Neutral Citation Number: [2024] EAT 102

Case No: EA-2021-001262-NT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26 June 2024

Before :

JUDGE STOUT

- -

Between :

(1) TAYLORS SERVICE LTD (DISSOLVED)

(2) MR IVAN TAYLOR & MR ERIC TAYLOR T/A TAYLORS POULTRY SERVICES

Appellants

- and -

THE COMMISSIONERS FOR HM REVENUE AND CUSTOMS

Respondent

- -
- -

James Boyd (instructed by **JMW Solicitors LLP**) for the **Second Appellant**
George Rowell (counsel) (instructed by **HM Revenue and Customs**) for the **Respondent**
No appearance or representation for the **First Appellant**

Hearing date: 23 May 2024

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JUDGMENT

SUMMARY

NATIONAL MINIMUM WAGE

The appellants are employers of workers on 'zero hours' contracts in the poultry industry. They provide transport by minibus for workers to and from their home addresses to farms around the country where they provide poultry services. The respondent, His Majesty's Commissioners of Revenue and Customs (HMRC), in 2020 decided that the time that workers spent travelling to and from farms was time that should be remunerated at the national minimum wage (NMW) and issued Notices of Underpayment accordingly. The appellants appealed to the Employment Tribunal under section 19C(1) of the National Minimum Wage Act 1998 (the 1998 Act). The Tribunal dismissed their appeals, holding that the time spent travelling was "time work" as defined in regulation 30 of the National Minimum Wage Regulations 2015 (the 2015 Regulations), although if it had not been 'actual work', it was not travelling that would have been deemed to be "time work" by virtue of regulation 4 of the 2015 Regulations.

Held, allowing the appeal:-

The approach to interpretation of regulations 30 and 32 of the 2015 Regulations taken by the Supreme Court in *Royal Mencap Society v Tomlinson-Blake* [2021] UKSC 8, [2021] ICR 758 also applies to regulations 30 and 34. Those regulations must be read together. Accordingly time spent 'just' travelling is not "time work" for the purposes of regulation 30 unless it is deemed to be such by regulation 34. As the Tribunal in this case had found that the workers were not working in the ordinary sense when on the minibus, and were not deemed to be engaged in time work by virtue of regulation 34, the only conclusion open to the Tribunal on the facts as it found them to be was that the workers were not engaged in "time work" for the purposes of regulation 30 of the 2015 Regulations. Decision of the Employment Tribunal set aside and remade by allowing the appellants' appeal against the Notices of Underpayment pursuant to s 19C of the 1998 Act.

JUDGE STOUT:

Introduction

1. The business of the appellants involves the provision of labour to poultry farms around the country. They engage workers under 'zero hours' contracts and supply them to poultry farms to carry out work such as catching poultry, providing injections, grading, loading and unloading poultry. The respondent, His Majesty's Commissioners of Revenue and Customs (HMRC), in 2020 decided that the time that workers spent travelling to and from farms was time that should be remunerated at the national minimum wage (NMW) and issued Notices of Underpayment accordingly.

2. The appellants appealed to the Employment Tribunal under section 19C (1) of the National Minimum Wage Act 1998 (the 1998 Act). Following a two-day hearing on 19 and 20 May 2021, Employment Judge Broughton (sitting alone), in a reserved judgment promulgated on 14 September 2021, dismissed their appeals and upheld the Notices of Underpayment.

3. Permission to appeal to the EAT was granted by Judge Susan Walker at a rule 3(10) hearing on 4 July 2023 on the sole ground that it was arguable that the judge had erred in law in concluding that the relevant workers' travelling time to the first assignment of the day and back again was 'time work' for the purposes of Chapter 3 of the National Minimum Wage Regulations 2015 (the 2015 Regulations), instead of being caught by the exception (or 'deeming provision') for travel time in regulation 34(1).

4. Judge Walker considered it to be arguable that the judge had erred in her approach to regulations 30 and 34 in the light of the Supreme Court's judgment in *Royal Mencap Society v Tomlinson-Blake* [2021] UKSC 8, [2021] ICR 758. The arguable error that she identified is that the judge erred by taking a 'sequential approach' and deciding that the workers' travel time was "time work" for the purposes of regulation 30 without considering simultaneously the effect of regulation 34.

The relevant legislative provisions

5. The entitlement to be paid at least the national minimum wage (NMW) in "respect of work in a pay reference period" is laid down in s 1(1) of the 1998 Act. Section 2(3) provides that regulations may make provision with respect to "circumstances in which, times at which, or the time for which, a person is to be treated as, or as not, working, and the extent to which a person is to be so treated".

6. The 2015 Regulations are the regulations that make that provision. What is "work", or deemed to be "work", for the purposes of the 1998 Act is dealt with in the 2015 Regulations. However, it is important to note that the Regulations contain no definition of "work", *per se*, save (by virtue of regulations 3, 57 and 58) to exclude from the definition work done in a family home or family business in certain circumstances.

7. Regulation 7 sets out the calculation to determine whether the national minimum wage has been paid as follows (by regulation 6 a pay reference period is a month, or period by reference to which a worker is paid, if shorter than a month):

> **7. Calculation to determine whether the national minimum wage has been paid**
> A worker is to be treated as remunerated by the employer in a pay reference period at the hourly rate determined by the calculation—
> R / H
> where—
> "R" is the remuneration in the pay reference period determined in accordance with Part 4;
> "H" is the hours of work in the pay reference period determined in accordance with Part 5.

8. Part 5 begins with regulation 17, which provides that the hours of work in the pay reference period "are the hours worked or treated as worked by the worker in the pay reference period", as determined by different Chapters in that Part of the Regulations depending on whether the work is "salaried hours work" (Chapter 2), "output work" (Chapter 4), "unmeasured work" (Chapter 5) or "time work", which is the work type relevant in this case and is dealt with in Chapter 3. By regulation 3 the definition of "time work" is to be found in regulation 30.

9. Regulation 30 of the 2015 Regulations provides:

> **30. The meaning of time work**

> Time work is work, other than salaried hours work, in respect of which a worker is entitled under their contract to be paid—
> (a) by reference to the time worked by the worker;
> (b) by reference to a measure of output in a period of time where the worker is required to work for the whole of that period; or
> (c) for work that would fall within sub-paragraph (b) but for the worker having an entitlement to be paid by reference to the period of time alone when the output does not exceed a particular level.

10. Regulations 31 to 35 make further provision about time work as follows:

> **31. Determining hours of time work in a pay reference period**
> The hours of time work in a pay reference period are the total number of hours of time work worked by the worker or treated under this Chapter as hours of time work in that period.
>
> **32.— Time work where worker is available at or near a place of work**
> (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.
>
> **33. Training treated as hours of time work**
> The hours a worker spends training, when the worker would otherwise be doing time work, are treated as hours of time work.
>
> **34.— Travelling treated as hours of time work**
> (1) The hours when a worker is travelling for the purposes of time work, where the worker would otherwise be working, are treated as hours of time work unless the travelling is between—
> (a) the worker's home, or a place where the worker is temporarily residing other than for the purposes of working, and
> (b) a place of work or a place where an assignment is carried out.
> (2) In paragraph (1), hours treated as hours when the worker would "otherwise be working" include—
> (a) hours when the worker is travelling for the purpose of carrying out assignments to be carried out at different places between which the worker is obliged to travel, and which are not places occupied by the employer;
> (b) hours when the worker is travelling where it is uncertain whether the worker would otherwise be working because the worker's hours of work vary either as to their length or in respect of the time at which they are performed.
>
> **35.— Hours not treated as time work**
> (1) The hours a worker is absent from work are not treated as hours of time work, except as specified in regulations 32 to 34.
> (2) The hours a worker spends taking part in industrial action are not hours of time work.
> (3) The hours a worker spends taking a rest break are not hours of time work.
> (4) A worker is not to be treated as taking a rest break during hours which, in accordance with regulation 34, are treated as hours of time work.

11. Part 5 includes in regulation 20 a definition of "travelling" as follows:-

> **20. Hours spent travelling**

> In this Part, references to "travelling" include hours when the worker is—
> (a) in the course of a journey by a mode of transport or is making a journey on foot;
> (b) waiting at a place of departure to begin a journey by a mode of transport;
> (c) waiting at a place of departure for a journey to re-commence either by the same or another mode of transport, except for any time the worker spends taking a rest break; or
> (d) waiting at the end of a journey for the purpose of carrying out duties, or to receive training, except for any time the worker spends taking a rest break.

12. It is also relevant to note that the other Chapters of Part 5 dealing with other types of work also contain deeming provisions in relation to travelling which are in substantially the same terms as regulation 34: see regulation 27(1)(c) for salaried work and regulation 39 for output work. Regulation 47 for unmeasured work is slightly different, providing simply:

> **47. Travelling treated as hours of unmeasured work**
> The hours when a worker is travelling for the purposes of unmeasured work are to be treated as hours of unmeasured work.

13. A further provision of potential relevance to this appeal is regulation 10(n) of the 2015 Regulations. This was not referred to by the parties during the hearing, but I directed the parties to provide further submissions on it in writing following the hearing because of the Tribunal's references in its decision to the concept of "ordinary commuting", which is in fact a term that appears in legislation to which regulation 10(n) refers. While regulation 9 sets out the payments made by an employer which count for the purposes of deciding whether they have complied with the requirements of the Regulations, regulation 10 sets out the payments made by an employer which do not count for the purposes of determining whether the NMW has been paid or not. Regulation 10(n) excludes from the definition of the worker's remuneration for the purposes of the Regulations any payments paid by the employer to the worker as respects travelling expenses that are allowed as deductions from earnings under section 338 of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA 2003).

14. HMRC in its written submissions describes the purpose of s 338 as being to ensure that the employee is not taxed on any element of their income which relates to necessary expenses incurred in the course of duty. Section 338 thus covers travel expenses that the employee is obliged to incur and pay as holder of the employment and attributable to the employee's

necessary attendance at any place in the performance of the duties of the employment, but excluding (by s 338(2)) "the expenses of ordinary commuting or travel between any two places that is for practical purposes substantially ordinary commuting". By sub-section (3), "ordinary commuting" means travel between (a) the employee's home and a permanent workplace or (b) a place that is not a workplace and a permanent workplace. "Permanent workplace" is defined in s 339(2) as being a place which "the employee regularly attends in the performance of the duties of the employment" which "is not a temporary workplace". "Temporary workplace" is defined in s 339(3) as a place the employee attends "for the purposes of performing a task of limited duration" or "for some other temporary purpose". There is further detailed provision that is not relevant to this case.

15. As HMRC explains it in its submissions, s 338 "this reflects the fact that ordinary commuting has long been recognised as something which the employee has to fund out of [their] taxed income, whereas other travel in the course of the employee's duties (including travel to temporary workplaces as defined in s 339) is an expense of the employer's business which must be paid or reimbursed by the employer".

16. Accordingly, while payments by way of travel expenses made by an employer to an employee are normally ignored when calculating whether the NMW has been paid, in principle payments made by the employer in respect of "ordinary commuting" as defined or travel that "is for practical purposes substantially ordinary commuting" (i.e. including all travel between home and a permanent workplace) can be included when deciding whether an employer has met its NMW obligations. I add immediately that this would not mean that payments made by the appellants in respect of home to assignment travel in this case would fall to be offset against other remuneration for NMW purposes because the workers were not travelling from home to "permanent workplaces" and the Tribunal in its decision records the appellants as having accepted that the travel in question in this case was not "ordinary commuting" (albeit that discussion of "ordinary commuting" before the First-tier Tribunal appears to have been

by reference to a colloquial use of that term rather than specifically s 388). So far as HMRC were concerned, however, the appellants had (for a period at least) been paying their employees £2.50 per hour for the travelling time and this amount was offset by HMRC when calculating the alleged underpayment of NMW in this case, i.e. the travelling time in issue was not treated as being "ordinary commuting" under s 338.

17. It is convenient also to record here the legislative history of regulation 10(n). Although the deeming provisions in respect of travelling and time work were included in regulation 15 of the 1999 NMW Regulations in broadly the same form as they now appear in regulations 30 and 34, there was no equivalent provision to regulation 10(n) in the 1999 NMW Regulations as originally enacted. Under the 1999 Regulations money payments paid by an employer to a worker in respect of travelling expenses counted towards the NMW. This was perceived by the government as being exploited by some employers who arranged "salary sacrifice" schemes whereby the employee could 'opt' to sacrifice part of their contractual remuneration which would otherwise be taxable and liable to NIC and be paid instead a sum by way of travel and subsistence expenses that were tax deductible and not subject to income tax or NIC. Regulation 10(n) was introduced by way of amendment through the *National Minimum Wage (Amendment) (No. 2) Regulations 2010* in January 2011. The lawfulness of the introduction of regulation 10(n) was challenged unsuccessfully in *R (Cordant Group Plc) v Secretary of State for Business, Innovation and Skills* [2010] EWHC 3442 (Admin).

18. Finally, it is important to bear in mind that section 28 of the 1998 Act reverses the burden of proof in NMW claims so that Employment Tribunals must presume that a worker has been paid at a rate less than the NMW unless the employer can show otherwise.

Discussion of the legal authorities

19. Counsel have been unable to place before me any previous authority dealing with regulation 34 of the 2015 Regulations, or any of the equivalent travel time deeming provisions in the 2015 Regulations.

20. However, a number of cases have considered the application of the 2015 Regulations to workers who undertake sleeping or sleep-in night shifts, and the leading authority in the respect of regulations 30 and 32 of the 2015 Regulations which are relevant to those cases is the decision of the Supreme Court in *Royal Mencap Society v Tomlinson-Blake* [2021] UKSC 8, [2021] ICR 758. That case was concerned with pay for night-time sleep-in shifts for care workers. Previous cases (in particular *British Nursing Association v Inland Revenue* [2003] ICR 19, *Scottbridge Construction Ltd v Wright* [2003] IRLR 21 and *Burrow Down Support Services Ltd v Rossiter* [2008] ICR 1172) had held that where a worker was required to undertake tasks during sleep-in shifts the worker may be actually working so that the whole of the sleep-in shift counted as a "time work" for the purposes of what is now regulation 30. The Supreme Court departed from these previous authorities (indeed, Lady Arden, giving the leading judgment, expressly overruled them). The Supreme Court held, if I may summarise the decision very shortly in my own words, that what constitutes "work" for the purposes of regulation 30 has to be interpreted in the light of regulation 32. As the drafters of regulation 32(2) evidently regarded a worker who is 'asleep' as neither being "available for work" or "working" for the purposes of the Regulations, so time spent sleeping could not be "work" for the purposes of regulation 30. It is right to note, as HMRC emphasises on this appeal, that the Court's interpretation of the Regulations was informed and guided by the evidence they received as to the intended effect of the Regulations in this respect, as reflected in the recommendation of the Low Pay Commission (quoted at [12] of Lady Arden's judgment), which was accepted by the government and was as follows:

> "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)

21. In the section of her judgment headed "Analysis", Lady Arden gave the following general guidance on the approach to the interpretation of the Regulations. I add emphasis to indicate

the passages of particular relevance to this appeal:

> **Analysis**
>
> *(1) Approach to statutory interpretation*
>
> *(a) The meaning of "work"*
>
> 35. These appeals raise questions of statutory interpretation, and, in my judgment, **I should not approach them with any preconception as to what should entitle the worker to a wage**. **It is clearly not the position that, simply because at a particular time an employee is subject to the employer's instructions, he is necessarily entitled to a wage. There are many situations when a worker has to act for the benefit of his employer which do not count for time work purposes, for example when he travels between home and work.** Nor does the legislation proceed on the basis that the worker must be paid a living wage. Nor in my judgment is the NMW dependent on the extent to which the work produces value for the employer or enables the employer to say that he has fulfilled his duty to someone else: that would make the NMW depend on the terms of a contract between private parties.
>
> 36. The objectives of the NMW as a social and economic measure are no doubt complex. It clearly helps to redress the law of supply and demand where there may be market failure, and the worker is not able to obtain basic recompense for his labour, but there are no doubt other policy objectives which it serves.
>
> *(b) The statutory question concerns the calculation of hours*
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> 37. **It follows that 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?**
>
> 38. That this is the correct question is confirmed by the fact that regulation 32 appears in Part 5, Chapter 3 of the 2015 regulations and that the heading to Part 5 is "Hours Worked for the Purposes of the National Minimum Wage". Chapter 1 is headed "Determining the Hours of Work". It starts with regulation 17, which provides that the hours of work in the pay reference period are the hours worked or treated as worked by the worker as determined in that period "… (b) for time work, in accordance with Chapter 3".
>
> *(c) Rules signal that they may produce counterfactual results*
>
> 39. The **use of the word "treated" in regulation 17 of the 2015 regulations is a signal that a counterfactual situation may arise. It underscores that the rules enacted by the regulations 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**.
>
> *(d) Finding the purpose in the recommendations of the LPC*

> 40. The recommendation made by the LPC in its First Report, set out in para 12 above, was that sleep-in workers should receive an allowance and not the NMW unless they were awake for the purposes of working. The LPC drew no distinction between workers who are working and those who are available for work and, as I see it, it did not contemplate that a person in the position of a sleeper-in could be said to be actually working if he was permitted to sleep. The LPC's recommendation was accepted by the government, and so it is right to proceed on the basis that the purpose of the sleep-in provision in the 1999 regulations for sleep-in workers was to implement that recommendation. There is no evidence of any other relevant purpose.
>
> 41. In the 1999 regulations as originally enacted, implementation was achieved for the purposes of time work by making sleepers-in an exception to the usual rule that availability for work required by the employer was to be treated as work. This was arguably not correct as the provision was not an exception to availability for work because it created a situation in which the sleep-in worker was not to be treated as performing time work. This may explain the subtle changes made in 2000. In the case of time work the amended regulation 15(1) retained the general rule that availability for work was to be treated as work and inserted a new regulation 15(1A), to which regulation 15(1) was made subject. This provided that sleep-in workers were not to be treated as performing time work unless they were awake for the purposes of working.
>
> 42. However, in the successor regulations of 2015, regulation 32(2) provides in relation to time work that only hours spent awake for the purposes of working are hours when the worker is "available", and this is so even if the employer has arranged for him to sleep. This provision may apply to a wider group than the sleep-in workers in these appeals since it appears to contemplate workers who sleep at or near a place of work but who do not have suitable sleeping facilities provided for them. **Be that as it may, it seems to me that, having regard to the purpose of regulation 32(2), which like its predecessors is to implement the LPC recommendation about sleep-in shifts, the contemplation of the regulations in relation to time work is that a sleep-in worker cannot actually be working for NMW purposes if the arrangement is that he is to be present and sleep on the premises during his hours of work subject only to emergency calls. Accordingly, regulation 32(2) should be treated as applying to all such workers doing time work.**
>
> *(e) Reading phrases and rules as a whole*
>
> 43. **The fact that there are separate regulations or regulations with separate paragraphs does not mean that those regulations or paragraphs do not have to be read as a whole: they must be read together so that the rules produce a harmonious whole.** Likewise, the expression "awake for the purpose of working" is a single phrase. The word "awake" is not to be read on its own.

22. Lady Arden then went on to give further, more detailed consideration to the sleep-in provision in regulation 32. Her analysis is, it seems to me, instructive in terms of the approach to be

taken to the other regulations in Part 5 of the Regulations (again the emphasis is mine):

> *(2) The meaning of the sleep-in provision*
>
> 44. **In my judgment, applying the approach explained above, the special rule for sleep-in workers (regulation 32(2) of the 2015 regulations/regulation 15(1) or, later, regulation 15(1A) of the 1999 regulations) is quite clear. The basic proposition is that they are not doing time work for the purposes of the NMW if they are not awake. However, the regulations go further than that and state that not only are they not doing time work if they are asleep: they are also not doing time work unless they are awake for the purposes of working.** So, it is necessary to look at the arrangements between the employer and the worker to see what the worker is required to do when not asleep but within the hours of the sleep-in shift.
>
> 45. If the employer has given the worker the hours in question as time to sleep and the only requirement on the worker is to respond to emergency calls, the worker's time in those hours is not included in the NMW calculation for time work unless the worker actually answers an emergency call. In that event the time he spends answering the call is included. In this aspect of the result, I agree with the illuminating analysis of the Court of Appeal. It follows that, however many times the sleep-in worker is (contrary to expectation) woken to answer emergency calls, the whole of his shift is not included for NMW purposes. Only the period for which he is actually awake for the purposes of working is included.
>
> 46. As I have explained above, the LPC in its First Report plainly did not consider that a sleep-in worker who was sleeping could be said to be working. **In my judgment, the drafter of the 1999 regulations (at least as originally enacted) and the 2015 regulations took the same view because the sleep-in provision appears in the context of availability for work and not in the context of defining, in Mrs Tomlinson-Blake's case, when she was working.**
>
> 47. The drafter removes the possibility of a sleep-in worker claiming to be available for work simply because he can be woken up and asked to work. To be available for work a person must be both awake and awake for the purposes of working and not simply awake for his own purposes. That means that the hours that he is permitted to sleep do not form part of the calculation of his hours for NMW purposes (unless he is woken for work reasons).

23. At [66] and following she turned to deal with the application of the law to the two cases before the Court. Counsel for Mrs Tomlinson-Blake argued that the Employment Tribunal in her case had found that she was as a matter of fact 'working' during her night-shift and so was doing "time work" within the meaning of regulation 30 without need to resort to the deeming provision in regulation 32. Lady Arden dismissed that argument as follows:-

> 66. In his eloquent submissions, **Mr Sean Jones QC, for Mrs Tomlinson-Blake, urges us to follow the approach of Simler P in the EAT and adopt the sequential**

approach of first deciding whether Mrs Tomlinson-Blake was doing "work" or whether she was simply available for work. He contends that, on the facts as found by the employment tribunal, she was working and not simply available for work for the purposes of regulation 32 of the 2015 regulations. I reject that submission for the reasons given above. That process would considerably reduce the sphere of operation of the sleep-in provision contrary to the apparent intention of the LPC. Moreover, there is no provision in the regulations for the position to change according to the frequency of the calls on the sleep-in worker, as Mr Jones submits.

67. Mr Jones urges on us that we should take into account the fact that, by performing her sleep-in shift, Mrs Tomlinson-Blake enabled Mencap to perform its contractual obligations to the local authority which in turn was thereby able to discharge its statutory obligations. I would be prepared to accept that there would have been regulatory or other duties on the employer in the context of care provision to continue care provision overnight. In addition, Mr Jones' argument is supported by an example given in a document entitled National Minimum Wage - Calculating the Minimum Wage issued by the Department for Business, Innovation and Skills in February 2015 (see p 31) as follows:

> "A person works in a care home and is required to work overnight shifts where they sleep on the premises. The person's employer is required by statute to have someone on premises for health and safety purposes. The person would be disciplined if they left the premises at any stage during the night. It is likely that the person would be considered to be 'working' for the whole of the overnight shift even when they are sleeping."

68. However, this document is not an aid to interpretation of the regulations (the 2015 regulations had not then been laid before Parliament), and merely reflects the opinion of the Department at that time. No doubt that opinion was based on the cases which had then been decided. Accordingly, I do not consider that that document assists the Court on these appeals.

69. Moreover, as I have explained, there is nothing in the regulations which would indicate that statutory requirements placed on the employer were a relevant consideration in calculating the hours of work for the purposes of the NMW. I should also add that it cannot be relevant as a matter of principle that an employer has imposed obligations on a worker unless they are reflected in the practical running of the arrangements between the employer and the worker.

70. Mr Jones submits that even when asleep Mrs Tomlinson-Blake had to have a "listening ear" but like the Court of Appeal I do not consider that having a listening ear leads to the conclusion that she was working for NMW purposes. A worker must travel from home to the employer's place of business, but it does not automatically follow that the travelling time falls within the calculation of hours for the purposes of the NMW.

71. **Mr Jones also submits that the multifactorial test adumbrated by Simler P should be reinstated to determine whether a worker was working by simply being present, but there is no call to do so under my interpretation of the regulations. That test would introduce a considerable amount of uncertainty into the NMW rights of the sleep-in worker, a point emphasised by Mr David Reade QC on**

> **behalf of Mencap and by Ms Anne Redston on behalf of the intervener. That would be undesirable and not in the interests of either party to the arrangement.**
>
> 72. In Shannon, Mr Glyn emphasises the point made also by Mr Jones that the fact that the worker was enabling the employer to perform a regulatory duty should be a factor weighing in favour of the worker performing work and not just being available for work. Mr Glyn also argues strongly that Mr Shannon was working by merely being present. As already explained, I do not accept these submissions.
>
> 73. **The sleep-in worker who is merely present is treated as not working for the purpose of calculating the hours which are to be taken into account for NMW purposes and the fact that he was required to be present during specified hours was insufficient to lead to the conclusion that he was working.** I consider that the reasons for dismissing this appeal given by the tribunals and the Court of Appeal were correct.

24. Lord Carnwath, Lord Wilson and Lord Kitchin broadly agreed with Lady Arden, although Lord Carnwath (with whom Lord Wilson agreed) and Lord Kitchin gave short judgments of their own, expressing disagreement only with her view that the effect of their judgment was to overrule the *British Nursing* case rather than merely leave it as 'no longer authoritative'. However, the respondent in this appeal has laid some weight on remarks of Lord Kitchin, so I set those out here (again with my emphasis):

> 86. **In some cases it may be thought helpful to consider the application of regulations 3 [now reg 30] and 15(1) [now reg 32] of the 1999 Regulations sequentially and to ask first, whether the worker was actually doing time work at the relevant time; and, if she was not, to ask secondly, whether she was, and was required to be, available at or near her place of work, other than her home, for the purposes of doing time work. If the answer to the second limb is "yes" then, subject to the exception for sleep-in workers, the time for which she was available for work also counts as time work**.
>
> 87. **That does not mean to say that regulations 3 and 15 of the 1999 Regulations can be interpreted separately from one another, however. In particular, in the case of a sleep-in worker, as I have defined her, the application of the exception in regulation 15(1) cannot be avoided by arguing that she was performing time work when she was permitted to sleep and was sleeping. The drafter regarded a sleep-in worker as being available for work rather than actually working, but the time in the hours she was permitted to sleep is only treated as time work when she was, and was required to be, awake for the purpose of working.** Any doubt as the correctness of this approach is dispelled by para 4.34 of the First Report of the Low Pay Commission ("the LPC"), set out at para 12 above, and by paras 5.40 and 5.41 of the LPC's Second Report, set out at paras 48 and 49 above.
>
> 88. The position is made still clearer by regulation 15(1A) of the 1999 Regulations (as amended by regulation 6 of the National Minimum Wage Regulations 1999 (Amendment) Regulations 2000) which came into effect on 1 October 2000. Now, in

> relation to a sleep-in worker who is provided with suitable facilities for sleeping, time in the hours she is permitted to sleep is only treated as time work when she is, and is required to be, awake for the purpose of working. **Once again, the operation of this provision cannot be avoided by arguing that such a sleep-in worker is performing time work when she is sleeping with the permission of and by arrangement with the employer. That would be to strip regulation 3 from the context in which it appears and to disregard the evident intention of the drafter in framing regulation 15(1) and (1A) in the terms and, in particular, subject to the limitations that they did**.
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> 89. As Lady Arden has explained, the substance of regulations 3 and 15 of the 1999 Regulations, as amended in 2000, later found expression in, respectively, regulations 30 and 32 of the National Minimum Wage Regulations 2015. The explanatory memorandum to this later instrument makes clear that it does not introduce any substantive change to the relevant regulations, however.
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> …
>
> 96. In my view the ET, the EAT and the Court of Appeal in *British Nursing* fell into error. In finding that the night shift employees were working for the whole shift, the ET and the EAT lost sight of the need to interpret regulation 3 and regulation 15 together; and the Court of Appeal failed to recognise that error. As Underhill LJ observed at para 43 of his judgment and I agree, it would not be a natural use of language, in a context which distinguishes between actually working and being available for work, to describe someone as working when she is positively expected to be asleep (and, I would add, may well be asleep) throughout all or most of the relevant period. That observation, made in the context of Underhill LJ's consideration of a sleep-in worker, is in my view equally applicable to a home worker.

25. The parties have referred me to a number of other authorities, but I need only mention two:-

26. First, *Whittlestone v BJP Home Support Ltd* [2014] IRLR 176 a decision of Langstaff J in the EAT, which must necessarily be treated with some caution given that it pre-dates the *Mencap* case and deals for the most part with sleep-in shifts. (There was a second ground of appeal related to travel time, but that was travel between assignments during the course of the working day and not travel between home and assignment as we are concerned with in this appeal.) It seems to me that the following passages from the judgment, concerned with the nature of "work" for the purposes of what is now the 2015 Regulations remain relevant (again, my emphasis):

> 11. **…what is "work" for the purposes of the Act is to be determined by those Regulations made under its powers. It is not to be determined by the Working Time Regulations which derive from European obligations nor by any common law or conventional view of what constitutes work.**

> …
>
> 15. The following observations can be made. First Regulation 15(1) deems some work which is not otherwise time work to be regarded as time work. If work is being done which is time work as defined by Regulation 3 then 15(1) has no application. It only applies to oblige an employer to treat as time work that which otherwise would not be. Second, that **work is not to be equated to any particular level of activity. The saying, "they also serve who only stand and wait" is true but it does not necessarily assist in knowing whether the standing and waiting is work or whether it is not: however, it is only to be time work if deemed to be under section 15(1) or (2), and not excluded from the scope of 15(1) by Regulation 1A nor excluded from paragraph 2 by the exceptions in 2(a) and 2(b).**
>
> 16. Thus the cases, as I shall show, note that **where a person's presence at a place is part of their work the hours spent there irrespective of the level of activity are classed as time work. Difficult cases may arise where a worker is obliged to be present at a particular place. That presence may amount to their working. Conversely it may not. An example of the latter might typically be where a requirement is imposed upon an employee to live at or near a particular place but it is not necessary for that employee to spend designated hours there for the better performance of the contractual duties. This is unlikely to be time work: presence facilitates work but it is not itself work. Conversely where specific hours at a particular place are required, upon the pain of discipline if they are not spent at that place, and the worker is at the disposal of the employer during that period, it will normally constitute time work**.

27. The second case is *Frudd and anor v The Partington Group Ltd* (UKEAT/0193/20/RN), a decision of Choudhury P (as he then was) relating to a receptionist and warden at a caravan site who were required to be 'on call' for emergencies during an hour between 7am and 8am for which they received no call-out payment. The Tribunal decided they were not engaged in "time work" during that hour and the EAT upheld that decision. Choudhury P at [44]-[45] indicated that the task for the Tribunal was to consider as a matter of fact whether the workers were only holding themselves available for work during that period rather than actually working and that was a question of fact for the Tribunal to determine applying ordinary English language and a commonsense approach and taking into account all relevant factors.

The Tribunal's decision

28. Before the Employment Tribunal, it was common ground between the parties that the workers while working for the respondent actually carrying out activities with poultry were engaged

in "time work" pursuant to regulation 30 of the 2015 Regulations.

29. There was also no dispute that although the appellants' business did have a base 'premises', for the most part the respondent provided a minibus which would collect them from their home addresses and transport them directly to their first assignment. Only occasionally were the workers required to attend the appellants' business premises before then being taken to the site of their first assignment. There also does not seem to have been any dispute that sometimes those journeys could be very long, up to about four hours each way, so that the workers could be travelling for up to 8 hours on top of a 'normal' working day, or that they may sometimes have been collected from their homes in the middle of the night in order to reach the assignment sites in time for a morning's work.

30. The issues the parties agreed for the Tribunal to decide included: (1) whether the travelling hours were 'actual work' for the purposes of regulations 30 and 31; and (2) if not, were the travelling hours deemed work for the purposes of regulation 34. The Tribunal set those issues out in paragraph 9.

31. It went on to decide that the travelling hours were "time work" for the purposes of regulation 30. As such, the judge noted at paragraph 253 that she did not need to deal with the deeming provisions in regulation 32 or 34. She nonetheless went on to do so briefly, in case her conclusion on regulation 30 were found to be wrong. At paragraphs 272 to 273, the judge concluded that, if she were wrong about regulation 30, then the workers' journeys from home to first assignment would not be deemed to be time work under regulation 34 because they were not undertaken at a time when the worker "would otherwise be working".

32. A large part of the judgment is taken up with rehearsing the evidence and making findings about whether the appellants were contractually obliged to pay the workers for their travel time. This issue was a relevant and important one for the Tribunal to consider because work, of any sort, can only be time work under regulation 30 if it is work "in respect of which a worker is entitled under their contract to be paid … by reference to the time worked by the

worker". In other words, in order to 'get past first base' in relation to regulation 30 in this case, it was necessary for the Tribunal to be satisfied that the workers had a contractual entitlement to be paid by the hour (or other time period) for travelling. I have to say that the Tribunal's factual findings on this point are confused and I need to say a few words about the nature of that confusion, although the difficulties I identify are not one of the grounds of appeal in this case.

33. Paragraph 18 of the judgment marks the start of a section headed "Findings of fact", stated to be made "on a balance of probabilities". However, what follows at paragraphs 19-116 is perhaps better characterised for the most part as a recitation of the evidence. A few paragraphs along the way contain apparently clear findings of fact, including (paragraph 77) that "there was no express contractual clause providing for payment for travel and the Workers … had no expectation of receiving any payment". This conclusion is repeated in slightly different terms at paragraphs 217 and 231. In paragraph 221, the judge makes observations about the absence of other express terms of the contract dealing with various issues in relation to travel (including whether there was a contractual requirement for the workers to travel to the appellant's workplace, or a contractual limit on the amount of travel time, or a contractual requirement to use the appellant's minibus). However, none of those issues are relevant to the very specific contractual issue that arises under regulation 30 as to whether there was an entitlement to pay for travel by reference to the time spent travelling. The judge does record at paragraph 27 the express terms of the contract as they were prior to August 2016 to the effect that travel time to the first assignment and from the last assignment of the day is "not normally payable", but she fails at any point in her judgment to refer back to the amendment to that contract in August 2016, recorded at paragraph 35 of the judgment, by which the workers' contracts were apparently changed so that "travel time is now to be paid". On the face of it, if pay was thereafter to be at an hourly rate, that was a complete answer to the contractual requirements of regulation 30 from August 2016 onwards. However, the judge

seems to have lost sight of that and instead spent a great deal of the judgment trying to ascertain whether the general arrangements made by the appellants for the workers to travel were contractual or not. Those points were strictly speaking irrelevant. Ignoring for the time being the issue that arises on this appeal as to the impact of regulation 34 on regulation 30, in order for regulation 30(a) to apply, all that is required is that there is (i) "work" carried out by the worker; and (b) an entitlement under the contract to be paid for that work "by reference to the time worked by the worker". The judge's inquiry into the contractual terms between the parties beyond those issues, carried out (it seems to me) without proper regard to the contractual principles that she had set out at paragraphs 196-200, was thus largely irrelevant because it did not address the regulation 30 question and/or unnecessary because it overlooked the August 2016 contract amendment.

34. However, the judge did nonetheless at paragraph 247 reach the conclusion as a matter of fact that the workers had a contractual entitlement to be paid in respect of travel time to and from the first assignment of the day. She did not make any finding as to the second necessary contractual element of regulation 30(a), which is that the entitlement to be paid under the contract needs to be "by reference to the time worked by the worker". Despite this, both parties were before me content to accept that the appeal should proceed as if these necessary factual findings about the contract had been made. There is no appeal against this aspect of the judgment. I therefore proceed on the assumption that, during the whole of the relevant period (whatever that may be, as that is also not clear from the judgment), the workers had the contractual right to be paid on an hourly basis for travelling time to and from their assignments, regardless of whether they started from their homes or from the appellants' business premises.

35. On the issue of whether the appellants were 'working' when travelling, the key paragraphs of the judgment to which I need to refer are as follows:-

> 242. In carrying out a realistic appraisal of the circumstances and the context; the Workers in the case before us were not performing activities as Flock Technicians

while being driven to the first site and back again. The Workers in accepting the job had to be prepared to travel long distances, sometimes the journey times were very significant, it could be for example an 8 hour journey on top of a working day.

243. On an ordinary definition of 'work', denoting some activity, the Workers were not performing work while sat on the minibus. However, the context is all important in determining whether they were in reality performing work for which they should have been paid under the contract. The travelling arrangements were within the control of the Appellants', the workers were required to attend the place and time specified by the Appellant even if that required them to wait for the minibus to arrive (this could be at their home or at the end of the street). When not convenient for the Appellant regardless of the inconvenience or cost to the Worker, (as in the case of Mr Gladwin) the Workers were then required to attend the business offices to be taken by minibus. If they failed be present at the place arranged at the time specified, they would more often than not, not work that day and lose a day's pay. They may find that they would lose further shifts albeit this was not I find, a formal penalty system but one I find was in practice condoned by the Appellant.

244. The Workers worked on the sites arranged by the Appellants. The Workers had no control over where the work would be carried out. They were taken to the destinations chosen by the Appellant and were paid for the travelling hours at various rates determined by the Appellants, which were not paid dependant on the journey length (albeit bonus payments appear to have been paid for particularly long journeys e.g. Anglesey).

245. The Appellant's on the 12 February 2019 conceded that journeys of 2 to 4 hours was not commuting time. So what was it?

246. While being physically on the minibus and not performing the main duties for which they were employed to perform, they could if they wished sleep (but there was no modification to the vehicles to enable the Workers to sleep comfortably on the bus).

247. In conclusion; on the very specific facts of this case, I conclude that the travelling time to the first assignment/site of the day and back again, was 'time work for which' in respect of which they were entitled to be paid under the contract. The Appellants could require the Workers to come to the business offices to take the transport. When mutually convenient the Appellants did not impose this obligation but both parties I find, understood that this was part of the contractual arrangement in place. The Appellant's paid for the travel time to sites albeit, the contract stated this was not 'normally payable' and they presented this to the Workers as something which was discretionary. The extent to which it was 'discretionary' was not set out in the express terms of the contract or in practice. In practice travel time was paid (based on the Appellant's own case) but at various amounts and terms.

248. The length of the journeys and the type of client is particularly important in this case because it meant that the Appellants had to control the arrangements for travel and dictate the mode of transport, collection times and route. They had to exert an unusual amount of control over the method and arrangements for travel.

249. The travel around the country to various sites was I find part and parcel of this job. While not carrying out any activities in the natural sense of the word, while on the minibus or in the car, they were not able to return home, they were under the control

> of their employer who was in control of where they were going, how far they would travel, what route they would follow.
>
> 250. The reality of the arrangements I find, was that the travel (which could be extreme and extremely variable), was part and parcel of this type of job in practice and was treated as such by both parties.
>
> 251. The business model required the labour to be moved around the country at the direction and control of the employer. This was not a normal commute; it was travel they could be contractually compelled to commence from the employer's premises to the premises of their clients. I do not find that the express terms of the contract excluded this travel as working time (other than for the purposes of the WTD) but in any event, the contractual arrangements in practice were such that the travel and waiting time, was part of the Assignment Work and treated as such.
>
> 252. I therefore conclude that on the specific facts of this case, the time spent travelling under the control of the employer to site and waiting to be collected for that purpose (when they were waiting at the stipulated collection time) and the travel back was part of their 'work' , they could not have carried out the work of a Flock Technician without also carrying out this type of extremely variable and at times extremely arduous, travelling under the control of the employer; it was in practice part and parcel of the work they were employed to perform.

The parties' submissions

36. Both parties provided helpful written skeleton arguments and made detailed oral submissions. They also provided further written submissions following the hearing at my direction. I intend no disrespect to either counsel in summarising their submissions relatively briefly.

37. Mr Boyd for the appellants submits that the Tribunal fell into error by failing to approach the case in accordance with the Supreme Court's decision in *Mencap*. He submits that, in a case concerned with travel time, regulation 30 must be read together with regulation 34 and/or that the Tribunal cannot decide whether regulation 30 applies without first considering whether regulation 34 does, since regulation 34 is on its face the relevant provision concerned with travel time. He submits that if the hours in issue are hours when the worker is travelling and not working while travelling (such as a worker might be who was working on documents while sat on a train, or employed to drive a lorry or as a ticket inspector on a train), then that is not work unless it is deemed to be work by regulation 34. As the Tribunal in this case concluded that this work was not deemed to be work by virtue of regulation 34, it follows that

it was not work for the purposes of regulation 30 either. He goes so far as to submit that, on the facts of this case as found by the Tribunal, the only proper conclusion, if the Regulations are interpreted as the Supreme Court in *Mencap* suggested they should have been, was that the travelling hours were not "time work" for the purposes of the Regulations. He further submitted that the Tribunal's approach of considering whether or not the travel was a form of 'commute' or not, taking account of matters such as the employer's requirements, the length of time and the provision of transport, was not appropriate and did not reflect what it says in the Regulations. It also leads to the difficulty of, for example, having to decide at what point a journey to work is too long to be a 'commute'. In his further written submissions, he explained that the references in the decision to the appellants having accepted that the travel was not "ordinary commuting" was not a reference to the definition of that term in s 338 of ITEPA 2003, but meant only in the colloquial sense. He noted that the fact that the language of "ordinary commuting" is not used in the 2015 Regulations supports the appellants' arguments on this appeal.

38. Mr Rowell for HMRC submits that the Supreme Court's reasoning in *Mencap* in relation to regulation 32 and sleep-in cases cannot be applied to travel time cases where regulation 34 is potentially engaged. He submits that the Supreme Court's decision in *Mencap* was driven by the evidence that the regulations were intended to implement the Low Pay Commission's recommendation and that there was nothing wrong with the Tribunal approaching regulation 30 and regulation 34 sequentially in this case. He pointed out that the parties had agreed that it should approach the matter sequentially and he submitted that the appellants ought not now to be complaining that the Tribunal had done exactly that. He submitted that there have to be cases in which 'travel' is 'work' and that whether or not it is in any particular case is a question of fact for the Tribunal, applying the multifactorial approach of Simler J in the EAT in the *Mencap* case. He referred to the well-established principle that 'work' requires no particular level of activity: see Langstaff J in *Whittlestone* and Choudhury P in *Frudd*. He emphasised

that the Tribunal had found that the appellants had a contractual entitlement to be paid for travel time and that in itself distinguished this case from most cases. He submitted, despite the lack of clarity in some aspects of the Tribunal's decision (discussed above), the Tribunal's conclusion that in this case the travel time was 'work' was more than open to it for the reasons it gave on the very particular facts of this case. He submitted that s 338 of ITEPA 2003 was of no assistance when construing the 2015 Regulations because of legislative history (set out above) indicates that the 1999 Regulations as originally enacted did not refer to s 338 ITEPA 2003 and so cannot inform the interpretation of regulations 30 and 34. He submitted that in any event s 338 ITEPA 2003 and regulations 30 and 34 are dealing with different concepts. To the extent that regulations 30 and 34 lack the 'safeguard' that one finds in s 338 for employees that permits employees 'commuting' to 'temporary workplaces' to be paid expenses that do not count towards the NMW, the purpose of the NMW legislation is served by permitting travelling hours to fall within regulation 30 in appropriate cases even where they do not fall within regulation 34 so as to ensure that workers in the situation of those in the present case are paid NMW for that time.

39. Both parties urged me, if I found there was an error of law in the Tribunal's decision, to remake the decision for myself if I am satisfied that I am able to on the basis of the facts found by the Tribunal.

My conclusions

40. Both parties in this case acknowledge that the facts are unusual, and the absence of legal authority on the issue that arises in this case tends to support their view that the appellants' business practices are unusual. It is, it seems, rare for workers to be required by their employer to engage regularly in lengthy journeys from home to work at different sites, and for the employer to provide or (as the Tribunal found) effectively mandate that the workers use the transport provided by their employer for this purpose. However, the fact that the case is

unusual does not, of course, mean that any different approach should be taken to the 2015 Regulations.

41. I need first to deal with Mr Rowell's submission that the Supreme Court's reasoning in *Mencap* cannot be 'read across' to travel time cases potentially engaging regulation 34. I reject that submission. Although the Supreme Court placed considerable emphasis on the recommendation of the Low Pay Commission (LPC) regarding sleep-in workers and how the intended purpose of the legislation was informed by that recommendation, my reading of the Supreme Court judgments is that they would have arrived at the same decision as to the interpretation of the Regulations even in the absence of the LPC recommendation. That is in my judgment clear from Lady Arden's choice of words at [46] ("the drafter of the …regulations … took the same view") and from what Lord Kitchin says at [87], where he merely identifies the LPC recommendation as supporting the conclusion he has already reached as a matter of ordinary legislative interpretation. Nowhere do the judges of the Supreme Court indicate that the purposive interpretation has led them to adopt a meaning for the legislation that they would not otherwise have given it.

42. It follows, it seems to me, that, in interpreting the meaning of "work" in the 2015 Regulations, it is necessary (as the Supreme Court held in *Mencap*) to look at the whole of the 2015 Regulations in order to understand what the drafters of the legislation considered "work" meant. Just as looking at regulation 32 leads, as the Supreme Court held, to the conclusion that the drafter of the legislation did not consider that "work" included "sleep", so it seems to me that regulation 34 tells us that the drafter of the legislation did not consider that travelling was "work" (both in its ordinary sense and including the specific travelling activities listed in regulation 20). That is why there is a deeming provision, and why in regulation 34(1) travelling is contrasted with the "working" that the worker might "otherwise" be doing.

43. Further, it is apparent that the drafter also considered that travelling would not be working even where it was for the purpose of carrying out assignments at different places between

which the worker is "obliged" to travel by the employer, hence the terms in which sub-paragraph (2)(a) is drafted. This latter point reflects what Lady Arden said at [35] of her judgment in *Mencap*: *"It is clearly not the position that, simply because at a particular time an employee is subject to the employer's instructions, he is necessarily entitled to a wage. There are many situations when a worker has to act for the benefit of his employer which do not count for time work purposes, for example when he travels between home and work."*

44. That is not to say, of course, that there will not be cases where someone is working while travelling and thus may be doing "time work" while travelling. Such cases would include workers employed as drivers of buses, trains and lorries, etc, or engaged to work on public transport in other functions. Equally, someone who works while travelling, such as someone working on documents or undertaking business meetings while on the train or in a car, will also (provided the other conditions are fulfilled) be carrying out "time work" as defined in regulation 30.

45. Mr Rowell submitted that there will be cases in which the travelling <u>is</u> the worker's work and that, if they are paid by reference to the time they spend doing it, will be "time work" within the meaning of regulation 30, notwithstanding the provisions of regulation 34. I do not accept that submission. It seems to me that, interpreting the Regulations as a whole as the Supreme Court has held we are required to do, 'just' travelling is not work for the purposes of the 2015 Regulations. Unless there is 'work' being done while 'travelling', the time spent on that activity cannot be 'work' for the purposes of regulation 30. Both 'work' and 'travel' are to be given their ordinary meanings in this context, albeit informed by the other relevant provisions in the regulations, including in particular regulation 34 and regulation 20. As such, the mere fact that the travel is for the purposes of carrying out work for the employer, or is travel that the worker is obliged by the employer to undertake, does not turn the travel into work. Nor, it seems to me, can it matter that the travel is done on a form of transport mandated by the employer or at a time determined by the employer. Those are just different ways in which the

travel might be something the employee is 'obliged' by the employer to do. Nuances in the form that obligation takes cannot change what would ordinarily be understood as 'travel' into 'work'. Further, given the terms of regulation 20, the mode of travel cannot matter.

46. It is also significant that regulation 34 does not use the language of "ordinary commuting" or the other elements of s 338 of ITEPA 2003. Given the legislative history of regulation 10(n), it cannot be said that the drafter of the legislation must be taken to be aware of s 338 of ITEPA 2003, but it nonetheless seems to me to be significant that the choice of language and approach in s 338 of ITEPA 2003 is so different to that of regulation 34. As Mr Rowell put for HMRC, they are dealing with different things. This is important: regulation 34 is not attempting to distinguish between ordinary commuting (in the colloquial sense even) and other types of travel to work. It is simply setting out a deeming provision as to what travel will be "time work" and what will not. Accordingly, the different language used in regulation 34 must have a different effect. If the drafter had meant to deem travel from home to work that was not ordinary commuting (in any sense) to be "time work", they could simply have said so. They did not, they chose different language. Accordingly, the concern of the Tribunal in this case that the workers were not engaged in an 'ordinary commute' was besides the point. The drafter of the 2015 Regulations appears clearly to have intended that travel from home to work should not count as "time work", regardless of whether the travel was to a "permanent workplace" or not (to use the language of "ordinary commuting" from s 338 of ITEPA 2003).

47. I can understand why it might be thought that that drafting decision creates injustice in this case. That is in part because of the sheer length of journeys in question, but also because the drafting accords such power to the employer to decide whether workers are entitled to NMW during those journeys or not. If the employer requires the employees to be collected from, and returned to home, then they are not (on my analysis) entitled to NMW, but if the employer requires them to come to its premises first, then the subsequent travel is deemed by regulation 34 to be "time work" and the NMW is payable.

48. However, the fact that the drafting creates what might appear to be an injustice in this case is a matter for the legislature to deal with. Mr Rowell in his written submissions following the hearing urges me to remedy this injustice by dismissing the appeal in the present case and upholding the Tribunal's approach that 'mere' travel between home and work can amount to "time work" if it is sufficiently controlled by the employer. Tempting as it may be to reach such a conclusion in order to benefit the workers concerned, I do not consider that such a result would properly represent the law in the light of the Supreme Court's decision in *Mencap*. The Tribunal is bound to apply the terms of the 2015 Regulations as drafted. The meaning of the Regulations is, following *Mencap*, sufficiently clear that there is no scope for an alternative purposive interpretation here.

49. In this case, the Tribunal frankly acknowledged at paragraph 243 that the workers were not engaged in work in the ordinary sense while travelling on the minibus. In the light of the law as I find it to be, that was an end of the matter. If the Tribunal had properly approached the Regulations by reading regulations 30 and 34 together, rather than taking a sequential approach and considering regulation 30 without reference to regulation 34, it would have to have concluded that the workers were not engaged in "time work" while travelling on the minibus.

50. Indeed, the Tribunal's efforts to explain why it considered the workers were working when sat on the minibus are in substance indistinguishable from the efforts of counsel in the *Mencap* case to argue that 'sleep' was 'work'. In that case too, the workers were paid for sleeping in (albeit not at the NMW), they were under their employer's control while sleeping and their sleeping presence was required in order to fulfil obligations their employers owed to clients, but the Supreme Court rejected the submission that that made it "work" for the purposes of the 2015 Regulations. In my judgment, the same inevitably goes for the Tribunal's efforts in this case to find that the travel was work because it was onerous, unpleasant, lengthy in duration and mandated by the employer. It was, it seems to me (and seemed to the Tribunal),

unavoidably still ‘travel’ and not ‘work’ applying the ordinary meaning of those terms. The workers while on the minibus were not working in any ordinary sense. They would have been free to talk, snooze, read and, if they had the necessary electronic devices, to listen to music, watch a film or spend their time applying for more agreeable employment. They were, in short, not working, but travelling for the purposes of the time work, which began on arrival at their destination and ceased when their poultry work was done and they awaited the minibus to take them home.

Disposal

51. It follows from my judgment that this is one of those rare cases in which there was, on a proper interpretation of the law as applied to the facts found by the Tribunal, only one right answer to this case. The workers when travelling by minibus from their homes to their place of first assignment, and on the return journeys, were not engaged in “time work” within the meaning of regulation 30 of the 2015 Regulations, nor deemed to be such by regulation 34. I accordingly allow the appeal, set aside the decision of the Employment Tribunal and exercise my power under s 35(1)(a) of the Employment Tribunals Act 1996 to remake the decision by allowing the appellants’ appeal against the Notices of Underpayment pursuant to s 19C of the 1998 Act.