Flexibility Model*’s ‘unity of labour law’ principle.

2. THE FRAMED FLEXIBILITY MODEL: PRODUCTIVITY REGULATION AND THE UNITARY APPROACH

To understand the *Mencap* and *Uber* litigation as potential conduits to temporal casualisation, it is worth returning to the *Framed Flexibility Model* of working time regulation.⁶ The *Model* was a scholarly contribution to the International Labour Organization (ILO) standard-setting exercise that generated the Domestic Workers Convention, 2011 (No. 189). Identifying domestic work as crucial to both the evolution of working time laws and to formalisation of unregulated and casualised labour

⁶ McCann and Murray 2014, n 5 above. See also McCann and Murray 2010, n 5 above.

markets, the *Model* proposed a conceptual framework for working time regulation that was designed to be operative across a range of informal and casualised work-forms.

The *Framed Flexibility Model* articulates key functions for working time regulation. Centrally, working time norms should balance flexibility and security and support the reconciliation of waged work with family life and unwaged domestic labour.⁷ To this end, the *Model* advocates the merging of universal working time norms with a degree of flexibility in favour of both employers and workers.⁸ It reflects a 'reconstructive labour law' strategy that mitigates against spiralling fragmentation by building and sustaining coherent and protective working relationships.⁹

For the purposes of this paper, the most significant element of the *Model* is that it identifies and clarifies the two most prominent regulatory approaches to conceptualising working time: productivity regulation and the unitary approach.¹⁰

2.1 Productivity regulation

Productivity regulation excludes periods that are, or are characterised as, non-productive, from legal conceptions of working time and therefore from the parameters of regulated work.¹¹ The associated technique is the bifurcation of working hours into 'active' or 'inactive' periods.¹² 'Inactive' hours are devoted solely to remaining available to perform the primary tasks of the job, and assumed to be non-productive. This separate classification of 'inactive' hours permits lesser working time protections and/or wage entitlements to be associated with various genres of 'availability' time. At the time when the *Framed Flexibility Model* was elaborated, this activity/inactivity dyad was most prominent in a proposed reform to the EU Working Time Directive that would have permitted longer hours in jobs that involve substantial periods of inactivity.¹³

By characterising on-call hours as amenable to regulation only when they are conceived of as fully productive, this activity/inactivity schema infringes the tenets of the *Framed Flexibility Model*. In particular, it mitigates against a work/family account

⁷ On the set of principles that underpin the *Model*, see McCann and Murray 2014, *ibid*, 326-335.

⁸ McCann and Murray 2014, *ibid*, 336-337.

⁹ On reconstructive labour law, see Deirdre McCann, 'Equality Through Precarious Work Regulation: Lessons from the Domestic Work Debates in Defence of the Standard Employment Relationship' (2014) 10 *International Journal of Law in Context* 507-521; McCann and Murray 2014, *ibid*, 347-348; Deirdre McCann, 'Travel Time as Working Time: Tyco, the Unitary Model and the Route to Casualisation' (2016) 45(2) *Industrial Law Journal* 244-250, 250. The *Framed Flexibility Model* is composed of three parallel sets of standards: a framework of hours limits and rest periods (the 'Framing Standards'); a set of flexibility norms (the 'Temporal Flexibility Standards'); and a set of procedural requirements to ensure that the substantive standards exercise a decisive influence on working life (the 'Effective Regulation Standards'); see further McCann and Murray 2014, *ibid*, 335-347.

¹⁰ McCann and Murray 2010, note 5 above, 29-30; McCann 2012, note 4 above, 340-344; McCann and Murray 2014, *ibid*, 340-344.

¹¹ McCann and Murray 2010, *ibid*; McCann and Murray 2014, *ibid*, 341.

¹² McCann and Murray 2014, *ibid* 341.

¹³ Commission of the European Communities (CEC), 'Commission's amended proposal COM (2005) 246 for a Directive amending the Working Time Directive 2003/88/EC' (Brussels: CEC, 2005), Art 1(1b). See further McCann and Murray 2014, *ibid*, 341.

of working time regulation: the implicit assumption is that the regulation of working time is intended to account for the arduousness of labour, rather than to recognise, compensate, and constrain periods that workers spend away from their families or other dimensions of their lives.¹⁴ As such, productivity regulation has the potential to sanction both long and variable hours and reduced wages.¹⁵

Earlier contributions have also pointed to a further, more far-reaching, risk of productivity regulation: that it has the capacity to stimulate casualisation.¹⁶ It cannot be assumed, it has been pointed out, that an active/inactive regulatory strategy would be confined to roles that inevitably straddle the working time/rest binary (care work in multiple forms, most obviously). It is feasible for a range of time-periods to be designated as 'inactive': travel time,¹⁷ 'on-call' periods of various kinds¹⁸ and, as discussed in this paper, periods in which drivers in various sectors (taxis, private hire, delivery) await dispatch and 'sleepover' shifts on an employer's premises. This bifurcation strategy is also available to deploy in other contexts, to exclude genuinely or ostensibly inactive hours from regulated work across an economy as a whole, draining time – of various genres – from the working day.¹⁹

This intuition about the risk of casualisation has since been substantiated by litigation strategies that have emerged in the case law during the last decade. In its 2015 decision in *Tyco*, most significantly, the Court of Justice of the European Union (CJEU) considered a challenge to the classification of travel time of a group of security system technicians who had no fixed or habitual workplace.²⁰ The employer unsuccessfully contended that the technicians' 'bookend' travel time (between home and the first and last clients of the day) should not be classified as 'working time' under the EU Working Time Directive or counted towards the Directive's mandates on weekly hours, daily and weekly rest periods, rest breaks and night work.

2.2 The unitary approach

The *Framed Flexibility Model* incorporates what it characterises as the unitary approach.²¹ This counts all periods of time spent in the workplace, and sometimes beyond, as working time. There is no activity/inactivity bifurcation. Working time is characterised as being at the disposal of the employer and includes availability.²² In this location-based unitary model, internal (workplace) on-call periods count as working time (together with periods of external availability of comparable

¹⁴ McCann and Murray 2014, *ibid*, 341-342, citing Deirdre McCann, 'The Role of Work/Family Discourse in Strengthening Traditional Working Time Laws: Some Lessons from the On-Call Work Debate' (2005) 23 *Law in Context* 127-147.

¹⁵ McCann and Murray 2014, *ibid*, 341.

¹⁶ McCann and Murray 2010, n 5 above; McCann 2012, n 4 above; McCann and Murray 2014, *ibid*.

¹⁷ McCann 2016, n 9 above.

¹⁸ McCann and Murray 2014, n 5 above.

¹⁹ McCann and Murray 2010, n 5 above, 30, McCann and Murray 2014, n 5 above, 342.

²⁰ Case C-266/14 *Federación de Servicios Privados del Sindicato Comisiones obreras (CC.OO.) v Tyco Integrated Security* EU:C:2015:578; [2016] 1 CMLR 22. See McCann, 2016, n 9 above.

²¹ McCann and Murray 2014, n 5 above, 342.

²² McCann and Murray 2014, *ibid*, 343; McCann and Murray, *Model Law*, n 5 above, section 1.

obligation).²³ In this way, the model sustains a rich, work/family-oriented notion of working time in which waged labour is regulated in part to recognise and limit workers' absence from their lives beyond waged labour.²⁴

The most prominent working time regimes embody versions of what McCann and Murray identify as the unitary approach. Most prominently, the conception of 'hours of work' in the ILO standards embraces both activity and availability ('time during which the persons employed are at the disposal of the employer'²⁵) and has been interpreted by the ILO *Committee of Experts on the Application of Conventions and Recommendations* to embrace periods in which workers are under a duty to be at the disposal of the employer until work is assigned.²⁶ The unitary model has also been forcefully, even defiantly, upheld whenever challenged before the CJEU in relation to the EU Working Time Directive, initially in relation to on-call periods in care work, for doctors,²⁷ subsequently for travel time in *Tyco*,²⁸ and more recently for the at-home on-call periods of a group of fire-fighters.²⁹ In *Tyco*, for example, the Court vociferously rejected the productivity regulation model in the realm of working time. The Court was explicit that neither intensity of work nor output are relevant to the definition of working time.³⁰ Travel time was considered intrinsic to the job, akin to the time the technicians spent on installing and maintaining security systems.³¹ To excise travel periods from hours limits and rest periods, the Court stated, would distort the European conception of working time and jeopardise health and safety.³²

A key feature of the *Framed Flexibility Model* is that it extends the unitary approach not just to working time entitlements but also to the regulation of wages.³³ In this context, periods of availability to an employer are recognised as taking 'time out of life' for activities such as rest, other domestic responsibilities, childcare, eldercare, etc., and

²³ McCann and Murray 2014, *ibid*, 343; *Model Law*, *ibid*, Sections 1, 18.1.

²⁴ McCann 2016, n 9 above, 5.

²⁵ Hours of Work (Commerce and Offices) Convention, 1930 (No 30), Art 2. See further International Labour Organization (ILO), *Ensuring Decent Work for the Future*, General Survey Concerning Working Time Instruments, International Labour Conference, Report III (Part B), 107th Session, Geneva, 2018 (Geneva: ILO, 2018), para 33.

²⁶ ILO *Hours of Work: From Fixed to Flexible* General Survey of the Reports Concerning the Hours of Work (Industry) Convention, 1919 (No. 1), and the Hours of Work (Commerce and Offices) Convention, 1930 (No. 30), International Labour Conference, Report III (Part 1B), 93rd Session, Geneva, 2005 (Geneva: ILO, 2005), para 46.

²⁷ Case C-303/98 *Sindicato de Médicos de Asistencia Pública (SIMAP) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* [2000] ECR I-7963; Case C-151/02 *Landeshauptstadt Kiel v Jaeger* [2003] ECR I-08389.

²⁸ *Tyco*, n 20 above.

²⁹ Case C-518/15 *Ville de Nivelles v Rudy Matzak* ECLI:EU:C:2018:82. This decision concerned what the *Framed Flexibility Model* characterises as 'external on-call work,' McCann and Murray 2014, n 5 above, 343; McCann and Murray, *Model Law*, n 5 above, section 1, Chapter 1.III. The fire fighters had a duty to respond to calls from the employer within eight minutes, which was held by the Court of Justice of the European Union (CJEU) to very significantly restrict their opportunities to carry out other activities, and therefore was regarded as working time. This approach is in line with *Framed Flexibility Model*, *Model Law*, section 1.

³⁰ *Tyco*, n 20 above, [31]. See McCann 2016, n 9 above, 247.

³¹ *Tyco*, *ibid*, [32].

³² *Tyco*, *ibid*, [32].

³³ McCann and Murray 2014, n 5 above, 343; McCann and Murray, *Model Law*, n 5 above, section 18.1.

are therefore deserving of full compensation. This approach is in contrast to the evolution of the CJEU jurisprudence in which a potential distinction has been highlighted between working time laws, in which the unitary approach is required by EU law, and wage laws, which the CJEU commented in *Tyco* are the remit of Member State laws and, implicitly, need not adopt the unitary approach.³⁴

3. **UBER: A UNITARY APPROACH (SO FAR) PREVAILS**

These contrasting models of working time regulation – productivity regulation and the unitary approach – are pertinent to *Uber* and *Mencap* and the response of the courts in these cases to legal challenges to vulnerable time periods. The most renowned of the cases – *Uber BV (UBV) v Aslam*³⁵ – highlights a species of slack time intrinsic to the taxi and private hire sector: the periods in which drivers are waiting to be assigned a passenger.³⁶

In *Uber*, Yaseem Aslam, James Farrar, Robert Dawson and a number of other current and former Uber drivers working in London are claiming entitlement to paid annual leave under the Working Time Regulations³⁷ and the National Minimum Wage (NMW).³⁸ Most significant for present purposes is the centrality to this litigation of hours that Underhill LJ in the Court of Appeal characterised as ‘availability time’³⁹: in the techno-organizational environment of Uber, the drivers are logged into the Uber app but have not accepted a trip. Uber’s argument has been that its drivers are untouched by employment law during these periods. They are not party to a worker’s contract until they are ‘performing the function for which...the contract exists, namely carrying a passenger.’⁴⁰

As is well-known, in *Uber* the drivers have – so far – been held to have been party to a worker’s contract as soon as they were within the territory in which they were licensed to use the app (London), had the app switched on, and were ready and willing to accept passengers.⁴¹ The Employment Tribunal – upheld by the Employment Appeal Tribunal and Court of Appeal – held the drivers to be ‘limb (b) workers’ under s 230(3)(b) of the Employment Rights Act 1996.⁴² The Employment Tribunal and Employment Appeal Tribunal also held the drivers to be engaged in ‘working time’ in terms of the Working

³⁴ *Tyco*, note 20 above, [47]-[49]. See further McCann 2016, n 9 above, 248-250.

³⁵ *Uber* (CA), n 2 above.

³⁶ On the notion of ‘slack time,’ see Huw Beynon, Damian Grimshaw, Jill Rubery and Kevin Ward, *Managing Employment Change: The New Realities of Work* (Oxford: Oxford University Press, 2002), 219–22.

³⁷ Working Time Regulations 1998, SI 1998/1833 (WTR), reg 13.

³⁸ National Minimum Wage Act 1998; National Minimum Wage Regulations 2015, SI 2015/621 (NMWR).

³⁹ *Uber* (CA), n 2 above, [157].

⁴⁰ *Uber* (CA), *ibid*, [101].

⁴¹ *Uber* (CA), *ibid*, [103].

⁴² On the ‘worker’ as a model of personal scope in UK working time and minimum wage legislation, see Deirdre McCann *Regulating Flexible Work* (Oxford: Oxford University Press 2008), 41-44.

Time Regulations 1998 during these periods⁴³ and classified as in 'unmeasured work' under the National Minimum Wage Regulations 2015.⁴⁴

Uber, first, signals an accelerating targeting of vulnerable time. The CJEU ruling in *Tyco*, it was observed earlier, highlighted how contemporary business models are targeting vulnerable time periods: in the contention that certain hours can legitimately be excised from the protective ambit of labour law.⁴⁵ The *Uber* litigation reinforces this observation and confirms that time-drainage techniques are gaining momentum. It features a strategy tailored to the UK labour law regime, served with a technological facade. First, a discrete availability time is identified. Next, an argument is made that this period should be carved out from protected time. In *Uber*, this logic is being applied to platform work and facilitated by a technological environment that permits a near-infinite dissection of the working day. *Uber* highlights a business model that is being moulded to doctrinal frameworks when it surfaces in litigation. Courts are urged to single out time periods that are intrinsic to standard work-shifts, yet to distinguish these periods from protected work.

Under the *Framed Flexibility Model*, the availability periods of Uber drivers are indistinguishable from other, more active, working hours, in that they are spent at the hirer's disposal. Under the *Model*, availability time would be counted wholly towards working time entitlements and fully-waged. So far, the courts' analysis in *Uber* has been in line with this location-oriented unitary approach. Indeed, the Employment Tribunal delivered an instantly memorable dismissal of productivity regulation. An oft-quoted passage from the Tribunal judgment, reproduced at length by the Court of Appeal, deftly linked the productivity expectations of the hirer to the entire expanse of the drivers' labour and accurately identified the value of availability periods. To recognise the drivers as 'working' under a 'limb (b)' contract only during rides, the Tribunal observed:

[C]onfuses the service which the passenger desires with the work which Uber requires of its drivers in order to deliver that service. It is essential to Uber's business to maintain a pool of drivers who can be called upon as and when a demand for driving services arises. The excellent 'rider experience' which the organisation seeks to provide depends on its ability to get drivers to passengers as quickly as possible. To be confident of satisfying demand, it must, at any one time, have some of its drivers carrying passengers and some waiting for the opportunity to do so. Being available is an essential

⁴³ WTR, n 37 above, reg 2(1). *Aslam v Uber* [2017] IRLR 4 (ET), [122]; *Uber v Aslam* [2018] IRLR 97 (EAT), [123]-[126].

⁴⁴ NMWR, n 38 above, reg 44. *Uber* (ET), *ibid*, [127], (EAT), *ibid*, implicitly at [120]-[126]. The Employment Tribunal noted that the hours of unmeasured work towards the NMW are computed in accordance with reg 45 as the 'hours ... worked,' but that it was 'not asked to determine any issue as to how that provision should be applied' (aside from a submission on the status of travel time to and from home), [127]. This issue was not the subject of argument before the Court of Appeal, *Uber* (CA), n 2 above, [10]-[11].

⁴⁵ McCann 2016, n 9 above.

part of the service which the driver renders to Uber. If we may borrow [a] well-known literary line: 'They also serve who only stand and wait.'⁴⁶

Towards conceptualising the current phase of regulated casualisation, second, the context of this analysis is revealing. The Tribunal's observation was elaborated, and quoted by the Court of Appeal, in the context of considering when the Uber drivers should be classified as limb (b) workers, rendered as periods in which they were 'working.'⁴⁷ The heightening quandary of protected time is presenting in the UK, then, as Davies has noted, as an issue of working time under the Working Time Regulations,⁴⁸ 'hours worked' under the National Minimum Wage Regulations,⁴⁹ and the duration of an employment or worker's contract.⁵⁰ In *Uber*, it emerged as all three.⁵¹

In this regard, *Uber* confirms – and further advances – an earlier observation that casualisation should be understood as equally contractual and temporal.⁵² At the time, this point was made to emphasise that fragmenting work schedules must be encompassed within scholarly conceptualisations of casualisation, and that working time laws are fundamental to the governance of casualised work. This insight on the temporal-contractual nature of casualisation was inspired by a consideration of domestic work, and therefore an informality more emblematic of the global South.⁵³ As intense fragmentation has become more characteristic of drivers and other casualised workforces in the global North, *Uber* reveals that casualisation is driving the contractual and temporal to become increasingly intertwined in litigation strategies and judicial analyses. As a consequence, analyses associated primarily with the realm of working time are becoming increasingly prominent in gauging the duration of each fragmented contract in a casualised working relationship.

The Court of Appeal's reasoning in *Uber* lends valuable prominence to the unitary approach to protected time. Yet a risk is signalled in Underhill LJ's dissent. He would have held the Uber drivers to be workers only from the point at which they accepted a passenger, rather than from when they logged on to the app.⁵⁴ His dissent probed at the implicit conflation of contractual duration and working time in the majority judgment. Reflecting on the 'secondary, but still potentially important' issue of the period of the contract, he turned to the 'closely related' questions of which periods constitute working time under the Working Time Regulations or are to be taken into account in calculating the minimum wage under the National Minimum Wage

⁴⁶ *Uber* (CA), n 2 above, [101], quoting *Uber* (ET), n 43 above, [100]. Uber had submitted that, even where there is a limb (b) contract between the driver and Uber, he is not 'working' under it unless and until he is carrying a passenger, *Uber* (ET), [100].

⁴⁷ *Uber* (ET), *ibid*, [100]; *Uber* (CA), *ibid*, [99]-[104]. The Court of Appeal posed the question as '[w]hen are the drivers workers?', [99]. This question was, the Court noted, argued only briefly before it.

⁴⁸ WTR, n 37 above, reg 2(1).

⁴⁹ NMWR, n 38 above, regs 22, 31, 37, 45.

⁵⁰ Davies 2017, n 3 above, 477-478. On the notion of working time as cross-cutting working time and wage entitlements, see McCann and Murray 2014, n 5 above, 343; McCann 2016, n 9 above, 248-250.

⁵¹ On the working time and minimum wage regimes, see *Uber* (ET), n 43 above, [121]-[128]; *Uber* (EAT), n 43 above, [120]-[126]; the majority judgment in the Court of Appeal did not address these regimes head-on.

⁵² McCann 2014, n 9 above; McCann and Murray 2014, n 5 above, 348.

⁵³ McCann 2014, *ibid*; McCann and Murray 2014, *ibid*.

⁵⁴ *Uber* (CA), note 2 above, [161]-[163].

Regulations.⁵⁵ Underhill LJ recognised that these regulatory concepts do not necessarily coincide, observing that the Court did not explore them and was not taken to the relevant authorities.⁵⁶ He felt that the Employment Tribunal correctly recognised the three questions to be distinct, and addressed them separately, but that the Tribunal regarded the answer to the first – the existence of a contract – to dictate the response to the other two.⁵⁷ One risk of *Uber*, then, is that a more concentrated focus on the Working Time Regulations and National Minimum Wage Regulations can be predicted. It would take the form of strategies to advocate that Uber drivers and other workers have their protected time reduced: within the span of their contracts but not working time or ‘hours worked’ under the NMW/NLW regime.

4. **MENCAP: A THREAT TO THE UNITARY MODEL IN CARE WORK**

The *Uber* judgments, then, have embraced the unitary approach, including towards conceptualising time under the NMW/NLW framework. In the process, they have expressed a welcome scepticism about productivity regulation in the private hire sector. Simultaneously, however, the unitary approach is under threat in the legal regulation of care work. If the Court of Appeal judgment in *Royal Mencap Society v Tomlinson-Blake*⁵⁸ is upheld by the Supreme Court it would upend a case law that has sustained a protective model of waged time for almost two decades.

The question at the core of *Mencap* emerges from a dispute over whether the entirety of a care worker’s presence on the premises of a client should attract the minimum wage.⁵⁹ The working arrangements under scrutiny are standard in the sector: a carer working in a client’s home or residential care home is required to remain overnight on the premises to provide support as needed and is permitted and/or expected to spend some of that time sleeping. Under the *Framed Flexibility Model*, overnight hours are fully counted – and waged – as working time.⁶⁰ The dispute in *Mencap* is about the status of these overnight shifts under the National Minimum Wage Regulations. In this framework, where, as in *Mencap*, the work is classified as ‘time work’ under regulation 30, all ‘hours worked’ are to be paid the NMW under regulation 31.⁶¹ Regulation 32(1) extends this entitlement to ‘hours when a worker is available, and required to be available, at or near a place of work for the purposes of working.’⁶² Yet the extended entitlement to ‘availability periods’ does not apply under regulation 32(2) where the worker ‘by arrangement sleeps at or near a place of work’ and the employer has

⁵⁵ *Uber* (CA), *ibid*, [111].

⁵⁶ *Uber* (CA), *ibid*, [159].

⁵⁷ *Uber* (CA), *ibid*, [159].

⁵⁸ *Mencap* (CA), n 1 above. The case was heard by the Supreme Court on 12-13 February 2020.

⁵⁹ The appeal was against three decisions of the EAT handed down in 2017: *Focus Care Agency Ltd v Roberts*, *Frudd v The Partington Group Ltd* and *Royal Mencap Society v Tomlinson-Blake* [2017] ICR 1186. The EAT had found in favour of the claimant in each, although only in *Mencap* was it directly decisive of NMW issue. See also Davies 2018, n 3 above; Hayes, 2018, 2019, n 3 above.

⁶⁰ McCann and Murray, *Model Law*, n 5 above, Section 1.

⁶¹ NMWR, n 38 above, regs 30-31. ‘Time work’ is defined as work in respect of which a worker is entitled to be paid by reference to the time he or she works, NMWR, reg 30.

⁶² Regulation 32(1) applies to ‘time work.’ A comparable extension of ‘salaried hours work’ is in NMWR, *ibid*, regulation 27(1)(b).

provided her with suitable sleeping facilities.⁶³ The architecture of the minimum wage regime – by explicitly singling out a period spent at the workplace when the worker may not to be paid her full wage – embeds a legislated vulnerability that is being leveraged in employers’ legal strategies and was absorbed into the decision of the Court of Appeal in *Mencap*.

4.1 Pre-*Mencap*: the unitary model

Before *Mencap*, the case law – albeit with some missteps – sustained a unitary model by, in effect, distinguishing between working time (regulation 30) and on-call periods (regulation 32). The leading case was the 2002 decision of the Court of Appeal in *British Nursing Association v Inland Revenue*.⁶⁴ Staff working from their homes at night to respond to telephone calls as needed were held by the Court of Appeal to be in ‘time work’ throughout their entire shifts and covered by (the predecessor to) regulation 30.⁶⁵ The equivalent provision to regulation 32 was held to be triggered only when ‘a worker is not in fact working, but is on call waiting to work.’⁶⁶ This analysis was followed in a line of cases including, in the same year, by the Inner House of the Court of Session in *Scottbridge Construction Ltd v Wright*⁶⁷ to the benefit of a night watchman in *Burrow Down Support Services Ltd v Rossiter* in 2008 for a care home security guard required to be at his workplace overnight who could sleep but had to respond to any noises⁶⁸; and for a care worker during overnight shifts in *Whittlestone v BJP Home Support Ltd* in 2013.⁶⁹

This case law was driven by a sophisticated reflection on the nature of working time that countered productivity regulation. This analysis was shaped, first, by a rejection of the intensity of activity as the gauge of protected time. The courts dismissed arguments that carers and others are entitled to the NMW only when physically active. As Langstaff P stated in *Whittlestone*: ‘work is not to be equated to any particular level of activity’⁷⁰ (and, making an early appearance, ‘they also serve who only stand and wait’⁷¹). This dismissal of activity, second, incorporated a rejection of colloquial/dictionary definitions of work. Again in *Whittlestone*, Langstaff P dealt expressly with the divergence between every day and legal conceptions of work: ‘[c]olloquially, work might bring to mind images of physical or sustained mental effort. Neither is necessary for something to constitute work...’⁷²

⁶³ *British Nursing Association*, n 64 above, [14]; NMWR, *ibid*, reg 32(2).

⁶⁴ [2002] EWCA Civ 494. See further Lisa Rodgers, ‘The Notion of Working Time’ (2009) 38(1) *Industrial Law Journal* 80-88.

⁶⁵ NMWR, n 38 above, reg 3.

⁶⁶ NMWR, *ibid*, reg 15(1). In the words of Simler J in the EAT judgment in *Mencap*, ‘[i]f he or she is working within regulation 30, the deeming provision in regulation 32 is not engaged at all,’ *Mencap* (EAT), n 59 above, [25].

⁶⁷ 2003 SC 520 (IH).

⁶⁸ [2008] ICR 1172.

⁶⁹ [2014] ICR 275.

⁷⁰ *Whittlestone*, *ibid*, [15].

⁷¹ *ibid*, since revived by the Employment Tribunal in *Uber*, n 43 above, [100]. See Section 3 above.

⁷² *Whittlestone*, *ibid*, [30].

The unitary analysis, finally, encompassed a recognition, later echoed by the Employment Appeal Tribunal in *Uber*, that a worker's level of activity is largely dictated by the employer's work organisation strategies.⁷³ This insight is recognised in the Employment Appeal Tribunal judgment in *Scottbridge*:

[I]t is wholly inappropriate for the employer while requiring an employee to be present for specific number of hours, to pay him only for a small proportion of those hours in respect of the amount of time that reflects what he is physically doing on the premises. The solution for an employer who wishes an employee to be present as a night watchman or the equivalent, is to provide him with alternative and additional work on the premises which enables him both to provide the employer with remunerated time and also the protection of someone on the premises for security reasons.⁷⁴

It was also expressed, perhaps most forcefully, in *Whittlestone*: 'The fact that [the carer's] physical services were not called upon during the night were...irrelevant since her job was to be there.'⁷⁵

This unitary approach does not, as sometimes suggested, make regulation 32 redundant. The Regulation is applied to periods entirely devoid of any work obligations in which the worker is exclusively available to work when needed.⁷⁶ 'Availability hours' in the National Minimum Wage Regulations can therefore be equated with being 'on-call' in the conventional meaning⁷⁷: in the terms of the *Framed Flexibility Model*, the worker is 'required to be at the disposal of the employer by being ready, willing and able to return to duty as required.'⁷⁸

A key illustration is *Wray*. This case involved a pub manager provided with accommodation who was required to 'reside and sleep on the premises.'⁷⁹ This requirement appeared to be solely a minimum security/preventative measure: the manager had no responsibilities when the pub was closed and could leave the premises for periods provided she slept there.⁸⁰ The Employment Appeal Tribunal held that the requirement was in 'the usual shorthand...“on-call”' and therefore covered by what is now regulation 32.⁸¹ The Tribunal helpfully characterised regulation 32 as a deeming provision: regulation 30 applies when the worker is working; regulation 32 deems the worker to be working in periods when 'he is in fact not working but is required to be available to work' (unless he is at home or provided with sleeping facilities).⁸² *Wray*, then, offers the correct understanding of 'on-call' periods. In this

⁷³ Davies has highlighted the role of managerial prerogative, 2018, n 3 above, 560-561.

⁷⁴ *Wright v Scottbridge Construction Ltd* [2001] IRLR 589 (EAT), [9].

⁷⁵ *Whittlestone*, n 69 above, [59].

⁷⁶ See also *Mencap* (EAT), n 59 above, [26].

⁷⁷ *British Nursing Association*, n 64 above, [14], *South Manchester Abbeyfield Society Ltd v Hopkins* [2011] ICR 254 (EAT), [38]; *Wray v JW Lees* [2012] ICR 43, [12]; *City of Edinburgh Council v Lauder* EAT 20 March 2012, [22].

⁷⁸ McCann and Murray, *Model Law*, n 5 above, s 1.

⁷⁹ *Wray*, n 77 above, [10].

⁸⁰ *Wray*, *ibid*, [13].

⁸¹ *Wray*, *ibid*, [12].

⁸² *Wray*, *ibid*, [12].

regard, the Employment Appeal Tribunal recognised – in the judgment by Underhill P as he was then – that the pub manager was not in a position analogous to a night-sleeper in a residential care home, ‘who has a responsibility throughout the night for those present in the home.’⁸³

Yet overnight shifts appear to have been widely unpaid in the care sector, as part of a broader pattern of underpayment and deficient enforcement.⁸⁴ This problem was highlighted in the policy debates on working conditions in the sector.⁸⁵ The government’s guidance on calculating the minimum wage, further, contained a formula that did not robustly convey the demands of the case law: that workers were not entitled to the NMW while ‘on standby or on call’ and asleep or entitled to be asleep⁸⁶ (coupled with an illustration suggesting that the NMW was not applicable during a period that could readily have been classified by the courts as working hours).⁸⁷ The formula was adjusted in 2015 more closely to approximate the case law: that ‘[e]mployers must ascertain whether a worker is still subject to certain work-related responsibilities whilst asleep, to the extent that they could be deemed to be “working.”’⁸⁸ In that case, they would be entitled to the minimum wage ‘for the entire time they are at work.’⁸⁹ This was the backdrop to the *Mencap* litigation.

4.2 *Mencap*: productivity regulation of overnight shifts and the potential for sleep

The decision of the Court of Appeal in *Mencap* has upended the judicial settlement on overnight shifts in the care sector. In doing so, it has offered an interpretation of the National Minimum Wage Regulations that risks facilitating casualisation – in an temporal form – in the care sector and more widely across the UK economy.

Mencap was an appeal in joined cases on the waged hours of care workers. The first, and focus of this paper, is *Royal Mencap Society v Tomlinson-Blake*. It was brought by a care support worker, Claire Tomlinson-Blake, who was employed by East Riding of Yorkshire Council to provide care to vulnerable adults.⁹⁰ She worked at two properties providing support to clients with autism and substantial learning disabilities. The clients lived in privately-owned properties and required 24-hour support. The Council had a care and support plan that it contracted-out to Mencap to deliver. This care was provided by a team of carers present in the men’s homes at all times. Tomlinson-Blake usually worked a day shift and the following morning shift, both part of her salaried hours. She was also required to carry out a ‘sleep-in shift’ between 10 and 7 am, for

⁸³ *Wray*, *ibid*, [13]. Similarly, the EAT in *Burrow Down* noted that even during the time when the security guard was permitted to sleep, he was still required to ‘deal with anything untoward that might arise,’ n 68 above, [24]. The security guard was not, then, deemed to be at work when only available to work, but actually working, [15], [24].

⁸⁴ See the literature cited in McCann 2016, n 9 above, footnote 1.

⁸⁵ Denise Kingsmill, *The Kingsmill Review: Taking Care. An Independent Report into Working Conditions in the Care Sector* (Newcastle upon Tyne: Your Britain), 24.

⁸⁶ Department for Business Innovation and Skills (BIS), *Calculating the Minimum Wage* (BIS, April 2014), 30.

⁸⁷ *ibid*, 31.

⁸⁸ BIS, *Calculating the Minimum Wage* (BIS, February 2015), 30.

⁸⁹ *ibid*.

⁹⁰ The facts are recounted at *Mencap* (CA), n 1 above, [92].

which she received a flat rate plus one hour's pay. During the sleep-in, no specific tasks were allocated. She was obliged to remain at the house throughout, to 'keep a listening ear out' in case her support was needed, intervene where necessary, respond to requests for help, and deal with emergencies.⁹¹ When needed to intervene, she was not paid for the first hour of her time.⁹²

The Employment Tribunal⁹³ and Employment Appeal Tribunal⁹⁴ held that Ms Tomlinson-Blake was in 'time work' and therefore entitled to receive the NMW across the overnight shift under regulation 30. When the Employment Appeal Tribunal judgment came down in July 2017 the HMRC was investigating social care providers for underpayment of overnight shifts.⁹⁵ In the wake of the judgment, the government temporarily suspended minimum wage enforcement for 'sleep-in' shift pay and waived historic financial penalties.⁹⁶ The government also reaffirmed its expectation that all employers pay their workers in accordance with the law including for sleep-in shifts, characterising the pre-2015 guidance as 'potentially misleading.'⁹⁷ In November 2017, the government launched a Social Care Compliance Scheme of 'assisted self-correction'⁹⁸ for social care providers.⁹⁹ Employers in the sector could voluntarily opt into the scheme and had up to a year to identify any underpayment for sleep-in shifts, with support from HMRC, and a further 3 months to pay the arrears. Employers that chose not to opt into the scheme were subject to the HMRC's normal enforcement strategy (fines, back pay, naming and shaming).

In July 2018, however, the Court of Appeal held Ms Tomlinson-Blake's overnight shifts to be excluded from waged time for NMW purposes. The Court held that she was 'available' under regulation 32 and therefore not entitled to the NMW during this period except for 'hours during which she was required to be awake for the purpose of working.'¹⁰⁰

To reach this outcome, Underhill LJ in the leading judgment, with which Ryder and Singh concurred, dismissed the series of unitary cases outlined in Section 4.1 above,

⁹¹ *ibid.*

⁹² *ibid.*

⁹³ *Royal Mencap Society v Mrs Tomlinson-Blake* ET, 22 Aug 2016.

⁹⁴ *Mencap* (EAT), n 59 above.

⁹⁵ Department of Business, Energy and Industrial Strategy (BEIS), *National Minimum Wage Law: Enforcement. Policy on HM Revenue & Customs Enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law* (BEIS, November 2017), para 3.10.8.

⁹⁶ BEIS, 'Enforcement of the National Minimum Wage in the Social Care Sector' (BEIS, July 2017); BEIS *National Minimum Wage Law: Enforcement 2017*, *ibid*, paras 3.7.5-3.7.6, 3.10.1-3.10.9. For a detailed overview of these developments, see Doug Pyper, *National Minimum Wage: Sleep-in Care* (House of Commons Library Briefing Paper, CBP 8243, 15 August 2018), at <https://researchbriefings.files.parliament.uk/documents/CBP-8243/CBP-8243.pdf> (last accessed 4 April 2020).

⁹⁷ See also BEIS *National Minimum Wage Law: Enforcement 2017*, *ibid*, 10.

⁹⁸ BEIS *National Minimum Wage Law: Enforcement. Policy on HM Revenue & Customs Enforcement, Prosecutions and Naming Employers who Break National Minimum Wage Law* (BEIS, Updated February 2020), para 3.3.12.

⁹⁹ BEIS, 'Interim Enforcement of the National Minimum Wage in the Social Care Sector: "Sleep-In" Shifts' (BEIS, November 2017).

¹⁰⁰ *Mencap* (CA), n 1 above, [93].

holding that he was not bound by these authorities to reach a different conclusion.¹⁰¹ *British Nursing Association* was not decisive¹⁰²: the working arrangements in that case differed from those in *Mencap*, in which ‘the essence of the arrangement is that the worker is expected to sleep.’¹⁰³ *Scottbridge* ‘simply adopted the analysis’ of *British Nursing Association*,¹⁰⁴ and was deficient because the Inner House did not directly confront whether the circumstances of the night watchman could be distinguished from ‘sleepers-in’ in a care home.¹⁰⁵ *Burrow Down* was wrongly decided in assuming that *British Nursing Association* required the conclusion that the security guard was working when he was expected to sleep throughout the shift.¹⁰⁶ Subsequent ‘availability’ cases that followed *Burrow Down* were therefore also wrongly decided.¹⁰⁷

The outcome of the Court of Appeal decision in *Mencap* is that the only overnight shift hours that count towards the NMW/NLW, in this and similar scenarios, are those in which the worker actively intervenes. The judgment defeated the purposes of the Social Care Compliance Scheme, which came to an end on 31st December 2018.¹⁰⁸ The government guidance on calculating the minimum wage was revised in line with the Court of Appeal ruling.¹⁰⁹ The outcome for the carer was that she was entitled to what would usually have been a payment of £29.05 for a 9 hour overnight shift (or £3.23 an hour).

At the heart of the Court of Appeal decision in *Mencap* is an unvarnished rendition of the productivity regulation model in which remuneration is inescapably linked to physical activity. It is particularly revealing for the purposes of this paper because it illuminates periods in which there is potential to sleep as a crucial genre of vulnerable time.

4.2.1. Artificiality, ‘clear meaning,’ and the potential for sleep in *Mencap*

The *Framed Flexibility Model*, grounded in a worker being at the disposal of the hirer, readily covers sleeping periods. The unitary approach to the National Minimum Wage Regulations that has characterised the care work case law also precludes the automatic exclusion of periods when workers are asleep: ‘an individual may be

¹⁰¹ *ibid*, [86].

¹⁰² *ibid*, [49].

¹⁰³ *ibid*, [57].

¹⁰⁴ *ibid*, [62].

¹⁰⁵ *ibid*, [80]. Underhill LJ also noted that the Inner House in *Scottbridge* was not referred to the *First Report* of the Low Pay Commission. See further Section 4.2.2 below.

¹⁰⁶ *ibid*, [77-78].

¹⁰⁷ *ibid*, [83]. These were *Smith v Oxfordshire Learning Disability NHS Trust* [2009] ICR 1395; *Whittlestone* n 69 above; *Esparon v Slavikovska* [2014] ICR 1037; *Governing Body of Binfield Church of England Primary School v Roll* [2016] IRLR 270; *Focus*, n 59 above; *Abbeyfield Wessex Society Ltd v Edwards* [2017] UKEAT 0256/16.

¹⁰⁸ <https://www.gov.uk/guidance/tell-hmrc-if-youve-underpaid-national-minimum-wage-in-the-social-care-sector> (last accessed 4 April 2020).

¹⁰⁹ The guidance now conveys that workers ‘required to stay at or near their workplace on the basis that they are expected to sleep for all or most of the period’ should, where the employer provides sleeping facilities, be paid the minimum wage only for the time when the worker is required to be awake for the purpose of working, BEIS, *National Minimum Wage and National Living Wage. Calculating the Minimum Wage* (BEIS, April 2020).

working merely by being present if he or she is simply required to deal with anything untoward that might arise in the course of the shift but is otherwise entitled to sleep.¹¹⁰ There has occasionally been a defensive quality, however, to the UK courts' treatment of waged-sleep: in the Employment Appeal Tribunal judgment in *Burrow Down*, for example, '[w]e recognise that there is some artificiality in saying that someone is working when he is sleeping...'¹¹¹ A similar scepticism about the potential for sleep also propelled the Court of Appeal judgment in *Mencap*.

In the Court of Appeal's rendition of productivity regulation, the potential for the carer to sleep was crucial. The judgment hinged on the '[b]asic artificiality of describing someone as "working" – still more, as actually working – during a shift when it is positively expected that they will spend substantially the whole time asleep.'¹¹² This assumption fuelled an ostensible return to the 'clear meaning' of the Regulations of the kind dismissed by the Employment Appeal Tribunal in *Whittlestone*.¹¹³ Underhill LJ declared that '[t]he self-evident intention' of the Regulations is that sleep-in workers are to be regarded as available but not working.¹¹⁴ Workers in sleep-ins are only entitled to have hours counted in which they are, and are required to be, awake to perform a 'specific activity.'¹¹⁵ Underhill LJ configured this approach as a 'straightforward' reading of the Regulations, which had been abandoned in the authorities.¹¹⁶

In fact, the judgment has been argued by Hayes to overstate the sleep expectation, neglecting the nature of care work for those who look after people with very complex needs.¹¹⁷ Ms Tomlinson-Blake had been found by the Employment Tribunal to be required to 'keep a listening ear out' in case her support was needed and to intervene where necessary to deal with incidents that might require her intervention as well as to respond to requests for help. The Employment Tribunal emphasised that these responsibilities required an exercise of her professional judgment.¹¹⁸

The potential for episodes of waged-sleep, however, captivated the Court of Appeal and propelled key features of the judgment. In particular, as mentioned above, the expectation that Ms Tomlinson-Blake might sleep underpinned Underhill LJ's decision to distinguish *British Nursing Association*. Buxton LJ's decision in the earlier case, in Underhill LJ's view, highlighted that the telephone operators were actually working throughout their shifts with lulls in activity when they could sleep.¹¹⁹ Buxton LJ, in his opinion, would not necessarily have taken the same view about a worker who was expected to sleep.¹²⁰ For that reason, *British Nursing Association* did not demand the

¹¹⁰ *Mencap* (EAT), n 59 above, [33], citing *Burrow Down*, n 68 above, [24]-[25].

¹¹¹ *Burrow Down*, *ibid*, [25].

¹¹² *Mencap* (CA), n 1 above, [82].

¹¹³ *Mencap* (CA), *ibid*, [77]. *Whittlestone*, n 69 above; see Section 4.1 above.

¹¹⁴ *Mencap* (CA), *ibid*, [43].

¹¹⁵ *Mencap* (CA), *ibid*, [47].

¹¹⁶ *ibid*.

¹¹⁷ Hayes 2018, 2019, n 3 above.

¹¹⁸ *Mencap* (CA), n 1 above, [92].

¹¹⁹ *Mencap* (CA), n 1 above, [78].

¹²⁰ *ibid*.

conclusion of the Employment Appeal Tribunal in *Burrow Down*. Similarly, Underhill LJ dismissed *Scottbridge* because it did not directly address 'sleep-ins' in a care home.¹²¹

The Court of Appeal decision highlights that periods in which sleep is permitted or encouraged are among the hours that are particularly vulnerable to time drainage in the contemporary phase of temporal casualisation. 'Sleep-ins' are an easy target: what greater degree of inactivity, after all, than sleep? Periods in which a worker is asleep, further, have a particular resonance when employment is hourly-waged, or where these periods are singled out for a flat-rate payment as in *Mencap*. Payments in these circumstances become particularly vivid and contested.

This suspicion of waged sleep was reinforced by the Court's reading of two reports from the early life of the UK Low Pay Commission on the legislative framework of the minimum wage.

4.2.2 The First and Fourth Low Pay Commission Reports

In considering overnight shifts, considerable weight was placed on the *First Report* of the Low Pay Commission from June 1998, in which the Commission gave recommendations on the coverage and initial level of the NMW in the new legal framework.¹²² The judgment is configured as giving effect to the Commission's recommendations on the coverage of the NMW.¹²³ The Commission recommended that the NMW should apply to all periods 'when a worker is required by the employer to be at the place of work and available for work, even if no work is available for certain periods,'¹²⁴ with the exception of hours during which workers are 'paid to sleep on the work premises.'¹²⁵ For these hours, the Commission proposed that workers and employers should agree an allowance, 'as they do now.'¹²⁶ This exception was foreseen to apply to 'those who are required to be on-call and sleep on their employer's premises' such as workers in residential homes or youth hostels.¹²⁷

In its 2003 *Fourth Report*, the Commission responded to the emerging case law, which it considered to lack clarity and potentially to extend to working arrangements it had felt should not attract the NMW.¹²⁸ The *Fourth Report* noted that Employment Appeal Tribunal judgments – implicitly *British Nursing Association* and *Scottbridge* – had held the NMW to be payable 'in circumstances where the worker was able to sleep at times during the night.'¹²⁹ It expressed concern that these decisions might imply that the

¹²¹ *Mencap* (CA), n 1 above, [80].

¹²² Low Pay Commission, *The National Minimum Wage: First Report of the Low Pay Commission* (Cm 3976, 1998).

¹²³ *Mencap* (CA), n 1 above, [44].

¹²⁴ Low Pay Commission 1998, n 122 above, Recommendation 11.

¹²⁵ Low Pay Commission 1998, *ibid*, Recommendation 12.

¹²⁶ *ibid*.

¹²⁷ Low Pay Commission 1998, *ibid*, para 4.34.

¹²⁸ Low Pay Commission, *The National Minimum Wage: Fourth Report of the Low Pay Commission. Building on Success* (Cm 5768, 2003).

¹²⁹ *ibid*, para 3.57.

NMW would be payable in 'sleepover cases.'¹³⁰ These it defined as where a worker is 'available to deal with emergencies but would not necessarily expect to be woken,' giving as examples workers in care homes, those who care for an elderly or disabled person in his or her own home, and wardens in sheltered housing.¹³¹ The Commission stressed that the government had accepted its earlier recommendations and that it still believed it had taken the right approach.¹³² Expressing concern that some uncertainty remained, it called for the Commission's position on 'sleepovers' to be 'maintained and clarified' and recommended that the Government consider issuing revised guidance or changing the Regulations.¹³³

In *Mencap*, Underhill LJ considered the Low Pay Commission's *First* and *Fourth Reports*, the only ones to which he was referred.¹³⁴ He considered himself obliged to take the *First Report* into account, relying on the principle in *Fothergill v Monarch Airlines Ltd*¹³⁵ reinforced by a requirement in Section 5(4) of the National Minimum Wage Act 1998 that the Secretary of State refer certain matters to the Low Pay Commission prior to issuing the first NMW regulations including the times at which a person is to be treated as working.¹³⁶ If the Secretary had decided to implement only some of the Commission's Recommendations,¹³⁷ or make regulations that differed from them,¹³⁸ he would have been obliged to lay a report before each House of Parliament with a statement of reasons. As the Court of Appeal noted, the Secretary of State did not make a report; instead, the government response was that it 'support[ed] all the Commission's key recommendations, subject to consultation on some of the practical details.'¹³⁹

For Underhill LJ, the *First Report* was exceptionally influential. He dismissed *Scottbridge*, in particular, centrally because the appellate court, the Inner House of the Court of Session, was not referred to the *Report*.¹⁴⁰ Although noting that he would have reached the same conclusion on the basis of the Regulations alone,¹⁴¹ he took the *First Report* as precluding the NMW for 'sleep-in' shifts,¹⁴² observing that the

¹³⁰ *ibid*. It is worth noting that the assumption appears to be that the overnight hours would generally be in addition to daytime shifts. The example given is of sleepovers that follow after 'someone works a day shift,' para 3.55

¹³¹ *ibid*, para 3.55.

¹³² *ibid*, para 3.56.

¹³³ *ibid*, para 3.59.

¹³⁴ *Mencap* (CA), n 1 above, [15].

¹³⁵ [1981] AC 251, [281] (Diplock L): '[w]here [an] Act has been preceded by a report of some official commission or committee that has been laid before Parliament and the legislation is introduced in consequence of the report, the report itself may be looked at by the court for the limited purpose of identifying the "mischief" that the Act was intended to remedy, and for such assistance as is derivable from this knowledge in giving the right purposive construction to the Act,' cited in *Mencap* (CA), n 1 above, [45].

¹³⁶ *Mencap* (CA), *ibid*, [9], [45].

¹³⁷ National Minimum Wage Act 1998, s 5(4)(b).

¹³⁸ *ibid*, s 5(4)(d).

¹³⁹ 'The Government's Response to the First Report of the Low Pay Commission,' 18 June 1998, at <https://webarchive.nationalarchives.gov.uk/20020615143044/http://www.lowpay.gov.uk:80/er/lowpay/response.htm> (last accessed 4 April 2020).

¹⁴⁰ *Mencap* (CA), n 1 above, [80].

¹⁴¹ *Mencap* (CA), *ibid*, [44].

¹⁴² *Mencap* (CA), n 1 above, [11]-[13].

Commission was expressly dealing with ‘workers who sleep in “residential homes” but who are required to be “on-call.”’¹⁴³ The Commission, he concluded, had referred to ‘what it evidently understood to be the existing practice ... namely that the worker would be paid an agreed “allowance,” unless wakened to work.’¹⁴⁴ In large part to uphold what he felt to be the original intent of the Low Pay Commission (and government), Underhill LJ dismissed the unitary precedents and decided that Ms Tomlinson-Blake was not entitled to the NMW while sleeping.

There are a number of reservations about the role played by the Low Pay Commission *Reports* in the Court of Appeal judgment. First, the recommendations made in the *First Report* can be read as reflected in the trajectory of the case law. In the *Fourth Report*, the Commission took its inaugural report to convey that the NMW should not be paid when there is an assumption that the worker ‘will not normally be woken.’¹⁴⁵ This is not, in fact, the terms of the *First Report’s* Recommendations, which referred to (1) workers ‘required to be on-call and sleep on their employer’s premises’ (paragraph 4.3) and (2) ‘workers...paid to sleep’ on the premises (Recommendation 12). Underhill LJ argued that paragraph 4.3 ‘plainly covers’ cases like *Mencap*.¹⁴⁶ However, both formulations – in paragraph 4.3 and Recommendation 12 - can equally be interpreted, as they have been, as referring only to genuinely on-call arrangements, in which the worker’s sole obligation is to respond to a request to work, rather than to have continuing obligations throughout the shift.¹⁴⁷ Indeed, this was the Employment Appeal Tribunal’s interpretation of the Recommendations in *Mencap*.¹⁴⁸ Simler P did not find the Recommendations to be of any assistance in illuminating the notion of ‘time work.’

Second, Underhill LJ referred to the Commission’s suggestion that the government provide further guidance or revise the Regulations,¹⁴⁹ concluding that there is no evidence that the government gave any further consideration to the issue.¹⁵⁰ He took this apparent silence to imply that the government’s preference would be to depart from the unitary approach. Yet it could equally, and perhaps even more convincingly, have been taken to signal satisfaction with the case law. The latter interpretation seemed to be that of the Employment Appeal Tribunal, which noted that the Regulations had not been revised.¹⁵¹

In any event, the government did explicitly consider whether the wording of the Regulations should be revised. Neither the Employment Appeal Tribunal nor the Court of Appeal referred to the government’s response to the consultation on the draft 2015

¹⁴³ *Mencap*(CA), *ibid*, [13], referring to Low Pay Commission 1998, n 122 above, Recommendations 11, 12 and paras 4.33, 4.34. On the judgment’s conflation of care work in ‘residential homes’ and home care, see Hayes 2018, n 3 above.

¹⁴⁴ *Mencap* (CA), *ibid*, [13].

¹⁴⁵ Low Pay Commission 2003, n 128 above, para 3.56.

¹⁴⁶ *Mencap* (CA), n 1 above, [46].

¹⁴⁷ On on-call periods, see Section 4.1 above.

¹⁴⁸ *Mencap* (CA), n 1 above, [20].

¹⁴⁹ *Mencap* (CA), *ibid*, [15].

¹⁵⁰ *Mencap* (CA), *ibid*, [16].

¹⁵¹ *Mencap* (EAT), n 59 above, [21].

Regulations.¹⁵² Responding to requests for clarity from a number of respondents,¹⁵³ the response reported that '[t]he Government has closely considered the case law and respondents' comments and is of the view that the [draft 2015 Regulations] correctly reflect the Government's intended policy and recent case law relating to sleeping time.'¹⁵⁴ Having promised to return to this issue in subsequent guidance,¹⁵⁵ the government did so in the Department for Business, Innovation and Skills 2015 guidance on *Calculating The Minimum Wage*.¹⁵⁶ This guidance was revised to state that '[e]mployers must ascertain whether a worker is still subject to certain work-related responsibilities whilst asleep, to the extent that they could be deemed to be "working."¹⁵⁷ In such cases, the workers would be entitled to the NMW for the entire shift.¹⁵⁸ Underhill LJ footnoted the 2015 guidance, but characterised it as 'attempt[ing] to state the effect of the recent case-law' and not 'a consideration of the kind recommended by the Commission.'¹⁵⁹

It is notable, finally, that the Low Pay Commission had, since the 2004 report, made peace with the unitary approach. In its September 2017 Report on *Non-Compliance and Enforcement of the National Minimum Wage*, the Commission stated, explicitly on adult social care, that '[i]f an individual is at work and required to be there they should, in most cases, be paid at least the NMW, even if they are asleep.'¹⁶⁰

4.3 Obligation in the unitary case law

The *Framed Flexibility Model*, as outlined above, grounds the allocation of time and wage entitlements primarily in the worker's location. Those who are required to remain in a place specified by the employer are engaged in working time and entitled – on an equal basis – to wage, working time, and other protections. The restriction on autonomy is the crux and all hours of availability to the employer in the workplace – without distinction and including sleeping periods – are remunerated in full. Such a location-oriented unitary model – while not without complex judgment calls in gauging a worker's degree of obligation while at home¹⁶¹ – is the most effective approach to ensuring that workers' time is valued and compensated. The ideal reform to the UK minimum wage framework would therefore be to revise the legislation to incorporate a location-centred model.

¹⁵² BIS, *National Minimum Wage: Government Response to the Consultation on the Draft Consolidated Regulations* (January 2015), at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/397182/bis-15-9-nmw-government-response.pdf (last accessed 4 April 2020).

¹⁵³ *ibid*, paras 11-13.

¹⁵⁴ *ibid*, para 14.

¹⁵⁵ *ibid*, para 15.

¹⁵⁶ BIS 2015, n 88 above.

¹⁵⁷ BIS 2015, *ibid*, 30.

¹⁵⁸ *ibid*.

¹⁵⁹ *Mencap* (CA), n 1 above, [16], note 2.

¹⁶⁰ Low Pay Commission, *Low Pay Commission: Non-Compliance and Enforcement of the National Minimum Wage* (Low Pay Commission, September 2017), para 4.25.

¹⁶¹ Under the *Framed Flexibility Model*, where a worker is on-call at home or another place of her choice, if her degree of availability is such that it is equivalent to a requirement to be on the premises of the employer, it is classified as internal on-call duty and counts as working time for all purposes, McCann and Murray 2014, n 5 above, 343; *Model Law*, n 5 above, sections 1, 18.1.

In the absence of such a reform, distinctions have to be drawn – even when the worker is at the workplace – between protected and unprotected time. As we have seen, the minimum wage framework envisages that certain hours workers spend asleep in a workplace will not attract the minimum wage. Even within this more restrictive model, however, the Court of Appeal judgment in *Mencap* is unsatisfactory. The unitary analysis from pre-*Mencap* case law is much better suited to averting temporal casualisation and protecting care workers. In particular, the value of the earlier approach lies in the centrality of obligation in shaping the courts’ understanding of work and working time.

4.3.1 Obligation as the crux of protection

The most significant element of the unitary case law on the minimum wage, although frequently overlooked, is that it has recognised obligation as the crux of protection. In doing so, the courts have sketched an obligation-oriented unitary approach that is preferable to the alternatives presented by the Court of Appeal in *Mencap*. This point is illustrated by the Inner House in considering the circumstances of the night watchman in *Scottbridge* and the nature of his obligation to the employer:

The work which was paid for under his contract ... [was] his attendance as a night watchman for the whole of those hours ... [T]he fact that the respondent had little or nothing to do during certain hours when he was permitted to sleep does not take away from the fact that he was throughout in attendance as a night watchman and required at any time to answer the telephone or to deal with alarms. The employment tribunal in our view, confused their estimate of the hours during which the respondent was generally active with an overall consideration of what was required of him as a night watchman at any time.¹⁶²

In this analysis, less active or visible responsibilities emerge as significant dimensions of the worker’s presence at the workplace. In *Mencap*, characteristically of care work in home settings, there was a substantial degree of obligation during overnight shifts that involved a high level of responsibility, condensed in Ms Tomlinson-Blake’s obligation to ‘keep a listening ear out.’¹⁶³ The act of deciding whether to intervene, as the Employment Tribunal emphasised, required an exercise of Ms Tomlinson-Blake’s professional judgment, based on her knowledge of the residents and linked to her capacities as a ‘highly qualified and extensively trained’ care worker.¹⁶⁴ The Employment Tribunal, quoted in the Employment Appeal Tribunal judgment, elaborated these vital and continuing responsibilities:

[T]he onus was constantly upon her to use her professional judgement and to use the detailed knowledge that she had of the needs of these residents to decide when she should intervene in order to meet their needs and when she should not in order to respect their right to privacy and autonomy. That

¹⁶² *Scottbridge* (IH), n 67 above, [11].

¹⁶³ *Mencap* (CA), n 1 above, [92].

¹⁶⁴ *Mencap* (CA), *ibid*, [92].

epitomises her role as a carer which ... she was performing either during a day time shift or whilst keeping a 'listening ear' whilst in bed, asleep or not.¹⁶⁵

The degree of obligation was also central to the Employment Appeal Tribunal's conclusion that all of Ms Tomlinson-Blake's hours should be counted towards the minimum wage. It stressed that she was subject to sustained responsibilities even though the frequency of activity might have been low and she was entitled to sleep.¹⁶⁶

The Employment Appeal Tribunal sketched a structure for an obligation-oriented analysis by providing a list of potentially relevant factors, none determinative and of varying weight depending on the facts.¹⁶⁷ All relate to the nature and degree of a workers' obligation: the employer's purpose in hiring the worker, including any relevant regulatory requirement; the restriction on the worker's activities by being required to be present and at the disposal of the hirer, including where she must remain on the premises on pain of discipline; the degree of responsibility undertaken by the worker; and the immediacy of the requirement to provide services in response to unexpected events or emergencies, including whether it is the worker who decides whether to intervene.

This is a potentially useful multi-factorial approach that incorporates key themes in the unitary case law and is particularly useful for conceptualising work in the care sector. The observation that a worker's presence may allow an employer to fulfil a regulatory requirement, for example, is highly relevant to care standards. In *Mencap*, the employer was subject to an obligation under health and social care regulations to have someone present on the premises at all times.¹⁶⁸ Statutory staffing obligations have been central to a number of judgments, notably *Esparon*.¹⁶⁹ In *Mencap*, however, this obligation was dismissed in the Court of Appeal. In Underhill LJ's analysis, the requirement was to have adequate staff on the premises and was not pertinent to the question of whether Ms Tomlinson-Blake was either working or available for work.¹⁷⁰

Under the minimum wage framework, in contrast to the *Framed Flexibility Model*, this is an intelligible approach in some circumstances. Within the dualistic structure of the legislation, the employer's obligation could be fulfilled through either 'availability' or 'work' depending on the circumstances. Yet in the circumstances of *Mencap*, the legislative requirement from the social care regime spoke to the purpose of the worker's presence in a manner that suggests that she was working under the National Minimum Wage Regulations. This regulatory intersection was spotted by the Employment Appeal Tribunal. Simler J focused on how the care standards shaped the care worker's obligation. She concluded that 'a regulatory or other requirement to have

¹⁶⁵ *Mencap* (EAT), n 59 above, [52].

¹⁶⁶ *ibid*. The observation in *Whittlestone* that work is not equated with any particular level of activity was reiterated by the EAT, *Mencap*, (EAT), *ibid*, [43], citing *Whittlestone*, n 69 above, [15].

¹⁶⁷ *Mencap* (EAT), *ibid*, [44].

¹⁶⁸ The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, SI 2014/2936, reg 12, cited in *Mencap* (EAT), *ibid*, [55]. The continuous presence of carers was also required to fulfil *Mencap*'s contract with East Riding of Yorkshire Council. See also Hayes 2019, n 3 above, 357.

¹⁶⁹ *Esparon*, n 107 above.

¹⁷⁰ *Mencap* (CA), n 1, [99].

the worker present is an obviously relevant factor in circumstances where the employer's obligations are likely to inform what work the employee might be required to do.¹⁷¹ That the Council's care and support plan required 24-hour support similarly indicated a substantial level of obligation on Ms Tomlinson-Blake.¹⁷²

Among the Employment Appeal Tribunal's other indicia of whether the employee is working, particularly pertinent to care work are that a sanction can be imposed if the worker is to leave the workplace – also considered relevant in *Whittlestone*¹⁷³ – and the nature and level of the worker's responsibilities. Both factors are central in *Mencap*. Ms Tomlinson-Blake would have been disciplined if she left the worksite.¹⁷⁴ In contrast, the pub manager in *Wray* had no responsibilities other than presence and could leave the premises provided she returned to sleep in them.¹⁷⁵ The degree of responsibility is particularly pertinent to care workers because of their responsibility for the wellbeing of others. In *Wray*, it was Underhill LJ who drew a distinction with care work, noting that the landlord was not like 'a night-sleeper in a residential care home who has a responsibility throughout the night for those present in the home.'¹⁷⁶

The requirement to respond directly to any incidents – the immediacy of the response – is also a helpful factor in distinguishing the working arrangements of Ms Tomlinson-Blake from scenarios in which a carer will be woken by a 'first responder.'¹⁷⁷ In this regard, as Hayes has pointed out,¹⁷⁸ it is notable that the Court of Appeal defined 'sleeping-in' as where a worker is 'expected to sleep for all or most of the period but may be woken if required to undertake some specific activity...'¹⁷⁹ This formulation implies that another employee, or client or third party, would wake the care worker.¹⁸⁰ Yet no-one else was hired for the overnight shift and the clients could not be expected to play this role.

4.3.2 The less convincing alternatives

The Court of Appeal in *Mencap*, then, disregarded obligation in distinguishing 'work' from 'availability' under the minimum wage regime. In this case there remains a need, however, to distinguish (1) shifts that will be entirely classified as work although they mix physical activity and sleep and (2) shifts that will be classified as availability from which periods of activity will be carved out and paid at the NMW/NLW rate. To draw this distinction demands a characterisation of the entire shift. When obligation is jettisoned as the fulcrum of this classification, however, the alternatives tend not to be particularly convincing.

¹⁷¹ *Mencap* (EAT), n 59 above, [41].

¹⁷² *Mencap* (EAT), *ibid*, [47].

¹⁷³ *Whittlestone*, n 69 above, [58].

¹⁷⁴ *Mencap* (EAT), n 59 above, [52].

¹⁷⁵ *Wray*, n 77 above, [13].

¹⁷⁶ *ibid*.

¹⁷⁷ *Mencap* (EAT), n 59 above, [44].

¹⁷⁸ Hayes, 2019, n 3 above, 358.

¹⁷⁹ *Mencap* (CA), n 1 above, [6].

¹⁸⁰ Hayes 2019, n 3 above, 358.

Under the productivity regulation approach, the ratio of physical activity to (assumed) sleep presents itself as an obvious candidate. In *Mencap*, it was pursued by the Court of Appeal in two different forms. First, Underhill LJ considered significant the frequency with which the carer got up to help her clients.¹⁸¹ This need to intervene was characterised by Simler J in the Employment Appeal Tribunal as ‘real but infrequent’: Ms Tomlinson-Blake had intervened to support the clients on six occasions in the preceding 16 months.¹⁸² An alternative formulation of the sleep/activity ratio also appeared in *Mencap*: an assessment of the normal duration of the worker’s overall sleeping time during the duration of a shift. The Court of Appeal considered it significant that the night watchman in *Scottbridge* could normally count on being able to sleep for five hours, implicitly much shorter than Ms Tomlinson-Blake¹⁸³ (although the Inner House actually noted that the Employment Tribunal in *Scottbridge* had found the night watchman to be required to be *awake* for four hours and entitled to sleep for the other 10 hours of his shift¹⁸⁴). These types of calculations, however, are ill-suited to care work for the reasons outlined above: they do not fully capture the nature of care jobs or the responsibilities involved. The exercise of discretion in particular – inactive and therefore invisible to the productivity regulation model – is disregarded, neglecting the occasions on which the carer awoke but decided that intervention was unnecessary (as the Employment Tribunal recognised¹⁸⁵).

Present also was a search for a primary purpose of the shift or job. Rather than distinguishing sleeping from waking time, the Court assessed whether sleep was the essence of the job. Considering explicitly whether a distinction could be drawn between the carer in *Mencap* and the nightwatchman in *Scottbridge*, Underhill LJ concluded that these workers were not identical because:

The essence of a ‘sleep-in’ contract is that the worker...by arrangement sleeps [at the workplace]...I do not think that that would be a natural characterisation of what a nightwatchman does, even one who appears to have had so few duties as the employee in *Scottbridge* and who is given a mattress to sleep on in the office.¹⁸⁶

Underhill LJ conceded that these distinctions between *Mencap* and *Scottbridge* were ‘subtle,’ but felt them sufficient to justify the different outcomes.¹⁸⁷ Yet, again, this conclusion is not particularly convincing. The night-watchman in *Scottbridge* was entitled to sleep for the majority of his shift. The ‘essence’ of a job, distinct from its execution, is inevitably elusive.

¹⁸¹ *Mencap* (CA), n 1 above, [94]. This frequency-of-waking model is discussed in Davies 2018, note 3 above, 562-563.

¹⁸² *Mencap* (EAT), n 59 above, [50].

¹⁸³ *Mencap* (CA), n 1 above, [79].

¹⁸⁴ *Scottbridge* (IH), n 67 above, [4].

¹⁸⁵ Quoted in the EAT judgment, *Mencap* (ET), n 59 above, [52].

¹⁸⁶ *Mencap* (CA), n 1 above, [79].

¹⁸⁷ *ibid.*

5. REGULATORY AND SECTORAL/GENDERED FRACTURES IN TEMPORAL CASUALISATION

In *Mencap* and *Uber* the archetypally enduring – care work – and the unevenly novel – platform work – have converged. The Court of Appeal’s analysis has diverged for different genres of vulnerable time, extending a critical opportunity to the Supreme Court to conceptualise and regulate working time in the private hire and care sectors. In doing so, the Court will choose how to envisage working time in the contemporary UK labour market and the role of labour laws in regulating this terrain. The *Uber* judgments have – so far – sidestepped the productivity regulation paradigm. The Court of Appeal’s decision in *Mencap* has been contrastingly deficient, destabilising a protective case law, absorbing productivity regulation, and unleashing it on the care sector to curb waged time. The Supreme Court judgments in these cases will have profound ramifications, either expediting or slowing the unfolding casualisation of the UK labour force.

Excising genres of slack time from legal protection is inherently dangerous and should be embarked upon with some trepidation. As noted in earlier work, periods of ‘availability’ are conceptually difficult to distinguish from other periods of slack time.¹⁸⁸ There is no particular reason for notions of non-productive time to be confined to either private hire drivers’ waiting periods or care workers’ overnight shifts. Once unleashed, legalised conceptions of ‘availability’ are at hand for further attempts to drain slack time from the working day, whether through employer strategy, legislative reform, or judicial interpretation. As a consequence, these notions could readily undermine working time protections, and minimum wage laws – tempering the potency of the minimum wage by generating insufficient waged hours for a decent living. The periodic revisiting of time spent sleeping in particular is, as it has been since the CJEU ruling in *Jaeger*,¹⁸⁹ a repeated probing at working time’s Achilles’ heel. It is therefore to be hoped that the Supreme Court will sustain and reinforce the unitary model in *Uber* and overrule the Court of Appeal in *Mencap*.

This holistic reading of *Mencap* and *Uber* has been revealing for scholarly efforts to conceptualise the paths and potential futures of UK labour law, by clarifying strategies and feasible regulatory conduits towards temporal casualisation. It has reinforced an earlier suggestion that a holistic approach can elicit a more accurate and comprehensive understanding of the evolution of a regulatory field.¹⁹⁰ When these cases are understood as showcasing different forms of temporal casualisation – parallel time-drainage strategies – advances can be made in understanding the overarching effects of this legal evolution. The holistic analysis also exposes emerging fractures in how the UK regulatory framework prompts and sustains casualisation, firstly between regulatory frameworks and, secondly, between the regulation of different sectors and, simultaneously, male- and female-dominated workforces.

¹⁸⁸ McCann and Murray, n 5 above, 342. See also Section 2.1 above.

¹⁸⁹ *Jaeger*, n 27 above. In *Jaeger*, the CJEU considered the coverage under the EU Working Time Directive of periods in which a doctor was on-call at his workplace - a hospital - and entitled to sleep. See further McCann 2005, n 14 above.

¹⁹⁰ McCann 2012, n 4 above, 175.

5.1 A wage/working time fracture

The first key fracture is between the legal regulation of working time and wages. In this regard, minimum wage laws are being revealed as a primary regulatory site of temporal casualisation. An earlier contribution highlighted wage regulation as the boundary of the CJEU's unitary model in *Tyco*.¹⁹¹ The CJEU forcefully asserted that the objectives of the Working Time Directive cannot be subordinated to purely economic considerations.¹⁹² Yet the Court highlighted an alternative path to casualisation, observing that under the EU legal order employers remain free to determine the remuneration of time spent travelling between home and customers (and, implicitly, can pay a lower rate for this bookend travel).¹⁹³

Mencap in the Court of Appeal has confirmed this intuition about wage regulation in the UK context. As noted above, the decision exacerbates an existing frailty in the minimum wage legislation that discounts certain periods spent in the workplace from fully-waged time.¹⁹⁴ This legislative vulnerability was reinforced by the Court of Appeal in part through an explicit bifurcation of the legal regimes on working time and wages.¹⁹⁵ Underhill LJ recalled that Buxton LJ in *British Nursing Association* had jettisoned any consideration of the CJEU decision in *SIMAP*, on the working hours of on-call doctors, because of the different objectives of the working time and minimum wage legislation.¹⁹⁶ In *Mencap*, Underhill dismissed the Working Time Regulations as 'likely to be unhelpful.'¹⁹⁷ He also introduced a further, intersecting, fracture, between legislation of UK- and EU-origin, emphasising that 'the Working Time Regulations are made pursuant to an EU Directive while the National Minimum Wage Regulations are wholly domestic.'¹⁹⁸

5.2 A sectoral/gendered fracture

The almost-scripted juxtaposition of the Court of Appeal judgments in *Mencap* and *Uber* has showcased a further fracture in UK labour law. The decisions as they stand risk heightening a sectoral, and therefore gendered, temporal regulation of the UK labour market. In the slipstream of the Court of Appeal's judgments, one casualisation strategy is being, potentially, averted, while another is tolerated. This exacerbates a sectoral mistreatment of the care sector that is, equally and predictably, gendered.¹⁹⁹

A sectoral impulse haunts the discourses that circle regulation 32. The Court of Appeal judgment in *Mencap* is partially grounded in an assumption that the Regulation has a

¹⁹¹ McCann 2016, n 9 above, 248-249.

¹⁹² *Tyco*, n 20 above, [40]-[41].

¹⁹³ *ibid*, [47]-[49].

¹⁹⁴ Section 4 above.

¹⁹⁵ *Mencap* (CA), n 1 above, [58].

¹⁹⁶ *ibid*, citing *British Nursing Association*, n 64 above, [20].

¹⁹⁷ *Mencap* (CA), n 1 above, [58].

¹⁹⁸ *ibid*. Underhill LJ further characterised the reasoning in *MacCartney v Oversley House Management* [2006] ICR 510 as 'tainted' by reference to authorities on working time, *Mencap* (CA), n 1 above, [72].

¹⁹⁹ On labour law's gendered treatment of care work, see LJB Hayes, *Stories of Care: A Labour of Law. Gender and Class at Work* (London: Palgrave, 2017).

particular application to the care sector. In Underhill LJ's view 'a sleeper-in in a residential home' is evidently required by the National Minimum Wage Regulations to be treated as available.²⁰⁰ His reading of the Regulations was reinforced by the Low Pay Commission's *Fourth Report*, which specifically identified overnight shifts in social care as validly precluded from the NMW.²⁰¹ It is notable that *Scottbridge* – concerning a night watchman – was explicitly distinguished on the grounds that sleeping was not the 'essence' of his job.²⁰²

This differentiation reinforces Hayes' analysis of the legal treatment of the care sector, in which she unravels how class and gender hierarchies structure the experience of care workers and explores the role of labour law in subordinating and disadvantaging working-class women.²⁰³ When courts classify care work as unpaid, Hayes argues, they craft the UK minimum wage as a tool for the devaluation of care work.²⁰⁴ On the decision in *Scottbridge*, she has noted that the working time of care workers was seemingly considered less valuable than that of security guards.²⁰⁵ Underhill LJ's assessment of *Scottbridge* in *Mencap* confirms this intuition by explicitly juxtaposing the two occupations; assuming, in effect, that regulation 32 is broadly inapplicable to security guards while self-evidently apt for care work.

Reading *Mencap* and *Uber* holistically, then, exposes a gendered dimension of the creeping time-drainage that has become characteristic of the UK economy. The decisions as they stand risk heightening a gendered bifurcation in the regulation of protected time that treats inequitably genres of availability characteristic of female-dominated jobs. This insight into the gendered tenor of temporal fragmentation could usefully be integrated more broadly into scholarly analyses of casualisation, including to resist explorations of the casualised labour market - or the 'gig economy' – that have an unbalanced focus on male-dominated jobs.

5.3 A solution from the *Framed Flexibility Model*: the unity of labour law principle

In contrast to the UK case law, the *Framed Flexibility Model* offers a unified conception of labour law. This paradigm is embodied in a 'unity of labour law' principle, which highlights that systems of regulation are most convincingly conceptualised as a cohesively-integrated whole.²⁰⁶ The unity principle was articulated in the context of the complex interrelationship of universal and particular norms generated by the specific regulation of non-standard work.²⁰⁷ In that context, it suggested that regulatory reforms should be pursued in an awareness of their repercussions for the evolution of the field as a whole. The principle is linked to the call for a 'reconstructive labour law,' which has identified a central role of contemporary legal regulation as

²⁰⁰ *Mencap* (CA), n 1 above, [79].

²⁰¹ Low Pay Commission 2003, n 128 above, paras 3.45-3.59. The *First Report* was not as targeted – it mentioned as examples of residential homes and youth hostels, n 122 above, para 4.34.

²⁰² *Mencap* (CA), n 1 above, [79]. See further Section 4.3.2 above.

²⁰³ Hayes 2017, n 199 above, 1, 5. Hayes characterises this treatment as 'institutionalised humiliation,' 4. See also Hayes 2018, n 3 above.

²⁰⁴ Hayes 2017, n 199 above, 143, also examining the case law on 'unmeasured work,' 145-147.

²⁰⁵ *Ibid*, 149.

²⁰⁶ McCann 2012, n 4 above, 175; McCann and Murray 2014, n 5 above, 329-330.

²⁰⁷ McCann 2012, *ibid*.

sustaining and constructing coherent and protective working relationships.²⁰⁸ The unity principle contributes to efforts to avert temporal casualisation by urging a holistic approach to the labour law sub-fields of working time and wages. Regulatory models that embed an expansive conception of working hours, across both working time and wage regimes, are a crucial element. More broadly, this approach requires an awareness of the intersecting features and impacts of legislative frameworks and judicial analyses as they regulate different genres of working time, work-forms, sectors, and labour force constituencies. This impulse should, it seems clear from contemporary patterns of casualisation, encompass an alertness to how regulatory mechanisms, including judicial decision-making, can disadvantage working-class, female, racialized, migrant, and other vulnerable workforces.

6. CONCLUSION

This paper has argued for a holistic analysis of *Mencap* and *Uber* as an opportunity to reflect on the evolving role of legal regulation in structuring the temporal dimension of casualisation. The holistic approach has revealed these cases to feature contrasting strategies for casualisation of the private hire and care sectors. Both are centred on notions of availability while at work and signal an accelerating targeting of vulnerable time.

The paper argues that a conceptual framework for working time regulation – the *Framed Flexibility Model* – is of value in analysing working time in *Mencap* and *Uber*. Centrally, the *Model* identifies two modes of regulating working time: productivity regulation, which excludes non-productive periods from regulated work and stimulates casualisation; and the unitary approach, in which all periods in the workplace are counted as working time for both wage and working time laws. In *Uber*, the Court of Appeal shunned productivity regulation in an analysis of working time that emerged as a question of the duration of the drivers' contracts. The Court's judgment is a valuable defence of the unitary approach, if accompanied by the risk that a more targeted focus on the Working Time Regulations and National Minimum Wage Regulations will involve attempts to have the drivers' protected time reduced.

This paper has focused primarily on *Mencap*. In this case, in contrast to *Uber*, the unitary model has been threatened by the Court of Appeal in relation to the overnight shifts of care workers. Under the *Framed Flexibility Model*, overnight shifts are fully counted as working time, including for wage purposes. In the minimum wage regime, a distinction between working hours and 'availability' is a legislative frailty that was targeted in *Mencap*. Overnight shifts are being conceptualised in legal strategy – in both compliance and litigation – as another form of availability time. Prior case law ably sustained a unitary model through a sophisticated analysis that configured regulation 30 to encompass overnight shifts and regulation 32 to apply only where an individual was not working but on-call, waiting to return to work if needed. The Court of Appeal departed from the precedents, configuring the availability mechanism in the National Minimum Wage Regulations as a path to temporal casualisation. This

²⁰⁸ McCann 2014, n 9 above, 516; McCann and Murray 2014, n 5 above, 348.

decision has offered a stark productivity regulation model and illustrated that periods that host the potential for sleep are a crucial form of vulnerable time. The Employment Appeal Tribunal offered a preferable analysis in which obligation is the crux of protection, and provided a useful multi-factorial matrix for gauging the tenor and degree of obligation.

The Court of Appeal's analysis, then, has diverged for separate species of excised time. The Court's judgments have, in particular, exposed two key fractures: between wage and working time laws; and between sectors, and therefore gendered workforces. Towards averting further casualisation, the paper highlights a 'unity of labour law' principle, derived from the *Framed Flexibility Model*, which calls for labour law to be conceptualised as a coherently integrated regulatory framework. This principle underpins an expansive conception of working hours that extends across both working time and wage laws, and prompts an awareness of the intersecting features and impacts of law's regulatory mechanisms. *Mencap* and *Uber* offer a critical opportunity to the Supreme Court to resist the multiplying strategies that would drain different forms of 'slack time' from the working day. It is therefore to be hoped that the Court will sustain and clarify the unitary model in *Uber* and overrule the Court of Appeal in *Mencap*. Both would be crucial interventions towards stemming and reversing casualisation and therefore critical to restoring the stability and coherence of working class lives.

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