Losing pay: the Low Pay Commission, 'sleep-in' shifts, and temporal casualisation as a driver of poverty

Deirdre McCann *considers the dire repercussions of the Low Pay Commission's treatment of 'sleep-in' shifts for workers' rights, particularly in the social care sector.*

A distinctive feature of the UK's low wage environment has resurfaced in the Low Pay Commission's annual report: the status of 'sleep-in' shifts under the minimum wage legislation. The 2021 report marks the latest stage in a longstanding conflict over what the law should require for payment of overnight shifts, especially in the social care sector. The treatment of sleep-in shifts is also of broader significance: as part of a trend towards many workers having insufficient waged hours. The approach taken to sleep-ins, therefore, has a wider resonance for how mechanisms of low pay are understood and tackled, including through legal regulation.

The Supreme Court in Mencap: fragmented working time

The Low Pay Commission's comments have been triggered by the Supreme Court judgment in the 2021 *Mencap* case. This judgment ruled on the 'sleep-in' shifts of a type common in social care: carers working in a client's home or in residential care are required to remain overnight on the premises to provide support as needed and are permitted or expected to spend at least some of that time sleeping.

The legal cases pivot on a distinction in the minimum wage legislation between 'work' and 'availability'. While 'working', individuals must be paid at least the minimum wage. While 'available', however, they are excluded from the minimum wage if they are entitled to sleep and provided with sleeping facilities, except when 'awake for the purposes of working'.

The line between 'work' and 'availability' is ultimately drawn by the courts in individual disputes. Until *Mencap*, the courts tended to classify sleep-in shifts as 'work' where they involved obligations beyond presence in the workplace. As a result, sleep-in shifts were recognised – including by the government and the Low Pay Commission – as likely to attract the minimum wage, albeit subject to initially confusing government advice and uneven compliance.

This was the legal position until the Court of Appeal judgment in *Mencap* in July 2018. In a departure from the earlier case law, the Court classified sleep-in shifts as 'availability'. The care workers were held not to be entitled to the minimum wage across their night shifts except when actively intervening to assist a client. This decision was upheld by the Supreme Court.

The Low Pay Commission was pivotal to the *Mencap* litigation. The courts relied heavily on the Commission's initial recommendations from 1998, when the legal framework was being designed, which it interpreted as proposing that sleep-in shifts should not attract the minimum wage (see on the Court of Appeal and Supreme Court decisions and a research paper).

The need for legislative reform

The upshot of the *Mencap* judgment is a regulatory settlement in which care workers – and others – can be paid sub-minimum wages during sleep-in shifts. This outcome can be expected to exacerbate low pay in the social care sector, among an overwhelmingly female workforce in which wages are already an urgent problem. It is also worth noting, although not always clear from the Low Pay Commission report, that the minimum wage legislation does not confine the 'sleep-in shift exception' to the care sector. This exception extends across the workforce; one of the prominent legal cases, for example, concerned a security guard in the construction industry. *Mencap*, then, represents a not insignificant diminution of legal protection for a substantial number of workers.

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In *Mencap*, we have also lost a rich legal imagery of working time of considerable value. The earlier sleep-in shift judgments were grounded in a sophisticated notion of working time in which a worker's level of obligation was the crux of protection. This notion comprehends that care workers often have a high level of responsibility for their clients throughout sleep-in shifts: they are poised to respond to emergencies and use their professional judgment to decide whether to intervene to support their clients. It conceives of working time as a whole and does not artificially bifurcate working hours into separate periods of 'work' and 'availability'.

Given the Supreme Court judgment, the only option is legislative reform. A protective legislative model would require the minimum wage for all time spent at the workplace. This 'unitary model' ensures that the entire expanse of working time is fully waged. It does not fragment working time into proliferating classifications (availability, travel time, waiting time etc.). It recognises that, across all periods in the workplace (and sometimes beyond), workers are at the disposal of the employer, are serving a need of the employer, and are prevented from devoting their time to their families and other responsibilities. This unitary model of waged time was jointly advocated by UNISON and Mencap in a letter to the Prime Minister in April 2021.

The Low Pay Commission's response: a missed opportunity

A number of submissions to the Low Pay Commission's consultation called for a response to the *Mencap* ruling. The Commission considered the payment of sleep-in shifts to be beyond its remit for the 2021 report. Yet the report discusses sleep-in shifts in some depth and reveals that it had carefully considered whether to respond to the *Mencap* judgment.

The Commission recognises the risks of exclusion of sleep-in shifts from the minimum wage. It accurately sketches the concerns about the post-*Mencap* settlement. It predicts the likely outcome: that workers on sleep-ins will not be paid the national minimum wage, triggering a further deterioration in working conditions and quality of care.

Yet the Commission does not assert that the minimum wage should extend across sleep-in shifts, or even make an alternative proposal. It appears to envisage some kind of reform, stressing that its initial recommendations are 'neither infallible nor unchangeable'. It concludes, however, that the government is better placed to resolve the treatment of sleep-ins, with the Commission 'willing to assist where it can'. Its rationale is that reform of the legal treatment of sleep-ins is inextricably tied to the government's plans for the future funding of social care, although it also admits to a lack of consensus among its members.

It is disappointing that the Low Pay Commission is not advocating, as a matter of principle, that all workplace hours should be paid at least the minimum wage. A statement that sleep-in shifts should be fully waged would have been welcome for at least two reasons: to place decent work at the core of decision-making on social care funding and for the Low Pay Commission to more firmly engage with how the casualisation of working time is generating low pay and the apt regulatory responses.

The Commission concludes that it would not be productive to recommend extending the minimum wage to sleep-in shifts if this reform were to be unfunded in social care, since this would additionally stress an overburdened sector. It therefore does not make any suggestion about legislative reform. The Commission betrays a degree of frustration at the stagnation in the sector: '[a]ll parties seem to agree that in an ideal world, care would not be a minimum wage profession but at this time there is no apparent path to realise this'.

It is apparent that a range of decent work deficits in social care are linked to inadequate funding. Yet having decided to comment on sleep-in shifts, the Commission had an opportunity to call for a commitment to decent work – including fully-waged time – to be an integral element of the funding settlement in the care sector, underpinned by legislative support. That the sector is largely reliant on public funding does not preclude a decisive stance from the Commission on the legal frameworks that are needed to tackle low pay.

Temporal casualisation as a driver of low pay

In the meantime – and for the foreseeable future if the government chooses not to act – sleep-in shifts are worked under a legal regime that endorses sub-minimum wages. Unspecified, entirely voluntary sub-minimum wages. 'Unregulated' in the words of the Commission, although more precisely a regulated casualisation generated by legislative tolerance of the *Mencap* ruling and with a particularly punitive effect on an overwhelmingly female workforce.

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This approach to sleep-ins has a broader significance for how mechanisms of low pay are understood and tackled, including by the Low Pay Commission. The Commission's reluctance to advocate for the unitary model of working time is a more far-reaching risk to policy on low wages, poverty, and labour regulation.

The lengthy conflict over payment of sleep-in shifts highlights a crucial aspect of how low pay manifests in contemporary working life. Low wages, that is, are increasingly generated by efforts to eliminate waged time. Low pay is driven not only by insufficient hourly wages, but also by insufficient waged hours. A range of mechanisms and strategies are spawning waged hours that are often insufficient for workers and, as the recent Joseph Rowntree Foundation *UK Poverty 2022* report has highlighted, are among the drivers of poverty. Being unpaid or paid sub-minimum wages while working is among the most punitive, and shocking, manifestations of this trend.

The Low Pay Commission has proposed legal strategies to avert temporal casualisation when it emerges as insufficient hours of work, a focus of its 2018 report on *One-Sided Flexibility*, and on unwaged time that flouts the law, notably the non-payment of travel time in social care.

The loss in relation to sleep-in shifts is of discounted time: working hours that are excluded from the entitlement to the minimum wage. Here, waged time is lost through a legal conduit: the *Mencap* judgment's unchecked alteration to the minimum wage regime. In this context, the Commission is not championing the apposite legal reform: an entitlement to fully waged working hours. This is despite the Commission endorsing the unitary model relatively recently: in 2017 it lamented that a flat rate for sleep-in shifts, rather than an hourly rate, can result in care workers being paid below the minimum wage.

By waiving this opportunity to endorse the unitary model, the Commission is failing to offer the robust conception of working time that is an essential element of efforts to avert temporal casualisation, in relation to overnight shifts and other working arrangements and across the labour law regime. The *Mencap* judgment redrew the line between 'work' and 'availability' and, in consequence, shifted prior judicial conceptions of the nature and parameters of working time. Its legacy is a deficient imagery of working time, which is embedded in the minimum wage framework and available for adoption in other policy and legal arenas.

It is to be hoped, then, that the Commission will in future call for workers to be entitled to at least the minimum wage for all of their working hours, as a core feature of both a sustainable social care system and a coherent and universal legal framework of worker protection.

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