

Unravelling the Sleeve of Care:

Fair Remuneration for Employer-contracted Sleep

‘the innocent sleep,

Sleep that knits up the ravelled sleeve of care,

The death of each day’s life, sore labour’s bath’

— Shakespeare, *Macbeth* (1606)¹

I. Introduction

The legislation that gives workers a right to receive the National Minimum Wage – the 1998 Act and 2015 Regulations of the same name – currently fails to achieve two of its most crucial aims.² These deficiencies arise whenever an employer contracts for the worker’s presence for a period of time that the worker is permitted to spend asleep. First, the law fails to provide sleep-in workers with a ‘single rate [...] below which a worker’s pay must not fall’, the key aim of the government in introducing the Bill and making the Regulations, thus leaving the door open to the lawful imposition of ‘poverty wages’.³ As currently drafted and interpreted, the legislation relinquishes all control over employer-contracted sleep to the common law, with its notorious insouciance regarding parties’ inequality of bargaining power.⁴ This imbalance is intensified by the low level of

1. William Shakespeare, *Macbeth*, ed by Nicholas Brooke (Oxford UP 1990) 127–38 (II.iii.35–37).

2. National Minimum Wage Act 1998 (‘the 1998 Act’); National Minimum Wage Regulations 2015, SI 2015/621 (‘the 2015 Regulations’).

3. SC Deb (D) 27 January 1998, col 338 (Barbara Roche MP, Minister of State for Small Firms, Trade and Industry; Ms Roche was responsible, with Ian McCartney MP, for piloting the Bill through the Commons). The statement closely echoes Labour’s 1997 Manifesto commitment to legislate for a ‘statutory level beneath which pay should not fall’: see Iain Dale (ed), *Labour Party General Election Manifestos, 1990–1997* (Routledge 2000) 359.

4. See, for instance, *National Westminster Bank plc v Morgan* [1985] AC 686 (HL), 707–708 (Lord Scarman), rebuffing Lord Denning MR’s *obiter* view that relief might be granted to the weaker party in cases involving ‘inequality of bargaining power’ (in *Lloyds Bank Ltd v Bundy* [1975] QB 326 (CA) 339).

unionisation within the care sector, in which almost all employer-contracted sleep takes place.⁵ Second, the law fails to provide employers contracting for workers' sleep with a clear, straightforward definition of their obligations under statute and contract.⁶ On the other side of the sleep-wage bargain, workers are unable to ascertain with any precision their rights under the contract of employment, a situation wholly at odds with the 'principle of universality, clarity and simplicity' that the government sought to establish by means of the 1998 Act.⁷

As this essay will demonstrate, no judicial guidance can straighten the crooked timber of the legislation as currently drafted: however the Supreme Court elects to resolve the appeal from *Royal Mencap Society v Tomlinson-Blake* in the coming months, the underlying legislation will remain both conceptually and practically deficient.⁸ The solution lies in creating a new national minimum sleep-in rate that fairly reflects the work-like qualities of employer-contracted sleep without eliding the distinction with work itself. For simplicity's sake, that rate should be the product of the relevant NMW rate and a single multiplier, set by the Secretary of State in consultation with the Low Pay Commission. Carefully integrated into the existing mechanisms of the Act, the reform set out in this essay will not undermine NMW legislation, but enhance it. As the following pages will show, both practical justice and conceptual coherence mandate its adoption.

5. Just 19.8% of care workers are members of a trade union or staff association: see Joe Dromey and Dean Hochlaf, *Fair Care: A Workforce Strategy for Social Care* (IPPR 2018) 24.

6. Those obligations are in effect identical as a result of s 17 of the 1998 Act, which implies a term into a worker's contract that she will be paid at a rate no lower than the national minimum wage ('NMW').

7. HC Deb 9 March 1998, vol 308, col 221 (Ian McCartney MP, Minister of State for Competitiveness).

8. [2018] EWCA Civ 1641, [2018] IRLR 932. The Supreme Court gave permission to appeal on 12 February 2019 and heard argument from 12–13 February 2020.

II. How and why the law struggles with employer-contracted sleep

From one perspective, the law's inability to provide a rational basis for the regulation of employer-contracted sleep is unsurprising. When Shakespeare's *Macbeth* images sleep as 'sore labour's bath', 'knit[ting] up the ravelled sleeve of care', he reflects an opposition between work and sleep so deeply embedded in our culture it scarcely seems plausible it could be otherwise. Like oil and water, the two concepts simply do not mix: if '[t]he sleep of a labouring man is sweet', as the author of *Ecclesiastes* asserts, it is because work and labour are complementary opposites.⁹ The same biblically-rooted dualism underpins *Paradise Lost* (1667), in which Milton distinguishes between 'other Creatures [who] all day long | Rove idle unimploid, and need less rest' and humanity, whose 'daily work of body or mind' calls forth 'the timely dew of sleep'.¹⁰ Just as the opposition between sleep and work was (and is) culturally dominant, so the material conditions of labour in industrialised Britain emphasised its salience: the 1843 report of the Children's Employment Commission describes a milliner who received no more than four hour's rest per night and on one occasion toiled for over 68 hours.¹¹ Perhaps unsurprisingly, when sleep appears in Sidney and Beatrice Webb's *Industrial Democracy* (1897), an early landmark in advocating and theorising a 'National Minimum of wages', it is as an activity that is threatened and compressed by the 'evils of industrial parasitism' to the point where even a skilled worker 'seldom obtains [...] an adequate amount' of it.¹²

Against this backdrop, tribunals have struggled to classify the nature of the worker's performance where she contracts with the employer to sleep at her workplace. It is this

9. *Ecclesiastes* 5:12 (King James Version).

10. Helen Darbishire (ed), *The Poetical Works of John Milton, Volume 1: Paradise Lost* (Oxford UP 1963), 88–89 (IV.613, 616–618).

11. Cited in Sheila Blackburn, *A Fair Day's Wage for a Fair Day's Work? Sweated Labour and the Origins of Minimum Wage Legislation in Britain* (Routledge 2007) 16.

12. Sidney Webb and Beatrice Webb, *Industrial Democracy* (Longmans, Green and Co 1897) 774, 722.

classification that determines the worker's entitlement to payment at the NMW rate or above: if the contracted-for sleep is not 'work' under the Regulations, the parties are free to bargain for any level of remuneration; if it is 'work', freedom of contract is constrained by the employer's obligation under section 1 of the 1998 Act to remunerate the worker at the NMW or above.¹³ Where the tribunal does *not* judge employer-contracted sleep to constitute work at this stage, the Regulations will not assist the worker in deeming the period of sleep a form of work.

Regulations 27(1)(b) and 32(1) of the 2015 instrument serve to categorise as work hours when a worker is available and required to be available at or near a place of work for the purposes of working, except if she is at home. However, regs 27(2) and 32(2) excise from that categorisation any time in which the worker is not 'awake for the purposes of working'.¹⁴ The effect of this contorted pair of provisions is simply to preclude employer-contracted sleep from being remunerated as work *unless* the tribunal considers it is work – a concept which the legislation leaves undefined despite its incorporation into the definition of concepts such as 'salaried hours work' and 'time work'.¹⁵ As currently drafted, the

13. For brevity's sake, this summary omits discussion of the complex mechanisms by which 'work' is classified as salaried hours work, time work, output work and unmeasured work for the purposes of calculating whether or not the NMW has been paid: see, respectively, regs 21, 30, 36 and 44 of the 2015 Regulations. A useful summary of these provisions (save for output work, which is not of relevance in the sleep-in context) is provided by Underhill LJ in *Mencap* (n 8) [18]–[31].

14. These provisions are equivalent, though not identical in wording or structure, to those in the National Minimum Wage Regulations 1999, SI 1999/584, regs 15(1) and 16(1); and to those in the 1999 Regulations as amended by the National Minimum Wage Regulations 1999 (Amendment) Regulations 2000, SI 2000/1989, regs 15(1) and (1A) and 16(1) and (1A). The Explanatory Memorandum to the 2015 Regulations makes clear they '[do] not introduce substantive changes to the rules' (at para 4.3), but seek to consolidate the 1999 Regulations with the 23 subsequent amending regulations listed at paras 4.4.5–27.

15. As defined, without any definition of the noun on which they are predicated, by regs 21(1) and 30 of the 2015 Regulations.

legislation therefore gives little assistance to tribunals obliged to determine whether sleep qualifies as work and, if so, what duration or intensity of interruption makes it so.¹⁶

Because the Regulations effectively make the ill-defined and ambiguous concept of work the control mechanism for NMW entitlement, judicial analyses of employer-contracted sleep have been sharply divided. The Court of Appeal's judgment in *Royal Mencap Society v Tomlinson-Blake* represents the current state of the law (although this currency may be short-lived depending on the view of the Supreme Court). Giving the only reasoned judgment, Underhill LJ explained how the legislation should be applied 'in a sleep-in case' – that is, a case in which 'the worker is contractually obliged to spend the night at or near their workplace on the basis that they are expected to sleep for all or most of the period but may be woken if required to undertake some specific activity'.¹⁷ In such a case, the Court held that 'for practical purposes' it is an 'unnecessarily elaborate approach' to ask whether the worker is 'actually working':

The self-evident intention of the relevant provisions [of the Regulations] is to deal comprehensively with the position of sleep-in workers. The fact that their case is dealt with as part of the availability provisions necessarily means that the draftsman regarded them as being available for work rather than actually working.¹⁸

16. The analysis of the of the relevant provisions of the Regulation and their effect adopted in this paragraph is uncontroversial: see, for instance, *Focus Care Agency Ltd v Roberts* [2017] IRLR 588 (EAT) [11] (Simler P), *Burrow Down Support Services Ltd v Rossiter* [2008] ICR 1172 (EAT) [15] (Elias P), *Scottbridge Construction Ltd v Wright* [2003] IRLR 21 (CSIH) [13] (Lord Cullen), *British Nursing Association* [2002] EWCA Civ 494, [2002] IRLR 480 [14] (Buxton LJ). Whilst Underhill LJ in *Mencap* (n 8) suggests the initial stage of asking whether contracted sleep is work is 'an unnecessarily elaborate approach', he acknowledged that this stage is at least '[l]ogically' anterior to the assessment of whether sleep is to be regarded as work under reg 32(1) and (2): see [43].

17. *Mencap* (n 8) [43], [6].

18. *Ibid* [43].

Underhill LJ's rejection of the need for any analysis of whether a sleep-in worker is 'actually working' during employer-contracted sleep reflects the culturally dominant understanding of sleep explored above. This approach appears to simplify the operation of the Regulations by treating their provisions as exhaustive of the treatment of any time spent asleep, except in narrowly (but somewhat uncertainly) defined cases.¹⁹ Yet it is also at odds with prior attempts in the Employment Appeal Tribunal to reconcile the framing of the Regulations with the potentially work-like qualities of employer-contracted sleep. In *Focus Care Agency Ltd v Roberts*, itself reversed by the Court of Appeal in *Mencap*, Simler P heard three appeals that turned on the proper approach to employer-contracted sleep and sought to give 'authoritative guidance' on its treatment (to adopt Underhill LJ's characterisation).²⁰

Rejecting the existence of a 'bright line or single key' with which to unlock the Regulations, Simler P emphasised that the 'particularly fact-sensitive' nature of the determination whether or not contracted sleep falls within the category of work obliges the tribunal to undertake a 'necessarily multifactorial evaluation'.²¹ In that evaluation, certain factors are 'potentially relevant' in assessing whether work takes place, but no single factor is determinative and the weight to be given to each factor, 'if any', should itself depend on the 'facts of the particular case'.²² The potentially relevant factors include the employer's purpose in engaging the worker (especially its need to comply with any contractual or regulatory requirement to have someone present), the extent to which the worker's activities are restricted, her 'degree of responsibility', and '[t]he immediacy of the requirement to provide services if something untoward occurs'.²³

19. See *Mencap* (n 8) [79]–[81], discussed below at pp 7–8.

20. [2017] IRLR 588 (EAT); *Mencap* (n 8) [2].

21. *Focus Care* (n 16) [32].

22. *Ibid* [44].

23. *Ibid* [44].

Almost all prior decisions follow the broad reasoning of *Mencap* or *Focus Care*.²⁴ *Scottbridge* and *Burrow Down*, in which contracted sleep is held to constitute work by virtue of the worker's contractual obligation to be present and at the employer's disposal, represent exceptions to this pattern; although this approach is favoured by Prof ACL Davies, it can be criticised as leaving reg 27(2) and 32(2) and its antecedents with no application.²⁵ Taken together, these three lines of authority show that the legislation as currently drafted is fundamentally flawed as it applies to sleep: any application of it, however judicious, is likely to entail uncertainty and unfairness.

First, neither *Mencap* nor *Focus Care* provides an adequately clear and predictable test for determining whether contracted sleep is work or not. Although the test in *Focus Care* is not an exercise of pure judicial discretion, its use of an open-ended list of factors, to be added to and weighted according to the facts of each case, sits uncomfortably with the need for certainty and clarity in this area. Its very sophistication erodes the ability of both employer and worker to ascertain their rights and obligations. The bright line approach taken in *Mencap* is, by the same token, surprisingly faded, at least at the margins: in declining to find *Scottbridge* wrongly decided, Underhill LJ accepted that there

24. The reported decisions on employer-contracted sleep can broadly be assigned to either the *Focus Care* or *Mencap* line of authority. *Esparon (t/a Middle West Residential Care Home) v Slavikovska* [2014] IRLR 598 (EAT) anticipates *Focus Care* in emphasising the importance of the purpose of the employee's presence with respect to regulatory requirements: see [52] (Judge Serota QC). *British Nursing Association v Inland Revenue* [2001] IRLR 659 (EAT) and *Whittlestone v BJP Home Support* [2014] IRLR 176 (EAT) likewise anticipate *Focus Care*'s emphasis on the extent to which the worker's activities are constricted as a criterion: see *British Nursing* [20] (Judge J Altman) and *Whittlestone* [16] (Langstaff P).

Other cases follow *Mencap* in emphasising the primacy of reg 27(2)/reg 32(2) in excluding employer-contracted sleep from the category of work, concluding that any finding that contracted sleep constitutes work would be exceptional. These include *South Manchester Abbeyfield Society Ltd v Hopkins* [2011] IRLR 300 (EAT), *Wray v J W Lees & Co (Brewers) Ltd* [2012] ICR 43 (EAT) and *Shannon v Rampersad* [2015] IRLR 982 (EAT).

25. See *Scottbridge* (n 16) [11]; *Burrow Down* (n 16) [25]; ACL Davies, "Sleep-in" Shifts and the National Minimum Wage: *Royal Mencap Society v Tomlinson-Blake, Shannon v Rampersad*' (2017) 47 ILJ 553, 565. Prof Davies's stance dovetails with the broader contention that the core criterion of work is the worker's availability to perform work directed in accordance with the employer's managerial prerogative: see ACL Davies, 'Getting More Than You Bargained for? Rethinking the Meaning of "Work" in Employment Law' (2017) 46 ILJ 477, 506.

may be 'subtle [...] distinctions' which bring periods during which sleep is permitted into the category of work, acknowledging that 'in marginal cases different tribunals might well assess very similar facts differently'.²⁶ Although *Mencap* de-emphasises the need for the tribunal to analyse whether employer-contracted sleep is work, suggesting it is 'unnecessarily elaborate' to do so, its acceptance that *Scottbridge* was correctly decided logically supposes that this analysis will be undertaken, implicitly or explicitly, whenever an employer permits a worker to sleep. Nor, with respect, is the analytic process implied by *Mencap* substantially more certain or predictable in outcome than the multifactorial evaluation envisaged in *Focus Care*.

The second problem with the manner in which the courts are constrained to classify sleep as work or its opposite is conceptual: it goes to the nature of sleep itself. As early as 1657 the natural philosopher John Beale wrote that the pressure of his 'incessant studyes' was such that he would 'direct that sleep that I had, about what kind of busines my dreames should be employed'.²⁷ At the cusp of the twentieth century, Freud's concept of dream-work (*Traumarbeit*) as 'a particular form of thinking' would mark the emergence of a modern interest in the ways in which sleep overlaps with work or its constituent aspects.²⁸ A more concrete sense of sleep's commerce with labour emerges in an account of a sleep-in shift given by an anonymous care worker in 2019:

26. *Mencap* (n 8) [79]; compare [88]. The subtlety of those distinctions is demonstrated by the material facts of *Scottbridge* itself, in which 'significant duties at either end of the shift', a five-hour maximum sleep duration and the provision only of a 'mattress [...] in the office' of the claimant security guard provided the basis for Underhill LJ to distinguish the case from those under consideration in *Mencap* itself. By contrast, those factors seem not to have been determinative for the Court of Session itself: see *Scottbridge* (n 16) [2]–[4], [11]–[12] (Lord Cullen).

27. Letter to Samuel Hartlib, 17 Aug 1657, quoted in Keith Thomas (ed), *The Oxford Book of Work* (Oxford UP 1999) 493–94.

28. Sigmund Freud, *The Interpretation of Dreams (Second Part) and On Dreams* (Hogarth Press 1953), 506 fn 2. *The Interpretation of Dreams* was first published in 1899.

You never properly sleep – you are half-awake all night – listening in case [a client] needs you. Often, we are up 5 or 6 times a night, taking them to the toilet or calming them down when they are agitated.²⁹

In these accounts, sleep is envisaged not as work's restful opposite but as a process with work-like aspects: attention is distracted, autonomy constrained. Shakespeare's 'sleeve of care' is not 'knit[ted] up', but constantly unravelling. Nor is the work-like quality of employer-contracted sleep limited to its effect on how the individual's mind is 'employed': it sharply constrains the worker's general autonomy, confining her to the workplace and constricting her ability to choose who and what surrounds her.³⁰ The present pandemic makes the severity of this constraint discomfotingly concrete. Where an individual without obligations under a contract would ordinarily have a near-unfettered right to minimise risk of infection by remaining indoors or away from others, a worker who contracts to sleep at a workplace has bargained away that right, subject only to the implied term that the employer will not place her in immediate and personal danger.³¹ That risk is especially pronounced in the care sector: 55.6% of English care homes had experienced at least one case of novel coronavirus by June 2020,³² while 38.6% of the social care workforce was aged fifty or above by 2018.³³

29. Quoted by Laura Smith MP in HC Deb 24 April 2019, vol 658, col 829.

30. Compare Davies, "'Sleep-in" Shifts' (n 25) 560. Prof Davies prefers the term 'liberty' to autonomy, but in this context the concepts are closely comparable.

31. *Ottoman Bank v Chakarian* [1930] AC 277 (PC); contrast *Bouzoulou v Ottoman Bank* [1930] AC 271 (PC) and *Walmsley v UDEC Refrigeration Ltd* [1972] IRLR 80 (Industrial Tribunal). These authorities, although of persuasive value only, suggest that it will generally be difficult for an employee to establish a danger sufficient to entitle her to refuse an otherwise lawful order. See, further, ss 44(1)(d) and 100(1)(d) of the Employment Rights Act 1996.

32. Office for National Statistics, *The Impact of Coronavirus in Care Homes in England: 26 May to 19 June* (Office for National Statistics 2020) 7 <<https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/conditionsanddiseases/articlesimpactofcoronavirusincarehomesinenglandvivaldi/26mayto19june2020/pdf>>. No more up-to-date statistics are currently available.

33. Dromey and Hochlaf (n 5) 14.

In seeking to apply NMW legislation to employer-contracted sleep, the courts are confronting an issue much broader than the notoriously infelicitous drafting of that instrument: they are seeking to assign sleep to one side of an opposition, work or not-work, into which it does not sensibly fit. Eminent figures such as Sir Patrick Elias, Sir Nicholas Underhill and Dame Ingrid Simler have differed so sharply in their analyses because the conundrum involved applying the Regulations is as much philosophical as legal: in its refusal to define work, the instrument effectively requires the tribunal to conduct its own speculation on the definitional limits of the term.³⁴ At the same time, of course, it requires the tribunal to reach an unqualified answer as to whether the period of sleep is work or not. The Regulations apart, employer-contracted sleep can be seen to fall into an uncanny gap between work and its opposite: not work, but too work-like to be its opposite. The reason why *Mencap*, *Focus Care* and *Burrow Down* reach such contradictory and conceptually problematic conclusions is that the Regulations oblige them to round this work-like quality up, categorising it as work, or down, taking it outside that category. Whatever the outcome of the *Mencap* appeal, the Supreme Court is doomed to rehearse at least some of the pitfalls of existing case law, which derive from not from any lack of judicial ingenuity but from defects in legislation to which it is bound to give effect. Twenty years after the Low Pay Commission declined to recommend the ‘straightforward’ sleep-in provisions of the Regulations be revised, it is clearer than ever that legislative amendment is required.³⁵

34. As President of the Employment Appeal Tribunal, Elias P gave judgment in *Burrow Down* (n 16); Simler P, also as President, gave judgment in *Focus Care* (n 16). Underhill LJ, Elias P’s immediate successor as President from 2009–2011, gave the only reasoned judgment in *Mencap* (n 8), disapproving both *Burrow Down* and *Focus Care*.

35. Low Pay Commission, *The National Minimum Wage: The Story So Far: Second Report of the Low Pay Commission* (Cm 4571, 2000) para 5.44. Although the Commission’s fourth report recommended that the Government examine whether ‘the present uncertainty over the treatment of “sleepovers”’ could be resolved through the provision of revised guidance’ or amendment of the Regulations, no substantive change appears to have been considered: see *The National Minimum Wage: Fourth Report of the Low Pay Commission: Building on Success* (Cm 5768, 2003), para 3.59.

III. 'They also serve who only stand and wait': laying the sleep-in saga to rest³⁶

The key defect in the existing Regulations is their failure to recognise the existence of employer-contracted sleep as a discrete category. The primary aim of the amendments detailed in the Appendix is therefore to confer on all individuals qualifying for the NMW the right to remuneration in respect of that sleep at a minimum hourly rate, to be known as the national minimum sleep-in rate.³⁷ In setting that rate, three principles are crucial. First, to preserve the primacy and conceptual unity of the NMW itself, the sleep-in rate is to be set only as a multiplier of the NMW, not as a stand-alone figure.³⁸ Second, that multiplier should be established by statutory instrument using the established mechanism by which the NMW itself is set and reviewed: that is, by the Secretary of State after receiving recommendations from the Low Pay Commission, itself consulting with a wide range of industry groups, union representatives and individual workers.³⁹ Third, by analogy with the common law principle that damages should 'as nearly as possible get at' the sum which would properly compensate the injured party, the multiplier should seek to reflect, as nearly as possible, the balance between rest and restriction of autonomy inherent in employer-contracted sleep.⁴⁰

36. John Milton, 'XIX ("When I consider how my light is spent")', in Helen Darbishire (ed), *The Poetical Works of John Milton, Volume 2: Paradise Regain'd; Samson Agonistes; Poems Upon Several Occasions, both English and Latin* (Oxford UP 1963), 155, cited, inter alia, in *Whittlestone* (n 24) [15] (Langstaff P) and *Walton v Independent Living Organisation* [2003] EWCA Civ 199, [2003] IRLR 469 [36] (Arden LJ).

37. See Appendix, National Minimum Wage (Amendment) Act 202X ('Amendment Act'), s 1.

38. Amendment Act, ss 1(3), 2.

39. Amendment Act, s 3. As explained by Prof David Metcalf, one of nine founding Commissioners of the LPC, the purpose of the Commissioners in making recommendations is to 'represent the interests of unions and employees, employers and the academic community': see David Metcalf, 'The Low Pay Commission and the National Minimum Wage' (1999) 109 *Economic Journal* F46, F48. The involvement of the LPC in setting the national minimum sleep-in multiplier would enable open and extensive consultation with interested parties before it is set; as Prof Metcalf notes, the consultation process prior to the setting of the first NMW rate involved soliciting evidence from 'almost 600 employer organisations, trade associations, unions, voluntary organisations, pressure groups and academics' and the visiting of 61 cities, towns and villages to consult interested parties at a local level (F48).

40. *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 (HL) 39 (Lord Blackburn).

The recognition of this third category preserves the integrity of employment law by facilitating a rational, intuitive definition of work that makes sense to the workforce it regulates. It radically simplifies the test which a tribunal must apply in classifying employer-contracted sleep. In place of the unwieldy and contradictory approaches in existing case law, the tribunal must simply determine whether the period in question is one ‘during which the worker is asleep or is entitled to sleep’,⁴¹ applying the injunction in *Autoclenz* to attend to ‘how the parties conducted themselves in practice’ as well as the wording of their contract.⁴² To guard against sham attempts to classify genuine work as sleep, the amendments prevent the use of the category between 9 a.m. and 9 p.m., and require appropriate facilities to be provided.⁴³ Those defences against fraudulent classification are buttressed by the Act’s existing burden of proof provisions.⁴⁴ Justifying those provisions in the House of Commons twenty-two years ago, Ian McCartney MP noted that ‘the overwhelming majority of people who will benefit from the minimum wage are in a weak position in terms of the employer-employee relationship’.⁴⁵ The time has come to ensure that the sleep-wage bargain, made by some of the most vulnerable workers in the economy, is afforded the protection of coherent statutory regulation.⁴⁶

41. See Appendix, National Minimum Wage Regulations 2015 (Amendment) Regulations 202X (‘the Amendment Regulations’), reg 2(4)–(6).

42. *Autoclenz Ltd v Belcher* [2010] UKSC 41, [2011] 4 All ER 745 [43] (Lord Clarke).

43. See reg 58A(1)(a) and (c) of the 2015 Regulations as amended by reg 2(6) of the Amendment Regulations. Note that the tribunal would retain a discretion to classify sleep according to the pre-reform system where the conditions in reg 58A(1)(a) or (c) of the 2015 Regulations (suitable sleeping facilities and restriction to the hours of 9 p.m. to 9 a.m.) are not met by the employer.

44. Section 28 of the 1998, as applied to the national minimum sleep-in rate by s 7 of the Amendment Act. The Amendment Act further applies the mechanisms of the 1998 Act to the national minimum sleep-in rate in relation to access to records (s 4), non-compliance (s 5), the right not to suffer detriment or unfair dismissal (s 6) and offences (s 8).

45. HC Deb 9 March 1998, vol 308, col 233 (Ian McCartney MP, Minister of State for Competitiveness). This observation reflects Otto Kahn-Freund’s crucial insight that inequality of bargaining power ‘is inherent and must be inherent in the employment relationship’: see Paul Davies and Mark Freedland, *Kahn-Freund’s Labour and the Law* (3rd edn, Stevens 1983) 18.

46. On the vulnerability of care workers generally, see Matthew Pennycook, *Does it Pay to Care?: Under-payment of the National Minimum Wage in the Social Care Sector* (Resolution Foundation 2013).

IV. Conclusion

The coronavirus crisis has subjected care workers to unprecedented levels of exhaustion and mental and physical ill-health.⁴⁷ It also represents a severe threat to the financial health of an already precarious sector.⁴⁸ Towards winter, those pressures are likely to return with renewed force. Against this backdrop, a fair, intuitively understandable and conceptually coherent framework for the remuneration of sleep-in workers is more important than ever. As the care sector adjusts to the post-Covid world, it requires two things that law reform can give it: a just recognition of the work-like nature of sleep-in shifts reflected in the provision of a fair national minimum sleep-in rate for all workers; and a clear, unambiguous set of rules on sleep-in pay that enables care providers to quantify their future wage liabilities accurately and facilitate forward planning. After two decades of uncertainty over sleep-in shifts, the pandemic makes the reform proposed in this essay not just timely but urgent.

[3000 words]

47. YouGov polling of healthcare professionals conducted in early April 2020 revealed that half of respondents considered their mental health had deteriorated as a result of the crisis, with 33% saying their physical health had declined: Chris Thomas and Harry Quilter-Pinner, *Care Fit for Carers: Ensuring the Safety and Welfare of NHS and Social Care Workers During and After Covid-19* (Institute of Public Policy Research 2020) 12. In a survey of paid and unpaid carers of people with dementia, 69% reported a feeling of constant exhaustion and 95% reported some impact on physical or mental health: Alzheimer's Society, *Worst Hit: Dementia During Coronavirus* (Alzheimer's Society 2020) 30.

48. See, in particular, Gill Plimmer, 'Biggest Care Home Group Warns over Outbreak Toll' *Financial Times* (London, 5 May 2020) 12; 'Care Home Industry Comes under Mounting Pressure' *Financial Times* (London, 25 May 2020) 11; and Gill Plimmer and Laura Hughes, 'Care Sector Calls for Direct Payments to Providers' *Financial Times* (London, 15 May 2020) 2.

Appendix: legislative mechanisms for introducing the reform⁴⁹

I. The National Minimum Wage (Amendment) Act 202X

An Act to amend the National Minimum Wage Act 1998 to introduce a national minimum sleep-in rate; and for connected purposes. [date]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1 Workers' entitlement to national minimum sleep-in rate.

(1) Section 1 of the National Minimum Wage Act 1998 (workers to be paid at least the national minimum wage) is amended as follows.

(2) After subsection (1) insert—

“(1A) A person who qualifies for the national minimum wage shall⁵⁰ be remunerated by his employer in respect of his or her sleep-in period in any pay reference period at a rate which is not less than the national minimum sleep-in rate.”

(3) After subsection (3) insert—

“(3A) The national minimum sleep-in rate shall be the product of:

- (a) the hourly rate at which a person is to be regarded for the purposes of this Act as remunerated by his employer, and
- (b) such single sleep-in multiplier as the Secretary of State may from time to time prescribe.”

2 Determination of sleep-in multiplier.

(1) Section 2 of the National Minimum Wage Act 1998 (determination of hourly rate of remuneration) is amended as follows.

(2) After subsection (1) insert—

“(1A) The Secretary of State may by regulations make provision for determining the value of the single sleep-in multiplier.”

(3) In subsection (3), after paragraph (a) insert—

49. These amendments are drafted in accordance with the Office of the Parliamentary Counsel's *Drafting Guidance* (Office of the Parliamentary Counsel 2020).

50. 'Shall', the use of which is deprecated in new legislation, is employed in order to harmonise with the existing provisions of the 1998 Act: *ibid* 4.

“(aa) circumstances in which, times at which, or the time for which, a person is to be treated as, or as not, adding to his or her sleep-in period, and the extent to which a person is to be so treated;”.

3 Referral to the Low Pay Commission prior to first sleep-in regulations.

(1) Section 5 of the National Minimum Wage Act 1998 (referral to the Low Pay Commission prior to first regulations) is amended as follows.

(2) After subsection (2) insert—

“(2A) Before making the first regulations under section 1(3A) or 2(3)(aa) or 2(1A), the Secretary of State shall refer the matters specified in subsection (2A) below to the Low Pay Commission for their consideration.

(2B) Those matters are—

- (a) what single sleep-in multiplier should be prescribed under section 1(3A)(b) to produce the national minimum sleep-in rate; and
- (b) the circumstances in which, times at which, or the time for which, a person is to be treated as, or as not, contributing to his or her sleep-in period, and the extent to which a person is to be so treated.”

(3) In subsection (3), after “under subsection (1)” insert “or (2A)”.

(4) In subsection (4), after paragraph (c) insert—

“(cc) to prescribe under section 1(3A)(b) above a single sleep-in multiplier which is different from the rate recommended by the Commission, or”.

4 Worker’s right of access to records.

(1) Section 10 of the National Minimum Wage Act 1998 (right of access to records) is amended as follows.

(2) In subsections (2) and (3), at the end insert “ or, as the case may be, the national minimum sleep-in rate.”

5 Non-compliance.

After section 17 of the National Minimum Wage Act 1998 insert:

“17A. Non-compliance in respect of national minimum sleep-in rate.

(1) Where any question arises as to whether an employer has complied with section 1(1A), section 17 has effect as if it were modified as follows.

(2) In subsection (1), (2)(a) and (2)(b), after ‘remunerated’ insert ‘in respect of his or her sleep-in period’.

(3) In subsection one, for ‘less than the minimum wage’ substitute ‘less than the national minimum sleep-in rate’.

- (4) In subsection (2)(b) and (4), for ‘national minimum wage’ substitute ‘national minimum sleep-in rate’.

6 Right not to suffer detriment or unfair dismissal.

- (1) Section 23 of the National Minimum Wage Act 1998 (right not to suffer detriment) is amended as follows.
- (2) In subsection (1)(c), at the end insert “ or for the national minimum sleep-in rate.”
- (3) Section 104A of the Employment Rights Act 1996 is amended as follows.
- (4) In subsection (1)(c), at the end insert “ or for the national minimum sleep-in rate.”
- (5) Article 135A of the Employment Rights (Northern Ireland) Order 1996 (S.I. 1996/1919) is amended as follows.
- (6) In paragraph (1)(c), at the end insert “ or for the national minimum sleep-in rate.”

7 Burden of proof in relation to minimum sleep-in rate.

- (1) Section 28 of the National Minimum Wage Act 1998 (reversal of burden of proof) is amended as follows.
- (2) After subsection (3) insert:
 - “(4) Where a question arises as to whether an individual qualifies or qualified at any time for the national minimum sleep-in rate, section 28 applies as if for ‘national minimum wage’ there were substituted ‘national minimum sleep-in rate’.”

8 Offences.

- (1) Section 31 of the National Minimum Wage Act 1998 (offences) is amended as follows.
- (2) In subsection (1), at the end insert “ or, as the case may be, the national minimum sleep-in rate.”

9 Extent, commencement and short title.

- (1) This Act extends to England and Wales, Scotland and Northern Ireland.
- (2) This Act comes into force on the day on which it is passed.
- (3) This Act may be cited as the National Minimum Wage (Amendment) Act.

II. National Minimum Wage Regulations 2015 (Amendment) Regulations 202X⁵¹

The Secretary of State, in exercise of the powers conferred by sections 1(3A)(b), 2(3)(a) and 2(3)(aa) of the National Minimum Wage Act 1998(a), makes the following Regulations [...]

Citation and commencement

1. These Regulations may be cited as the National Minimum Wage Regulations 2015 (Amendment) Regulations 202X and come into force on [date].

Amendments to the National Minimum Wage Regulations 2015

2.—(1) The National Minimum Wage Regulations 2015(b) are amended as follows.

(2) In regulation 4, after paragraph (1) insert:

“(1A) The single sleep-in multiplier is [*a value from 0 to 1 to be determined by the Low Pay Commission*].”

(3) In regulation 3, in the entry for “work” for “regulations 57 and 58” substitute “regulations 57, 58 and 58A”.

(4) In regulation 27, after paragraph (2) insert:

“(3) Any period during which the worker is asleep or is entitled to sleep that is not treated as having been worked shall be included in the worker’s sleep-in period and remunerated accordingly.”

(5) In regulation 32, after paragraph (2) insert:

“(3) Any period during which the worker is asleep or is entitled to sleep that is not time work shall be included in the worker’s sleep-in period and remunerated accordingly.”

(6) After regulation 58, insert:

“Work does not include periods spent sleeping-in.

58A.—(1) ‘Work’ does not include periods during which—

- (a) the employer provides suitable facilities for sleeping,
- (b) the worker is asleep or entitled to sleep, and
- (c) the time is between 9 p.m. and 9 a.m.”⁵³

(a) S.I. 2015/584, to which there are amendments not relevant to these Regulations.

52. The precise form of these amending regulations would, as a result of the consultative process contained in s 5 of the 1998 Act as amended, be subject to the LPC’s recommendations.

53. By s 7 of the Interpretation Act 1978 as read with s 3(1) of the Summer Time Act 1972, any expression of time is, unless otherwise specifically stated, a reference to Greenwich mean time or, where relevant, British summer time.