Invisible Labour: The Legal Construction of Unpaid Work in the UK Care Sector

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ABSTRACT

This thesis examines the legal construction of unpaid work in the United Kingdom adult social care sector. Working time remains a highly contested, poorly regulated, and deeply political topic. The study begins with a broad enquiry of social themes and the theoretical understandings of work, narrowing to the specific legal intersections that define and permit unpaid labour. It argues that neoliberal economics and austerity policies drive underpayment, while the devaluation of reproductive labour serves as justification. Drawing on these themes, this thesis traces their practical impact and application across the social care funding landscape. An analysis of funding and commissioning practices reveals a structurally embedded reliance on the underpayment of care workers. In particular, commissioning models reduce care to contact time with clients, invisibilising essential periods of workers' schedules. This thesis distinguishes between a productivity and availability interpretation of the National Minimum Wage Act 1998 and the Working Time Regulations 1998, revealing a growing divergence between working time and paid working time based on the former. This trend marks the emergence of temporal casualisation: the strategic exclusion of vulnerable time periods from regulation through employer strategy, legislative provision and judicial interpretation.

The first case study explores the non-payment of travel time, a construction rooted in contractual mechanisms. The widespread use of zero-hour contracts and electronic monitoring has fragmented and abstracted the working day, allowing for the non-payment of travel time despite clear legal entitlement. Weak enforcement by HMRC and barriers to accessing employment tribunals further entrench this model. This contractual abstraction reflects a broader shift in the measurement of working time, whereby employers will, rather than objective metrics, increasingly determine working time. The second case study focuses on sleep-in shifts, where judicial interpretation plays the central role. Analysis of two decades' worth of case law reveals gendered inconsistencies in minimum wage application: female claimants have been trapped by the contractual abstraction of their employment contracts, while male claimants have been afforded traditional protectionist interpretations of minimum wage legislation. These contradictions illustrate how funding pressure and the societal undervaluation of care work result in the gendered application of temporal casualisation.

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CASES

Autoclenz Ltd v Belcher [2011] UKSC 41
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LEGISLATION

Care Act 2014
Care and Support (Direct Payments) (Wales) Regulations 2015
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Council Tax (Demand Notices) (England) Regulations 2011
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AUTHORS DECLARATION

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

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INTRODUCTION

What do The Economist, Forbes (Blumenfeld, 2020) and the American physician Ira Byock (Byock, 2013) all have in common with one another? All three cited the famous - and yet questionably anecdotal- response from anthropologist Margaret Mead when asked by a student what she considered the first sign of civilisation. Mead allegedly pointed to a 15,000-year-old healed femur fracture. She explained the healed injury indicated that someone had taken the time to bind the wound, tend to the individual throughout their recovery, and ensure they had food and water. This, she maintained, was the first sign of civilisation. While the evidential basis for this conversion ever existing rests on shaky ground, what it does reveal, perhaps, is our own beliefs as to the foundation of civilisation: care.

Advocated as forming the basis for 'the state's human infrastructure' (Hayes, 2017, p. 332), the European Institute for Gender Equality define care as the 'work of looking after the physical, psychological, emotional and developmental needs of one or more other people' (EIGE, 2024). Social care is state-funded and covers a wide umbrella of care services ranging from social work to personal care and social support. This thesis focuses upon adult social care, which aims to assist people living with disabilities, illnesses, or other challenges to live independently while maintaining their health and safety (Kings Fund, 2014). This care can be short-term or long-term, covering tasks such as washing, toileting and cleaning, as well as broader community engagement services (Kings Fund, 2014). To understand the importance of care in society, we need only think of the consequences of a society without care. It is unlikely anyone will escape the need to care or be cared for during their life. Without social care, the basic dignities we take for granted - being able to use a toilet, eat and drink, engage with friends and family - are denied to us, our loved ones or the wider community. Social care is a testament to the belief that human beings are inherently deserving of dignity.

Despite its importance, it is unlikely that reading this will be the first time you have heard the words 'crisis' and 'care' in the same sentence. The British Medical Association describe the sector as a 'ticking time bomb', exacerbated by years of chronic underfunding and neglect of the workforce (BMA, 2022). Where 1.6 million people over 65 fail to have their needs for care and

support met for tasks as basic as getting out of bed and eating (Reeves, 2023, p7), and vacancies are predicted to reach 440,000 by 2035 (Fenton, 2023), understandably, the crisis has been characterised as a 'political hot potato' (Smith, 2019, p.46). Media focus on the crisis has largely been upon recipients' access and the financial viability of providers. Alternatively, this research focuses on care workers, more specifically, their underpayment.

The National Minimum Wage

The National Minimum Wage (NMW) is the minimum hourly rate that someone who is working in the United Kingdom can be paid.[1] Introduced in 1998 under the policy of combining fair treatment with competitive markets, it aimed to encourage competition based on quality rather than labour costs (Board of Trade, 1998, [3.1]-[3.2]). The statutory basis for the NMW is the National Minimum Wage Act 1998 (NMWA), which makes provision for entitlement, enforcement and exclusions. The Act bestows powers upon the Secretary of State to regulate payment in practice,[2] which can be found in the National Minimum Wage Regulations 2015 (NMWRs). The NMWA also established the 'Low Pay Commission',[3] a body responsible for recommending the hourly rate and monitoring its implementation (HMRC, 2025).[4] In their first report in 1998, care was identified as a low-pay sector and has maintained this status ever since (LPC, 2024, p.46).

There is not a single NMW rate. Different rates apply to apprentices, workers under 18, those aged 18 to 20, and those 21 and over. Workers aged 21 and over are described as earning the National Living Wage (NLW). Despite differing terminology, both the NMW and NLW are age-based minimum rates, regulated and enforced identically by the NMWA/R. In this thesis, NMW refers to the appropriate rate for whoever the issue of underpayment concerns, whether the NMW or the NLW. Where NLW is used, it refers to that rate specifically. Most care workers are paid the NMW/LW, or marginally above it. For example, in March 2025, 58% of care workers earned less than April's expected 37p rise in the NLW (Care England, 2025). Despite evidence

[1] National Minimum Wage Act 1998, s1(2)(a)-(b).
[2] National Minimum Wage Act 1998, section 1(3)-(4), 2, 3, 9, 51(1)(b).
[3] ibid Section 5, 6, 7 and Schedule 1.
[4] ibid., section 5(2)(a).

of widespread underpayment of minimum wages in social care, UNISON maintain that the government have been unwilling to tackle the issue (LPC, 2024, [9.2]-[9.3]). This chapter maintained earlier that care exists to maintain dignity. What is often overlooked is the equal importance of maintaining care workers' dignity at work through rights such as the NMW. If upholding recipients' dignity comes at the price of depriving carers' dignity, then the belief that all humans are inherently deserving of dignity is undermined.

I will advance that the care sector's financial viability, given current funding, relies on care workers' unpaid work. My thesis shows that central government, local government and care providers are all responsible for orchestrating the underpayment of minimum wages. In practice, underpayment is due to the non-payment of two integral periods: travel time and sleep-in shifts. Legally, however, unpaid working time is constructed through the interpretation of work under the NMWRs. Arguments advanced by local authorities (LAs) and providers, labelled 'productivity regulation', maintain that only time spent engaged in core tasks - otherwise, hands-on care - will amount to working time under the NMW. This interpretation is reflected in commissioning agreements, which only compensate for face-to-face hours, and by the judicial interpretation of 'work' for the purpose of the NMW.

Where upheld, productivity regulation risks enabling *temporal casualisation* - a term coined by McCann to articulate the strategy of employing productivity analysis to drain vulnerable periods from the 'protective ambit of labour law' (McCann, 2020, p10) which finds its expression in 'employer strategy, legislative reform, or judicial interpretation (McCann, 2020, p27). Reducing paid care to either hands-on work or time spent in clients' homes ignores the relational underpinnings of care and the realities of care workers' schedules. Despite prevalence in care, temporal casualisation has potential ramifications far out with the sector. At the core of the dispute is the question of whether 'work' for the purpose of the NMW is measured through productivity or availability. Therefore, while care sector underpayment exists within its specific funding environment and gendered context, the wider question is this: do we believe, unequivocally, that work should pay?

The UK Adult Social Care Sector

In what follows, I provide a brief overview of the history of the adult social care sector in the UK, describe the divisions between categories of care workers and outline my methodology. Then, I will summarise the arguments of each of the following chapters.

Legal Developments

Most care in the UK is provided by an estimated 5.8 million unpaid carers (Carers UK, 2025, p.2). Often, family members support one another at home through raising children, housework, or caring for elderly and disabled relatives. In tandem, a large proportion of care is provided by paid care workers. Most paid carers work in the adult social care sector, a state-regulated form of care provision funded by general and local taxation. Its origins are linked to the National Assistance Act 1948, which marked a departure from the previous 300 years of 'poor law' and laid the groundwork for a new welfare state, creating a duty on local authorities to provide accommodation for the elderly and people with disabilities.[5] However, it was not until the Local Authority Social Services Act 1970 that a duty was imposed on LAs to create departments responsible for planning and delivering social services to their constituents.

Traditionally, LAs both organised *and* directly provided care services. In turn, most care workers were employees of LAs. However, the National Health Service and Community Care Act 1990 shifted their role from providing to instead commissioning care from private providers. This has brought about dramatic change, solidifying the privatisation and marketisation of the care sector. Now, only 3% of roles in England remain within the public sector (Hayes, 2017, p.6). The process of devolution, alongside the establishment of the Scottish Parliament and the Welsh and Irish Assemblies, means social care is governed under devolved powers.[6] Devolution introduced significant variation in regulation, but primarily regarding recipients' access. While the sources in this thesis are generally English, the mechanisms for underpayment apply equally across the UK.

[5] National Assistance Act 1948, Section 1 & 21.
[6] The Scotland Act 1998, Government of Wales Act 1998, Northern Ireland Act 1998.

Care Delivery

Most care services are delivered by Private providers, including for-profit commercial care companies and trading charities (Hayes, 2017, p6). While they operate differently internally, they are not legally distinct in the commissioning process. Roles in the sector range from managerial positions, administrative staff and registered nurses; however, care workers - mainly care assistants, support workers and nursing home assistants - form the largest group (National Careers Service, n.d.). While both care assistants and support workers provide in-home assistance, their focus differs. Care assistants - often referred to as homecare workers or domiciliary care workers - provide personal care, including washing and basic medical support. Support workers, on the other hand, help clients manage daily tasks such as budgeting and cooking (Safehands Recruitment, n.d.). Alternatively, nursing home assistants work in residential facilities for adults who require help but not hospitalisation. This thesis concerns homecare workers and nursing home assistants. It is noteworthy that both groups face issues related to non-payment for sleep-in shifts, but homecare workers face the additional challenge of non-payment for travel time.

Methodology

The focus of this thesis necessitates a combination of both doctrinal and socio-legal methodologies, exploring the nexus between law and lived reality. While grounded in legal scholarship, this thesis is keenly aware of the inherent interdisciplinary nature of employment and labour law, which invites discussion of the social, political and economic context. I strongly advocate that employment and labour regulation should be written and applied in a protectionist manner and condemn the increasing acceptance of market regulation as the basis for the field (Dukes, 2014, p.109). Accordingly, the theoretical frameworks underpinning the following arguments - such as feminism[7], temporal casualisation, purposive statutory interpretation and

[7] This thesis acknowledges the significant impact that the nexus between immigration law and labour law has on the working conditions of migrant care workers. While it would have been preferable to conduct a complete intersectional analysis of underpayment- looking at gender, race and class simultaneously- due to practical constraints, I choose to focus on the first only. This research could be expanded upon through a comprehensive study of the impact of institutionalised uncertainty and precarity imposed by immigration law on unpaid working time.

reconstructive labour law - all acknowledge the inherent disparity of power between labour and capital.

Doctrinal methodology, often described as 'black-letter law', involves a systematic analysis of the law in isolation. This methodology enabled examination of key statutory instruments such as the NMWA/Rs and the Working Time Regulations 1998, selected case law and Low Pay Commission reports. Outside of the NMW, I drew from international labour conventions and various care-related statutes, alongside legal commentary in legal journals, notably the Industrial Law Journal. Through doctrinal methodology, this thesis identified exactly where statute and case law constructed unpaid working time. Equally, it revealed where payment in practice diverged from statutory intention, justifying the integration of socio-legal methodology.

Socio-legal methodology builds holistic contextual analysis around legal regulation. The legal construction of unpaid working time is inexplicably intertwined with the social context it exists within, as Cotteral effectively summarises: 'legal ideas are the means of structuring the social world' (Cotterrell, 1998, p.192). As such, I engaged with a broad range of non-legal sources. While discussing economics, I utilised scholarly writing and journal articles, alongside grey literature - think tank research, charity and chamber reports. Due to the state-funded nature of social care, I incorporated government social research and investigated recent Budgets set by the HM Treasury. While investigating the interaction between gender and work, I amplified care workers' voices using qualitative sources such as Hayes' interdisciplinary study in *Stories of Care,* 18th-century poetry written by women and interviews on Employment Tribunal Experiences. Combining these sources, I traced the underpinnings of the legal construction of unpaid work and analysed its societal impact.

The integration of both doctrinal and socio-legal methodologies allows for not only an understanding of how legal regulation directly constructs unpaid working time, but also the inability of legal regulation to ensure working time is paid in the face of social, economic and political powers.

Thesis Structure

Chapter One outlines the broad themes which permeate each chapter of this thesis: neoliberalism, austerity and gendered understandings of reproductive labour. It examines neoliberalism's ideological roots and its role in the sector's privatisation, questioning the feasibility of marketisation's goals- increased efficiency and productivity- within the care sector, where increasing productivity is, by nature, uniquely difficult. I link neoliberalism to austerity policies, focusing on how spending cuts to social welfare threaten wages. Latterly, the chapter considers how the expectation of unpaid reproductive labour, borne by women, has been extrapolated from the home into paid work. Due to female domination in the sector, carers have been portrayed as motivated by the feminised desire to nurture rather than monetary gain, leading to an association between quality and low pay. A moral contract exists within care, encouraging carers to accept non-pecuniary benefits such as familial gratitude (Nare, 2011). While neoliberalism and austerity directly drive underfunding, sexist narratives towards reproductive work help justify it.

Chapter Two demonstrates that underfunding and competitive commissioning, products of neoliberalism and austerity, directly contribute to care workers' underpayment. Funding mechanisms in both central and local government are critically analysed. While the central government provides a grant from general taxation, LAs must raise the remainder and organise care provision, primarily through contracting with independent providers. As funding falls behind rising demand, LAs have adopted two problematic strategies: (ii) using monopsony power to push hourly rates below minimum pricing; and (ii) contracting for only contact time without purchase guarantee, ignoring integral elements of care provision. The detrimental effects of cost-cutting contracting strategies on the sector's stability and, crucially, on providers' ability to pay care workers the NMW are investigated. Across all four UK nations, commissioning rates fail to meet the minimum rate required to guarantee care workers the NMW.

Chapter Three develops the theoretical basis for the legal construction of unpaid work. Payment is dependent on the worker's activity being designated as 'work' under the NMWRs, but the regulations lack a clear definition, leaving it largely open to judicial interpretation. Two

approaches have emerged: productivity analysis, narrowly focused on time spent actively engaged in core tasks, and availability analysis, encompassing all time made available to comply with managerial instruction. Where the former succeeds, it risks the emergence of temporal casualisation, defined earlier in this chapter. The success of productivity regulation- both through judicial interpretation and employer practice- has resulted in a trend whereby the definition of working time under the NMWRs is being conceptualised as distinct from that of the Working Time Regulations 1998. In turn, the existence and legitimacy of unpaid work are becoming ever more normalised.

Chapter Four investigates the non-payment of travel time, despite clear qualification as working time under section 20 of the NMWRs. Three primary drivers are detailed: commissioning practices, Zero-Hour Contracts (ZHCs) and electronic monitoring (EM). Providers mirror the lack of purchase guarantee in commissioning through a lack of guaranteed work under ZHCs, which segment the working day, contractually blurring the lines between work and non-work, and stripping non-productive periods from NMW regulation. EM is then used as a tool to enforce that distinction, putting temporal casualisation into quantitative practice. Neither system accurately captures care workers' work and relies heavily on carers' discretionary effort. Latterly, I analyse the effectiveness of enforcement mechanisms under the NMWA. Ultimately, I argue the UK system is too heavily reliant upon care workers' proactive self-reporting, all while tribunals are financially inaccessible and offending employers are exposed to reputational sanctions, rather than the fines and criminal penalties available to HMRC.

Finally, in *Chapter Five*, I explore the interpretation of sleep-in shifts under the NMWRs and the UK Supreme Court (UKSC) case of *Mencap Society v Tomlinson-Blake [2021].* Through analysing judicial treatment of sleep-in shifts, the chapter raises a critical question: why have the sleep-in shifts of security guards, including those working in care homes, consistently been classified as work under the NMWRs, while care workers have not? Mencap entrenches previous misinterpretations of working time and endorses temporal casualisation through Lady Arden's use of productivity analysis. More broadly, the chapter evaluates the decision within its economic environment, considering the impact of underfunding. Then, contrasting the outcome

with Uber v Aslam [2021],[8] I explore the exception of *Mencap* to the trend of purposive statutory interpretation, evidencing that temporal casualisation has been applied on a gendered basis.

[8] Uber v Aslam [2021] UKSC 5.

CHAPTER ONE

Constructing the Crisis: The Impact of Neoliberalism, Austerity and Sexism on Care Work

1.1 Introduction

In reaction to the rise of socialist political parties in Europe and increasing state ownership of industries, Friedrich Hayek invited 36 scholars- economists, historians and philosophers- to form the Mont Pelerin Society and discuss the fate of liberalism in 1947 (Harvey, 2005, p.20). Their founding statement proclaims; 'over large stretches of the Earth's surface the essential conditions of human dignity and freedom have already disappeared ... they have been fostered by a decline of belief in private property and the competitive market; for without the diffused power and initiative associated with these institutions it is difficult to imagine a society in which freedom may be effectively preserved' (Texas Tech, n.d.). Despite the society's insistence that it did not intend to align itself with political parties, their work has been described as 'the driving force behind the international political project known as neoliberalism' (Cornelissen, 2017, p507) and their ideas were widely disseminated to think tanks, research institutions and public intellectuals (Cornellissen, 2017, p508). There is a famous anecdote that Thatcher brought a copy of Hayek's 'Constitution of Liberty' to a Conservative Policy meeting and declared, 'This is what we believe' (Sotheby's, 2025).

This chapter begins by framing the sectors' underfunding, fragmentation and low pay, not as isolated issues, but as products of conditions created by intentional policy decisions, whose reasoning spans decades to broad political, economic and social movements. I explore three key themes: neoliberalism, austerity and gender. Beginning with neoliberalism, the fundamental tenets of the ideology are outlined. Falsely adopting principles such as dignity and freedom, neoliberalism has advanced the interests of a particular class under the guise that free markets are the *only* solution to human progress and well-being. This chapter advances that privatisation has mobilised neoliberalism within the care sector through the NHS and Community Care Act 1990, which has formed the root economic cause for the underpayment of care workers. Austerity has

acted as a continuation of neoliberal desires. In combination, austerities' social welfare cuts and neoliberalism's goals of efficiency and productivity are not only incompatible with caring labour but have turned wages into a cost-cutting target.

Latterly, this chapter examines gendered prejudices. The expectation that women provide reproductive labour to their families, rooted within biologically deterministic conceptions of femininity, has been translated into paid care work. This section explores the perception of women's intrinsic and extrinsic motivations to work in care. I argue that existing intrinsic motivations, alongside inherent tensions between reproductive labour and capitalistic methods of quantifying worth, have been exploited by the care sector to reinforce the notion that quality care is ensured by low wages. Where neoliberalism and austerity provide the economic motivation for low wages, sexism is the social tool used to enforce it.

1.2 Neoliberalism

Neoliberalism is a theory that 'proposes that human well-being can best be advanced by liberating individuals' entrepreneurial freedoms and skills', and involves strong support for private property rights, free markets and free trade (Harvey, 2005, p.2). For any theory to gain traction, it must 'appeal to our institutions and instincts, to our values and desires' (p.5). Neoliberalism's appeal can be attributed to its founding principles of human dignity and individual freedom (p.5). The theory's particular brand of equality, however, is not rooted in the distribution of power, but in consumers' ability to choose and partake in markets. This thesis maintains that neoliberalism is not just a theory but an ideology which advances a particular class interest (Brown & Baker, 2012, p.34). As Campbell effectively summarises, 'more narrowly, one can say that capitalism abandoned the Keynesian compromise[9] in the face of a falling rate of profit, under the belief that neoliberalism could improve its profit rate and accumulation performance' (Filho & Johnston, 2005, p.189). Human dignity and individual freedom may be the desires of neoliberalists, but within the UK, the move towards neoliberalism was driven by an active choice to centre profit (Davidson, 2013).

[9] Keynesianism dominated the UK economy in the 50s and 60s and advocated for a system whereby governments proactively influence the economy and increase spending to create increases in demand.

A cardinal element of neoliberalism is the belief that free markets ensure choice and freedom, whereas state economic decisions are politically biased and misinformed, unable to compare to superior market signals (Harvey, 2005, p.21). Yet markets are not conscious beings, so the idea that they are either 'free' or 'independent' is untrue. Still, the assumption that markets can be unregulated has become so deeply ingrained in contemporary European economies that it is now difficult to dispute (Massey, 2013 cited in Hall et al, 2025, p.16). Advocating for markets as 'free' estranges the economy from democratic control, and the fundamental understanding that it takes its particular form because of politicians' and corporations' choices is lost. Zizeck explains that neoliberals 'knew that it was much easier to accept inequalities if one can claim that they result from an impersonal blind force' (Zizeck, 2008, cited in Harvey, 2005, p.22). Neoliberalists believe free markets allow for increased efficiency and productivity, ensuring better living standards for all and eliminating poverty, otherwise known as 'trickle-down economics' (Harvey, 2005, pp.64-65). The ideology presents itself as deregulatory, whereby the role of law is simply to facilitate freely negotiated contracts between consumers and the market (p.64). This, however, presumes all individuals within a market have equal bargaining power in their participation, abstracting the economic reality of capitalism (p.68). Ultimately, neoliberalism supports the control of markets by the capitalist class and veils their responsibility for economic inequality under the guise of deregulated 'free' markets.

1.3 Privatisation

Free markets are characterised by: (i) decentralisation and privatisation; (ii) stable property rights; (iii) free trade; and (iv) minimal state regulation (Brennan, 2019, p.3). Accordingly, privatisation was the vehicle which turned theory into practice for neoliberal governments (Brown & Baker, 2012, p.20). It entails relinquishing state ownership and charging for services previously funded through taxation. Privatisation appeased capitalists, providing novel avenues of capital accumulation in previously state-controlled sectors (Brown & Baker, 2012, p.21), and appeased neoliberals by advancing free markets, appealing to their desire for increased productivity and efficiency. Privatisation is not simply a change of suppliers, but creates a 'culture of competitiveness, hierarchy, [and] self-interest' (Wolin, 2008, p.213). When a sector is

privatised, management's goals alter. Considerations of growth and technological advancement are trumped by capital accumulation and shareholder demands (Davidson, 2013, p.30). Privatisation allows capitalists to expand outside the borders of traditional production and accumulation. The private home, personal conduct and even private thoughts become potential sites of profit (Brown & Baker, 2012, p.16). This financialization renders everything susceptible to commodification (Davidson, 2013, p.33), described as marketisation.

If neoliberalism's claims of trickle-down potential were genuine, privatisation would have narrowed the wealth gap. Instead, the average wage of a Financial Times Stock Exchange (FTSE) top one hundred company CEO rose from 17 times the average worker's wage in 1988 to 75.5 times the average worker's wage only two decades later (Davidson, 2013, p.34). While the promise of personal wealth has been realised, a reduced tax burden for working people has not (Davidson, 2013, p.32). This increasing concentration of wealth evidences the failure of not only trickle-down economics, but also consumer choice as a measure of equality.

1.3.1 The marketisation of care

Unlike healthcare in the UK,[10] social care has never been free for all. The National Assistance Act 1948 stipulated, from the beginning, that there would be means testing for both residential and non-residential care services.[11] Until the 1980s, social care was centralised: it was organised, funded and provided by LAs, with almost all care workers employed directly (Hayes, 2017, p.6). Following his management of the NHS, Sir Roy Griffiths was commissioned to produce the report 'Community Care: Agenda for Action' in 1988 (Griffiths, 1998). Griffiths recommended LAs should maintain their budgetary and organisational roles in managing and accessing care, but instead of providing care, they should purchase care from a selection of private providers. Under a neoliberal Conservative government, the recommendations were mobilised by the NHS and Community Care Act 1990. The Act encouraged a reduction in state-funded care recipients and required that LAs create community care plans, laying out the involvement of private

[10] National Health Service Act 1946, Section 1(2).
[11] The National Assistance Act 1948, section 22(2)-(8).

providers in care delivery, ultimately shifting LAs' role from providing to commissioning (Filinson, 1998, p.241).

Another legal development motivated by neoliberalism was the introduction of LAs' duty to offer direct payments.[12] Recipients of direct payments receive their state funding directly from LAs, allowing them to employ their own personal assistant. Direct payments were introduced with the justification that consumer choice would enhance competition and improve equality (Hayes, 2017, p.169; Bennet & Stockton, 2010). However, the true motivation seems to have been cost reduction (Scott et al., 2008, p.170). Direct payments have turned care users' needs for affordable care against care workers' need for liveable wages (Hayes, 2017, p.192), destabilised commissioning and leading to the closure of collectively funded services such as day centres (Dunning, 2010). Privatisation's supposed goals of productivity and efficiency are not workable in the care sector. As policy goals, they are at odds with the nature of care because it is uniquely difficult to increase productivity in the sector. This is because care cannot be made more productive through mass production, innovation has a limited effect in hands-on care, and care recipients cannot be flexible in their needs or demands (Scott et al., pp.483-5).

1.4 Austerity

Austerity can be described as the deliberate choice to deflate wages and prices through reducing public spending, which usually coincides with increased taxation (Stucker, 2017, p.18), and is 'designed to reduce a state's debt and deficits, increase its economic competitiveness and restore what is vaguely referred to as 'business confidence' (Blyth, 2013, p.41). Linking austerity to neoliberalism is the belief held by both proponents that reducing spending will encourage private investment (Blyth, 2013, p.41).

Cruelly, austerity affects those on lower incomes, who are more reliant upon state-funded services, the most. In response to the 2008 financial crisis, the UK Government bailed out large banks and financial institutions to prevent their failure, but subsequently increased public debt.

[12] The Care Act 2014, section 31(2), Social Care (Self-Directed Support) (Scotland) Act 2013, section 19(1), Social Services and Well-Being (Wales) Act 2014, Section 50(1), The Care and Support (Direct Payments) (Wales) Regulations 2015, Section 2(b), Carers and Direct Payments Act (Northern Ireland) 2002, Section 8(1).

Slowing global markets led to increased job losses, which meant lower incomes and a fall in consumer spending and tax revenue (Stucker, 2017, p.18). In turn, David Cameron's Conservative Party cut expenditure on social services, portraying them as unaffordable and their users as greedy over consumers (Hayes, 2017, p.331). In social care, ageing itself becomes perceived as a burden because of the state funding it often demands. With the sector forming the largest portion of LAs' budgets, it became the primary target of public spending cuts; between 2010 and 2014, there was an effective 26% cut in funding for social care (ADASS, 2015 cited in Hayes, 2017, p.333). By 2025, there will be an estimated funding gap of £3.5 billion (LGA, 2024, [16]). The practical effects of these cuts to welfare have been described by some as 'social murder' and were so detrimental that they stalled improving mortality rates in the UK (Grover, 2018, p.336).

The 2008 financial crash demonstrated the failure of supposedly superior market signals and the fragility of the 'free' market. The Conservative government's response to the failure of neoliberal economics was to respond with austerity, a system described as 'neoliberal dreams come true' (Farnsworth & Irving, 2008; Berman & Hovland, 2025). With wages forming the largest expense in the sector (Hayes, 2017, p.330), whose focus is now increasing profit, all whilst working under a decreased budget, it is no surprise that underpayment of care workers has emerged.

1.5 Care Work and Sexism

Throughout this thesis, it will be argued that the expectation of unpaid care borne by women has been translated into the paid economy, acting as a catalyst for underpayment. In what follows, I will discuss the divisions between reproductive and productive labour, explore women's motivations to work in care, both intrinsic and extrinsic, and lastly, evaluate the connection between intrinsic motivation and low pay.

1.5.1 Reproductive and Productive Labour

Care work is a form of reproductive labour, defined by the European Institute for Gender Equality as 'all the tasks associated with supporting and servicing the current and future

workforce - those who undertake or will undertake productive work… it includes childbearing and nurture but is not limited to these tasks' (EIGE, n.d.). Reproductive labour has faced discriminatory low value because it has been construed as an expression of femininity, an act 'innate' to women's nature. Traditional expressions of femininity include kindness, patience, tolerance, love, selflessness, affection and nurture. A risk inherent in this interpretation is that it presents women's labour as a natural resource (Hayes, 2017, p.131). As Federici warns, women's unpaid labour becomes 'available to all, no less than the air we breathe or the water we drink' (Federici, 2004, p.97). Under capitalism, only paid work is seen as productive and valuable. The patriarchal structure of family in pre-capitalism allowed men to participate in productive forms of work, which gave rise to profit, whilst limiting their female family members to the reproductive labour necessary for sustaining their capitalist ventures (Adams, 2022, p.398). The division between reproductive and productive labour, and the worth ascribed to them, is crucial to the undervaluation of care work.

1.5.2 Motivation to Care

Most care workers in England are middle-aged women.[13] As care is a form of reproductive labour, often associated with mothering (Hayes, 2017, p.119), carers are often assumed to be driven by stereotypical feminine qualities like love and affection. Many, especially those providing hands-on care, *are* intrinsically motivated by their recipients' well-being (Folbre, 2012, p.607). Care work often involves not just a labour contract but a moral one, with carers expressing a desire to feel 'like part of the family' (Nare, 2011, p.408). When interviewed, some carers linked quality care to 'feminine knowing', suggesting that men, and even younger women, inherently lacked those requisite skills (Hayes, 2017, p.131). For carers, upholding the notion of 'love over money' is an opportunity to gain social respect: one carer in Hayes's study considered care workers motivated by money as 'others' (Hayes, 2017, p.118-120). Intrinsic motivation can improve performance in jobs such as care, where practical constraints necessitate intuition and tasks are ambiguous (Kreps, 1997 cited in Folbre, 2012, p.600). However, in care, intrinsic motivation has been leveraged to justify underpayment.

[13] 81% of the care workers in England in 2023 were woman (Foster, 2024, [1.2]).

Motivation to work in care is not exclusively intrinsic. Overemphasis on intrinsic motivation is biologically determinist: the notion that behaviour stems from innate biological traits rather than social and cultural factors (Oxford, n.d.). This thinking frames the traditional division of labour between men and women as unchangeable and inherent. Hayes instead argues femininity can be conceived as a gendered construction and through socialisation, particularly motherhood, women develop the complex emotional skills necessary for care (2017, p.121-3). This can be evidenced in care provider strategy, one CEO explained it 'makes sense to target people that have children… especially if they don't have a baseline skill because they'll have those life skills in caring for children' (Palmer & Evaline, 2012, p.262). Folbre posits a middle ground, acknowledging that biological and socialised norms may work in tandem (2012, p.605). Labour market access also matters; middle-aged women generally have existing caring responsibilities, such as children and elderly parents. Care is one of the few jobs in the formal economy which offers flexibility to accommodate this, especially for women without substantial formal education or qualifications (McCann & Murray, 2014, p.344). The structure of women's lives, frequently shaped by external influences within the political and social economy, guides them toward roles in care work. Ultimately, women's motivations to care are multifaceted. Intrinsic and extrinsic motivations co-exist, and any attempt to use the former to undermine the latter is rooted in sexist understandings of the value of reproductive work.

1.5.3 Pay

The low value attributed to reproductive labour has sparked historical contention. In the 1970s, the campaign 'Wages for Housework' was orchestrated by radical Marxist feminists such as Selma James, Mariarosa Dalla Costa and Silvia Federici (Bracke, 2013, p.262). They sought to highlight that whilst reproductive labour sustains productive labour, capitalism had turned a blind eye to its worth (Adams, 2022, pp.385-6). Caring labour, however, does not align with the 'language, customs and expectations' of competitive markets (Hayes, 2017, p.37). While the traditional wage labour economy men entered was heavily based on producing material commodities, caring labour is opposed to this type of production, instead focused upon 'the maintenance of life and social bonds' (Adams, 2022, p.397). Where the production of

commodities can be expressed in quantitative statistics such as time and productivity and articulated clearly in contractual provisions, caring labour cannot (p.397).

Where intrinsic motivation is seen to enhance performance, it can have the effect of lowering wages (Besley & Ghatak, 2005, cited in Folbre, 2012, p.608). This trend exists in care. Too much emphasis is placed upon intrinsic motivations, and extrinsic pecuniary motivations have been ignored, leading to paternalistic arguments emerging that if carers received higher pay, the job would 'lose some of the special, emotional, interpersonal aspects'(Nelson, 1999, p.43). In essence, quality care is ensured when carers are motivated by nature and emotion, and therefore, low wages ensure quality care (Palmer & Evaline, 2012, p.270). A paradox occurs where care workers are commended for their sacrificial nature but are personally blamed for accepting low wages (Harrington-Meyer, 200, p.6). In reality, intrinsic and extrinsic motivations do not undermine each other; they co-exist. Women can simultaneously feel fulfilled by caring and expect to be paid the minimum wage.

Contrary to managerial ideology in the sector (Hayes, 2017, p.133), 'warm feelings' cannot compensate for low wages (Nelson, 1999, p.109). Carers' desire to feel like part of their care receivers' family should not mean that 'gratitude and familial duty or affection' is an acceptable alternative to minimum wages (Nare, 2011, p.406). Predictably, these ideas of submissive acceptance of pay violations are not applied equally to men within the sector, who have been described as riding the 'glass elevator' into senior positions (Kingsmill, 2014, p.31). Coercing workers into accepting non-pecuniary compensation, and care workers' acceptance of this social standard, leads to the appearance that improvements in pay are not an urgent problem (Hayes, 2017, p.127). This allows courts and tribunals to view 'unpaid labour as a component which is inherent to care work' (Hayes, 2017, p.147). Despite care work now existing within the paid economy, it is still plagued by sexist low value attributed to reproductive labour.

1.6 Conclusion

This chapter has covered the interaction of neoliberalism and gender with the care sector, which is thematically relevant to each chapter of this thesis. While a brief overview of the topics has

been provided, the subsequent chapters will detail the exact points of intersection with underpayment. In summary, neoliberalism is an ideology promoting the interests and unfettered power of the upper capitalist class. It does so by falsely advocating that free markets- and subsequently privatisation- allow for increased living standards to trickle down to the working class. Privatisation as a vehicle for neoliberalism in care can be seen in the recommendations of the Griffiths report and their implementation in the Care Act 1990. Concerningly, the goals of privatisation- efficiency and productivity- as vehicles for profit and cost reduction, are largely redundant in the care sector. In tandem with austerities cuts to social care funding, I argue that wages become a cost-cutting target.

Sexism in the sector was investigated. Care is a starkly female-dominated profession and a translation of reproductive work into the paid economy. Despite its formalisation, women are often believed as working in care out of feminine desire rather than economic viability. As such, management has encouraged the acceptability that workers be partially paid in familial-esque gratitude from recipients, allowing the belief that unpaid work is a necessary condition in care. The next chapter will examine privatisation in action through the evaluation of the funding mechanisms in care.

CHAPTER TWO

Cash-Crisis-Repeat: The Impact of Underfunding and Commissioning Practices on the Underpayment of Care Workers

2.1 Introduction

While care workers' wages are paid by private providers, when care is delivered to state-funded recipients, the funding available to private providers to pay those wages originates from the state. Described as 'piecemeal' (Stevenson, 2024), adult social care funding comes from a variety of sources, including central grants, local taxation and nation-specific revenue mechanisms. It begins in central government, but because social care is devolved, there is no national budget, and central funding comprises only a portion. Central budgets are then passed into LAs, who are under a legal duty to raise the remainder of revenue, assess constituents' eligibility and either provide care directly or outsource to private providers by commissioning for care. In 2024, Meg Hillier, the former Labour chair of the Department of Health and Social Care, explained that 'years of fragmented funding and the absence of a clear roadmap has brought the adult social care sector to its knees' (UK Parliament, 2024). This chapter asserts that, beyond funding fragmentation, there exists a systematic avoidance of responsibility for underfunding across all levels. I will evaluate the impact of funding on the underpayment of care workers through an examination of three key stages: (i) central government; (ii) local authorities; and (iii) commissioning.

This chapter identifies a consistent theme of inadequacy. Firstly, it evaluates the central government's approach to funding, critiquing its dependence upon last-minute cash injections. It then explores the stress that already inadequate funding puts on LAs. While each nation has unique local revenue mechanisms, in common is the monopsony position LAs possess in each of their care markets, stemming from their dominant purchasing power. The budgets of private providers available to pay carers' wages are dictated and regulated by the commissioning rates set by LAs. Through an exploration of the contractual techniques employed in commissioning, chiefly the move from block contracting to framework agreements, this chapter illustrates how

underfunding is directly linked to underpayment. Though LAs are not legally liable for underpayment, their practices shape the conditions in which it occurs. Aligning with the arguments of *Chapter One,* this chapter solidifies the incompatibility of privatisation with care, evidencing that efficiency and productivity have become synonymous with unpaid work.

2.2 Central Government

Since 2015, the trend in central government funding for adult social care has been metaphorically termed 'crisis-cash-repeat' (Hoddinott, 2023, p.40). In England, central funding comes in the form of a grant from the Department of Levelling Up, Housing and Communities (DLUHC) - covering both adult and child social care (DLUHC, 2024).[14] Alternatively, devolved nations receive central funding via a grant determined by the HM Treasury per the Barnett Formula (Tudor, 2023). The formula aims to give each devolved nation the same 'pounds-per-person change in funding as the equivalent UK government spending' and is calculated based on compatibility percentage and population proportion (Tudor, 2023).[15] The grant apportioned under the Barnett Formula covers central funding for all devolved issues. Therefore, it is up to devolved legislatures how much they choose to spend on delivering adult social care.

Despite overall increases in gross expenditure,[16] funding has failed to keep pace with costs, and unrealistic financial models have led to over-reliance on 'last-minute national grants'(Stevenson, 2024). For instance, the government's 2024 spring budget ring-fenced[17] an additional £600m for social care in 2025-26, as the original funding designated was expected to fall short (HM Treasury, 2024, 2.72). However, even this additional injection is a temporary remedy in light of the true funding deficit (LGA, 2018, [16]). Despite an explicit commitment to ensuring the sustainability of welfare spending (HM Treasury, 2024, [1.59]), the treatment of social care under the 2024 Autumn Budget has been described as 'not so much left out in the cold as pushed right to the edge of a cliff' (Curry, 2024). In fact, social care did not even appear on the list of reform priorities for the 2025 spring spending review (Allen & Sameen, 2024). Consistent

[14] Local Government Act 2003, section 31(4).
[15] For the years 2025-26, Scotland will receive £47.7bn, Wales will receive £21bn and Northern Ireland will receive £18.2bn (Livermore, 2025).
[16] In England, gross expenditure rose by 14.2% in 2023-24 (NHS England, 2024).
[17] Where funding is ring-fenced, it may only be spent on the designated purpose.

requirements for last-minute cash injections into the budget evidence its inadequacy and instability. Rescue attempts are temporary solutions, not meaningful, sustainable ones. So long as the government refuse to prioritise reform of their financial modelling or willingness to spend, the trend of 'cash-crisis-repeat' will remain.

2.3 Local Government

Central government grants are then passed onto LAs, who are responsible for raising the remaining budget through local taxation and unique revenue mechanisms.[18] In tandem, they are legally required to assess recipients' eligibility and utilise their budget to provide care or, most commonly, outsource to private providers.[19] This process, known as commissioning or tendering, involves arranging, purchasing and monitoring private care services.

The true deficit in funding for adult social care is revealed through hourly commission rates, described as the 'elephant in the room' when it comes to the underpayment of carers (LPC, 2025, [8.40]). Commissioning was first introduced by the aforementioned Community Care Act 1990 to establish an 'internal market' (Wenzel, 2023). Due to the privatisation and subsequent marketisation of care, commissioning has been characterised by the dominance of state-funded recipients and the monopsony purchasing power this has afforded LAs (Pennycook, 2013). In an economic environment where the costs outpace designated funding, LAs have used their monopsony power to lower commissioning rates to unsustainable levels. The remainder of this chapter examines the factors behind rising commissioning costs, the shift from block contracting to spot contracts and framework agreements, and the consequences of these unsustainable commissioning rates.

[18] While LAs are responsible for commissioning for care, devolution has led to structural variation between nations. In England it is the responsibility of LAs and Integrated Care Boards, in Wales it is LAs and Local Health Boards, in Scotland it is Health and Social Care Partnerships and in Northern Ireland it is Health and Social Care trusts: (Homecare Association, 2024).

[19] England: The Care Act (2014), Section 1(1), Wales: Social Services and Well-being (Wales) Act 2014, Scotland: Social Work (Scotland) Act 1968, section 12(1).

2.3.1 Commissioning Costs

The cost of delivering care has undeniably risen. Wages are the largest expense in the sector (Hayes, 2017, p.330) and in the last decade alone, the NLW has risen by 82%.[20] The rise in April 2025, in combination with increased Employer National Insurance Contributions, is estimated to have cost the sector an additional £2bn (Curry, 2024). Minimum wage increases increase staffing costs for providers, but reportedly also consume large portions of last-minute central grants (Curry, 2024). In tandem, the demand for care has increased. This has been driven firstly by a growth in the number of adults aged over 85 in the UK (Foster, 2025, p.14).[21] However, this growth has been compounded by an increase in the number of working-age adults in need of care. Working-age adults as a group generally require more specialised and expensive care packages. Therefore, when asked, directors cited costs due to increasingly complex care demands as the sector's biggest concern (Foster, 2025, p.14-15). Overall, the combination of higher staff costs, increased demand and more complex care plans is the primary factor which has contributed to the rising cost of care.

2.3.2 Contracting

While costs have increased, funding has not kept pace. The Conservative Party's funding of social care between 2010 and 2022 was characterised heavily by austerity. While spending statistics show that LAs spend more on commissioning year-by-year (Foster, 2025, p.12),[22] there has been a 19% fall in spending in real terms, meaning that spending has not adjusted for inflation or demographic changes (Foster, 2025, p.12). Thus, LAs' budgets are tightened while demand only increases. In what follows, I will examine the cost-cutting strategies implemented by LAs to accommodate this crisis. Namely, the move towards framework agreements and spot contracts (Bessa, 2013, p.40-44). There are three primary issues with these agreements: (i) unilateral price setting; (ii) lack of stability for providers; and (iii) failure to capture working time accurately.

[20] In 2015, the NLW was £6.70 an hour. In 2025, it was £12.21 an hour.
[21] Between 2011 and 2021, the number of adults in the UK aged over 85 grew by 16% (Foster, 2025, p.14)
[22] Spending on adult social care between 2010 and 2022 increased by 16% overall (Foster, 2025, p.12)

Traditionally, LAs engaged in a form of tendering called block contracting; contracts which guaranteed providers a specific number of hours of care or a percentage of the demand, sometimes amounting to almost exclusive provision rights (Bessa, 2013, p.30). In return, providers tended to offer discounted prices (p.40). Spot contracts - where LAs purchase care for a specific individual - were employed but usually reserved for specialist care or backup as required (p.39). In line with increasing costs, LAs have shifted to commissioning for almost exclusively spot or framework agreements. John Cunningham explains: 'a framework agreement is a list of suppliers who have already demonstrated an acceptable level of capability, experience, competence and value… via a competitive tendering process managed by an organisation known as a framework agreement host' (Cunningham, 2024). Importantly, framework agreements and spot contracts contract for smaller care packages, leading to an increased number of providers (Pennycook, 2013, p.22). This increase is preferable for LAs because it intensifies competition, enhancing their ability to lower prices (p.22). In addition, both Rubery and the UKHCA agree that direct payments have been a factor: LAs expressed worry about being tied to block contracts in fear that a rise in direct payments would jeopardise their ability to provide a guaranteed volume of work (Rubery, 2011).

LA's ability to unilaterally lower prices is due to its monopsony position. Monopsonies occur when there is only one buyer for a service or product, but there are several sellers. State-funded recipients make up most care home inhabitants (ONS, 2023), and nearly one million homecare recipients (Policy Bee, 2025). Thus, in commissioning, LAs are monopsony buyers, private care providers are sellers, and the service is carers' labour. Economists have argued that monopsonies lead to a reduction in wages (Azar & Marinescu, 2024; Brooks, 2021). Where there are multiple buyers of a service, competition between buyers incentivises them to pay higher wages to attract more workers (Manning & Petrongolo, 2024, p.951). However, where there is only one buyer or a dominant buyer, there is no competitive incentive to increase wages. As such, the dependency of providers on LA contracts leaves them with little defence against unilateral price reduction. They either must comply with the price offered, regardless of sustainability, or risk not being approved for framework agreements (Pennycook, 2013, p.44).

A primary issue with framework agreements and spot contracts is the lack of stability they offer providers. Guaranteed hours or percentages under block contracts facilitating long-term planning, investment (UKHCA, 2012), and permanent staff (Bessa, 2013, p.49). Most framework agreements and spot contracts, however, do not guarantee hours or a percentage of demand; instead, they are agreements establishing hourly rates providers will be paid *if* LAs provide them with recipients (UKHCA, 2012, p.22). Without guarantees of work, providers cannot offer their care workers the consistent hours and economic stability found in employment contracts. Furthermore, despite the additional overheads that flow from individualised small-volume purchases, LAs have become accustomed to the discounted prices offered under block contracts. The UKHCA explained that they have now formed the 'starting price' for all forms of contractual negotiations (2012, p.45). Additionally, by 2012, only 7% of providers had any automatic arrangement to increase prices in line with the inflationary index (p.8). For example, the IJB highlight that the rising cost of energy has increased delivery costs, but this has not been accounted for in commissioning, and providers are forced to bear the loss (Accounts Commission, 2024, p.44). Where a lack of purchase guarantee means providers are unable to budget sustainably for labour, in combination with the risks of inflation remaining unaccommodated, framework agreements jeopardise the financial viability of private providers.

Most concerningly, framework agreements are time and task-focused, rather than outcome-orientated (Accounts Commission, 2024, p.43). In practice, to reduce costs, these agreements pay only for 'contact time'. This means LAs no longer compensate for discrepancies between actual and scheduled visits, or for travel time (Moore et al., 2018, p.108). This is particularly alarming considering that managers have reported that 'what's commissioned compared with what's planned, compared with what's actually delivered, is totally different… somewhere between 10 and 20 per cent different' (p.108). When most care workers are earning only the NLW or slightly above, a difference of 10% between commissioning and delivery risks wages falling below minimum rates. Touching on the assertions of *Chapter One,* the failure of 'contact time' as a measurement is reflective of the inherent difficulty in quantifying caring labour. Recipients' needs are unpredictable and inflexible. In turn, so is the time required to satisfy them. The result of commissioning and delivery discrepancies is that LAs receive more hours than they pay for, at the expense of care workers' rights to the NLW.

2.4 The Impact of Underfunding

So far, the impacts of underfunding at the central government level have been traced to LAs' commissioning practices, revealing that hourly rates accommodate for increased demand by paying for only 'contact time'. This section will evaluate the impact of this practice on three groups: care workers, providers and recipients.

2.4.1. Homecare

Evidence that current commissioning leads to underpayment in home care is most stark when examining compliance with minimum pricing. The Homecare Association (HA) publishes an annual estimate of the minimum price that LAs must contract to ensure adherence to minimum wage laws. Additionally, they provide estimated hourly rates which also encompass the operational costs involved in delivering care. This accommodates costs such as recruitment, training, insurance and utilities, all necessary for compliance with care regulations (Houghton, 2024). From April 2024 to March 2025, no nation in the UK commissioned at a rate compliant with the HA minimum estimated to cover minimum wages and operational costs.[23] Hourly rates were not only non-compliant but drastically lower than minimum rates. For instance, in Wales, the rates were £8 below minimum pricing, while in Northern Ireland, they were £9 lower.[24] Across the UK, the HA estimated that over a quarter of LAs did not even commission at rates compliant with minimum wage laws, disregarding essential operational costs entirely (Cooney & Houghton, 2025). This is the direct practical translation of commissioning based on an inaccurate system of working time measurement. Contact time does not, and *cannot,* account for the time carers spend working. This underfunding leads directly to the underpayment of minimum wages for care workers.

[23] In England, the estimated price for homecare in 2024-25 was £28.53 (Homecare Association, 2023). Whereas the average rate being paid was £22.03 (Kings Fund, 2025). In Wales, the estimate was £28.53 for 2024-2025 (Houghton, 2024). However, the standard commissioned rate was reported as only £22.12 (Morgan, 2023). In Northern Ireland, they estimated a minimum rate of £29.37 (Homecare Association, 2024). However, when the Department of Health announced an additional 70 million in funding in 2024, it was to raise the commissioning rate to only £20.01 per hour (DoH, 2024).

[24] ibid.

2.4.2. Care Homes

In light of constant concerns over the financial viability of care homes, the Parliamentary Accounts Committee sought assurance from providers that the 2022 cash injection was 'not simply going into provider profits' (Booth & Dugan, 2024). A forensic study of the pre-tax profits of over 800 care homes revealed profits are often hidden through complex corporate structures, using routes such as property costs, debt repayment, directors' remuneration and management fees (Kotecha, 2019, [14] & [112]). For example, by paying exorbitant levels of rent or debt to related offshore companies, care homes exclude these payments from their income tax calculation ([36]-[42]). When pre-tax leakage is accounted for, the largest providers were making profits of 13.35%, whereas the small to medium-sized providers were pocketing 7% (Kotecha, 2019, [130]-[131]). This is in spite of the Competition and Markets Authority reporting that the average hourly rates paid by LAs do not match the full operational costs involved in providing care (CMA, 2017, p.13). Since the introduction of austerity,[25] providers have increasingly subsidised insufficient commissioning by charging self-funders increased rates, who pay on average 41% more (CMA, 2017, [2.37]-[2.40]). Resultantly, a positive correlation exists between the percentage of self-funders and profit (CMA, 2017, p.17). In summary, the residential care industry has avoided the financial consequences of unsustainable commissioning by raising the only prices they have control over.

2.4.3 The Fragmentation of Responsibility

Shifting responsibility for operational costs downwards onto self-funders illustrates a consistent theme: the fragmentation of responsibility. The fragmentation of social care funding is beneficial for central government. LAs have a legal duty to provide care, but the eligibility criteria for recipients and substantial portions of their budget are determined separately by central government, leaving them responsible for a crisis which begins outside their control. LAs then mirror this avoidance. While they are responsible for commissioning, they accommodate insufficient budgets by abstracting the reality of care workers' working time. This allows them to avoid commissioning for time which falls outside of 'contract time', such as travel and

[25] In 2005, only 20% of care homes charged self-funders higher rates, by 2019, this grew to 90% (The Carer, 2019)

discrepancies in scheduling, all whilst providers are still under a legal duty to pay minimum wages for those periods. This avoidance is mirrored for a third time. Private providers, faced with the responsibility of paying wages and operational costs for state-funded recipients, on insufficient budgets, force that burden downwards onto carers and self-funders. Carers are expected to provide unpaid labour while self-funders are expected to pay exorbitant rates. This fragmentation obscures the reality that the cost reduction, or 'efficiency', achieved through commissioning is a front for forcing vulnerable workers and members of society to absorb costs once borne by the government. The Chief Executive of the HA captured this succinctly: 'when public bodies buy care at prices that don't even allow payment of the minimum wage, it's not efficiency, it's enabling modern slavery'(Homecare Association, 2025). Privatisation has not reduced the cost of care; rather, it merely shifted the burden of paying for it.

In *Chapter One,* I raised the issue that privatised goals of efficiency are at odds with the nature of care, warning that with wages forming the sector's largest expense, they would become a target. The data on hourly rates above clearly shows commissioning practices form the link between privatisation and underpayment. Ultimately, underfunding has led to a situation whereby efficiency and unpaid labour have become synonymous.

2.5 Conclusion

In short, this chapter argues that the underfunding of care, motivated by austerity and privatisation, has directly led to the underpayment of care workers through unsustainably low hourly commissioning rates. Central government funding has not kept pace with demand, often relying on last-minute grants that fail to provide a sustainable solution. The current government's lack of policy prioritisation has left the social care funding crisis overlooked and unaddressed. Despite rising costs in provision, fuelled by changing demographics and inflation, commissioning rates set by LAs have not adjusted accordingly. Most importantly, LAs have exploited their monopsony power to reduce prices unilaterally. By opting for framework agreements over block contracts, LAs have reduced costs by disregarding essential non-contact periods that are vital to care workers' schedules and unavoidable due to the nature of planning care.

Consequently, hourly rates offered to residential and homecare providers have fallen drastically short of covering minimum wages and operational costs. Throughout this chapter, there is a noticeable fragmentation created by the reluctance among parties to take responsibility for the underfunding crisis. While neoliberalists proudly boast of the potential for the benefits of privatisation to 'trickle down', the only thing trickling down in social care is the responsibility of paying for it. The first two chapters of this thesis laid the groundwork for understanding the broader themes of underpayment, tracing the origins of underfunding from central government down to hourly commissioning. The subsequent chapters will delve into the consequences of commissioning, specifically, on the legal construction of unpaid work.

CHAPTER THREE

What Does it Mean to Work? Working Time, the National Minimum Wage and Temporal Casualisation.

3.1 Introduction

Traditionally, in agricultural societies, working time was orientated around specific tasks and constricted by natural phenomena such as seasonal changes (Thompson, 1967 cited in Haworth & Veal, 2005, p.23). However, during the rise of the Industrial Revolution, clock time began to dominate, with Mumford claiming that 'the clock, not the steam engine, is the key machine of the modern industrial age'(Mumford, 1934, p.13-14 cited in Haworth & Veal, 2005, p.23). Limiting working hours was one of the earliest demands and struggles of the organised labour movement, with protective legislation dating back to the 1833 Factory Act. Presently, working time is regulated by the Working Time Regulations 1998 (WTR). Alternatively, minimum wages are regulated by the National Minimum Wage Act 1998 and the National Minimum Wage Regulations 2015. Although the application of working time and minimum wage laws are both dependent on our understanding of working time, they have been regulated separately and are often considered conceptually distinct.

This chapter explores the intersection between working time and minimum wage legislation, arguing that incongruences in the definition of working time have enabled the legal construction of unpaid work. With no clear definition of working time, the NMWRs have sown legal ground for varying interpretations of 'work', resulting in two strains of argument: productivity analysis and availability analysis. While productivity analysis encompasses only periods spent actively engaged in core tasks, availability analysis is more holistic, accounting for the entire period during which a worker complies with managerial instructions. Born of the risks of productivity analysis, temporal casualisation - the intentional draining of vulnerable periods of time from legal protection - has emerged. Temporal casualisation, both motivated by underfunding and facilitating it, has been leveraged by employers to reduce the periods of workers' schedules

which qualify for the NMW. The theoretical framework outlined in this chapter lays the groundwork for the remainder of this thesis.

3.2 Work and Leisure

Although not an absolute division, time ownership is often divided into two opposing categories: work and leisure (Whipp et al., 2002, p.117). An essential element of 'leisure', or 'own' time, is the degree of autonomy workers have over how they spend it. Importantly, leisure does not fall under the legal definition of working time and therefore is not regulated by either working time or minimum wage legislation. Work, on the other hand, is at the direction of management, unless categorised as self-employment, and is the focus of labour/employment regulation. The division's existence represents the struggle within our capitalist society for control over time. As mentioned, limiting working hours was one of the very first demands of the organised labour movement. Under a capitalist system, time becomes a commodity; an 'exploitable resource', one that can be 'measured, bought, sold and spent 'thriftily' (Ingold, 1995 cited in Whipp et al., 2002, p.118). Once time can be leveraged for the means of capital accumulation, the desire to control it becomes clear. As such, capitalists will attempt to increase working time, while workers will endeavour to reduce it (Spencer, 2024, p.26).

Working time regulation exists for a purpose and is indisputably linked to well-being, with scholars warning of a plethora of consequences flowing from insufficient leisure time, such as 'stress, hypertension, gastric illness, heart disease, cancer, depression, marital violence and under-socialised and antisocial children' (Schor, 1991 cited in Haworth & Veal, 2005, p.54). The impacts cannot on well-being cannot be underestimated. A World Health Organisation and International Labour Organisation (ILO) global study revealed that 745,000 people died of heart disease and stroke due to long working hours in 2016 (Pega et al., 2021, p.7). Working time restrictions are particularly important for women, who are often described as working a 'second shift' (Hochschild, 1989). The expectation that women carry out most of the reproductive work within the home means that after completing their first shift in the paid economy, women often come home to their second shift in the home. In their book *Precarious Work, Women and the New Economy,* Fudge and Owens cite an 18th-century poem, written by a washerwoman, whose words capture this experience:

‘For when we are home,
Alas! We find our work but just begun;
So many Things for our Attendance call,
Had we ten Hands, we could employ them all…
Our Toil and Labour’s daily so extreme,
That we have hardly ever *Time to dream.’*
(Collier, 1739 cited in Fudge & Owens, 2006, p.101)

At first glance, the regulation of working time may appear as merely a matter of determining how many hours workers have and can spend working. However, the implications reach far deeper. The way we choose to regulate working time has the potential to dictate societal opportunity and well-being.

3.3 Working Time and the National Minimum Wage

The wage-work bargain ‘lies at the heart of the contract of employment’ (Davies, 2017, p.477). As such, the legal definition of work is often the keystone to accessing the most basic employment rights, such as the NMW.[26] While the NMWA 1998 and NMWR 2015 establish and regulate minimum hourly pay rates, and the WTR 1998 regulates working hour limits, the two intersect in that their application hinges on the definition of working time. Increasingly, however, a trend has emerged whereby the definition of working time is conceptualised as ‘inevitably distinct’ in either set of regulations (McCann, 2020, p.5). In practice, this means that periods of work which qualify as working time for the WTR 1998 do not similarly qualify as work for the NMW.

The WTR, derived from EU Law, define working time as periods whereby: (i) a worker works under their employers’ disposal and is carrying out their activities or duties; (ii) time spent training; and (iii) any additional time treated as work under a relevant collective or legally enforceable agreements.[27] Because the purpose of the WTR is primarily the effects of working

[26] NMWA 1998 section 1(1).
[27] Working Time Regulations 1998, section 2(1).

time on health and safety, namely, the division between work and leisure, there is nothing in the act which addresses whether hours worked should be paid. Alternatively, the NMWA/Rs, derived from domestic law, are concerned with pay. Only the hours of work which amount to working time for the purpose of these regulations will be paid. All working time for the purpose of the NMWRs is working time for the WTR, but the converse is not always true.

To accommodate diversity in payment structure, under the NMWRs, the question of working time depends on how a worker is paid. There are four categories: (i) salaried workers are paid on an annual basis[28]; (ii) time work is paid based on the number of hours worked;[29] (ii) output work is measured by reference to output;[30] and (iv) unmeasured work is measured by the actual hours worked or by daily average agreements.[31] Whichever category a worker falls into can considerably impact their working time calculation and wage. For example, availability for work falls under working time definitions for the purpose of salaried work and time work, but not for output or unmeasured work. Despite categorisation, there exists no specific definition of work under the NMWRs, and therefore, it is largely left to judicial interpretation. This malleability in the definition of work provides attractive ground for employers to formulate arguments which inhibit workers' access to minimum wages, all while maintaining the length of their working time.

3.4 Competing Interpretations: Productivity v Availability

Two approaches to defining work have emerged: (i) productivity; and (ii) availability. The importance of the prevalence of either interpretation over the other in statutory language and judicial interpretation cannot be stressed enough, with Nine St John Chambers stating, 'it is certainly no hyperbole to state that the future tone of labour law discourse in this field… rests almost exclusively on the question of which of these two conflicting models of regulatory labour prevail' (2022, p.10).

[28] NMWR 2015, section 21.
[29] ibid regulation 30.
[30] ibid regulation 36.
[31] ibid regulation 44.

A productivity interpretation of work only includes the time spent actively engaged in core tasks, a particularly literal interpretation (Davies, 2017, p.478). This involves a bifurcation of working hours, excluding periods which are considered non-productive from conceptions of working time and therefore regulation itself (McCann, 2020, p.6). In care, this often translates to only hands-on care being considered sufficiently productive to amount to 'work', while essential periods such as travel are disregarded, as is seen in most framework agreements. Although perhaps more 'superficially appealing', the interpretation allows for employers to benefit from their employees' availability but dispense with their reciprocal obligations of pay (Davies, 2017, p.478). The interpretation implies that the regulation of work, pay specifically, exists to compensate for the 'arduousness of labour', leaving no room to conceptualise compensation for the time workers spend away from their families and personal lives (McCann, 2017, p.7). Worryingly, this inaccurate measurement of working time has the ability to warrant long hours and stimulate casualisation (p.7).

Productivity regulation is particularly poor at capturing caring labour. Reproductive labour is task-orientated rather than time-orientated. While traditional productive labour can submit to the measurement of clock time, Fudge and Owens highlight that reproductive labour is otherwise rooted in 'human tides' (2006, p.108). Manufacturers of goods may calculate the precise time it takes to complete a task, but care workers work with people who have willpower and autonomy. Providers may try to quantify the time it takes to feed or toilet a recipient, but ultimately, a care worker's role is defined by the completion of the task, not its duration. For example, a carer may need to spend ten minutes calming a distressed or confused patient before handling them physically. In this scenario, 'the provision of care, completing the task and putting in the time do not quite coalesce' (Fudge & Owens, 2006, p.108). These periods are often considered unproductive: they exist outside of commissioned slots and lack the physical arduousness of toileting or cleaning. They cannot be predicted, planned or allotted, but they are all the same part of a care worker's job. Consequently, care cannot be measured by 'core tasks', because it cannot be reduced to them.

Alternatively, Davies maintains that what employers pay for is not an activity but a period of availability whereby the worker will comply with their instructions (2017, p.484). This aligns

with Marx's perspective: 'what the working man sells is not directly his labour, but his labouring power, the temporary disposal of which he makes over to the capitalist' (Marx & Engels, 1969, p.55 cited in Brown & Baker, 2012, p.483). More nuanced, this interpretation recognises the relationship between the time workers spend at their employers' disposal and the control employers assert to extract productivity during that period, aligning more cohesively with the 'internal logic' of the employment contract (Davies, 2017, p.478). The approach is more humane: by recognising the time workers spend away from their personal lives, the approach appreciates that work is provided by a human being with a life outside their work, who is not simply a vehicle for profit. If employers fail to exercise their prerogative to provide them with 'productive' activity, this is no fault of the workers. There is considerable benefit for employers to have workers on 'standby'; therefore, regulation should not allow them to leverage this without payment (Davies, 2017, p.488). Demanding that workers evidence they have performed 'work', rather than evidence they were 'ready and willing', is an unjust evidentiary burden (p.506). For 'leisure' to be genuine, it must be free of the burden of making oneself available for work.

The availability approach aligns with McCann's 'framed flexibility model' (2020, p.4). The model was an academic contribution to the International Labour Organisation's (ILO) preliminary standard-setting exercise, before the adoption of the Domestic Workers Convention 2011 (No.189). It advocates for coherent and unitary working time regulation in sectors affected by casualisation (McCann, 2020, p.6). The unity principle within the model asserts that regulation is most comprehensive when it is 'conceptualised as an integrated whole' (McCann & Murray, 2014, p.330). Corresponding with Davies' belief, the model's approach to 'work' accounts for the time spent at employers' disposal, not simply core tasks, preventing the ever-growing distinction forming between working time and wage law (McCann, 2020, p.7). This is an example of 'reconstructive labour law'. While most research on casualised work focuses on the effects of contractual status, McCann's reconstructive strategy acknowledges equally the effects of working time laws (McCann & Murray, 2014, p.348). Thus, the reconstructive role of labour law is to protect workers from 'intermittent episodes of economic exchange' (McCann 2014, p.508).

In advocating for a coherent interpretation of work across working time and minimum wage legislation, the framed flexibility model reconstructs fragmented and episodic working schedules.

The availability approach found in the framed flexibility model aligns with the conception of 'hours of work' under the ILO standards. Article 2 of the Hours of Work (Commerce and Offices) Convention, 1930 (No.30) states that 'for the purpose of this convention the term 'hours of work' means the time during which the persons employed are at the disposal of the employer'. The ILO Committee of Experts on the Application of Conventions and Recommendations re-emphasised this in 2005, stating 'the definition of 'hours of work' in both conventions is based on the criteria of 'being at the disposal of the employer'' (2005, [46]). They did, however, acknowledge the discrepancy between their interpretation and the reality that in the majority of member states, 'the requirement of being at the disposal of the employer is supplemented or replaced by the need to perform actual work' (ILO, 2018, [33]). In line with the availability approach and the ILO interpretation, this thesis maintains that all the time workers spend under the employer's managerial prerogative should be considered working time for the purpose of the NMW, regardless of the level of activity.

3.5 Temporal Casualisation

The ability of productivity analysis to bifurcate workers' shifts into productive and non-productive segments has laid the groundwork for draining payment from the latter (Ewing, 2021). Temporal casualisation is a term coined by McCann to articulate the strategy of employing productivity analysis to drain vulnerable periods of time from the 'protective ambit of labour law' (McCann, 2020, p.10), which finds its expression in 'employer strategy, legislative reform, or judicial interpretation (p.27). In care specifically, periods of non-contact work have been drained from the protective ambit of the NMW, actioned by providers and LAs, and endorsed by the judiciary's interpretation of 'work'. Where LAs are looking for strategies to justify lowering commissioning and providers are looking to stretch low hourly rates, temporal casualisation provides an attractive solution by legally constructing unpaid work. In essence, care workers carry out the same volume of work, but employers avoid the reciprocal obligation to pay for its entirety, all whilst complying with regulation.

3.6 Conclusion

Through examination of the WTR and NMWRs, this chapter has identified a legislative fragmentation between work and paid work. While workers' working time encounters few hurdles under the WTR, the same working time increasingly struggles to qualify for minimum wages. With working time left open to judicial interpretation, predictably, multiple strains of argument- serving opposite parties' interests- have emerged. Availability analysis is the correct interpretation of work; it complies with the internal logic of the employment contract and ILO interpretation, acknowledges that workers' availability is time spent away from their personal lives and recognises that availability is financially advantageous for employers, regardless of activity. Productivity analysis is not only an inappropriate evidentiary burden for workers but has stimulated the use of temporal casualisation, draining vulnerable periods of work from the protective ambit of the NMW. While productivity analysis lays the theoretical groundwork for temporal casualisation, the remaining chapters examine the use of temporal casualisation to legally construct unpaid work; (i) firstly, using ZHCs and EM to exclude payment for travel time; and (ii) secondly, excluding payment for sleep-in shifts through the UK Supreme Court (UKSC) interpretation of time and unmeasured work.

CHAPTER FOUR

Is the Stopwatch the New Clock? Zero-Hour Contracts, Electronic Monitoring and the Non-Payment of Travel Time.

4.1 Introduction

Due to the spatially fragmented nature of home care, carers must spend a portion of their working day travelling between recipients' homes. Despite the NMWRs explicitly recognising travel time as remunerable work, in June 2023, UNISON stated that 75% of homecare staff in England are not being paid for travel between appointments (UNISON, 2023). Considering that care workers earn at or around the statutory minimum, non-payment for what amounts to a fifth (UNISON, 2023) of their working day puts them at serious risk of earning under the NMW (Pennycook, 2013, p.3). The legal construction of unpaid travel time is rooted in a combination of commissioning strategies, Zero Hour Contracts (ZHCs) and Electronic Monitoring (EM) systems, which create episodic and abstracted working schedules. While the previous chapter began with the claim that clock time is the key machine of the industrial age, this chapter will demonstrate that the stopwatch has become a more accurate description.

Unlike traditional employment contracts, employers using ZHCs are not required to 'offer an employee any defined number of working hours and the employee is, in turn, neither guaranteed any set number of working hours nor obliged to take any offer' (Pennycook et al., 2013, p.6). Whilst ZHCs purport flexible working, in reality, they fragment the working day and create episodic schedules whereby the lines between work and leisure are drawn without regard to the availability that carers provide. Resultantly, employers can exclude non-contact periods from NMW regulation. If ZHCs contractually blur the lines between work and non-work, stripping non-productive periods from the NMW regulation, then EM is the tool used to enforce that distinction, putting temporal casualisation into quantitative practice. EM can take the form of telephone-based technology (Moore et al., 2018, p.103), GPS and mobile apps. The IT system matches the care workers' number to a database at the EM suppliers' call processing centre, logging digitally the time the carer arrived for their visit (Moore et al., 2018, p.103). Importantly,

EM systems only compensate time care workers spend in recipients' houses providing face-to-face care, disregarding travel between appointments as an integral element of homecare workers' schedules. Ignoring concerns that such systems jeopardise clients' dignity and safety, providers and LAs rely on the discretionary effort of carers, flowing from the moral obligations they feel towards recipients' well-being.

Where legal clarity is consistently ignored in practice, the effectiveness of enforcement mechanisms must be examined. This chapter will investigate the two primary routes for care workers: (i) employment tribunals; and (ii) self-reporting to His Majesty's Revenue and Customs (HMRC). While there has been success in tribunals, notably Kaamil Education Ltd v Diligent Care Services Ltd 2020, and HMRC are equipped with the power to enforce both civil and criminal penalties, both mechanisms fall short of delivering comprehensive justice for workers. The UK system of enforcement is too heavily reliant upon a system of self-reporting. Combined with tribunals' inaccessibility for those without financial and educational resources and HMRC's lackadaisical approach to issuing penalties and criminal sanctions, insufficient enforcement reduces the NMW to a right on paper rather than in reality for many care workers.

The structure of this chapter is as follows; (i) an examination of pay for travel time under the NMWRs; (ii) a discussion of the impact of commissioning; (iii) a critical analysis of the effects of ZHCs on working time; (iv) an examination of the impact of electronic monitoring and discretionary effort; and (v) lastly, an evaluation of the mechanisms for enforcing the NMW.

4.2 The National Minimum Wage Regulations 2015

The law regarding payment for travel time is found within the NMWRs. Travelling is defined as such; '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'.[32] However, not all forms of travel amount to 'work' for the purposes of the NMW, excluded is 'travel between- (a) a workers home, or place where the workers 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'.[33] In other words, traditional commuting is not travel time under the NMWRs.

The act explicitly states workers are entitled to the NMW for: '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'.[34] Additionally, the statutory guidance for the Care Act 2014 reinforces that 'remuneration should be at least sufficient to comply with the national minimum wage legislation for hourly pay or equivalent salary…this will include appropriate remuneration for any time spent travelling between appointments' (DoH, 2024). A prima facie issue with the regulations is that carers employed by recipients of direct payments are not entitled to payment for travel, which amounts to travel between separate employers and is captured by section 34 (Pennycook, 2013, p.19). For most carers, however, the clarity in the regulation and statutory guidance calls into question why the issue of underpayment is so widespread.

4.2.1 Travel Time and Commissioning

In *Chapter Two*, I explained that the move from block contracting to framework agreements means LAs now contract almost purely based on contact time, which does not capture travel time (Moore et al., 2018, p.108). By 2014, a mere 2% of providers received a separate payment to cover travel time costs (Broughton, 2014), and where providers previously paid homecare workers enhanced rates to compensate for travel, this has fallen to 28% for visits under an hour (UKHCA, 2012, p.38). Where commissioning explicitly does not compensate for one-fifth of homecare workers' working time, it does not take much analysis to see how underpayment can emerge. Pennycook provides a practical example:

[32] NMWR 2015, s20(a)-(d).
[33] ibid s34(1)(a)-(b).
[34] ibid s34(2)(a).

Sharon's contact time, or the time she was paid for, was 8 hours at the rate of £6.50, meaning she earned £52. However, when her travel time was accounted for, her working time was 10 hours and 6 minutes. Therefore, she was paid £5.13 per hour, and £4.14 if her £10 petrol expense was taken into consideration (Pennycook, 2013 p.12).

The structure of employment relationships in care arguably exacerbates the issue: LAs are responsible for the money made available to pay care workers and oversee their entitlement to such pay, but are not their direct employers and therefore do not issue this pay (Hayes, 2017, p.180). In other words, providers act as a liability buffer, allowing LAs to underpay for care but bear no responsibility for the underpayment of carers. Commissioning practices construe payment for travel as a 'privilege', dependent on the 'generosity' of specific providers, whose responsibility it will be to subsidise insufficient rates (Pennycook, 2013, p.13).

4.3 Zero-Hour Contracts

This section will trace the development and impact of ZHCs on homecare workers' paid working time. Firstly, it will situate their rise within globalisation and flexibility demands. Secondly, it will evaluate their desirability for providers and the risk they pose to workers. And, lastly, it will demonstrate their ability to reconfigure working time, falsely categorising work as leisure. Ultimately, ZHCs are an illustration of legally constructed unpaid work by contractual means.

Broadly, ZHCs' development exists within the context of globalisation - an economic system which involves breaking down barriers to economic integration, such as tariffs and quotas - and neoliberalism. With the rise of industrial power in Southeast Asia, increasing Western inability to manufacture competitively led to de-industrialisation (Haworth & Veal, 2005, pp.27-8). In response to over-saturation, Western economies could no longer depend on mass production to stimulate competitiveness, so instead, they focused on understanding consumers as having diversified needs, more effectively served by 'increasing variety of products on shorter time scales, in smaller quantities and at lower prices' (Gorz, 1999, p.28). The new need for constant innovation and adaptation catalysed the move from demand for full-time standard employment to instead 'feminised' flexible workforces, who could be moulded constantly to evolve alongside

the market (Haworth & Veal, 2005, p.36). There are two kinds of flexibility: functional flexibility- a change in the types of tasks expected of workers- and numerical/temporal flexibility- where the number of workers is adjusted to meet fluctuations in supply and demand (Fredman, 1997, pp.338-9). Temporal/numerical flexibility has flourished across sectors; however, it has equally been described by Tuckman as 'an attempt to desegregate work from non-work' (Whipp et al., 2002, pp116-7). In practice, ZHCs are the contractual tool which affords employers complete temporal flexibility.

4.3.1 The Success of Zero-Hour Contracts in Care

A quarter of care workers and 47% of homecare workers are on ZHCs (Foster, 2024, p.9). ZHCs have been so successful in care for three primary reasons: (i) the lack of guaranteed purchase in commissioning contracts; (ii) the hourglass pattern of work; and (iii) their ability to eliminate traditional employment costs.

Commissioning without purchase guarantee leads directly to dependency upon ZHCs, as one provider explained: 'it would be difficult to not sustain a zero-hours contracts because you don't have any guaranteed or block hours contracts from the local authority… because they're all commissioned and frameworks, there's no guarantee of business, it's difficult to guarantee a workforce business or work' (Bessa et al., 2013, p49). The shift to commissioning with no guaranteed hours has forced providers to mirror this by contracting with no guarantee of work. This reflection mirrors the avoidance of responsibility for underfunding discussed in *Chapter Two,* acting as another potent illustration of care workers being forced to absorb the burden of a crisis created by Government.

The pattern of demand in care is equally a motivator for temporal flexibility. Demand varies on an hourly basis because it follows an hourglass pattern: it is high in the morning and evenings but dips during normal working hours (Rubery, 2015, p.757). This is because a primary element of homecare workers' roles is helping recipients get out and into bed. Additionally, ZHCs allow employers to eliminate traditional costs involved with employment, such as training, and absolves them of numerous employment rights owed to employees, such as maternity leave

(Pennycook et al, 2013, p.13). As such, the inherent risks of business borne by employers are shifted onto carers, an action which arguably blurs the purposive lines of regulation drawn between 'employed' and 'self-employed' status (Rubery, 2015, p.754). For example, unlike employees, care workers on ZHCs bear the risk of loss of income that flows from a client going into the hospital rather than providers.

Perhaps it is unfair to say that ZHCs are completely undesirable; for some part-time workers, such as university students, this 'flexibility' may be welcome (Pennycook et al., 2013, p.16). However, the flexibility within ZHCs is fundamentally illusionary: workers are not able to choose their hours and often have little control over them. In reality, they must remain available to work at all times, and testimony has been consistent that rejecting hours leads to the withdrawal of future work as a penalty from management (p.4). For the majority of workers, who are reliant on substantial weekly hours, a lack of predictable income makes managing household finances, supporting dependents and navigating tax credit claims difficult, if not impossible (p.4).

4.3.2 The Reconfiguration of Working Time

ZHCs reconfigure working time by only compensating workers for the time they spend face-to-face, or 'contact time', with clients (Rubery, 2015, p.753). They do this through episodic, or fragmented, working schedules (Moore & Hayes, 2017, p.102). In essence, ZHCs allow pay to be turned on and off throughout the working day. However, in homecare, pay is being 'switched off' during periods in which carers are still working. This constitutes the elimination of 'unproductive' working time (Moore & Hayes, 2017, p.102), and from a Marxist perspective could be described as 'a closer filling up of the pores of the working day' (1976, p.534). While care work traditionally paid for periods of low demand and inherent gaps between visits, time workers remained continuously available to employers, ZHCs allow providers to eliminate periods of availability deemed insufficiently productive. The time existing between this fragmenting schedule is construed as 'leisure', when it is work.

Sardadvar and Reiter studied the split shifts of Austrian care workers, concluding it was only when breaks amounted to at least four hours that it began to feel like leisure time that they could

utilise for genuine rest (2023, p.423). In reality, workers spent their 'breaks' either travelling between workplaces or remaining nearby, meaning they often felt 'mentally stuck' on the next shift (p.425). Carers explained this predicament meant that what looked like part-time work began to require devotion of what felt like their 'whole lives' (p.418). This blurs the traditional boundaries between work and leisure, resulting in the creation of a 'kind of unpaid working time…[or] an incomplete leisure time' (p.429). I contend that the move towards ZHCs is another step in the evolving construction of working time. While the clock may have been the key machine of the industrial age, ZHCs allow post-Fordist capitalists to replace the clock on the wall with the stopwatch in their hands, contractually excluding travel time from the NMW. This is a primary example of temporal casualisation and an illustration of the risks that conceptualising the regulation of working time as distinct from pay poses.

4.4 Electronic Monitoring

To ensure that they only pay for contact time, as contracted, LAs have required the use of electronic monitoring (EM) in their tendering documents (Moore & Hayes, 2017, p.107). Rubery's three-year study on recruitment and retention in social care concluded that EM reduced care workers' wages by restricting paid working time to the time they spent in clients' homes (2011, p.345). If ZHCs contractually blur the lines between work and non-work, stripping non-productive periods from NMW regulation, then EM is the tool used to enforce that distinction, putting temporal casualisation into quantitative practice.

4.4.1 Operation and Justification

EM allows providers and LAs to track the real-time location of care workers. The resulting data is used to produce invoices, which dictate how much LAs will pay providers (Moore & Hayes, 2017, p.253). Across the sector, multiple platforms are used for its operation, such as apps on workers' phones (Unique IQ, 2024), GPS tracking systems, clients' mobile landlines or Near Field Communication tags (Nourish, n.d.). The IT system matches the care workers' number to a database at the EM suppliers' call processing centre, logging digitally the time at which the carer arrived for their visit (Moore et al., 2017, p.103). When calculating pay, councils often use a 'banding system'. Meaning, they pay for incremental slots of time, such as fifteen minutes, thirty

minutes or an hour (p.110). Importantly, the electronic logging of visits begins only when care workers arrive at, or enter, clients' homes.

EM introduced new levels of managerial control within home care, where control was previously limited by the private nature of clients' homes (Dexter & Herbert, 1983, in Moore et al, 2018, p.103). Foucault explains that this form of observation allows for 'perfect control': care workers internalise the idea that they are being observed and alter their behaviour to meet the expectations of the observer (1977 cited in Brown & Korczynski, 2010, p.405). When justifying electronic monitoring, LAs have explained that the system exists to protect workers from clients' complaints or accusations of non-arrival (p.406; Bessa et al., 2013, p.53). Alternatively, providers believe the true reason is for financial gain, with the UKHCA adding that it allows for a reduction in the cost of invoicing (Moore et al., 2018, p.109). Revealingly, the publicity material for EM technology has explicitly stated that its purpose is to improve efficiency (p.108), boasting savings of up to 37% for LAs (p.109). For example, between 2013-2014, Hampshire County Council claimed they saved £1 million using EM systems (Hayes, 2017, p.334). Care workers themselves interpret the system as one of oversight, primarily for their control rather than protection (Brown & Korczynski, 2010, p.419). One care worker explained, 'basically that it's big brother… why can't they trust us?' (p.419).

The rise of surveillance at work exists within and is a product of our current political and economic environment (Lyon, 2003 cited in Moore & Hayes, 2017, p.101). *Chapter One* highlighted that under austerity, care - both its provision and consumption - becomes time (Hayes, 2017, p.329). EM is framed as preventing employees and service users from 'stealing' employers' time, aligning with the narrative under austerity that users are 'greedy' and care workers are 'time-takers' (Ehrenreich, 2001 cited in Moore et al., 2018, p.114). Ultimately, monitoring is depicted as a system which can rationalise pay, which, in this context, is the legitimisation of unpaid work.

4.4.2 Temporal Casualisation

EM is a clear illustration of temporal casualisation and the advancement of productivity regulation by LAs. It compounds the effects of ZHCs, electronically abstracting and narrowing paid working time even further and has been described as the 'technological driver for very real degradations of employment and pay' (Hayes, 2017, p.331). The banding system is particularly inflexible, a poor rubric of measurement in a sector where clients' needs are acutely unpredictable, and scheduled calls do not accurately reflect working time (p.334). As mentioned in *Chapter Two,* care is task-orientated rather than time-orientated, and therefore EM's attempt to reduce it to rigid time slots is at odds with its nature.

The UK Homecare Association reports that despite figures produced by monitoring technology, LAs tend to round these figures up or down to the closest band (UKHCA, 2012, p.35). Therefore, paid working time is restricted not only to time within clients' houses but even more narrowly, to time which fits into stipulated banding slots. As care workers explained, if they arrive late for a 30-minute call due to traffic, the endpoint of that visit would not be extended. Therefore, if they were there for 20 minutes, they may only be able to clock 15 minutes of working time (Moore et al., 2018, p.110). This equally applies when calls run over in time. Perversely, work of greater intensity, such as call cramming, can result in less pay because each new call introduces more potential for unpaid time (Moore & Hayes, 2017, p.110). Banded time systems undermine the judgment and expertise of care workers themselves; even if they are finished with their tasks, they cannot leave until their allotted time ends to be paid (p.110). There are few avenues for easy recompense when time is incorrectly logged. To dispute inaccurate recordings, workers must submit a variation report. Providers explain that these variation reports are particularly time-consuming (UKHCA, 2012, p.36) and potentially too high an administrative burden to make a dispute worthwhile. Additionally, if the visit is logged incorrectly, there is no payment for the provider or the care worker, which was confirmed as a common occurrence (Moore & Hayes, 2017, p.109). The impacts of EM culminate in allowing the technology to determine when care workers are 'either visible or invisible for the purposes of controlling [their] movements and [their] pay' (Hayes, 2017, p.336), creating periods of invisibility which construct unpaid working time (UKHCA, 2012, p.35).

This system of payment is detrimental to both the quality of care and the stability of the sector. The UKHCA raised concerns that visits as short as 15 minutes lack sufficient dignity for recipients, with a third of providers agreeing and 6% raising safety concerns (UKHCA, 2012, p.7). This rises to 87% for concerns over dignity in Northern Ireland, where 43% of recipients receive a visit of less than 15 minutes, demonstrating a clear correlation between longer visits and quality care (Dodsworth & Oung, 2023). Long-term, this system of pay destabilises the sector as fragmented working patterns lead to issues of retention. As mentioned, many care workers were previously paid enhanced rates for taking on shorter call times of 15-30 minutes, but that figure fell to 28% for visits under an hour nationally, and there are no enhanced payments in Northern Ireland (UKHCA, 2012, p.38). Now, it is difficult to incentivise staff to undertake such short visits, knowing compensation is insufficient for both visit and travel time (p.38).

It is not inherently unreasonable for LAs to capture working time, but their definition of work must encompass the time workers make available to providers and must be flexible enough to capture this accurately. There currently exists a serious issue of dissonance between the operation of technology and the practice of care; technology is unable to recognise its relational underpinnings, the reality that workers will be reluctant to clock out if a client has not had their needs met. Carers' commitment to clients' welfare remains, but LAs shed their reciprocal commitment to pay (Hayes, 2017, p.336). Once again, the clock is no longer the dominant time instrument for care work, but the stopwatch, held firmly in the hands of LAs. Competitive commissioning not only leads to unsustainable hourly rates but also motivates systems, like EM, which uphold their validity. EM may act as an instrument of temporal casualisation, but it is not the cause.

4.5 Discretionary Effort

Chapter One established that many care workers enter not only a labour contract but also a moral contract. Their desire to feel 'like part of the family' is exploited by providers to reinforce the non-pecuniary benefit of familial gratitude to supplement underpayment. In practice, this

translates into discretionary effort. Before Brown and Korczynski carried out their study on surveillance technology and discretionary effort, there was existing research suggesting that care workers spent additional time with their clients outside of the paid day (2010, p.408). A study conducted in Finland found that EM devices rationalised work in a manner which contradicted the care ethics of workers towards their clients (Zielinski et al., 2006 cited in Brown & Korczynski, 2010, p.408). Care workers in Brown's study felt similarly that it acted as a barrier to care; (i) the technology materially mediated the relationship between worker and client; and (ii) it acted as an intensification of already existing time pressures (p.421). As one worker explained: 'They're rushing all the time. There's no time for human care' (Moore et al, 2018, p.119). Another complained that 'a lot of them [clients] like company and if I've got 10 minutes, I will have a chat. But then they [managers] can turn around to you and say that you are not paid to talk' (Brown & Korczynski, 2010, p.425).

In reaction to this rationalisation, care workers attempted to distance themselves from their organisation by increasing their discretionary effort, at the expense of further increasing the intensity of their work (Brown & Korczynski, 2010, p.425). One care worker in Moore and Hayes' study explained that 'you stay on because it's your duty to care', despite a lack of pay (2017, p.336). In other words, care workers sacrifice their own unpaid leisure time to bond and create positive relationships with clients. This aligns with Rubery's argument that under a system of EM, providers and LAs rely on the 'goodwill of care staff not only to create good relations but also to ensure the safety of the user without any compensation' (2015, p.762). Such characteristics have been explicitly recognised as desirable on providers' websites, with Trinity Homecare explaining that the ideal homecare worker treats a client 'like they would a member of their own family' (Trinity Homecare, n.d.). Therefore, not only are LAs employing temporal casualisation via EM, but they are doing so with the understanding that care workers desire to feel like part of the family, or simply uphold a recipient's dignity, compels them to ensure their client's safety and comfort in their own 'leisure' time (Nare, 2011, p.132). Although EM strategies are motivated by neoliberal competitive commissioning, it is the gendered understandings and expectations borne upon care workers that allow it to operate safely in practice.

4.6 Enforcement Issues

Considering the legal clarity in NMW entitlement for travel time, the sheer magnitude of underpayment raises concerns about the adequacy of enforcement mechanisms. As highlighted by the Resolution Foundation, 'rights are not worth the paper they are written on if non-compliant employers regularly flout the rules' (Judge & Slaughter, 2023, p.14). Under the NMWA 1998, any underpaid worker is entitled to receive arrears from their employer.[35] While the Department for Business and Trade are responsible for policy on compliance and enforcement, it is HMRC that enforces it in practice (GOV UK, 2014). However, in reality, enforcement is heavily reliant upon and restricted by care workers' proactive choice to self-report their underpayment (LPC, 2023) and to initiate contractual claims in employment tribunals.[36] This section will critically evaluate the effectiveness of both mechanisms, analysing the challenges workers face in each. Ultimately, both mechanisms fall short of delivering justice, and their inadequacy facilitates the legal construction of unpaid working time.

4.6.1 Tribunals

In Kaamil Education Ltd v Diligent Care Services Ltd 2020,[37] 17 domiciliary care workers based in North London alleged that, between 2010 and 2016, their employer paid them less than half the NWM due to a lack of payment for travel time (Hill, 2016). Judge Goodman decided in their favour, ordering their employers to pay damages of over £100,000 (Mackenzie, 2020). Goodman followed an availability interpretation of work, emphasising the fact that rostering appointments was entirely under employers' control and workers could not return home during gaps between appointments.[38] Like Davies's contentions in *Chapter Three*, Goodman explained that 'carers should not be penalised if the employer adopts a lackadaisical approach to rostering'.[39] Goodman drew his analysis from Whittlestone v BJP Home Support [2014],[40] explaining that 'the carer must have a meaningful opportunity to rest or relax once they arrive back at home… it would be

[35] NMWA 1998, section 17.
[36] Employments Rights Act 1996, section 13.
[37] Kaamil Education Ltd v Diligent Care Services Ltd (2020) Case No. 1302183/2016.
[38] Kaamil Education ltd, 4(1)-(2).
[39] Ibid, 4(1).
[40] Whittlestone v BJP Home Support [2014] I.C.R 275.

pointless if as soon as they put their key in their front door, they would have to turn around and travel to the next appointment'.[41] Subsequently, travel time attracted the NMW where the gap between appointments was 60 minutes or less.[42] While not aligning completely with Sardavar and Reiter's (2023) earlier contention that breaks needed to be of at least four hours for genuine rest, it at least acknowledges the importance of genuine leisure as a measurement. The tribunal decision, despite not addressing episodic ZHCs as the root issue, reinforces the correct interpretation of the NMWRs. The delineation of 60 minutes encompasses most periods of travel, bringing clarity to the issue and allowing care workers to calculate their potential underpayment (Rennie, 2020). However, UNISON's finding that 75% of care workers were not paid for travel in 2023 questions the judgment's potential in practice (UNISON, 2023). Why is it, then, that tribunal decisions do not have a meaningful impact in deterring non-compliance?

Firstly, tribunals are non-binding and therefore subsequent underpayment- even underpayment by the same providers of the same worker- would have to be brought to the tribunal once more, with potentially differing interpretations. Secondly, care workers face substantial barriers in accessing tribunals in the first place. Fundamentally, access to tribunals is easier for those with 'greater levels of education, social capital and economic resources' (Busby & McDermott, 2020, p.178), none of which are resources that care workers traditionally have in abundance. Law is a complex area of practice, and claimants have faced issues understanding their rights, navigating the administrative process, and articulating their claims (p.185). This is exacerbated if the defence can afford legal representation when the claimant cannot. One claimant in this scenario explained, 'that's not fair; he's been to university and law school and has been doing it for years… they've got all this experience and I've got none… if I do fail, I do think it's going to be on their laws, procedures, time limits' (p.187).

Despite there being no costs involved in making a claim to an employment tribunal (GOV UK, n.d), there are potential costs involved in finding witness experts, potentially a solicitor (Kirk et al., 2017, p.5), taking time off work, or even having to leave your job. Considering the already low wages of care workers, starting as low as £19,000 for full-time hours (National Careers

[41] Kaamil Education Ltd, 4(2).
[42] ibid 5(2).

Service, n.d), and the high prevalence of carers with dependents, it is unlikely that most care workers will want, or be able, to take the time off work necessary to engage in a tribunal. Even in an ideal scenario where a case is successful, Citizens Advice warn that many claimants will not receive full payment (Citizens Advice, n.d.), and due to their non-binding nature, decisions provide no guaranteed protection from future underpayment (Pennycook, 2013, p.28). One claimant in Nicole Busby's study described her experience as 'fighting with the wind' (Busby & McDermott, 2020, p.178). When the only available route is to take independent, lengthy action, at risk of losing your employment, forcing you into an unfamiliar environment where those with wealth and higher education are given an advantage, all with no promise of protection from future violation, it is understandable why carers may feel that justice is out of their grasp.

4.6.1 HMRC

HMRC compliance officers are empowered to collect information from employers' premises.[43] If underpayment is identified, they can: (i) issue a notice of underpayment at their discretion; [44] or (ii) impose a 200% penalty charge of up to £20,000 (HMRC, 2024). Where an employer refuses to cooperate with a notice of underpayment or is found to be persistently underpaying workers, HMRC can open a criminal investigation.[45] There are six grounds: (i) refusal or wilful neglect to pay the NMW; (ii) failure to keep records; (iii) knowingly keeping false records; (iv) producing or allowing the production of false records; (v) impeding an HMRC officer; and (vi) failure to answer or provide officers with documents when required.[46]

In 2023, the LPC estimated that 1 in 5 workers earning minimum wages were underpaid in April 2022 (LPC, 2023, p.9). With the Resolution Foundation reporting an even higher rate of 1 in 3 (Judge & Slaughter, 2023, p.5), underpayment clearly extends beyond the remit of the care sector. However, in those same years, HMRC were generally only receiving around 3000 complaints from workers (LPC, 2023, p.26). The primary issue is that HMRC's enforcement is still reliant on workers' self-reporting underpayment, meaning that in practice, the pipeline

[43] NMWA 1998, section 14.
[44] ibid section 19.
[45] NMWA 1998, section 31.
[46] ibid section 31(1), 31(2), 31(3), 31(4), 31(5)(a), 31(5)(b).

between underpayment and self-reporting is 'only delivering a trickle of cases' (Judge & Slaughter, 2023, p.6). Raising complaints is hindered by the fact that only 18% of care workers report receiving payslips which clearly detail whether time spent travelling has been paid, making it difficult to evidence complaints (UNISON, 2023). ZHCs also play a role; workers on already insecure hours are reluctant to risk having to leave a job, or risk being offered fewer hours, due to raising an issue such as underpayment (LPC, 2023, pp.25-6). This is intensified by potential bullying and linguistic or cultural barriers (p.26).

Even when reporting makes it to investigation, sanctions against employers are minimal. The UK has focused mainly on a 'slap on the wrist' reputational sanction system. In 2024, HMRC named and shamed 524 companies for failing to pay the NMW (Hollindrake, 2024). While it has been shown that potential reputational damage motivates firms to comply with regulation, this was restricted to scenarios where firms felt their profits were at risk (Slaughter, 2021, pp.8-9). The damage was often short-lived, and businesses felt consumers would not penalise them if they were shown to be taking steps towards compliance (pp.16-17). In addition, HMRC's attitude that companies would like 'to do the right thing' means they continually refrain from imposing penalties, instead simply allowing employers to pay back arrears (Judge & Slaughter, 2023, p.9). The assumption that underpayment is unintentional is naive and unjustifiable for a government body with the expertise of HMRC. It turns compliance with the NMW into a 'worst case scenario' for minimum wage employers, making underpayment a potentially lucrative venture. Criminal sanctions have also been underused. Since 2007, only 21 employers have been prosecuted for underpayment (DoBT, 2024), and in the last decade, not a single care provider has faced criminal investigation (UNISON, 2023). Such a lackadaisical approach to enforcement neglects workers' rights and emboldens employers. It is not only the contractual techniques discussed which construct unpaid working time, but also insufficient enforcement.

4.7 Conclusion

The intersection between rights and reality in the social care sector illuminates the persistent disparity between statutory protections and lived experience. The systematic underpayment of travel time in homecare reflects a broader neglect of labour rights and effective mechanisms of

enforcement for homecare workers. Unpaid working time is contractually constructed through commissioning strategies, ZHCs and EM, which work independently and in tandem to narrow the periods of homecare workers' working time which qualify for the NMW through productivity regulation arguments. In turn, illustrating temporal casualisation.

Motivated by increasing demands for flexibility and the lack of guaranteed purchase in commissioning contracts, ZHCs shift the risks of business downwards onto care workers by failing to guarantee work. ZHCs disrupt the traditional continuous shift and replace it with an episodic work schedule. Through segmenting care workers' availability into work and non-work, ZHCs falsely categorise periods of work as leisure. Contrary to the marketing of EM as a neutral efficiency tool, it exacerbates the existing fragmentation, legitimising unpaid working time by restricting paid time to hands-on work in clients' homes. The banding system used is inflexible and incapable of recognising and accommodating the relational underpinnings of care, ultimately putting recipients' safety and dignity at risk. Despite this, LAs have relied on the willingness of care workers to perform unpaid labour, rooted within the moral contract, to ensure safety.

Systematic underpayment for travel time is facilitated by insufficient enforcement mechanisms under the NMWA. Situated within a system reliant on self-reporting, justice through employment tribunals remains financially and socially out of care workers' grasp. Even where complaints of underpayment are acknowledged by HMRC officers, time and time again, they have focused on reputational sanctions rather than utilising the civil and criminal penalties available to them. Ultimately, without a commitment to addressing the structural issues in funding and employment practices which generate non-payment of travel time, or dedication to improving the accessibility of enforcement, non-payment for travel time will persist. Despite the UK government's insistence that 'anyone entitled to be paid minimum wage should receive it' (GOV UK, 2024), in practice, payment for travel time has been reduced to a right on paper, not in practice.

CHAPTER FIVE

Those who only stand and wait: Has the UKSC applied temporal casualisation to sleep-in shifts on a gendered basis? *Uber*, *Mencap*, and the contractual abstraction of working time.

5.1 Introduction

The needs of recipients with complex medical conditions persist beyond standard working hours, and consequently, so does the work of carers. Both residential and homecare workers carry out 'sleep-in' shifts, providing recipients with essential care throughout the night. This might involve administering medication, assisting them to the toilet, or being present to deal with emergencies as and when they arise. There has been a general ambiguity and inconsistency in the categorisation of sleep-in shifts under the NMWRs. Courts have not always been consistent in separating 'work' and 'availability for work', with striking disparities emerging between male-dominated and female-dominated professions.

This chapter will outline the applicable statutory law, tracing its application. Occasionally, sleep-in shifts are categorised as 'time work' under Regulation 30. However, other times, their 'time work' categorisation has been undermined by on-call exceptions in regulation 32 or falsely categorised as unmeasured work under regulation 44. For example, while decisions such as *British Nursing Association v Inland Revenue [2002]*[47] and *Scottbridge Construction Ltd v Wright 2003*[48] favoured workers by acknowledging that presence at the workplace constitutes work, later rulings- particularly in care-related cases such as *Walton v Independent Living Organisation Ltd 2003*[49] and *South Manchester Abbeyfield Ltd v Hopkins [2011]*[50]- have imposed additional hurdles for remuneration. In 2021, the UKSC ruled in *Royal Mencap Society v Tomlinson-Blake [2021]*[51] that homecare workers were not 'working' for the purpose of the

[47] British Nursing Association v Inland Revenue [2002] EWCA Civ 494.
[48] Scottbridge Construction Limited v Wright 2003 SC 520.
[49] Walton v Independent Living Organisation Ltd [2003] EWCA Civ 199
[50] South Manchester Abbeyfield Ltd v Hopkins [2011] ICR 254
[51] Royal Mencap Society v Tomlinson-Blake [2021] UKSC 8

NMW during sleep-in shifts unless 'awake for the purposes of working'.[52]As I will demonstrate, at the heart of the ruling, and the previous judicial treatment of on-call time, lies the fictitious deliberation over 'work' and 'availability for work'. While already inconsistently applied, the UKSC ruling in Mencap has solidified a narrow productivity-based approach to on-call time, endorsing the technique of temporal casualisation.

Why is it harder for care workers to access the NMW than drivers and security guards? By examining the trajectory of judicial reasoning, this chapter illustrates the increasingly fragmented and selective interpretation of 'work' under the NMW for carers. While the underfunding crisis in care is a key driver for the decision in *Mencap*, stronger protections have been justified for male-dominated professions because of gendered prejudice against the value of reproductive labour. While drivers in *Uber v Aslam [2021]*[53] were afforded the purposive approach in judicial reasoning, one which 'refers to the interpretation of texts in a manner which seeks to achieve their underlying goals' (Atkinson & Dhorjiwala, 2022, p.790), carers have consistently been restricted by the contractual abstraction of their employment terms. Not only does *Mencap* uphold and enforce the technique of temporal casualisation, but it also risks allowing the gig economy's working conditions to leak into formalised employment, jeopardising the protection that the contract of employment once provided, and in turn, the protection of labour law itself.

5.2 The National Minimum Wage Regulations 2015

The relevant regulations in this chapter are regulations 30 & 32 of the NMWRs. These sections are redrafted adaptations of sections 3 and 15 of the earlier 1999 regulations, respectively. The majority of these cases refer to the 1998 regulations, but they are essentially the same. Defined in section 30, work is 'time work' where workers are entitled under their contract to be paid according to the time they work, or by a 'measure of output in a period of time'.[54] Regulation 30 is qualified by Regulation 32, which addresses on-call periods. It states that time work will encompass time where workers are required to be available either near to or at their workplace

[52] ibid [44].
[53] Uber v Aslam [2021], [68]-[71].
[54] NMWR, section 30(a)-(b).

for the purpose of working, but only for hours where they are 'awake for the purposes of working', even if their employer provides them with sleeping facilities.[55]

However, where workers are not contractually designated as paid according to time work, they have on occasion been deemed as performing 'unmeasured work' under regulation 44. This is 'work that is not time work, salaried hours work or output work'. Under regulation 49, workers performing unmeasured work can be paid according to daily average agreements: agreements between workers and employers which specify 'the average daily numbers of hours a worker is likely to spend working where a worker is available to work'.[56] For example, a carer and provider may agree in writing that a carer will be paid a lump sum of £30 for a 12-hour shift, and the NMW for time spent awake and tending to medical treatment or emergencies.

Prima facie, the regulations complicate the application of the availability analysis through the further requirement that workers must be 'awake for the purposes of working' and endorsing daily average agreements which fall far below the NMW. Contrarily, this thesis asserts that all hour's workers are available for work should attract the NMW regardless of whether they are awake or asleep. Despite this wording, cases emerging from 2002 avoided the possibility of productivity regulation in regulation 32 by viewing entire sleep-in shifts as time work under regulation 30, with no need for consideration of regulation 32. In essence, if a shift can be deemed as 'work', then on-call derogations did not apply. Unfortunately, as the case law developed, both availability and productivity analysis were applied to seemingly factually indistinguishable scenarios. Disappointingly, when the issue reached the UKSC, it was the productivity approach which prevailed. This next section will trace, analytically, the development of relevant case law.

5.3 Judicial Interpretation

Lord Justice Buxton's ruling in British Nursing Association v Inland Revenue [2002] marked a turning point in the law regarding the payment of sleep-in shifts, forming the previous root

[55] ibid section 32(1)-(2).
[56] NMWR 2015, Reg 49(1).

authority. Bank nurses answering telephone calls overnight from their homes, facilitating a 24-hour booking service, claimed they were 'working for the whole of their shift'[57] in accordance with section 3 of the regulations, with no need for consideration of section 15. Agreeing, Buxton explained that 'no one would say that an employee sitting at the employer's premises during the day waiting for phone calls was only working… during periods where he or she was actually on the phone'.[58] In line with availability analysis, if employers choose to provide 24-hour services, the court held it was the 'availability of the facility, not its actual use, that is important to him'.[59] Any other conclusion would 'make a mockery' of the NMW.[60] By treating night work identically to day work, *Nursing* avoided consideration of the Nurse's shifts as 'on-call' time in the first place.

It was not until *Scottbridge Construction Ltd v Wright 2003*, however, that payment of the NMW was extended to the time workers were permitted to sleep. Wright was a factory night watchman, working 14 hours, seven days a week and required to be awake for only four hours per shift.[61] Contractually, he was only paid for those 4 hours; however, Wright claimed entitlement to the NMW for the entire shift under Section 3. The court observed that even though 'it would be a very rare occasion when sleep would not have been possible', this does not affect the reality that he remained available for work throughout the shift.[62] In the appeal tribunal, Lord Johnstone maintained that 'it is wholly inappropriate for the employer while requiring an employee to be present for a specific number of hours, to pay him only for a small proportion of those hours in respect of the amount of time that reflects what he is physically doing on the premises'.[63] This understanding aligns with both Davies's and McCann's conception of working time in *Chapter Three* and is a clear example of reconstructive labour law. *Scottbridge* improved upon *Nursing*. Although *Nursing* recognised the importance of availability as a gateway to the NMW, it failed to recognise that being present and constrained to the workplace, regardless of permission to

[57] Nursing [2002] p21.
[58] ibid p22.
[59] ibid p22.
[60] ibid p24.
[61] Scottbridge 2003, p520-521.
[62] James Wright v Scottbridge Construction Ltd [2001] 4 WLUK 98, [4]
[63] ibid [9].

sleep, is a form of availability and an integral part of the role of security guards *and* care workers.

Despite the unitary direction of *Nursing and Scottbridge,* inequalities in their application emerged when applied to home/ domiciliary carers. In *Walton v Independent Living Organisation Ltd,* a domiciliary carer was on duty day and night for three days to facilitate independent living for clients. Alongside her employer, she estimated that 6 hours and 50 minutes of this would be spent providing hands-on care.[64] Walton brought a claim, just like Scottbridge, that the time she was permitted to sleep outside of her stipulated duties attracted the NMW. Like *Scottbridge*, Walton was 'rarely disturbed during the night'.[65] However, Aldous LJ enforced her contract. Distinguishing *Scottbridge*, he stated that in Walton's contract, she was paid according to unmeasured work, whereas Scottbridge was paid according to time work.[66] Is there justice in two scenarios, which are at their root factually identical, being treated differently based on contractual wording? Aldous LJ quoted the famous line from John Milton, 'they also serve who also stand and wait',[67] commenting that 'not every worker who 'only stands and waits' carries out contractual duties: it is a question of fact'.[68]

The HMRC internal manual expands on unmeasured work. Specifically, that it is applicable where 'there will be no exact relationship between the work being performed, the time spent performing the work and the amount of payment', citing care as an example (HMRC, 2025). However, there is a clear relationship here between the work Walton performed, the time spent performing it and the amount she should have been paid. Quite simply, she made herself available to ensure the safety of her recipients, the duration of her presence ensured any emergencies would be attended to, and she should have been paid the NMW for each of those hours spent available. While the construction of unpaid working time began contractually in Walton's case, judicial interpretation solidified it.

[64] Walton [2003], p688.
[65] ibid p689.
[66] ibid p695.
[67] ibid p697.
[68] ibid p698.

Any integrity as to the distinction between time work and unmeasured time concerning sleep-in shifts was undermined only five years later when a security guard working in a care home made the same claim in *Burrow Down Support Service v Rossiter [2008]*.[69] Like Walton, the guard was contracted to work from 10 PM to 8 AM and permitted to sleep unless an emergency arose,[70] but was only contractually entitled to the NMW for the 15 minutes spent on handover duties and one hour of breakfast duties.[71] When the guard similarly claimed entitlement to the NMW for the entire shift, unlike Aldous LJ, Elias LJ explained that the claimant was working for the whole period of the shift, for the same reasons outlined in *Scottbridge*, and therefore 'falls firmly under the scope of regulation 3 as a time worker'.[72] Upholding availability analysis, Elias LJ admitted that there is 'some artificiality in saying that someone is working when he is sleeping' but that the employer could simply provide alternative work if they were concerned about value for money.[73]

Despite its progressive nature, the decision in *Burrow Down* begs the question as to why *Walton* was decided so differently. Both claimants were working in care settings, permitted to sleep unless an emergency arose and contractually only entitled to pay for a small portion of their shift. Hayes comments that these decisions are evidence that the judiciary 'understand 'care' as work for which women are not entitled to be fully remunerated and work which has less value than that of security guards (*Scottbridge*), or, farcically, security guards working in care homes (*Burrow Down*)' (Hayes, 2017, p.148). The court's refusal to recognise availability as work in *Walton* is an extension and legitimisation of the notion of 'love over money' discussed in *Chapter One*. Why are care workers, overwhelmingly women, expected to be satisfied with the gratitude of their clients as payment when security guards, overwhelmingly men, carrying out a factually similar role, are not? Once more, the narrative that women work in care out of love or obligation is upheld, even in paid employment relationships. Following *Walton* and *Burrow Down,* subsequent case law has inconsistently applied both productivity and availability arguments when defining work.

[69] Burrow Down Support Service v Rossiter [2008] ICR 117
[70] ibid p1172.
[71] ibid p1175.
[72] ibid p1177.
[73] ibid p1177.

5.3.1 Productivity

In *South Manchester Abbeyfield Ltd v Hopkins [2011]*, Judge Reid QC denied domestic workers access to the NMW once more. The claimants were expected to remain on-call in their sheltered accommodation between 9 pm and 8 am during the work week.[74] Distinguishing the case from *Burrow Down,* Reid leveraged a novel argument that a key factor in *Burrow Down* was that the claimants had no 'core hours' outside of their on-call shifts. Alternatively, the present claimants worked 'core hours' during the day, of which their sleep-in shifts were apparently ancillary,[75] and therefore claimants' sleep-in working time fell under the WTR, but not the NMWRs.[76] There was supposedly a clear difference between 'cases where an employee is working merely by being present at the employer's premises (e.g. a night watchman), whether or not provided with sleeping accommodation, and those where the employee is provided with sleeping accommodation and is simply on-call'.[77] The creation of the 'core hours' argument is a figment of judicial imagination, found nowhere within the regulations and a quintessential example of productivity regulation in action. Through baseless distinction, Reid QC worsens the statutory fragmentation between the WTR and the NMWRs. The attempt to juxtapose the role of a security call guard who sleeps unless awoken by an emergency, with a housekeeper, who also sleeps unless awoken by an emergency, is absurd.

This argument was upheld once more only a year later in *City of Edinburgh Council v Lauder & Ors [2012].*[78] Care workers expected to remain in provided accommodation four nights a week, on top of their contracted 36-hour work week, were denied the NMW for those hours by Lady Smith, who argued that carers' 'on-call' time was 'out with normal working hours'.[79] Smith upheld a distinction between two types of cases: 'one where the job in question is a 'sleepover' job like that in Scottbridge and one where it is not but the worker keeps at or near the workplace and may be called on to work during that period of what would otherwise be sleep, in addition to,

[74] South Manchester Abbeyfield Ltd v Hopkins [2011] ICR 254, p254.
[75] ibid p263.
[76] ibid p264.
[77] ibid p264.
[78] City of Edinburgh Council v Lauder & Ors [2012] UKEAT 0048_11_2003.
[79] ibid [8].

his normal work'.[80] The 'core hours' argument insinuates that any work housekeepers do outside of their supposed 'core hours' is, in some sense, voluntary or a lesser form of work. More worryingly, it upholds the idea that if employers choose to stipulate periods of on-call work as separate from the 'core job', then they can exclude them from the protection of the NMW. There are no material differences between the nature of availability in *Edinburgh* and *Manchester*, as opposed to *Burrow Down* and *Scottbridge*. What can be distinguished, however, is the gender of the claimants and the social status of the work they performed. The core hours argument is a clear example of temporal casualisation through judicial interpretation.

5.3.2 Availability

Promisingly, in 2014, two cases, independently reasoned, upheld the availability analysis of work for care workers' on-call time. In *Whittlestone v BJP Home Support [2014]*,[81] a carer undertook sleep-over shifts between 11 pm and 7 am in addition to her daily rota.[82] Paid a fixed rate of £40, she instead claimed the entire 8 hours, and her travelling time attracted the NMW.[83] Langstaff J applied a purposive approach to *Whittlestone's* contract: despite the phrase 'normal working hours', he deduced that in reality, she had no fixed hours.[84] Importantly, he emphasises that 'work is not to be equated with a particular level of activity… where a person's presence at a place of work is part of their work, the hours spent there irrespective of the level of activity are classed as time work'.[85] Discipline as a result of leaving the workplace is cited as a clear indicator of time work.[86] This is the correct interpretation, according to this thesis, of working time. Warning of the core hours argument, Langstaff J argues there is no 'proper distinction' to be made and treating terms which do not arise from statute as authoritative is risky and misleading.[87]

[80] ibid [33].
[81] Whittlestone [2014].
[82] ibid p275.
[83] ibid p275.
[84] ibid p277.
[85] ibid p279.
[86] ibid p280.
[87] ibid p288.

Similarly to *Whittlestone,* in *Esparon v Slavikovska [2014]*,[88] Judge Serota QC dismissed the core hours argument for carers on sleep-in shifts between 9 PM and 7 AM. Important factors in determining whether someone was carrying out time work were noted: (i) 'it was essential for her to be on the employers' premises'[89] and (ii) it was essential 'pursuant to a statutory requirement to have suitable persons on the premises… a powerful indicator that the employee is being paid simply to be there and is thus deemed to be working regardless of whether work is actually carried out'.[90] The statutory requirement is a persuasive factor, but it should not be framed as a necessary one. Availability is availability regardless of whether it is mandated by law. Both judgments make clear that the increasing conception of working time regulation and wage regulation as distinct is a judicial choice rather than an imperative.

5.3.3 Correct Interpretation

So far, this chapter has heavily criticised successful applications of Regulations 15/32. So, what is the correct interpretation? Interestingly, a case arose in 2012 where the application was true to the wording and spirit of the regulation: *Wray v J Leses & Co (Brewers) Ltd (2012*).[91] The claimant was a pub manager, contractually obliged to remain in the free accommodation provided, who claimed NMW entitlement for that time.[92] Underhill J noted, however, that the obligation was not to remain on the premises at *all times*. Unlike the previous cases, Wray could leave the pub after hours without breaching her contractual duty.[93] Such a distinction is important and perhaps a fairer application of regulation 15/32. Missing from many of the previous judgments was any consideration that during sleep-in shifts, workers are separated from their own lives and face potential penalties if they leave their workplace. An ideal application of section 32 would be a scenario like *Wray*, where a claimant can leave their workplace to walk their dog or food shop, but would be entitled to pay if unexpected work arose while on the premises. Commenting on previous cases, Underhill J explains that the pub manager was not in a 'position analogous to that of a night-watchman or a night-sleeper in a care home'.[94] However,

[88] Esparon v Slavikovska [2014] ICR 1037.
[89] ibid p1043.
[90] ibid p1051.
[91] Wray v J Leses & Co (Brewers) Ltd UKEAT/102/11 (2012)
[92] ibid p43.
[93] ibid p48.
[94] ibid p49.

the wording 'night-sleeper' arguably places undue emphasis on night work as the core role, rather than an element of a carer's job. Therefore, although Wray highlights an important distinction- the impact of the obligation to remain available- the judgment could be construed as upholding previously undesirable rulings.

In summary, an analysis of the case law on on-call time leading up to the UKSC decision in *Mencap* reveals that the judicial interpretation of work has upheld the notion of 'love over money' for care workers, legally constructing their unpaid working time. A striking feature of the case law is the overwhelming inconsistency in the interpretation of working time under the NMW. While payment for security guards- *Scottbridge and Burrow Down*- who are permitted to sleep while on shift has been upheld, payment for shifts of an identical nature has been denied for carers and housekeepers. The evident gendered division between these forms of work is too stark to be ignored. Justifications for denying care workers access to the NMW have followed the trend of false distinctions- whether that be contractual wording as in *Walton* or the novel invention of a distinction between core and non-core hours in *Manchester* and *Edinburgh.* Optimistically, there have been decisions based on availability analysis for carers, such as *Whittlestone and Esparson,* demonstrating that the NMW is capable of upholding and protecting a definition of work that adequately compensates carers for their time.

5.4 Mencap v Tomlinson-Blake [2021]

When *Mencap* reached the Supreme Court, it was the first time the court had deliberated upon entitlement to the NMW since its introduction. Mrs Tomlinson-Blake was a highly qualified care support worker who performed sleep-in shifts for two vulnerable adults, for which she was paid an allowance of £29.05 (one hour estimated pay at £6.70 included). She was not allocated specific tasks while on shift, but was to "keep a listening ear out' even while asleep'.[95] Controversially, from the beginning, Arden made clear she did not believe that 'simply because at a particular time an employee is subject to his employer's instructions, he is necessarily entitled to a wage'.[96] Perhaps, however, this reasoning can be explained in her discussion of the

[95] Royal Mencap Society v Tomlinson-Blake [2021] UKSC 8, [19].
[96] ibid [35].

NMW, whose purpose she described as helping 'redress the law of supply and demand where there may be market failure'.[97] Particularly non-worker-centric, the description is revealing of the court's view on the intended recipients of the framework and may explain their lack of concern for Mrs Tomlinson-Blake's financial situation.

Lady Arden began her analysis on the basis that the appeal should not be approached 'with any preconception as to what should entitle a worker to a wage'.[98] Therefore, Arden spent no time deliberating upon the definition of work; she jumped straight to regulation 32(2) rather than first discussing whether the sleep-in shift was work in its entirety.[99] Interpreting regulation 32(2), Arden concluded: 'the basic proposition is that they are not doing time work for the purpose of the NMW if they are not awake… they are also not doing time work unless they are awake for the purposes of working'.[100] Consequently, the decision overruled both *Burrow Down* and *British Nursing*, on the basis that both cases failed to acknowledge the distinction between work and availability for work in the regulations.[101]

Guiding her interpretation of Article 32(2) were the comments of the first report of the Low Pay Commission in 1998 (LPC, 1998). The Low Pay Commission are a statutory body whose recommendations regarding the NMW either must be put into force by the Government, or an explanation against doing so must be provided to parliament. Recommendation 11 of the 1998 report states that 'the national minimum wage should also apply to all working time when a worker is required by the employers to be at a place of work and available for work, even if no work is available for certain periods' (LPC, 1998, p.10). This was qualified by recommendation 12 - 'for hours when workers are paid to sleep on work premises, workers and employers should agree on 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' (p.10).[102]

[97] ibid [36].
[98] ibid [35].
[99] ibid [42].
[100] ibid [44].
[101] ibid [57].
[102] ibid p10.

At first glance, the qualification itself is odd, but it also clearly does not apply to Mrs Tomlinson-Blake, who was paid to facilitate care and security for disabled adults, not purely to sleep. This is unlike the *Wray,* who was indeed paid to sleep. If the UKSC had taken the time to engage with the definition of work, this would have been evident. Aside from whether Mrs Tomlinson-Blake fell under the definition of 'work' under the act, the sheer notion of a difference between 'work' and 'availability to work' runs antithetical to the arguments of this thesis. As Ewing highlights, the idea of being 'available for work' creates what she describes as 'an interim status between work and rest, which leaves workers vulnerable and subject to the vagaries of judicial interpretation' (Ewing, 2021). On-call time, already a vulnerable period, has been targeted by employers using productivity analysis to drain it from the protection of the NMW. The UKSC endorsement of temporal casualisation is not only disappointing but detrimental to the financial stability of hundreds of thousands of care workers in the UK.

5.4.1 Legislative Reform

Despite Arden's misinterpretation of the LPC recommendations, the wording of the NMWRs admittedly facilitates the false distinction between 'work' and 'availability for work', contributing to the legal construction of unpaid working time. If judicial interpretation cannot protect care workers, then this thesis proposes that the wording of the statutory instrument should be re-drafted. Below is a proposed re-draft of Section 32:

Section 32 - (1) Time work includes hours when a worker is available, and required to be available

(a) at or near a place of work for the purposes of working, unless the worker is at home,

(b) including where the worker by arrangement sleeps at or near a place of work and the employer provides suitable facilities for sleeping

Arden also relied on the phrase '*hours worked or treated as worked'* in section 17 as evidence that the statutory conception of paid working time may not always reflect reality. She commented that occasions will exist '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'.[103] The provision and Arden's interpretation uphold the notion that working time under the WTR and NMWRs is conceptually distinct. Therefore, the phrase should instead be re-drafted as simply '*hours worked'*. Lastly, care workers performing sleep-in shifts should not be categorised as carrying out 'unmeasured work'. Therefore, the aforementioned example of live-in care as unmeasured work in the HMRC Internal Manual should be removed.

5.4.2 Affordability

Post-dispute, Mencap and UNISON jointly wrote a letter to Boris Johnson stating that they were 'united in the same vision' of an adequately funded care sector, and that 'paying staff decent wages is a major part of this' (UNISON, 2021). They requested that the LPC investigate, properly, sleep-in pay and recommend that the entirety of sleep-in shifts be deemed as work which attracts the NMW (UNISON, 2021). The decisions of the first appeal tribunal in *Mencap* came in 2017,[104] only a year after the 11% rise in the NMW for those over 25, brought about by the National Living Wage (Hayes, 2017, p.97). A decision in favour of Mrs Tomlinson-Blake would have cost providers 400 million in back pay claims (Hayes, 2019, p.353). In combination with Mencap's letter, these figures insinuate that their efforts to deny carers the NMW were rooted in funding concerns rather than principle or ideology. Following the first employment tribunal decision in favour of Mrs Tomlinson-Blake, Mencap's orchestration of the 'Stop Sleep in Crisis' campaign to raise awareness that a change in the guidance, and the potential back pay claim, was unaffordable considering current commissioning rates, evidences this proposition (Rogers, 2017).

Busby supports this claim, emphasising that the UKSC judgement cannot be separated from its sectoral environment and that judges most likely factored in the pleas from providers that 'paying the NMW for sleep-in shifts could have put the whole care system in financial jeopardy'(Busby & Zahn, 2025, p.14-15). Undoubtedly, the court was aware that denying the appeal would not only benefit providers but also relieve the state of additional funding pressure.

[103] Mencap [2021], [39].
[104] Royal Mencap Society v Tomlinson-Blake [2017] UKEAT/0290/16/DM.

Although understandably persuasive for judges, relieving pressure for the government and providers cannot compare to the impact the judgment has on hundreds of thousands of care workers who are now legally expected to work for less than the NMW. American academics have begun to term instances such as this, where workers are not paid the minimum wage they are entitled to, as 'wage theft' (Hallett, 2018, p.98).

In response, the LPC recognised that funding for social care has 'failed to match the pace of the rising national minimum wage' in their 2021 annual report (LPC, 2021, p.75), with 70% of the report's respondents confirming that local government funding does not cover staff costs (p.76). Despite acknowledging underpayment, the LPC chose to make no recommendation regarding *Mencap*; 'any further development in this approach to sleep-ins would need to be inextricably linked to wider plans for social care's funding arrangements… Government is better placed than the LPC to resolve the treatment of sleep-ins' (LPC, 2021, xiii). However, as seen in *Chapter Two, the* Government has consistently avoided responsibility for the crisis. In their 2024 report, the LPC addressed the issue once more, calling on the government to review sleep-ins 'in the planned Fair Pay Agreement for the social care sector' (LPC, 2025, [8.55]). Disappointingly, they offered no opinion as to whether carers should be paid the NMW for sleep-ins. The UKSC and LPC, both key players in enforcing and upholding the right to the NMW, have chosen to facilitate the trend of responsibility avoidance for the funding crisis by abstaining from pressuring the government.

5.4.3 Temporal Casualisation and Sexism

The decision in *Uber v Aslam [2021]*[105] came only four weeks after *Mencap*. Claimants working for the private hire vehicle booking service - Uber - brought an action asserting their 'worker' status and claimed they were entitled to the NMW when logged on to the app, within the correct territory, and 'ready and willing to accept trips'.[106] Despite the material differences between *Uber* and *Mencap*, the fundamental question in both claims is 'during what period of time were the claimants working'[107]; Mencap denied that care workers were working while on-call during

[105] Uber v Aslam [2021].
[106] ibid [123].
[107] ibid [121]

sleep-in shifts, and Uber denied drivers were working when waiting for requests for rides. In both, a vulnerable period of time - one which could be categorised as 'unproductive'- was targeted to drain it from the ambit of law's protection. Despite this common root, the claimants prevailed in *Uber.* Contractually, Uber's terms stated drivers were working only when they accepted requests for trips.[108] However, the court noted that if drivers did not maintain a certain rate of acceptance regarding ride requests, they would be logged out of the app,[109] and deemed this sufficient evidence that drivers' time spent 'on duty' amounted to 'work'. Is this not analogous to the penalty Mrs Tomlinson-Blake would face if she left her clients' home during the shift? Quoting the same line as Arden LJ in *Walton*, Lord Leggat instead maintained that 'being available is an essential part of the service which the drivers render to Uber… [labour protections] 'also serve who only stand and wait'.[110]

Why is it that labour protections serve 'those who stand and wait' when they are in taxis but not when they are in patients' homes? Busby suggests that the reason drivers have benefited from the NMW when carers have not is due to the distinguishing factor of value, 'specifically the different values ascribed to different forms of work in terms of contribution and reward' (Busby &Zhan, 2025, p.13). *Chapter Two* outlined the inequalities of value awarded to reproductive work in comparison to those which produced quantifiable material commodities. Quantifying the value of work is intertwined with the ability to measure it, and as Fudge noted, 'the rhythms of women's work in the home are not wholly attuned to the measurement of the clock' (Fudge & Owens, 2006, p.108). Where drivers exist within the traditional capitalist economy, whose work can be measured quantitatively, is publicly visible and generally performed by men, care work- and the availability to perform care- is deemed as 'an activity which is performed intuitively and without effort in a 'homely' setting and this does not amount to real work'(Busby & Zahn, 2025, p.14). There is a clear analogy to be drawn between care workers sleeping in clients' homes and mothers who sleep and wake when their children cry. Arguably, the judiciary has leveraged our social understanding of the former to taint the latter's value. Once more, the narrative of 'love over money' is forced upon carers.

[108] ibid [125].
[109] ibid [129].
[110] ibid [100].

At the beginning of her judgment, Lady Arden asserted that 'no one would doubt the importance in society today of carers and wardens who help to look after those who, through age or infirmity, cannot look after themselves'.[111] As an example, she mentions the statutory duty local authorities incur to provide carers.[112] Her choice of illustration perfectly encapsulated the UKSC's understanding of care workers' importance; it is the care work they provide- and the low price they provide it at - that is valued, not the workers themselves. Where lack of funding acts as the closer motivation for the non-payment of sleep-in shifts, the gendered value applied to care work is the tool used to uphold the belief that care should be kept cheap.

5.4.4 The Purposive Approach

In contrast to Lady Arden's understanding of the NMW's purpose, Lord Leggat, in *Uber,* factored that labour legislation exists to 'protect vulnerable workers from being paid too little for the work they do, or be compelled to work excessively long hours'.[113] Why is it that for care workers, the purpose of the NMW is to 'redress the law of supply and demand',[114] but for Uber drivers it was 'manifestly enacted to protect those whom parliament considers to be in need of protection'?[115] The court describes the contemporary approach to statutory interpretation in *Uber* as one which considers its purpose as well as its wording.[116] Resultantly, *Uber* has been described by Atkinson and Dhorjiwala as 'a dramatic shift in focus, replacing a more formalistic contractual approach with a broader 'relational' analysis that engages with the underlying goals and purposes of employment statutes' (2022, p.799).

This type of judicial analysis can be described as a 'purposive approach'. Its development- in this context- can be traced back to *Autoclenz v Belcher* [2011],[117] a case concerning sham self-employment contracts. Lord Clarke began his analysis by acknowledging the difference between employment and commercial disputes. Aligning with Kahn-Freund's view that 'the law does and

[111] Mencap [2021], [2].
[112] ibid [2].
[113] Uber [2021], [71].
[114] Mencap [2021], [36].
[115] Uber [2021], [76].
[116] ibid [70].
[117] Autoclenz Ltd v Belcher [2011] UKSC 41.

to some extent must conceal the realities of subordination behind the conceptual screen of contracts' (Davies & Freedland, 1983, p.15 cited in Bogg, 2012, p.331), Lord Clarke admitted that for employment disputes, 'the true agreement will often have to be gleaned from all the circumstances of the case, of which the agreement is only a part'.[118] Without recognition of this inherent imbalance in power, Belcher's contract would have legally abstracted the reality of his employment, depriving him of the protection of employment regulation. Where we allow contracts to have precedence over reality, we, in essence, give employers self-regulatory powers. Should economic 'necessity' allow employers exemption from the rule of law (Merritt, 2024)? The right in question in *Mencap* was a statutory one, and yet, Arden refused to recognise the true worker protective purpose of the NMWA/R, acting as a continuation of 'the propensity of lawyers to turn a blind eye to the realities of the distribution of power in society' (Bogg, 2012, p.331).

The purposive approach would have been particularly effective in *Mencap* because of the aforementioned issue with reducing care work into contractual terms. ZHC gig economy work, particularly the vulnerability of incorrect 'self-employed' and 'worker' status, however, has maintained the majority of the purposive and academic focus (Busby & Zahn, 2025, p.3). Although proven effective at 'slotting workers employed on zero-hours contracts into the standard work relationship' (p.2), the purposive approach is arguably not developed enough, or the judiciary willing enough, to set aside the discriminatory low social value attributed to care work. Where drivers were designated incorrectly as self-employed and not working for the purpose of the NMW when waiting for requests, that contractual designation was waived. Contrastingly, *Mencap's* designation that Mrs Tomlinson-Blake was not working unless actively engaged in hands-on work with her clients was not challenged purposively, despite Lady Arden sitting on both cases. Mrs Tomlinson-Blake had an employment contract and could not be described as a gig worker, but Busby rightly points out that the UKSC put her in the exact position that Lord Leggat felt necessary to alleviate Uber drivers from (p.13). This is a key illustration of the importance of McCann's reconstructive role for labour law discussed in *Chapter Three.* While in *Uber* it was the workers' contractual status that rendered them vulnerable, the intersection of gender in *Mencap* meant casualisation was able to persist even

[118] ibid [34]-[35].

within the boundaries of traditional employment. Without a focus on reconstructing fragmented episodes of work, the benefits of protectionist regulation risk leaving women behind.

Upholding temporal casualisation not only leads to underpayment but also allows the working conditions of the gig economy to leak into formalised employment, once deemed safe from casualisation. When there are such clear inequalities in the application of the law, the only conclusion is that the application is rooted in inequality. The diverging approach between *Mencap* and *Uber* reveals that temporal casualisation is being applied on a gendered basis, transcending the traditional distinction between casualised and formalised employment.

5.5 Conclusion

The decision in *Mencap* represents a critical juncture in the judicial treatment of on-call time, upholding temporal casualisation, undermining the protective potential of the NMW and legally constructing unpaid working time. Analysis of the case law leading up to *Mencap* reveals an existing bias against payment for reproductive labour. The sleep-in shifts of security guards, and even security guards in care homes, were deemed to attract the NMW. For housekeepers and carers in factually identical scenarios, however, the NMW was denied. The court's reasoning in *Mencap*, which prioritised productivity over availability, stands in stark contrast to the purposive approach taken in *Uber,* where the court recognised the vulnerability of workers engaged in the gig economy and extended protections accordingly. While the immediate motivation for the decision in *Mencap* was to alleviate the sector from the pressures of consistent underfunding, traditional conceptions of gender hierarchies within the labour market - specifically the narrative that women perform reproductive work out of love, rather than for money - have been employed to justify the court's reasoning, such that the application of temporal casualisation emerges on a gendered basis.

Contrary to its portrayal by Arden LJ, the distinction between 'work' and 'availability for work' is not a neutral legal construct but a purposeful tool of fragmentation, one with the potential to circumvent minimum wage law and devalue the working time of entire sectors. Where electronic monitoring already fails to accurately capture homecare workers' rota, and travel time is not

accounted for in commissioning, removing NMW protection from on-call time is simply another move in what seems like an ever-continuing saga to keep care cheap, at the expense of the livelihoods of carers themselves. It appears that at every possible opportunity to raise awareness over underfunding and place pressure on central government, the judiciary and the LPC have instead chosen to shelter their decisions from criticism. How far can the facilitation of underfunding go before labour law as a regulatory technique is completely undermined?

CONCLUSION

The focus of this thesis was the investigation of the legal construction of unpaid work in the UK adult social care sector. Succinctly, the legal construction of unpaid working time in care is created primarily through productivity analysis as an interpretation of working time under the NMWRs, via both contractual techniques, poor enforcement mechanisms and judicial interpretation. Underpayment is both purposeful and systematic. *All* stages of the adult social care provision chain - funding, commissioning, contracting and monitoring - are embedded and reliant upon underpayment. Where statutory rights exist, they are narrowed and undermined judicially, or worse, point-blank ignored. The result is that care workers remain trapped within a system where every actor is financially invested in their underpayment.

In reaching this conclusion, it was first necessary to explore the wider themes impacting the economics of care. Building on the contextual landscape, in *Chapter One,* I examined the ideology which underpins the UK economy: neoliberalism. I established that the privatisation and marketisation of care exist within an economy whose broader goal is the creation of 'free' markets in furtherance of efficiency and productivity, and the facilitation of private profit. Legally, I identified the Community Care Act 1990 and the Care Act 2014 as primary examples of the bridge between neoliberal politics and the care sector. Evaluating the goals of neoliberalism within the reality of care, I raised concerns early in this thesis that the goals of efficiency and productivity are challenging, if not impossible, to action in the sector. Any attempt to mould vulnerable, inflexible recipients into a model of mass production jeopardises realistic financial models.

In light of the gendered makeup of care workers and the traditional lines drawn between reproductive and productive labour, women's unique experiences of the labour market are essential to building the contextual landscape. Care work, while existing within the paid economy, continues to bear the consequences of our gendered understandings of reproductive labour. The narrative of women's biological predisposition for providing unrewarded care, motivated by feminised traits such as love, affection and kindness, is internalised by carers themselves and exploited by employers for monetary gain. Remuneration in the sector is

underpinned by the sexist contention that 'good' care workers do not care about money and that if wages increased, it would somehow attract 'bad' carers. To understand underpayment, it is crucial to understand that women working in care are seen as women before they are seen as workers. In essence, the expectation of a mother's selfless duty to her family is extrapolated into a wider duty to care for society, which is used to justify systematic underpayment of the minimum wage.

In *Chapter Two,* I narrowed my focus, looking specifically at the funding mechanisms of the adult social care sector. My core argument is that underpayment is directly linked to the hourly commissioning rates set by LAs. Detailing the impacts of neoliberalism, I situated the commissioning landscape within the austerity cuts of the 2010s and privatisation's stimulation of competition. A key theme developed in this chapter was the fragmentation and avoidance of responsibility for underfunding. While the crisis begins with the central government's inappropriate financial modelling, responsibility for accommodating those budgets is fragmented due to LAs' legal duty to provide care. Faced with the pressure of rising demand, LAs have leveraged their monopsony positions to inflict inappropriate framework agreements upon the sector, which fail to guarantee purchase or pay for essential and unavoidable periods of non-contact work. As such, the key link between commissioning and underfunding is revealed as a productivity-based measurement of paid working time in framework agreements, encompassing only 'contact time'. This accommodation of underfunding eventually falls to the most vulnerable parties, those situated at the end of the chain: care workers and recipients. Self-funders are charged exorbitant prices, while care workers are expected to accept pay below the NMW. Unpaid working time is therefore a consequence of underfunding, but also the foundation which sustains it. By design, the entire social care sector's financial viability is now predicated upon unpaid labour.

In *Chapter Three,* I linked the exclusion of non-contact time in framework agreements to the relevant statutory instruments: the NMWRs and the WTR. As the definition of work under the NMWRs has been left largely open to judicial opinion, it was necessary to examine the theoretical understandings of what it means to work. The correct interpretation of work across all regulations should be availability analysis, whereby work encompasses all the time workers are

available to comply with employers' instructions, regardless of the level of activity. Each legal construction of unpaid work in this thesis, however, can be traced back to an opposing interpretation. LAs, providers and the judiciary all have advanced productivity regulation analysis, an interpretation of work which reduces paid work to the time spent productively engaging in core tasks. Thus, a trend is increasingly emerging whereby working time and paid working time are construed as distinct. In other words, you can simultaneously be working for the purpose of the WTR, but not the NMWRs. This opens the floodgates to constructing unpaid working time by threatening the traditional distinction between work and leisure, creating a third category: unpaid work. Where employers can successfully demonstrate that workers were insufficiently productive, they can exclude their liability to pay the NMW. I choose Deidre McCann's term 'temporal casualisation'- the draining of vulnerable time periods from the protective ambit of labour law- to articulate the issue.

Using the theoretical productivity arguments that narrow and invisibilise our conception of work, I addressed the focus of this thesis by detailing their use in legally constructing unpaid work in two specific time periods: travel time and sleep-in shifts.

My analysis revealed that the legal construction of unpaid travel time is primarily contractual. The exclusive designation of paid work as contact-time by LAs ignores one-fifth of homecare workers' schedules and their clear entitlement to the NMW for travel under section 20 of the NMWRs. Providers avoid risk through mirrored practices. Where LAs contract with no purchase guarantee, providers force these risks downwards onto care workers by contracting with no guarantee of work, using ZHCs. The episodic nature of ZHCs construct unpaid working time by allowing pay to be turned on and off throughout the working day. Often, schedules created under ZHCs do not align with the actual parameters of carers' work, instead switching off pay during essential travel periods, falsely construing time as leisure by contractual exclusion. This construction of unpaid work is quantified through EM. The task-orientated nature of care means that the banded slot system used in EM renders time out with predetermined schedules invisible and unpaid. This alleviates LAs and providers of the financial consequences that unpredictable recipients, and therefore unpredictable schedules, create.

Such contractual techniques mark a major shift in time measurement within the labour market. Where clock time has dominated since the Industrial Revolution, I believe time measurement for workers on ZHCs and EM systems is more akin to a stopwatch. While these systems abstract working time, care workers are expected to, and often do, compensate for uncommissioned hours by providing free labour of their own volition. This contractually constructed unpaid work is then upheld by inadequate enforcement mechanisms under the NMWA. Despite the right to raise contractual claims, I conclude that tribunal design is inaccessible for care workers who generally lack both financial resources and social power. HMRC may be empowered to enforce both civil and criminal penalties, but their consistent choice to instead stop at reputational sanctions emboldens employers and fails workers. The contractual construction of unpaid travel time acts as a reminder that, without adequate enforcement, rights become meaningless.

Unlike travel time, the legal construction of unpaid work during sleep-in shifts is achieved mainly through judicial interpretation of sections 30, 32 & 44 of the NMWRs. My analysis reveals that while the general trend in judicial decisions between 2002 and 2021 was the endorsement of availability analysis - seen clearly in *Scottbridge, Whittletone* and *Esparon* - gendered understandings of the value of care and domestic work undermined that consistency. In male-dominated professions, even men working in care, judges consistently dismissed contractual attempts to construct unpaid working time. Women working in feminised professions, however, were subjected to arguments that their sleep-in shifts were somehow ancillary to their 'real' work. Disappointingly, the judiciary was shown to continue the extrapolation of women's duty to care for their families into a wider duty to care for society in the formal economy.

The UKSC decision in *Mencap* was a stark endorsement of productivity regulation, a clear illustration of temporal casualisation through judicial interpretation and a worryingly non-worker centric understanding of the NMWA/Rs. Where productivity was construed as an imperative under the NMWRs by Judge Arden, only four weeks later, the case of *Uber* revealed it as a conscious interpretative decision. Without a clear distinction, taxi drivers were considered 'working' for the purpose of the NMWRs while 'unproductive', but care workers were not. Evidencing once more the struggle for reproductive labour to be considered and compensated as

'real' work. The interpretative technique in *Uber* was purposive, one which acknowledged the inherent power imbalance between workers and employers and therefore ensured that the application of the NMWRs was protectionist. Alternatively, the interpretative technique in *Mencap* was political and financial, focused upon the avoidance of the potential financial collapse of the private social care sector. Disappointingly, it is also damning evidence that keeping care cheap over keeping care workers paid is prioritised not only by the Government, but by the very bodies tasked with upholding their right to the NMW.

Research Contribution and Potential

The underpayment of care workers in the UK has not gone unnoticed within labour law scholarship. This thesis brings together some of the most important academic contributions to the crisis: Deidre McCann's work on temporal casualisation and the Framed Flexibility Model, Sian Moore's research on the ability of ZHCs to eliminate unproductive working time, Anne Davies's work on productivity regulation and Lydia Hayes interdisciplinary study of gender and labour law in *Stories of Care*.

I have situated this research within one continuous narrative, tracing the legal construction of unpaid working time from broad social and economic themes to specific contractual techniques and the judicial interpretation of key statutory rights found in the NMWA/R. Unpaid working time is not a phenomenon or a reality we have no choice but to accept. Understanding how unpaid work is legally constructed and upheld, as well as the specific actors and mechanisms at play, is a crucial step in understanding how the crisis can be tackled. We cannot solve underpayment without knowing who is responsible. We cannot interpret judicial decisions without discerning the gendered bias judges may hold. The potential for utilising this research to action change is multifold. For example, *Chapter Four's* conclusions provide solid ground for strategic litigation against non-payment for travel time and advocacy for enhanced legal aid in Employment Tribunals. Additionally, in *Chapter Five,* I outlined re-draft ideas for regulations 32 and 17 of the NMWRs, alongside recommendations for amending the HMRC Internal Manual. The impact of the proposed Employment Rights Bill is yet to be seen. Ultimately, however, solving underpayment cannot be achieved solely through legal means. As seen in *Chapter Four*

regarding travel time, even the clearest statutory drafting can be ignored in practice. The solution reflects the methodology of this thesis; it will need to be both economic, political and social. Politically, we need to re-evaluate the worth of social welfare. Economically, we need to reflect that value through sustainable financial models. And, socially, we need to take active steps towards treating women and reproductive labour equally. Only then will legal regulation be effective.

Chapter Three of this thesis maintained, in line with Nine St John Chambers, that the deliberation between productivity and availability regulation would dictate the future tone of labour law in this field. While the division between leisure and work in the paid economy should be fundamental, the prevalence of productivity regulation has ensured the existence of a third category within social care: unpaid work. A time legally designated as leisure, and therefore unregulated by the NMWRs, but where workers remain under managerial prerogative. Unique gendered notions which see reproductive labour as less than 'real' work, in combination with a political unwillingness to spend on welfare, have made care an ideal target. Nevertheless, the rest of the labour market is not safe from the risks of productivity regulation and temporal casualisation. As seen in *Mencap,* the exclusion of care workers' right to the NMW during sleep-in shifts overturned cases regarding security guards' and nurses' pay. Care work does not exist in a vacuum. If minimum wages can be undermined in care, there is no reason why the same arguments cannot be made in other vulnerable sectors such as hospitality, retail and agriculture. Where LAs and the judiciary undermine the employment rights of care workers because of financial pressure, they inadvertently undermine those rights for all workers.

Widespread acceptance of non-payment for travel and non-productive periods of sleep-in shifts signals to employers that, by advocating for productivity regulation, they can make workers work longer for less. Where working time is measured through the passing of seasons or the hands on a clock, that passage of time exists outside of the control of both employers and workers. The expansion of productivity regulation, however, allows employers to metaphorically take that clock off the wall and replace it with a stopwatch in their hands. Paid working time becomes subjective; increasingly, it starts and stops depending on its ability to create profit. Greater control over working time was one of the first demands of the organised labour

movement; the findings of this thesis demonstrate that the struggle is not yet over. The words of the 18th-century washerwomen ring as true now as they did then. Like the women of centuries gone by, care workers today have hardly ever *Time to Dream.*

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