Homecare workers have the right to be paid National Minimum Wage: Is the game now up for employers who have broken the law?

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Lydia Hayes holds a law and society fellowship with Cardiff Law School and is working with Sian Moore, from CESR, on a British Academy/Leverhulme Trust funded investigation into the impact of electronic monitoring of working time on homecare workers. This article discusses how homecare workers are affected by National Minimum Wage law and the potential significance of the Care Act 2014.

Government ministers are talking tough about a crackdown on employers in the homecare industry who do not comply with the National Minimum Wage (NMW). Staff should be paid at least £6.31 for each hour of eligible working time, but about half of care companies are failing in their obligations (HM Revenue and Customs, 2013). Following an important legal judgment, homecare workers have now won the right for NMW calculations to include time spent travelling between calls, as well as hours on sleeping night-shifts. In June 2014 a leading care company was prosecuted and ordered to pay staff a total of £600,000 in recompense for unpaid wages. Is the game now up for homecare employers who have failed to pay the legal minimum?

Investigating widespread non-payment of working time

Homecare workers make visits to older and disabled people to support them in living at home. Calls are scheduled to last between 15 and 60 minutes and duties include washing, toileting, dressing or helping to feed service users. Most homecare workers are employed by private sector care companies who hold contracts with local authorities for the provision of care. Although the hourly pay rate set out in their employment contracts is likely to be higher than the NMW rate, research suggests that wages actually paid are often less than NMW entitlements. Up to 60% of homecare workers may be affected by underpayment (Bessa *et al.*, 2013). Problems lie in the organisation of working time into periods of paid and unpaid time. Put simply, the quantity of time for which homecare workers are working, is more than the time for which they are paid. Paid periods cover only the time spent on individual visits. Although the details of individual contracts will vary, it is generally the case that other time is unpaid and can include time for induction, travelling, cancelled visits, calls which overrun, training, and gaps on work rotas.




The vast majority of homecare workers are employed on zero hours contracts, under which an employer has no obligation to provide them with work (Bessa *et al*., 2013, Rubery *et al*., 2011). They are additionally subject to time-management regimes that record the number of minutes they spend on each scheduled visit. Because homecare workers can be paid by the minute, employers have acute control over wage costs. Local authorities also have access to this information and its detail enables them to mitigate potential losses for short or missed visits, pay only for the services as they are actually provided, and build up commissioning knowledge about the reliability of each care company. The minute-by-minute tracking of working time gives local authorities considerable power over the delivery of care, without the responsibility of direct employment.

Under contracting arrangements, local authorities avoid legal responsibility for NMW payments because they do not directly employ homecare workers. Companies win contracts on the basis of both quality and value for money criteria but the purchasing power of local authorities enables them to impose price constraints and indirectly suppress wages (EHRC, 2011; Oxfam, 2009; UKHCA, 2012). The statutory role of the Low Pay Commission is to recommend the annual rate at which government should set the NMW. It reported in June 2014, that while care workers are at a high risk of being paid unlawfully, government action in the sector has 'been slow to materialise' (Low Pay Commission, 2014). Low wages mean care companies find recruitment very difficult (Rubery *et al*., 2011).

The 2013/2014 Parliamentary session has seen the government's Care Bill pass into law. During lengthy debates over the substance and wording of (what has become) the Care Act 2014, MPs and Lords had the opportunity to specifically legislate in response to poor employment practices in the care sector, but declined (Hansard, 2013). The Care Act 2014 makes provisions about care standards, without tackling issues of employment abuse head on.

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However, it would seem that the days of systematic NMW non-compliance are drawing to a close. Pressure on employers is evident at Ministerial, legislative, and judicial levels. Social Care Minister, Norman Lamb, has stated that non-compliance with the NMW because of non-payment of travel time is "a criminal offense and is not acceptable". Statutory guidance under the Care Act 2014 was issued by the

Department of Health in June. In respect of new statutory responsibilities, para 4.27 expects local authorities to:

> *"…assure themselves and have evidence that service providers deliver services through staff remunerated so as to retain an effective workforce. Remuneration should be at least sufficient to comply with the national minimum wage legislation."*

s.1 of the Care Act 2014 sets out the new overarching duty on local authorities to promote 'individual well-being' and places due diligence responsibilities on local authority commissioners

It would seem that the new overarching duty on local authorities to promote 'individual well-being', as set out in s.1 of the Care Act 2014, places due diligence responsibilities on local authority commissioners. This falls far short of a requirement to *ensure* that the NMW is actually paid by the homecare companies with whom they contract. However, at the point of commissioning at least, they should now satisfy themselves that the contractual price is not so low as to encourage non-payment of NMW and should additionally seek assurances from contractors about pay-setting.

An Employment Appeal Tribunal (EAT) judgment in the recent case of *Whittlestone v BJP Homesupport* has clarified the legal position in relation to NMW calculations for travelling time and night shifts in homecare.[1] As a consequence, time spent travelling between homecare visits is eligible for NMW payment when it falls 'within the general control of the employer … arranging the assignments'. Further, Whittlestone won her NMW claim for hours worked on a night shift in which she was permitted to sleep when her service user was sleeping. The EAT rejected the employer's explanation that the £40 it paid her for each overnight was intended to cover her wages 'just in case' her services were required. The contention was that Whittlestone had never actually been woken during the night and, since she had never performed any 'work', her shift should not attract the attention of the NMW. However, the EAT preferred to look at the reason why Whittlestone spent her shift in the service users' home. It found she attended as a condition of her employment and was required by her employer to be 'personally present at that particular place'. Whether Whittlestone was sleeping or otherwise during the shift was irrelevant. She was engaged in 'time-work' during this period and eligible for NMW payments. The judgment emphasises that employer control over working time broadly determines whether time is eligible to be included as part of NMW calculations.

[1] *Whittlestone v BJP Home Support Ltd*. [2014] I.C.R. 275; [2014] I.R.L.R. 176. EAT.

If employers are no longer be able to get away with non-payment of NMW … how will compliance be achieved?

The evidence suggests that a tipping point has been reached and employers will no longer be able to get away with non-payment of NMW. In an era of public sector spending cuts there is little prospect of extra cash from local authorities or central government to meet wage shortfalls. Since 2010, government funding of adult social care has fallen by 12% and the number of people in need of care and support has risen by 14%. The Association of Directors of Adult Social Services claims that, as a result of this 26% reduction in funds, the homecare sector is now at breaking point (Association of Directors of Adult Social Services, 2014). Wage costs comprise the largest element of expense in the provision of homecare services. In October 2014, the National Minimum Wage will rise by three per cent to £6.50 an hour. This will be the first above-inflation NMW rise in five years. With wage costs rising, more hours to be included as working time and continued funding cuts, it seems reasonable to question how NMW compliance can be achieved.

Achieving statutory compliance

There would appear to be four options open to the industry:

a) to increase contractual pay;
b) to end unpaid work;
c) to improve productivity;
d) to exploit statutory opportunities to remove minimum wage rights from workers.

a) Increase contractual pay

The first option is to increase contractual pay, while continuing the practice of paying homecare workers by the minute when in a service users' home. If the contractual wage is high enough to cover the NMW threshold on an average basis, workers are left without a legal mechanism with which to challenge a contract that provides for unpaid working time. The advantage of this response to the industry is to leave zero-hours contracts intact and to retain a high degree of local authority control over commissioned visits. It would seem an unlikely option however, because homecare companies would need to finance increased wages from operating costs and take a fall in profit. A consequence might be business failure or withdrawal from contracts. The threat of older people being left without care, and exposed to potentially life-threatening situations, would present a level of political risk that is arguably unacceptable to government.

b) To end unpaid work

A second option is to pay homecare workers on an hourly basis for the entire time when they are on shift. This would mean that the length of time for which they were paid would increase. In return, contractual wage rates would have to fall – most likely down to the NMW threshold. The reduced requirement for time-tracking would probably weaken the control of local authorities over the delivery of services they commission. A larger problem however may lie in employers having to advertise homecare vacancies as zero-hour contract jobs which pay no more than the legal minimum wage and do not guarantee work. In that instance, potential new recruits would be far better equipped to realise how poorly paid the work is, before they get involved in a job which offers so little security of income. Greater transparency over pay matters might lead to even greater labour shortages in the sector and the negative consequences of business failure or non-fulfilment of homecare contracts as outlined above.

c) To improve productivity

A third option would enable employers to continue to pay for time engaged on scheduled visits, at current rates of pay, while trying to reduce unpaid periods taken up as travelling time. If visits can be better planned and more tightly co-ordinated the separation of paid from unpaid periods of work would have a less severe impact on take-home pay. This option would present a win-win situation for local authorities, homecare companies and homecare workers. If paid periods of time could be increased through a reduction in travelling time take-home pay would increase in concert with productivity gains and the NMW thresholds would be exceeded.

It is possible that the Care Act 2014 will precipitate changes in the way that homecare is commissioned

It is possible that the Care Act 2014 will precipitate changes in the way that homecare is commissioned. For example, s.9 requires an assessment of care needs to include 'the outcomes that the adult wishes to achieve in day-to-day life'. Although benefits to workers and employers may be possible in theory, productivity increases upwards of 10% would be required. This may be particularly difficult in the context of a commissioning shift, driven by the requirements of the Care Act, away from contracting on the basis of call times and care tasks and towards qualitative outcomes.

d) To exploit statutory loopholes which remove minimum wage rights

The fourth option is that employers may employ homecare workers in ways which take them beyond the reach of national minimum wage protection. This would seem particularly attractive in the current climate of NMW enforcement, and there are several ways in which the statutory framework provides for exemption.

Self-employment

Under the definition of 'worker' provided in s. 54(3) of the National Minimum Wage Act 1998, homecare workers contracted as self-employed are not entitled to hourly pay in line with NMW provisions. The case of *Carter v Prestige Nursing Care* informs us that many homecare workers are already working on contracts which state they are self-employed.[2] It was back in 2003 that Carter signed an agreement which referred to her as a 'member' of the company, rather than as an employee. It stated that her job was 'temporary' and she was 'self-employed'. The agreement did not refer to 'wages'. Rather, it described a system of 'fee payments' by service users, from which Prestige would take a commission, in return for paying her weekly 'advances' as a member of the company. Her case serves as a powerful indicator that homecare workers can be subject to complex contractual arrangements which may position them outside of NMW protection. In Carter's case, the Tribunal did not accept that she was genuinely self-employed. However, for the overwhelming majority of homecare workers, the realities of working life means they are unlikely to challenge a contract which defines them as self-employed or even recognise that such a reclassification may be legally possible. Carter herself had worked for nine years under the terms and her situation is not uncommon. Prestige is a national care company with an annual turnover in excess of £20 million and represents the tip of the iceberg.

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[2] *Mrs G Carter v Prestige Nursing*. Appeal No. UKEAT/0014/12/ZT, UKEAT/0015/12/ZT. EAT (2012).

The 'familial exemption'

Another form of exemption is available where homecare workers 'live-in' with both service users and their families. A series of judgments have focussed attention on the 'familial exemption' available under Regulation 2(a) of the National Minimum Wage Regulations 1999. Workers who are caught by this exemption do not need to be actual family members. Judges have interpreted the 'familial exemption' very broadly. Workers are exempt from NMW payments if they reside in the family home of the employer and are 'treated' as if they were members of the family. The Regulation provides for this assessment to be made, 'as regards the provision of accommodation and meals and the sharing of tasks and leisure activities'. In *Jose v Julio* a care worker was employed for six days a week to undertake basic domestic chores and care work.[3] She lived with the family, starting work early in the morning and finishing late at night. She undertook the vast bulk of the family's care and domestic work but could also watch TV during parts of the day and enjoyed only limited privacy in her living arrangements. Her employment contract provided for a net payment of £800 per month and no holidays. Despite the fact that her wages were never paid in full, Jose was unable to succeed in a NMW claim because the EAT found she was 'treated as a member of the family'. She suffered a contractual underpayment of £30,384 in the six years of her employment, yet this breach was not considered to be sufficiently strong to override the statutory indicators of accommodation, meals, tasks and leisure activities.

Workers who are caught by this exemption do not need to be actual family members

In *Nambalat v Taher* a live-in care worker was found to be treated 'as though' she were a member of the family, in part, because she did more work within the family than was strictly required under her contract.[4] Nambalat provided care and support which went beyond the scope of her duties and shared in preparing meals, when her job required only that she clean up after meals. This additional service was a factor which weakened her case for recognition as a regular live-in employee and her right to the NMW. As a consequence of recent judicial interpretations of the 'familial exemption', live-in care workers may yet have to demonstrate that they are treated like domestic servants, if they are to successfully claim the right to NMW coverage.

[3] (2011) *Jose v Julio Nambalat v Taher Chamsi-Pasha v Udin.* [2012] I.C.R. 487; [2012] I.R.L.R. 180. EAT.
[4] (2012) *Nambalat v Taher and Udin v Chamsi-Pasha.* [2012] EWCA Civ 1249, [2012] IRLR 1004.

An implication is that live-in homecare workers may lose their NMW rights if they get too close to service users and their families. It is important to note that measures in the Care Act 2014 promote models of homecare delivery which increase the degree of control that service users and their families exert over homecare employment relationships. Provisions for 'direct payments' from local authorities to the families of service users are designed to enable families to purchase and organise homecare services themselves. While direct payments are not a new initiative, the Government expects that s.31-33 of the Care Act 2014 will increase take up, encourage care needs to be fully addressed through such arrangements, and for wage costs to be constrained as a consequence. Direct payments do not necessarily create employment relationships which fall outside NMW coverage, but the principle of engaging families as active participants in the employment of care workers, is not inconsistent with the logic exhibited by the Courts in determining 'familial exemption'. It may be the case that when families assume the role of direct employers, under systems of direct payment, and care companies merely organise the placement and provide a supplementary training and support service, employment will fall outside NMW entitlement if homecare workers live-in and are 'treated' like family.

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Unmeasured work and daily average agreements

The benefit of a right to be paid NMW can be diluted if homecare work is constructed as being qualitatively different from work measured under the standard scheme of NMW hourly pay. By requiring homecare workers to enter into 'daily average' agreements, in accordance with Regulation 28 of the National Minimum Wage Regulations 1999, employers may submit that homecare is 'unmeasured' work. While the standard 'time work' calculation of the NMW requires payment to apply to all hours worked. Yet in work classed as 'unmeasured work' under Regulation 6, is it only the number of hours set out in the 'daily average agreement' that is relevant for calculating NMW.

In the case of *Walton v Independent Living Association*, the Court of Appeal reasoned that homecare work was specifically suitable to be organised on the basis of 'daily average' agreements because service users did not need to be continuously attended to during long shift periods.[5] Walton worked on a zero-

[5] (2003) Walton v Independent Living Organisation Ltd. [2003] EWCA Civ 199; [2003] I.C.R. 688.

hours contract for 24 hours, 3 days a week, and was paid just £31.40 a day. In July 1999, her employer was informed by the Inland Revenue that a complaint about NMW non-payment had been made. Prior to the inspection, the employer put a 'daily average' agreement in place, under which Walton confirmed that her 24 hour shift required her to perform only 6 hours and 50 minutes of 'work' on average each day. This was an estimate of the time it took her to physically carry out care tasks during the 24 hour period she was in attendance at the home. After the investigation by the Inland Revenue, and because of the existence of the 'daily average' agreement, her pay remained exactly the same because the NMW threshold which applied at the time was met for the 6 hours and 50 minutes of eligible working time. The Court of Appeal upheld this practice, arguably swayed by the cost implications of otherwise requiring NMW payments to be made for the full 24 hour period. The UK Homecare Association maintains that periods of round-the-clock care must be organised as 'unmeasured work' in order to prevent it from becoming 'prohibitively expensive' (UKHCA, 2007).

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In the subsequent case of *South Holland District Council v Stamp* the EAT found care work to be 'unmeasured' work for the purposes of NMW calculations, because the time that a worker herself spent sleeping, washing, entertaining or undertaking domestic chores could not count because the tasks were not included on a 'duties list' which accompanied the contract of employment.[6]

It seems likely that, under pressure to comply with the law, homecare employers will exploit statutory opportunities to reduce or remove their NMW obligations. This includes employing workers on a self-employed basis; employing workers directly within families (to be treated as though they are family members even though they are employees); or by employing homecare workers via 'daily average' agreements for unmeasured work.

Conclusion

Even though there is a great deal of public and political attention to national minimum wage non-compliance, the problem of poverty pay for homecare workers may not be resolved under current statutory arrangements. In the absence of more generous funding for homecare, wage increases of any substance are unlikely to be

[6] (2003) *South Holland DC v Stamp.* (unreported) *EAT/1097/02 RN.*

forthcoming. Arguably, it is the competitive market in care and the arms-length commissioning of services which requires an overhaul. It is through the resultant contracting chains that legal rights are weakened and local authority power to reduce wage rates is strengthened.

It is possible that the current climate of concern about unlawfully low wages in homecare may result in a further worsening of terms and conditions. If the industry further fragments following the introduction of the Care Act 2014, homecare workers may be more frequently employed in ways that neutralise or remove their National Minimum Wage rights. This would leave UK homecare workers in a similar position to their USA counterparts. Following the Supreme Court judgment of *Coke* in 2007, homecare workers in the USA lost minimum wage rights under the Fair Labour Standards Act to which they had been entitled since 1974.[7] It is through unionisation that homecare workers in the USA have secured (limited) opportunities at State level to improve their working lives (Klein and Boris, 2013).

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Even if NMW loopholes are closed, legal rights are a poor substitute for collective bargaining. A system of national sectoral bargaining for UK care workers could greatly assuage public and political concern about poverty pay, employment abuse and the risk presented to the well-being of older people. If genuinely motivated to secure fair pay for care workers, a UK government could enable multi-employer collective bargaining. This could establish a reasonable industry price for care and support the representation of homecare worker interests alongside those of service users to secure negotiated standards and terms and conditions of employment. However, this common sense solution has yet to find a political champion.

In the meantime, the current combination of ministerial, legislative and judicial attention to NMW non-compliance in homecare means that the game is indeed now up for employers who have broken the law. If, as suggested here, a new game is about to begin, it is one in which homecare workers have no more power than before and the odds continue to look stacked against them.

[7] (2007) Long Island Care at Home, Ltd. v. Coke *551 U.S. 158 (2007) (No. 06-593).* US Supreme Court.

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