

## What is work?

### Worker Status, Working Time, and the National Minimum Wage

*This paper supplements a webinar given by David Reade QC, Niran de Silva QC and Georgina Leadbetter on 24 May 2021.*

#### Introduction

1. The question of “what is work?” has been at heart of two recent decisions of the Supreme Court: *Uber v Aslam*<sup>1</sup> and *Royal Mencap Society v Tomlinson-Blake*.<sup>2</sup> To the casual observer, or perhaps more accurately the “*twitterati*”, there appeared to be a tension. Why was the Uber driver parked up with his App switched on waiting for a job found to be working, whereas the carer constrained to sleep over “*on call*” was not? Add to that a twist: would the answer have been different if either was located on top of Slovenian Mountain?
2. The answer rests upon the differing definitions of work, or more accurately the absence of a definition in one case, for the purposes of the Working Time Regulations 1998 (“WTR”) and for National Minimum Wage Regulations 2015 (“NMW”). Despite “*work*” being a concept which might have been thought to be central to employment law one finds that an activity (or indeed the absence of activity) may be work for one purpose but not for another. This paper considers the nature and significance of the concept of work across three areas: worker status, the NMW, and the WTR.

#### Worker Status

3. The issue of “*work*” which arises in the context of employment and worker status is perhaps not so much “*what is work*” but whether the work done that is done is done as an employee, worker, or a self-employed person, or more loosely whether the work is done for someone else or on the individual’s own account.

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<sup>1</sup> [2021] ICR 657

<sup>2</sup> [2021] UKSC 8. The authors of this paper appeared for Royal Mencap Society.

4. Therefore, before addressing the differences between “*work*” for the purposes of working time and “*work*” for the purposes of the NMW, this paper considers the relevance of work for the purposes of employer or a worker. Various aspects of the test for employee or worker status have had primacy over the history of status cases - mutuality of obligation, personal service, control – this paper considers where the law stands.

### The Legislation

5. Section 230 of the Employment Rights Act 1996 states:

*(1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*

*(2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*

*(3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—*

*(a) a contract of employment, or*

*(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;*

*and any reference to a worker’s contract shall be construed accordingly.*

6. The definition of a ‘limb b’ worker in ERA section 230(3)(b) is precisely the same as the definition of worker in regulation 2 of the WTR and section 54 of the National Minimum Wage Act 1998 (“**the NMW Act**”). Claims for underpayments in contravention of the Working Time Regulations 1998 and the NMW Act 1998 are generally brought as unlawful deduction of wages claims under the Employment Rights Act, in particular because of the more favourable ‘back stop’ provisions which may entitle the claimant to a longer period of loss.
7. Further, the test for ‘worker’ status in the above legislation is the same as the test for ‘employee’ status in the Equality Act 2010 (***Pimlico Plumbers*** [2018] ICR 1511).

## The Contract

8. Before turning to the various aspect of the status tests, it is necessary in the light of the Supreme Court’s judgment in Uber to consider the relevance of the express contract between the parties. In that judgment, Lord Leggatt quoted the case of McCormick, in which the Supreme Court of Canada had held (emphasis added):

*Deciding who is in an employment relationship ... means, in essence, examining how two synergetic aspects function in an employment relationship: control exercised by an employer over working conditions and remuneration, and corresponding dependency on the part of a worker. ... The more the work life of individuals is controlled, the greater their dependency and, consequently, their economic, social and psychological vulnerability in the workplace ...*

9. Focusing on these considerations of ‘control’ and dependency, he went on:

*...it can immediately be seen that it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a “worker”. To do so would reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker. Laws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it.*

10. Therefore, it is not simply the case that the contract of employment is not determinative of status (something with which we were already familiar with from Autoclenz v Belcher [2011] ICR 1157) it is no longer even the starting point.
11. As a result, there will be greater focus in many cases on the actual work being carried out by putative worker for true picture of the working relationship – to ascertain whether the sort of person who should be protected by legislation.

## Control

12. These considerations of ‘control’ and ‘dependency’ can be seen clearly in the factors that the Supreme Court relied on in finding that the *Uber* claimants were workers:
  - a. Uber’s control over pay;
  - b. Uber’s dictation of contractual terms;
  - c. Uber’s control over choice of fares;
  - d. Uber’s control over how the workers deliver their services;
  - e. Uber’s restriction on communication with passengers.
  
13. Once status was established in *Uber*, separate questions arose as to when the workers were working for the purposes of the WTR and the NMW. These questions are addressed below.
  
14. The Supreme Court in *Uber* considered - but did not decide - the question of whether someone who had been found to be a worker was working at times when they were carrying out work for more than one employer (a situation which apply to ‘multi-apping’ drivers, to couriers and even to on-call care providers). However, this could even be a question of status itself – if the individual were simultaneous working for multiple employers, they might be found to be working on their own account and therefore self-employed.

## Personal Service

15. One issue which did not arise in *Uber* is the issue of ‘personal service’. The statutory test provides that work must be ‘performed personally’ for there to be worker status. If there is a genuine and unfettered right for the individual to substitute someone else, then they will not be a worker.
  
16. However, difficult issues arise where there is a limited right to substitute someone else. In *Pimlico Plumbers*, a distinction was drawn by the Supreme Court between a right of substitution only to a suitable qualified colleague on the one hand (which did not necessarily undermine worker status) to a situation where the employer was “*uninterested*” in the identity of substitute (which did). The Court went on to say that in some cases,

Tribunals might consider whether personal performance was a “*dominant feature*” of the relationship.

### **Mutuality of Obligation**

17. Much of the confusion around the concept of ‘mutuality of obligation’ arises from the fact that it is used, even in the case law, in two different senses. In the first sense, it is used simply to describe what is needed for a contractual bargain to exist.
18. It is the second sense which is more relevant to status: this refers to an obligation on a putative worker to accept and perform some minimum amount of work for the putative employer, who is obliged to offer some work and pay for it.
19. The issue arises most commonly in cases where the worker carries out assignments between which there are periods when they are not working. In *Windle v MOJ* [2016] ICR 721, the Court of Appeal took into account the absence of mutuality of obligation between assignments to uphold the Tribunal’s judgment that two interpreters were not workers.
20. In *HMRC v Professional Game Match Officials Board* [2020] UKUT 147 (TCC), which concerned the tax status of part-time lower-league referees, the Upper Tribunal took into account the fact that the referees could turn down assignments (which lasted around a week in relation to each match) not only before the assignment but even after the assignment had been affected and without having to arrange a substitute. This case is on appeal to the Court of Appeal and due to be heard in June 2021.

### **Comparing ‘Employee’ and ‘Worker’ Status**

21. The differences between employment status and worker status have been eroded over time. It is also relevant to note that many cases do not consider the distinction between the two because claimants wish only to have ‘worker’ status and do not wish to be held to be employees. However, some differences remain.
22. One difference is that a lower degree of mutuality might be required to confer employment status. In the recent case of *Somerville v NMC*, the EAT upheld the judgment of the

Tribunal that there was insufficient mutuality of obligation between assignments to give rise to an employment contract but there were sufficient obligations on each side to create the necessary contractual relationship in the context of worker status and the absence of mutual obligations to offer or accept a minimum amount of work was not incompatible with worker status.

23. In *Windle*, the Court of Appeal (Underhill LJ) described the difference by stating that similar issues are engaged when considering employment and work status but there is a lower ‘passmark’ for worker status. *Somerville* may be seen as an example of this, although the *Windle* ‘passmark’ was not referred to.
24. Further, taking financial risk points away from employment status towards worker status, as in *Pimlico Plumbers*. However, a note of caution here is that doing business on one’s own account is a feature of self-employed status so it seems only where there is an ‘intermediate’ degree of financial risk that the individual will be a worker but not an employee.

### **The Way Forward**

25. It may be recalled that the Taylor Review of modern working practices recommended that the tests that determine whether someone is self-employed or has worker rights should place more emphasis on control and less on the notional right - said to be rarely exercised in practice - to send a substitute, reflecting new business employment models.
26. The Government agreed with the conclusion that businesses should not be able to avoid their responsibilities by trying to misclassify or mislead their staff. The Government’s Good Work Plan 2018 contained a proposal to therefore bring forward legislation to make access to a written statement a ‘day one’ right for both employees and workers and to expand the information required in the statement. However, the Employment Bill was not in the Queen’s Speech on 11 May 2021 so this remains something to watch out for.
27. Lastly, Lord Hendy has sought permission to bring a private members’ bill for the creation of a single unified status whereby:

- a. The individual is engaged by another to provide labour;
- b. They not genuinely operating a business on own account; and
- c. The burden is on the employer to show that the individual is not an employee.

28. Although not many private members bills find their way to statute books, this is also one to watch out for.

### **National Minimum Wage**

29. The NMW regime has lately been under the spotlight in part prompted by the decision of **Royal Mencap Society v Tomlinson-Blake**. In **Mencap**, discussed further below, the Supreme Court held that a sleep-in worker was not entitled to the NMW for the entirety of a sleep-in shift, but only for hours spent awake for the purpose of working. This decision has prompted much critical commentary, in large part arguing that care workers are providing a valuable service at the expense of their own freedom during their sleep-in shift and to deprive them of the minimum wage during this time is to devalue their work and facilitate their exploitation.

30. Lady Arden opened her leading judgment in **Mencap** by paying tribute to the importance of care work in society, before turning to the question on appeal:

*“the key question with which these appeals are concerned: how is the number of hours in their case to be calculated for the purposes of the National Minimum Wage (or “NMW”)?”.*<sup>3</sup>

31. That this question makes no mention of the word “work” at all is revealing of the nature of the NMW framework. Within this framework, the key question is always which hours are to be counted.

32. By way of illustration, the National Minimum Wage Regulations 2015 (“**the 2015 Regulations**”) and their predecessor contain exemptions carved out from the regime for a number of types of activity which on any common sense view constitute work, but are for

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<sup>3</sup> Paragraph 2.

NMW purposes not to be counted: work undertaken by one who lives in the home (such as an *au pair*) (Regulation 57); work by a member of a family pursuant to the family business (Regulation 58); and a work placement lasting up to a year undertaken within a higher education or further education course (Regulation 53). The exemptions notably do not shy away from the language of work (“‘work’ does not include any work done by a worker in relation to an employer’s family household [...]”) but rather specify in which circumstances those work hours, or hours ancillary to work, attract the state-mandated minimum wage.

### The origins of the NMW framework

33. Although in the UK today there is a broad consensus for the minimum wage and a strong sense of scepticism that anyone should fall beyond its protection, this was far from being the case when the regime was introduced.
34. In 1998 the Low Pay Commission was created, comprising representatives from employer, employee and academic backgrounds.<sup>4</sup> The Commission was tasked with consulting widely in order to understand the social and economic implications of the minimum wage, and to make recommendations which would inform the coverage and initial level of the NMW.
35. As succinctly described by Lady Arden, the Commission’s reports are of a particular and unusual significance:<sup>5</sup>

*The Secretary of State can refer matters to it for its consideration at any time in accordance with section 6 of the NMWA 1998, and, if its recommendations are required to be implemented by new regulations, the Secretary of State must inform Parliament if those recommendations are not accepted and why (section 5(4) of NMWA 1998 as applied by section 6(3) of that Act). That means, as I see it, that if the Secretary of State accepts certain recommendations, the court should approach the regulations on the basis of the presumption that they do in fact implement the LPC’s recommendations.*

36. The social partnership model of consultation embedded deeply within the NMW Act reflects the original need to build consensus around the concept of the NMW, and an ongoing need to ensure the NMW is effective, affordable and enforceable. The Commission

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<sup>4</sup> Pursuant to s.8 of the NMW Act.

<sup>5</sup> *Tomlinson-Blake*, paragraph 9.



noted that “*the idea of a National Minimum Wage has for many years been subject to fierce political debate in the UK*”, but that having completed their work “*despite our different starting points, we have reached unanimous agreement on issues which, until recently, would have proved impossibly controversial*”.<sup>6</sup>

37. Read in the context of its inception, the notion that only some hours of what most would recognise as work count for NMW purposes is less surprising than it may originally seem: the purpose of the legislation was not to extend blanket protection without exception, but to strike a careful balance taking into account competing needs and interests.

### **The NMW framework**

38. The NMW was introduced by the NMW Act. Section 1(1) provides:

*A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage.*

39. In order to accommodate the wide variety of payment structures, periods and practices, the NMW Act and the Regulations made under it set out a flexible framework.<sup>7</sup> Ultimately, one must compare an hourly rate against the hourly NMW. Given that most are not paid on a simple hourly rate the NMW Act provides for different mechanisms for identifying the work in question and the pay in question and calculating the hourly rate from the two. Regulation 7 provides that the calculation to be undertaken is to divide “*remuneration in the pay reference period*” by “*hours of work in the pay reference period*”.<sup>8</sup> The key question here is not “*what is work*” but “*what are the hours of work*”: which hours count?
40. The answer to this question will depend significantly on the type of work the individual is carrying out. This relates not to the kind of activity carried on by the worker, but to the way in which the worker is paid:
- a. **Salaried hours work:** The worker is paid a salary calculated on an annual basis;<sup>9</sup>

<sup>6</sup> First Report of the Low Pay Commission, 1998, Foreword, paragraphs 1 and 9.

<sup>7</sup> References in this paper are to the 2015 National Minimum Wage Regulations.

<sup>8</sup> The pay reference period is governed by regulation 6, and the calculation of pay in respect of that reference period by regulations 8-16.

<sup>9</sup> Regulation 21 (formerly Regulation 4 of 1999 Regulations).

- b. **Time work:** The worker is paid by reference not to a salary but to a set number of hours;<sup>10</sup>
  - c. **Output work:** Work other than time work for which the worker is paid by reference to output;<sup>11</sup> and
  - d. **Unmeasured work:**<sup>12</sup> Work which is not time, salaried or output work.
41. This feature of the NMW regime is a practical one: payment arrangements are complex and varying. Any system which needs to deal with salary, day rates, benefits in kind, bonuses, commission, uniform allowances, and the many and varying other features of modern working relationships, and apply to them the common comparator of the minimum wage, must have a way of taking into account the different forms and structures of payment and rendering them comparable.
42. These categories are, however, not just means of facilitating a calculation. In many cases the category into which a worker falls in respect of particular work will make a significant difference to the outcome of that calculation.<sup>13</sup>
43. One of the most significant examples of this difference relates to availability for work. Hours of actual work count for NMW purposes whichever category of work is in question. In the realm of salaried and time work, a worker is also entitled to the NMW in respect of hours spent available for work (subject to significant carve outs including for home working and sleep-in shifts, as considered in *Mencap*). In the realm of output work or unmeasured work (the category of work in the *Uber* case), hours of availability do not count: a worker is only entitled to the NMW for hours of actual work.

### Sleep-in Exemption

44. In *Mencap* and joined appeal *Shannon v Rampersad and another*, the Supreme Court considered the application of the sleep-in exemption applicable to salaried work and time work (applying the 2015 Regulations in *Mencap* and 1999 Regulations in *Shannon*).

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<sup>10</sup> Regulation 30 (formerly Regulation 3).

<sup>11</sup> Regulation 36 (formerly Regulation 5).

<sup>12</sup> Regulation 44 (formerly Regulation 6).

<sup>13</sup> A worker may fall within different categories in respect of different work; for example, the Claimant in *Tomlinson-Blake* was engaged in time work (overnight, the shifts that were the subject of the appeal) and salaried work (in respect of her daytime work).

45. Regulation 32 of the 2015 Regulations contains the deeming provision by which hours of availability count in respect of time work (sub-paragraph (1)) and the exclusion of sleep-in shifts from that deeming provision (at issue in Mencap) (sub-paragraph (2)):

*(1) Time work includes hours when a worker is available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home.*

*(2) In paragraph (1), hours when a worker is “available” only includes hours when the worker is awake for the purposes of working, even if a worker by arrangement sleeps at or near a place of work and the employer provides suitable facilities for sleeping.*

46. If a worker is by arrangement sleeping at a place of work within the definition in subsection (2), he or she is not included in the definition of available for work. The appeal in Mencap turned on whether the sleep-in worker qualified as performing time work by the other available route: actually working, as opposed to simply being available for work.

47. In considering this question, Lady Arden again noted the need to be specific as to the question being posed: “*not all activity which restricts the worker’s ability to act as he pleases is work for the purposes of the NMW but that does not mean that it may not be work for some other purpose. However that may be, the statutory question in these appeals is not primarily whether he is working but: how are his hours of work to be determined for NMW purposes*” (para 37). The court openly notes that the Regulations refer to the hours to be “*treated*” as worked, signalling that they may produce a counterfactual result: “*it underscores that the rules [...] may not accord with reality and that there will be occasions when hours are not treated as hours worked for the purpose of the regulations even though a different number of hours might have been determined to be worked in the absence of that provision*”.

48. As set out above, the court noted that the initial report of the Low Pay Commission, on a specific statutory footing, was an aid to construction. The court took particular assistance from the following recommendation:

*For hours when workers are paid to sleep on the premises, we recommend that workers and employers should agree their allowance, as they do now. But workers should be entitled to the National Minimum Wage for all times when they are awake and required to be available for work (para 4.34)*

49. It was the express sleep-in provision within Regulation 32 which was determinative of the Claimant's appeal in *Mencap*. The court was not, as one might think from some commentary, engaged in a value judgment as to the role of the care worker. Likewise, the sleep-in provision explains the difference in outcome that many have noted between this case and *Uber: Uber* was simply not a sleep-in case, so the provision that was determinative in *Mencap* was entirely irrelevant.
50. Notably, there is no sleep-in provision within the output work or unmeasured work categories. It is difficult to envisage how the issue of sleeping on shift would arise in respect of output (piecework) work (where the relevant unit is not time at all), but it can arise and has arisen in relation to the residual category of unmeasured work. In *Walton v Independent Living Organisation Ltd* [2003] ICR 688, the court considered the position of a carer who was required to be on hand 24 hours a day to assist her client, but whose active duties took up an average of 6 hours and 50 minutes per day. As on the facts found by the tribunal, this was an unmeasured work case, and so only actual work counted. The Court of Appeal (including Arden LJ as she then was) held that Miss Walton was not continuously performing her contractual duties during her 24 hour a day shifts, and instead was only available for work during that time. In the absence of a deeming provision, such time did not count.

### **Home working exemption**

51. The other significant carve-out from the availability provisions, relating to both salaried and time work, is "*unless the worker is at home*". Across each of those categories and unmeasured work, the only question to be asked in relation to the individual working at home is whether they are actually working: hours of availability do not count.
52. This rule had been considerably softened by the decision in *British Nursing Association v Inland Revenue* [2003] ICR 19. That case concerned workers who worked a night shift

from home answering the telephone. Between calls they were entitled to do as they pleased, including to sleep, and in the middle of the night were frequently able to sleep for an extended period. The employment tribunal made, and the Court of Appeal upheld, a finding that the workers were in fact working during this entire period. This effectively avoided the difficulties posed by the home working carve out in the availability provisions, even though on the face of the facts the availability provisions would seem highly relevant here, by going straight into the category of actual work (in which home working makes no difference).

53. The Supreme Court in *Mencap* held that the tribunal was not entitled to make that finding of actual work, and overruled *British Nursing*. The panel differed on how far they wished to give guidance on the correct approach to such a case, given that these were not the facts of *Mencap* (where the Claimant was not at her own home). There was, however, a clear direction by Lady Arden (see paras 56-62) that the court in *British Nursing* fell into error by ignoring the availability provisions and not looking at the regulations as a whole. In effect, the definition of “work” should not be manipulated to bring into scope hours which on the face of the regulations do not count (in this instance because hours of home working are specifically excluded from the availability provision).
54. Lady Arden and Lord Kitchin emphasised, as had Underhill LJ in the Court of Appeal below, that this does not mean that time spent between tasks of an intermittent nature will always fall outside the protection of the NMW; even having a nap between tasks will not necessarily be inconsistent with a finding of actual work (see paras 57 and 99): this will depend on the facts.
55. Clearly there is scope for considerable argument here as to when intermittent work becomes availability for work and when a nap becomes a sleep-in shift. No doubt tribunals will have to grapple with these issues and others when determining the question of whether any individual is, on the facts, working. It remains to be seen whether and how the law will give employers and employees any degree of predictability: it would surely be unsatisfactory for the question of whether minimum wage is payable for a shift to depend upon for example how many calls come in during that shift, something that neither employer nor employee can know in advance or necessarily control.

56. In the present circumstances, where many may have been forced to work from home by the pandemic, tribunals will no doubt be reluctant to find them not entitled to the NMW by virtue of being at home. We may well see tribunals moving towards an expanded definition of “work” akin to that in *British Nursing* in order to bring these workers within the remit of the regulations. However, it seems unlikely, following *Mencap*, that such developments would survive appellate scrutiny in the longer term: tribunals must focus on the wording of the statute in the round, and the regulations expressly carve out from their protection those who are available for work at home.

### **The concept of work: surprisingly unimportant**

57. The concept of work, then, is not as crucial to the NMW framework as one might expect. By operation of the categorisation and deeming provisions, some hours of work will not count, and some non-working hours will count. Hours most people would recognise to be hours of work do not always neatly map on to hours for which a state mandated minimum wage is payable.

58. Recent litigation has focused on this mismatch, and in areas such as sleep-in shifts has sought to close this gap by expanding the remit of the concept of work itself under the regulations.

59. Notably, there is no specific definition of work for NMW purposes. Perhaps for this reason, arguments as to what should qualify as work have often been made on a principled, moral basis, focusing on factors unquestionably relevant to the issue of working time.

60. These arguments are of course important, particularly for those who seek to urge Parliament to change the law to bring sleep-in workers (and perhaps also those available for work at home) within the protection of the NMW. When bringing or defending cases under the present legal framework, however, such arguments have tended to be less powerful than those grounded in a thorough and holistic understanding of the wording of the regulations.

**Categorisation: surprisingly important**

61. One particularly and increasingly important area to understand is the categorisation of work (salaried, time, output, or unmeasured) and the significant difference this makes. In particular, as set out above, hours of availability for work (subject to exceptions) only count as work in the realms of salaried or time work. As such, in the increasing number of cases where availability for work is relevant (whether waiting at a computer to answer customer queries, waiting in a car to pick up passengers, waiting to answer phone calls, or being on standby to assist a client), categorisation will be crucial.

62. As noted in Walton, the decision as to the applicable category of work is a fact-sensitive one for the tribunal and will not be lightly disturbed by an appellate court (para 31):

*The correct approach is to look at all the facts including the type of work that is involved and then to ascertain whether the worker is paid by reference to the time for which the worker works or by reference to something else. That is a decision which is for the Tribunal to make. They see the witnesses and decide the facts.*

63. This tendency is borne out in recent authority: in each of Walton, Uber and Mencap, appellate courts were invited to reconsider the categorisation of the work in question but declined to do so, and upheld the finding of the tribunal as to the applicable category.

64. Given the importance of categorisation and the difficulty of seeking to change category after the event, legal advisors would be well advised to treat this issue with particular care. A thorough assessment of category will need to be made at the outset of litigation. This should be informed by the relevant information and underlying documentation, rather than organisational assumptions or vague instructions as to how payment relates to work. Categorisation of work is an area ripe for selective concessions, as it will rarely be the case that there are sensible arguments for all four categories being in play, but concessions in this area need to be taken as seriously as in any other area of law.

65. The issue of categorisation is also one employers can sensibly have regard to long before the prospect of litigation. An employer can only be confident of their NMW calculations if they are confident in their categorisation. Given that the determinative factor is to what pay relates, employers are largely in the driving seat here. If there appears to be real scope for

uncertainty or argument about the category in play, employers can look to clarify or change their practices as appropriate to ensure lengthy and costly disputes are avoided.

### **Working Time Regulations**

66. In a post-Brexit world the Working Time Regulations 1998 (“WTR”) remain as yet unchanged and for the moment are to be read as being aligned with the Working Time Directive 93/104/EC (now consolidated as Directive 293/88/EC) (“**the Working Time Directive**”) which they were intended to implement, and thus with the existing case law of the CJEU. The most recent guidance on one aspect of the WTR on which we will focus is that of the CJEU in *D J v Radiotelevizija Slovenija* [2021] IRLR 479 C-344/19 post-dates the transition period and thus is a matter of guidance rather than binding obligation on the domestic Court.

67. The key issue with the WTR is to identify the time when one is working, and this is contrasted with non-working time which is rest time. The CJEU has made clear, most recently in *DJ*, that any period of time falls to be classified as working time or rest time, there is no intermediate category.

### **WTR and NMW Contrasted**

68. However, this is a classification for health and safety purposes and there is no obligation to be paid for working time under the WTR. The starting point will be what the contract of employment provides as to payment, see *Thera East v Valentine* [2017] IRLR 878, *EAT*. NMW is concerned with the determination of required payment of NMW but only for hours of work as determined as work for the purposes of NMW. This is not the same as work under the WTR.

69. The WTR were not before the Supreme Court in *Mencap* and one can only speculate, but for the reasons explored below it seems likely that that the entire duration of the ‘sleep in’ shift would be work for the purposes of WTR.



70. The WTR were before the Supreme Court in *Uber*, and much of the commentary on the case has focused on the status of the test of whether someone is a worker. These issues become slightly fused at para 123 where Lord Leggatt said:

*The Working Time Regulations 1998 and the National Minimum Wage Regulations 2015, SI 2015/621 each contain provisions for measuring working time. But before those provisions are applied, it is necessary to identify the periods during which the individual concerned is a 'worker' employed under a 'worker's contract' so as to fall within the scope of the legislation.*

71. With respect this seems a little surprising as it seems to suggest that there may be periods when an individual is not a worker for the purposes of the WTR. That would not appear to be the correct analysis as rest time, the only opposite to working time, would still involve the individual being a worker, but not at that point working.

### **Work Under the WTR**

72. As distinct from the NMW, working time has a definition under Reg 2 of the WTR which in turn defines work (this is drawn directly from art 2 of the Directive):

*'working time', in relation to a worker, means—*

- (a) any period during which he is working, at his employer's disposal and carrying out his activity or duties,*
- (b) any period during which he is receiving relevant training, and*
- (c) any additional period which is to be treated as working time for the purpose of these Regulations under a relevant agreement;*

*and 'work' shall be construed accordingly;*

73. There are then three forms of work, including training and, with a parallel to the NMW, deemed work periods of time which are to be treated as working time and thus work.

74. The core definition under (a) has two elements: the period of time has to be firstly one during which the worker is working at their employer's disposal and secondly the period of time has to be over which the worker is carrying out their activity or duties. Being at an employer's disposal is not of itself sufficient unless the worker can also be said to be carrying out the employer's activities or duties.

75. That brings into question a number of areas over which it is open to question whether the worker is engaged in work, including:
- a) Being “on call”, at home or elsewhere; and
  - b) Travelling to and from the location of work, in particular when travelling from home.

### “On Call”

76. The tension with NMW is apparent with the issue of being “on call”. This is evident from a comparison of the facts in *DJ v Radiotelevizija Slovenija* [2021] IRLR 479 with those in, for example, *Mencap*.

### The Facts of DJ

77. DJ’s place of work was rather inconveniently on the tops of mountains in Slovenia, he was a technician in a transmission centre. These locations were not all close to his home and not always easily accessible. He therefore had to stay in the location and there were accommodation facilities. When not “working” he was able to rest in the accommodation provided.
78. A shift pattern operated and DJ worked either a 6am to 6pm shift or a 12pm to midnight shift. Outside the shift hours DJ could relax in the accommodation. In terms of remuneration DJ was paid on the basis of 12 hours of the normal shift. Six hours of the remaining time was treated as rest time and was not paid. There were then six hours of what were regarded as “stand by” time. During this period DJ was free to leave the transmission site and the accommodation, although it appears that it would not have been practicable to have gone home. DJ had to be contactable during this six hour period and had to be able to return to the transmission site within an hour. For the standby period DJ was paid 20% of normal pay but was paid at normal rate for any time actually called on.
79. DJ claimed, not least because there were limited recreational options near the transmission centre on top of the mountain, that the reality was that the entire 24 hour period was spent on the site. The claim that was brought was that the “standby” period of six hours should

be paid as overtime, as although there was no actual obligation to remain at the transmission centre the practical reality was that workers did by reason of its location.

80. The claim was brought on the Slovenian provision giving effect to the Directive which provided that, Article 142 of the *Zakon o delovnih razmerjih* (Law on employment relationships) of 5 March 2013,

*(1) Working time shall be the actual working time and break time in accordance with Article 154 of this Law, and the time of justified absences from work according to the law and the collective agreement or to a general regulatory act.*

*(2) All time during which workers work, which is to be understood as meaning the period in which the worker is at the disposal of the employer and fulfils his employment obligations under the contract of employment, shall constitute actual working time.*

*(3) Actual working time shall form the basis for calculating labour productivity.*

81. Other provisions of Slovenian law stipulate rates of pay for public workers if on “stand by” rather than working.

82. The claims were unsuccessful before the lower Slovenian Courts and the appellant court referred the following questions to the CJEU:

*'(1) Must Article 2 of Directive 2003/88 be interpreted as meaning that, in circumstances such as those in the case in the main proceedings, periods of stand-by time [according to a stand-by system], during which a worker who works at a radio and television transmission centre must, during his or her free periods (when his or her physical presence at the workplace is not necessary), be contactable when called and, if necessary, be at his or her workplace within one hour, are to be considered working time?*

*(2) Is the definition of the nature of [stand-by time according to a stand-by system], in circumstances such as those of the present case, affected by the fact that the worker resides in accommodation provided at the site where he or she performs his or her work (radio and television transmission centre), since the geographical characteristics of the site make it impossible (or more difficult) to return home ('within the locality') each day?*

*(3) Must the answer to the two preceding questions be different where the site involved is one where the opportunities for pursuing leisure activities during free time are limited on account of the geographical characteristics of the place or where the worker*

*encounters greater restrictions on the management of his or her free time and pursuit of his or her own interests (than if he or she lived at home)?'*

83. In approaching the answer to that question the CJEU reiterated the Health and Safety objective underlying the Directive and in particular the limitation on maximum working hours and the requirements for weekly and daily rest periods. They also reviewed the existing case law on the issue of whether “on call” time was working time.

84. As noted the above the CJEU restated that a period of time is either working time or rest time, there is no intermediate time. Whether someone is travelling or on standby the question is whether that is working time, if not it is a rest period, there is no intermediate category, see **Federación de Servicios Privados del sindicato Comisiones obreras (CC OO) v Tyco Integrated Security SL**, C-266/14, EU:C:2015:578, [2015] IRLR 935, [2015] ICR 1159.

85. Activities are not a requirement of working time under the Directive. So as the CJEU noted:

*Workers undertaking periods of stand-by time undertaken at places of work which were separate from the workers' residence, in which case the decisive factor for finding that the elements that characterise the concept of 'working time' for the purposes of Directive 2003/88 are present is the fact that the worker is required to be physically present at the place determined by the employer and to remain available to the employer in order to be able, if necessary, to provide his or her services immediately.*

86. See by way of example the doctors on call in **Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana**, C-303/98, EU:C:2000:528, [2000] IRLR 845. This is the **Mencap** situation.

87. It is of course necessary to have an understanding of what is the “workplace” for these purposes and the Court described in these terms (para 35):

*It should be specified in that regard that the workplace must be understood as any place where the worker is required to exercise an activity on the employer's instruction, including where that place is not the place where he or she usually carries out his or her professional duties.*

88. Thus in a particular case this may be the worker's home, but it is not simply a matter of location but also constraint. The CJEU has previously held that working time may be a period of stand-by time where the worker is required to remain at his or her workplace and to be available to his or her employer and thus must remain apart from his or her family and social environment and has little freedom to manage the time during which his or her professional services are not required. This then is classified as 'working time', irrespective of the professional activity not actually having been carried out by the worker during that period. For example *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, C-397/01 to C-403/01, EU:C:2004:584, [2005] IRLR 137, [2004] ECR I-8835, para 93; and *Dellas v Premier Ministre*, C-14/04, EU:C:2005:728, [2006] IRLR 225, [2005] ECR I-10253.
89. Further even if the worker can leave their “place of work:” this still may constitute working time where, having regard to the impact, which is objectively significant, the constraints imposed on the worker have on the latter's opportunities to pursue his or her personal and social interests are such as to render it working time. That differs from a period during which a worker is required simply to be at his or her employer's disposal inasmuch as it must be possible for the employer to contact him or her (see, to that effect, the judgment of 21 February 2018, *Ville de Nivelles v Matzak*, C-518/15, EU:C:2018:82, [2018] IRLR 457, [2018] ICR 869, paras 63–66). This was case of part time firefighters who were on call but who had to be at home, not their place of work, when on standby available to reach their place of work with 8 minutes. These constraints were sufficient to render that time to be working time. The degree of restraint meaning that the worker is not only at the employer's disposal but is also performing their duties.
90. Thus the issue become whether objectively whether the:

*constraints imposed on the worker are such as to affect, objectively and very significantly, the possibility for the latter freely to manage the time during which his or her professional services are not required and to pursue his or her own interests. Conversely, where the constraints imposed on a worker during a specific period of stand-by time do not reach such a level of intensity and allow him or her to manage his or her own time, and to pursue his or her own interests without major constraints, only the time linked to the provision of work actually carried out during that period constitutes 'working time'*

91. The constraints on DJ were occasioned primarily by location in the sense that whilst it was possible to leave the site during the six hour stand by period, subject to the obligation to be able to return within the hour, there was nowhere to go. But the CJEU made clear that considering the constraints imposed, for the purpose of the objective assessment of whether it was working time, these were only those imposed by the law of the Member State, or a collective agreement or by the employer. Organisational difficulties, including natural factors or personal choice, are not brought into account. The distance between the normal place of work and the workers home is typically a matter of personal choice and is not brought into account. Thus the fact that one would not be able to get home in the “stand by” period did not make it “working time”. Although the location of the place of work has implications for travel and whether travel time can, in some case, be considered to be “working time”, see below.
92. Here the employee was not constrained to the workplace but it was also necessary to consider the degree of restraint imposed upon the worker by the period of time over which they had to return to the workplace. The fact that the employer makes available to the worker, owing to the particular nature of the workplace, service accommodation located at that workplace or in its immediate vicinity, does not constitute, in itself, a decisive factor for the purpose of classifying periods of stand-by time. In addition to considering the period over which the worker could be required to return to the work place the Court should consider, if possible, the average frequency of the actual services that are normally carried out by that worker during each of those periods of stand-by time. Thus the more often the worker is called upon to work during the standby period the more likely it is to be working time.
93. In the case of DJ drawing those threads together the CJEU’s answer to the referred questions was as follows:

*Directive 2003/88 must be interpreted as meaning that a period of stand-by time according to a stand-by system, during which the worker is required only to be contactable by telephone and able to return to his or her workplace, if necessary, within a time limit of one hour, while being able to stay in service accommodation made available to him or her by his or her employer at that workplace, without being required to remain there, does not constitute, in its entirety, working time within the meaning of that provision, unless an overall assessment of all the facts of the case, including the consequences of that time limit and, if appropriate, the average frequency of activity*

*during that period, establishes that the constraints imposed on that worker during that period are such as to affect, objectively and very significantly, the latter's ability freely to manage, during the same period, the time during which his or her professional services are not required and to devote that time to his or her own interests. The limited nature of the opportunities to pursue leisure activities within the immediate vicinity of the place concerned is irrelevant for the purposes of that assessment.*

## **Travel**

94. Travel also featured in *Uber* in that it had been claimed that the period it took the Uber drivers to drive from their home to the area in which they could operate was working time but this was rejected by the Tribunal and was not the subject of the appeal before the Supreme Court.
95. Typically travel between home and the place of work will not be working time. If the place of work is fixed then the worker will have made an elective choice as to the location of their own home. Travel between work locations in performance of duties will typically be work time, unless there is a significant period of freedom, free from constraints which would constitute rest time.
96. Further if the place of work is not fixed then travel from home to the place of work may be working time. Thus in *Federación De Servicios Privados Del Sindicato Comisiones Obreras v. Tyco Integrated Security Sl And Another* [2015] IRLR 935 the workers had no fixed place of work but carried out their work as technicians in the homes and businesses of clients, receiving the addresses they had to travel to on a daily basis by email. They drove to those locations using a company vehicle. The employer had calculated time only from the point at which they arrived at their first job to the conclusion of the last.
97. The CJEU held that the journey to and from the first and last site from the worker's home was a necessary means of providing the worker's technical services to those clients and thus in driving to the location the workers were carrying out their activities and duties and were at the employer's disposal, as it could change the order in which the workers visited customers and cancel appointments. This with the consequence that that during that travel period they were not able to use their time freely so as to pursue their own interests and they were therefore at their employer's disposal and it follows carrying out their duties.

## Conclusions

98. The differences between the WTR and the NMW must be borne firmly in mind. The WTR, which derived from European law, are focused on the difference between work on the one hand and rest on the other. The NMW, which is domestic in origin, is calculated according to a formula which was set out in the NMW Act after detailed consultation by the Low Pay Commission with stakeholders across the economic spectrum, including unions and employers' groups, and is intended to set a minimum level of pay taking into account need, enforceability, and economic reality.
99. One notable difference is the provision in the NMW which applies to certain sleep-in workers who are provided with "*adequate sleeping facilities*". Under regulation 32, only the hours when they are "*awake for the purposes of working*" count towards the NMW. there is no equivalent of this in the WTR and therefore it is likely that the hours of many sleep-in workers would count towards entitlements under the WTR even if they would not count toward the NMW.
100. All of the above shows that the concept of work is often far less intuitive than one might expect, and careful consideration needs to be given to the factual and legal matters to be put before the Employment Tribunal. By way of example, parties will need to provide evidence of the reality of the working relationship between the parties and even outside that relationship, for example about the operation of a substitution clause across the company. When it comes to the NMW, parties will need to analyse carefully whether the work concerned should be pleaded as time work, salaried hours work, output work or unmeasured work as different outcomes may arise depending on the type of work in question. The authorities show clearly that even at appellate level, factual findings are considered very closely by the Court and parties are likely to be constrained by the way they put their case at first instance.

**David Reade QC**

**Niran de Silva QC**

**Georgina Leadbetter**