

Sharing is Caring – Care workers' employment bargain and the National Minimum Wage.

Kinga Stabryla

Abstract

In light of the changing working practices in the United Kingdom and the development of the 'gig economy', which aims to reduce companies' costs, the essay using quantitative and qualitative data at length explores the care workers' legal position. The core substance of the National Minimum Wage Regulations 2015/621 and the Employment Rights Act 1996 are analysed and criticised for omitting feminist theory and being too capitalistic in its approach. The essay concludes that care workers, for the sake of social capital and market logics, are forced to share their skills with the ageing population instead of being paid for their hard work. It is inevitable that the regulations need to be more proactive and inclusive as to combat equality and fairness issues surrounding the care industry.

Introduction

It is undoubtedly noticeable that care workers' employment rights are currently prominent in the news and raise important social, market and legal concerns of equality and fairness. They stimulate debates on the consequences of the legal position on the 'wage-work bargain' of care workers and the national minimum wage laws are central to this.

It can be said that national minimum wage (NMW) underpayments stem from laws which define social structures and attitudes about care giving. As such, the core substance of NMW regulations will be analysed to define how and why this issue exists and what is the impact. Inevitably, socio-legal issues about the gendered workforce, multi-level control of the industry and economics (the ageing population, social capital and market logics) will serve as perspectives of criticism to the current position of law on care work and the NMW. For this reason, day domiciliary care providers will be studied, and the meaning of 'worker' will be analysed as this form the basis for NMW entitlements under National Minimum Wage Regulations (NMWR) 2015. Further analysis of worker categories will follow, with a focus on 'time work' and 'unmeasured work' distinctions. This identification and analysis will then be applied to the main legal issues associated with care workers - 'on call' time (where the worker is at the disposition of the employer) and its link to travel time and use of '0-hour' contracts.

'Sharing is Caring', a well-known saying is used to describe the work of social care workers, as they truly portray what it can mean. Before one understands the contextual meaning, a digression to outline the current legal and social situation precedes.

General Overview

Social care work treats home as the workplace, where physical and mental dependencies are the sources of employment.¹ As we encroach into the private home and human dignity, where people are vulnerable and subject to the goodwill of other individuals, regulations are necessary. The care industry is managed multi-laterally by local governments, service-users and care-providing companies, with councils being in 80% the paying body for care.² Service-users have control over their care through the Care Act 2014, though it is choice that they wanted.³ The impact is that the risk bearing obligations of the employer(s) to pay the costs associated with control over the industry are diffused between the multi-party management. The costs are largely worker costs, as they form 74% of the industry costs.⁴ Lately, council restructuring, budget-cutting and outsourcing led to a shift of care working jobs into the private sector which changed the management dynamics. The new development of business modelling i.e. the use of '0-hour contracts' has likely contributed to the general increase of in-work poverty which affects one in eight workers.⁵

Council employed direct adult care workers earn an annual median pay of £17,500 - the second lowest paid role in the whole adult social care sector following ancillary staff who are not care providing.⁶ Together with the distinct use of multilateral control, it is likely that low pay does not cover basic living costs.

¹ Lydia Hayes, *Stories of Care: A Labour of Law* (Palgrave Publishing 2017).

² *ibid.*

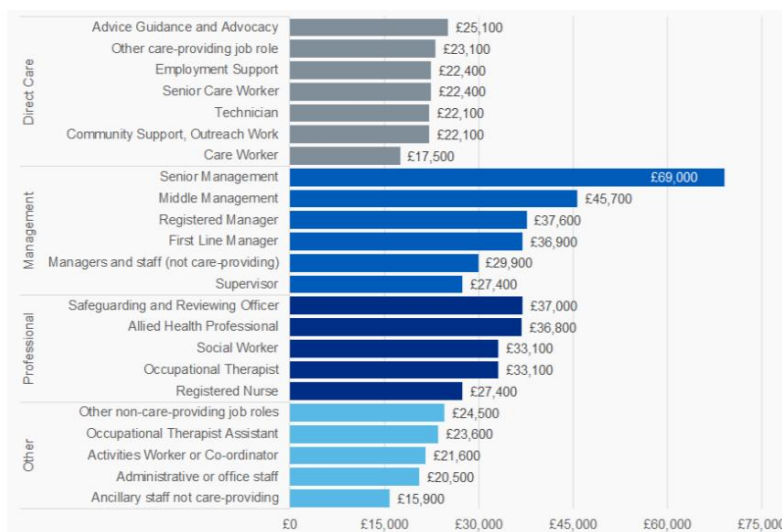
³ LJB Hayes, 'Care and Control: Are the National Minimum Wage Entitlements of Homecare Workers at Risk Under the Care Act 2014?' (2015) 44(4) *Industrial Law Journal* 492.

⁴ 'Time to Think Differently' (The King's Fund, 2017) <www.kingsfund.org.uk/projects/time-think-differently> accessed 13 December 2017.

⁵ 'Monitoring Poverty and Social Exclusion 2016 (MPSE)' (Joseph Rowntree Foundation, 2017) <www.jrf.org.uk/report/monitoring-poverty-and-social-exclusion-2016> accessed 14 December 2017.

⁶ ONS, 'Personal Social Services: Staff of Social Services Departments' (NHS Digital, 2016) p 22 <<http://digital.nhs.uk/media/30476/Personal-Social-Services-Staff-of-Social-Services-Departments-at-30-September-England-2016-Report/Any/pss-staff-eng-16-rpt>> accessed 14 November 2017.

Figure 1: Annual 'median' pay of adult social services jobs, by jobs roles



1. Based on 152 councils with pay data recorded.
 Source: Skills for Care - NMDS-SC - Please also see Tables 6a(i) & 6a(ii) of Data Reference

Gendered Workforce

In total, 85 to 95% of direct care and support-providing jobs are occupied by women. A large proportion are of an ethnic minority group or a migrant, raising important intersectional questions.⁷ It is the largest provider of low paid employment for women in the UK⁸, where the low level of pay is still maintained⁹. This employment, therefore, represents the rooted class and gender division in the labour market. Regulation 2(4) of NMWR 1999 supported this claim, as it excluded carers who were also the service-user's family members from NMW entitlements. Consistently with literature on gender employment inequality, there is a higher proportion of males in managerial roles, where pay is significantly greater, though there are less of them in the industry.¹⁰

⁷ *ibid* [20].

⁸ Hayes (n 3).

⁹ Jill Rubery et al, "It's All About Time": Time as Contested Terrain in The Management and Experience of Domiciliary Care Work in England' (2015) 54(5) *Human Resource Management* 753.

¹⁰ ONS (n 6) [18].

KENT STUDENT LAW REVIEW Volume 4 2018

The resulting low pay signifies the lack of value of care providing in the social and economic discourses where it is not seen as a career.¹¹ Subsequently, these women do not have an active part in the public economy as care is not seen as profitable per se.¹² However, emotional and non-financial motivators were also found to be factors responsible for low pay, though simultaneous encouragement for policies to address the position of pay was advocated.¹³ Consequently, interests of care workers and women at large are not accounted for in policy changes and legal protection at work and of work is inaccessible, unenforced and often problematic. This can be summarised as 'institutionalised humiliation', which represents poverty pay, low social status and disrespect.¹⁴

The problems of workers in the industry are significantly elevated by social capital considerations. Therefore, on top of social expectation for women to care for the sick and elderly for no financial reward and legal protections, there is now an imposed economic burden.

Social capital

Since 2010, there was a 26% decrease in the social care budget, with a further £1.1 billion cut in 2015/16.¹⁵ Simultaneously, this is the fastest-growing industry, with an expected one million jobs increase by the end of the decade, as we live in an ageing

¹¹ Shereen Hussein, "We Don't Do It for The Money" ... The Scale and Reasons of Poverty-Pay Among Frontline Long-Term Care Workers in England' (2017) 25 Health & Social Care in the Community 1817, 1823.

¹² Terre Nash, 'Who's Counting? Marilyn Waring on Sex, Lies and Global Economics' (NFB, 1995) <www.nfb.ca/film/whos_counting/> accessed 10 December 2017.

¹³ Shereen Hussein, Jill Manthorpe, 'Structural Marginalisation Among the Long-Term Care Workforce in England: Evidence from Mixed-Effect Models of National Pay Data' (2012) 1(34) Ageing and Society 21, 35.

¹⁴ Hayes (n 1).

¹⁵ Hayes (n 1).

KENT STUDENT LAW REVIEW Volume 4 2018

population.¹⁶ In the autumn budget statement, social care was not mentioned, and the green bill was moved to appear on 2018 agenda.¹⁷ The shift of financial burdens of the ageing population onto women (and a small proportion of men) began by a 3% increase (from 75% in 2011 to 78% in 2015) in the total number of adult social care jobs in the independent sector, which equates to 160,000 jobs.¹⁸ As such, in September 2016, only 55,800 direct adult care workers were directly employed by councils – this is a 37% decrease since 2014.¹⁹ Such a decrease automatically impacted on collective bargaining power of care workers as there was a distribution and de-centralisation of worker complaints regarding their legal entitlements and ability to gather together for a strike under the same trade union (rendering membership meaningless). Additionally, because of an increased multilateral control and service demands, inequality of bargaining powers were significantly prevalent, and standardised contracts are entered into. As an effect, the government no longer needs to take responsibility for care workers entitlements and the taxpayers' money is sourced elsewhere. Subsequently, Gross Current Expenditure on Adult Social Care (ASC) has fallen slightly last year (see figure 2).²⁰

¹⁶ Laura Gardiner, 'The Scale of Minimum Wage Underpayment in Social Care' (Resolution Foundation 2015) <www.resolutionfoundation.org/app/uploads/2015/02/NMW-social-care-note1.pdf> accessed 13 December 2017.

¹⁷ 'Autumn Budget 2017 Overlooks Social Care' (2017) <www.ukhca.co.uk/mediastatement_information.aspx?releaseID=234402> accessed 14 December 2017.

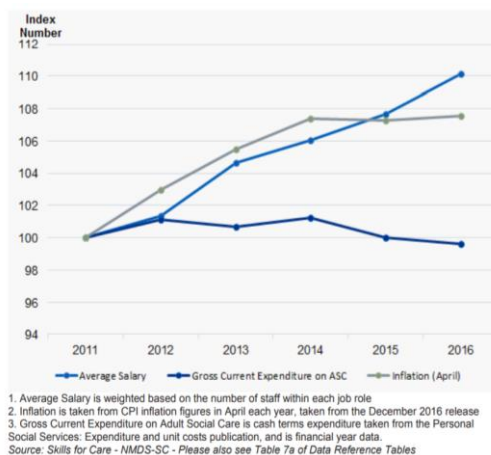
¹⁸ ONS (n 6).

¹⁹ ONS (n 6) [10].

²⁰ ONS (n 6).

KENT STUDENT LAW REVIEW Volume 4 2018

Figure 2: Index of average salary (weighted), inflation and gross current expenditure on adult social care, 2011-16.



Note: Whilst the graph shows that the average salary has increased, this is likely to a result of inflation and an increase in national minimum wage over the year, not voluntary pay rises.

Councils selecting the most efficient and facilitative care provider to commission is the likely cause of the budget decrease. Employers can offer low prices because money is saved through management for which they are responsible for. Since management is profit-focused, profit is made by cutting labour costs by using labour law.²¹

Consequentially, care workers are under a social and economic detriment as they bear the burden of the ageing population and simultaneously facilitate the market for the tax payers and the government. This market facilitation approach is reflected by government statements. This most predominantly relates to NMW underpayments for sleep-over care. Between 2011 and 2013, 'HMRC found non-compliance in 88 (48%) of [employers enquired] (...) identifying £338,835 arrears of pay for 2443 workers'.²² When reading the Impact Assessment of the financial penalty changes,

²¹ Shereen Hussein (n 11) 1817.

²² HM Revenue & Customs, 'NMW Enforcement - Social Care Sector Evaluation 2013' (Gov.uk, 2013) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/262269/131125_Social_Care_Evaluation_2013_ReportNov2013PDF.PDF> accessed 13 December 2017.

KENT STUDENT LAW REVIEW Volume 4 2018

evaluated costs and benefits are employer-focused and no direct reference is made to the welfare and wellbeing of care workers who have lost pay and possibly lived in poverty.²³ The government was more concerned with the possible damage to the industry through the knock-on effect of employers finally paying NMW entitlements to their workers than they are about the workers and their legal rights themselves.²⁴ The Social Care Compliance Scheme (SCCS) which followed the review gives employers a year to identify sleep-over workers' arrears and further three months to make payments. This clearly portrays social care workers as ones bearing the risk, which negatively affects their legal entitlements and in essence their wage-work bargain.

Final contextual remarks

As such, what 'sharing is caring' means is that social care workers, mostly women, quite directly share their skilled time for social and capital gain by caring for those who are unable to care for themselves. Sharing, rather than being paid, is formally established by contractually compressing time into short paid phrases where care workers are directly engaged with service-users.²⁵ Contractual terms are accompanied by legal technical requirements of defining a worker/employee status under the Employment Rights Act 1996 and the category of work a worker falls under NMWR 2015. What employers try to do is avoid possible findings of fact that care workers did in fact work by using '0-hour contracts' and construing manuals that give care workers a false sense of control over their time 'on call'.²⁶ Whilst 'on call' time at

²³ Department for Business Innovation and Skills, 'Power to Set the National Minimum Wage Financial Penalty on Per Worker Basis: Impact Assessment' (Parliament, 2014), p 10 <www.parliament.uk/documents/impact-assessments/IA14-14V.pdf> accessed 13 December 2017.

²⁴ The Institute of Employment Rights, 'Govt launches scheme to 'encourage' employers to pay social care workers minimum wage' (IER, 2017).

²⁵ Hayes (n 3) [3].

²⁶ For example, *Whittlestone v BJP Home Support Limited* UKEAT/0128/13/BA.

night shifts is now recognised by case law²⁷, travel time which constitutes 19% of the tasks²⁸ remains largely unchanged because the courts often misinterpret working tasks²⁹. In effect, time is shared with the employer without return benefits, creating social and economic burdens and disadvantages and reinforcing gender-pay inequality. All this time is not awarded with appropriate monetary remuneration, which should be paid under NMWR 2015.

Legal definitions: working status and worker category distinction

The correct definition of work is important alone. In the Cambridge English Dictionary, work is defined as 'activity, such as a job, that a person uses physical or mental effort to do, usually for money'. Whilst this definition is correct, what is more important in terms of employment law is the truthful classification of tasks which impacts whether one gets paid or not.

Further and more recently, 'work' was defined in two ways: 'Time spent actively engaged in core work tasks on behalf of the employer', and 'Worker's time spent at the employer's disposal' with 'the employer's use of managerial prerogative in order to obtain productive work'.³⁰ Since the second definition reflects the employment relationship more precisely in terms of the internal management of a business and provides workers with greater protection from exploitation, it shall be used as the reference point for this discussion.³¹ Though, one needs to remember that certain types of work are viewed literally and are allowed to be classified as non-work under

²⁷ *Burrow Down Support Services Ltd v Rossiter* EAT/0592/07; *British Nursing Association v Inland Revenue* (National Minimum Wage Compliance Team) [2002] IRLR 480 CA.

²⁸ Hayes (n 3) [3].

²⁹ *South Manchester Abbeyfield Society Ltd v Hopkins* [2011] ICR 254.

³⁰ A. C. L. Davies, 'Getting More Than You Bargained For? Rethinking the Meaning of 'Work' In Employment Law' [2017] *Industrial Law Journal* 2.

³¹ *ibid.*

NMW criteria. It happens so that more consideration is given to economic factors (such as affordability of workers) and public policy rather than employee protection.³²

Working status

By statute, all individuals who are involved in work are classified as workers. A worker is someone who works under a contract of employment or a contract requiring the worker to perform tasks or provide services.³³ The worker status, therefore, applies when one works as someone who is not self-employed, under an agreement. Notably, work does not need to be regularly provided by the employer or accepted by the employee and there must be control over ones' performance, tax and NI contributions (pay deductions) and materials or tools used to carry out the job.

This status provides an entitlement to the NMW. Though, pay is received for availability, disposal and obedience to employers' instructions, rather than for actual physical and mental effort.³⁴ Demanding more than readiness and willingness would be unfair because the employer should bear any risks as the main profitee from any workers' action. For one to think of pay as rewarding the completion of assigned tasks, rather than labour power, lies in the measurements and definitions used in society and by the courts who decide on such disputes.³⁵ This simple, yet usually complex approach transposes into society and becomes normative.

Whilst treatment as a worker is guaranteed when direct care is provided at a service-users home, the legal definition creates a hurdle for those 'on call'. The employment contract is construed unfairly by removing mutuality of obligation

³² Davies (n 30) [13].

³³ Employment Rights Act (ERA) 1996, s 230(3).

³⁴ Davies (n 30).

³⁵ *ibid* [7].

KENT STUDENT LAW REVIEW Volume 4 2018

(necessity to agree and do work under his control for pay) necessary for him to be classified as an employer, even though he is still likely to be the main beneficiary of this 'free' time where the worker is not at liberty. Interestingly, some employers pay mileage expenses (for example paying 25p a mile) for travelling between assignments, whilst not paying for the time. This is not wholly reasonable and should justify mutuality, as payment shows understanding and care for the worker during this time. Whilst this point should suffice, travel expenses are not considered in NMW calculations.³⁶

Additionally, there is an elevated status of an 'employee' that one might obtain. The Employment Rights Act 1996 provides that an 'employee' is an individual who works under a 'contract of employment'.³⁷ The distinction is necessary and very important for working mothers, as amongst additional rights is Statutory Sick pay, all sorts of childbirth and emergency leave, minimum notice periods and protection against unfair dismissal and Statutory Redundancy pay. As such, the distinction is vital for the establishment of the core working bargain. But, the definition is practically the same as one for workers.³⁸ It is uncertain whether the government is capable of providing a clearer definition, apart from that an employee has 'extra employment rights' and 'responsibilities that do not apply to workers'.³⁹ It seems that the indicator of entitlement, in this broad guideline, is a larger/ more difficult workload (responsibilities) and a more sophisticated mutuality of obligation and control where the employer, largely at his will, treats the worker as a servant whilst paying him and providing important rights. This would reflect the courts approach to the classification

³⁶ NMWR 2015, Reg 10(1).

³⁷ ERA 1996, s 230(1).

³⁸ ERA 1996, s 230(3)(b).

³⁹ Employment Status <www.gov.uk/employment-status/worker> (Gov.uk) accessed 12 December 2017.

KENT STUDENT LAW REVIEW Volume 4 2018

of contracts of employment.⁴⁰ Nevertheless, the worker/employee status distinction is often surrounded by complex facts and it seems that not enough affirmative guidance is provided to make a fair evaluation. This is demonstrated by allowing *Pimlico Plumbers* to appeal to the Supreme Court regarding the finding that the plumber was a worker.⁴¹

Worker status is particularly important when considering the future and one's pension that is calculated based on hours of work and pay. But, this is the approach in *Whittlestone*, where at first the EAT found that travelling in between 'new shifts'/ assignments was 'purely incidental' to the core working tasks.⁴² Only after control was considered properly the tribunal found that travel time should be counted to NMW calculations. But, will this always be the case, even if there is a 3-hour break between assignments? It might not, considering the reason *why* the long pause in assignments existed.⁴³ It is likely for the employer to say that no work was available. As such, before deciding on working categories, travel time may be missed out in national minimum wage calculations and the care worker treated as a non-worker.

This capitalistic approach is rather problematic for those who are under multilateral control with wages and funds under scrutiny of parties who all want to save capital and profit. Their expectation affirms the traditional view that females should care for others out of good will, without economic security. What this approach might render is business and economic inefficiency through the creation of longitudinal poverty as the large proportion of workers are paid marginal amounts for long hours of productive work. With the fast-changing social norms where elderly loneliness is

⁴⁰ *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497.

⁴¹ *Pimlico Plumbers Ltd and another v Smith* [2017] IRLR 323 CA.

⁴² *Whittlestone v BJP Home Support Limited* UKEAT/0128/13/BA.

⁴³ *Esparon v Slavikovska* UKEAT/0217/12/DA.

greater and life expectancy grows, care workers will be the next ones needing care for which they will not be able to pay for (as the average care worker is 47).⁴⁴ A claim is, therefore, made that the fundamental definitions governing legal and social understanding of worker distinction fails to adapt to the complex operation of the care industry.

Additionally, this distinction is particularly significant for female care workers in need of the rights provided to employees (most significantly maternity leave and subsequent flexible working requests). A significant fraction of workers are on a 'zero-hour' contract and therefore one could automatically conclude that the worker category only applies, and rights cannot be guaranteed. In result, the definitions and subsequent lack of guidance results in discrimination against female care workers. A claim is made that this distinction is gender-biased and discriminates against women, opposite to what was stated in *Quinnen v Hovells*.⁴⁵ The fact that the courts felt the need to say that all workers are protected by the Sex Discrimination Act 1975 is enough to prove that a problem with the status distinction exists. Additionally, by evaluating the 1% uptake of shared parental leave, one can conclude that men are not willing to use the vast amount of employee rights, which are work-life-balance orientated, because they are not profitable.⁴⁶ Whilst this is a reasonable decision, why are females stripped out of their rights and provided with no choice in an industry that is their main employment provider? The answer is likely to be an economical one – rights, which are very likely to be used by women, cost money and money equals less profit and loss of taxpayers money.

⁴⁴ ONS (n 22) [19].

⁴⁵ [1984] IRLR 227 EAT.

⁴⁶ Alexandra Topping, 'Few Fathers Can Afford To Take Shared Parental Leave, Say Campaigners' (2017) <www.theguardian.com/money/2017/apr/05/few-fathers-can-afford-to-take-shared-parental-leave-say-campaigners> accessed 14 December 2017.

Worker categories

The hours for which the NMW (rated according to age) is paid also depends on the measurement of work pay. For NMW purposes there are four different types of work under NMWR 2015: 'salaried hours work' (reg. 21), 'time work' (reg. 30), 'output work' (reg. 36) and unmeasured work (reg. 44). Output work is not applicable in the industry whilst salaried hours work is easy to recognise because reference is made to specific number of hours (for example 36 hours per week) in the contract. Reg. 30(a) NMWR 2015 describes time work as 'work, other than salaried hours work, in respect of which a worker is entitled under their contract to be paid (a) by reference to the time worked by the worker'. If a worker does not satisfy this category, the default category of unmeasured work applies.

It is certain that employers pay care workers based on the hourly rate, which falls under time work. This is necessary to comply with the law and industry standards where work with service-users is defined by time i.e. 30 minutes is allocated to do certain tasks for a service-user.⁴⁷ As Davies stated, time work category is protective of the employee as full performance or completion of a task is not a prerequisite for NMW, only availability, willingness and obedience.⁴⁸ Additionally, a timed care worker has a further safeguard as to travel time pay (even if it is not considered as a core work task by the employer).⁴⁹ This is because travel is to be treated as working hours if the worker would 'otherwise be working', including, 'travelling for the purpose of carrying out assignments (...) which the worker is obliged to travel'.⁵⁰ In comparison,

⁴⁷ Hayes (n 3) [7].

⁴⁸ Davies (n 30) [14].

⁴⁹ NMWR 2015, reg 34(1)

⁵⁰ NMWR 2015, reg 34.

'hours when a worker is travelling for the purposes of unmeasured work are to be treated as hours of unmeasured work.'⁵¹

Categorisation problem with 'on call' work

Disputes arise with the categorisation of 'on call' work – time in between direct service-user tasks where the worker is supposedly 'available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home'.⁵²

These categorisations are a grey area of work in the care work industry because the working day is fragmented into separate shifts and pay received only for contact time, as this is what the council and the service-users essentially pay for.

However, the worker is not at complete liberty from the multi-party managerial prerogative. Requirement of availability, which can be a decisive point in a dispute about NMW underpayments, is often exercised by having to check the rota (often an app on the phone) continuously throughout the day to provide a service to a service user at a short notice. This may be done often because it is the service user who has the power and control over how his or her care is provided.⁵³ As such, it may be affordable to keep the worker available, as profit can be generated purely from efficiency of worker management.⁵⁴ From an economic perspective, paying for available time renders social capital costs, which could outweigh the benefits. Effects on workers are again economic and social disadvantage.

This fragmented approach makes the evaluation of the how and when workers should be paid difficult. After some court intervention in *Walton*, the turning point was

⁵¹ NMWR 2015, reg 47.

⁵² NMWR 2015, reg 32.

⁵³ Care Act 2014, s 1.

⁵⁴ Davies (n 30), 23.

how pay was assessed.⁵⁵ To successfully make a finding that the worker is working separate shifts, '0-hour contracts' are used.

'On call' on a '0-hour' contract

The term '0-hour contract' is not a legal one but refers to casual agreements where the working hours are not guaranteed, and one works, or can choose to work, when a service-user demands care.

These contracts are referred to as 'trash agreements' and are seen as detrimental for citizens, even by some governments in other European countries like Poland.⁵⁶ This contract type safeguards the employer from paying extra costs associated with his workers. It is relative to female care workers, as they make up 57.7% of the 2.8% of all workers on this type of contract in the UK and 23.06% of adult care workers were or are on one this year.⁵⁷

To start at the basics, the common employers' claim which aims to justify the use of zero-hour contracts is flexibility and incentive for non-qualified staff to join the industry (although qualifications rates conflict with this claim)⁵⁸. The proportion of workers who truly benefit from this contractual arrangement is likely to be marginal, even though it provides flexibility and ones' hours are in large proportion that of a part-time role.⁵⁹ Unfortunately, to justify this based on the flexibility would be naïve, as it is

⁵⁵ Walton v Independent Living Organisation Ltd 2003 ICR 688 (CA).

⁵⁶ Said by Mateusz Morawiecki at first speech on 12 December 2017 in parliament after being revealed as the new prime minister.

⁵⁷ Sally Doody, 'Contracts That Do Not Guarantee A Minimum Number Of Hours - Office For National Statistics' (ONS, 2017) <www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/contracts-that-do-not-guarantee-a-minimum-number-of-hours/september2017#what-are-the-characteristics-of-people-employed-on-zero-hours-contracts> accessed 14 December 2017.

⁵⁸ ONS (n 6) [26].

⁵⁹ Sally Doody, 'Contracts That Do Not Guarantee a Minimum Number of Hours' (ONS, 2017).

not flexibility which is an issue – it is the legitimacy of use and the exploitation it renders.

The classification of workers, for their NMW entitlements, is concerning, especially where the relationship is of a different nature than the paper copy (the contract) states. Whilst some agreements are casual since rotas are supplied week-by-week, like in *O'Kelly* case, rotas are not the decisive factor.⁶⁰ Gladly, the courts recognised this practice in *Autoclenz* and more recently in *UBER*, and use a contextual approach.⁶¹ Realistically, this agreement in substance often operates consistently in terms of working hours and days, with presence of mutuality of obligation (a future expectation of providing work and the acceptance of work) and sufficient control over the worker on working days. For example, when entering into an agreement, workers may be notified that any changes to availability must be approved by a manager and the manager must be updated about time-off sick every day, even when work was not provided for that day. They might also be required to check their mobile rotas throughout the working day and are expected to accept on-the-day assignments. A care worker's day may be 14 hours long with 8 service-users to see for various periods of time. Time in-between assignments may be as short as 30 minutes or as long as 260 minutes and will require some travelling time from and to assignments. To divide assignments into new shifts throughout the day to avoid paying NMW, in which is travel time and sleep and associated expenses, is unjust and exploitive. Unfortunately, this is a complex situation as work and non-work is combined with no measurement of the distinction.

⁶⁰ *O'Kelly v Trusthouse Forte Plc* [1984] QB 90 (CA).

⁶¹ *Autoclenz v Belcher* (2011) UKSC 41; *Aslam v Uber BV* [2017] IRLR 4.

It cannot be regarded plainly as a bad bargain, as there is an inequality of bargaining power between the parties because the worker needs the job more than the employer needs the specific worker. On the contrary, making oneself available fulfils own economic interests rather than a contractual obligation, especially where no promise to provide work was made by the employer.⁶² Nevertheless, all those female workers are not treated with dignity and respect and are used for capitalistic gains without much chances to establish a contractual relationship for 'on call' time.⁶³

Conclusions and Possible solutions

This is the business model for the industry, which is quite similar to *UBER*.⁶⁴ It is one where the risk is diffused between the multi-party management as no one volunteers to pay the costs associated with control over care workers' availability. Additionally, service-user control provides a justification for non-payments because working time is not controlled by the employer only.⁶⁵ By now it should be clear that NMWR 2015 and ERA 1996 should be more inclusive, as to include women and the care work industry mechanism at large. The current consequences are legal exclusion and marginalisation, social disadvantage and poverty. There are also important future detrimental effects regarding social capital for care work. Ultimately, women are still risk-bearers for care, as there is uncertainty as to working hours, subsequent NMW entitlements and underpayments for work they do. They are sharing through caring.

This should be changed by amending the Care Act 2014 to give service-users choice rather than control. This would significantly reduce unpredictability of working

⁶² Davies (n 30) [27].

⁶³ *Tilson v Alstom Transport* [2011] IRLR 169.

⁶⁴ *UBER* (n 61).

⁶⁵ Hayes (n 3) [13].

KENT STUDENT LAW REVIEW Volume 4 2018

hours, could reduce the use of casual contracts and promote guaranteed hours arrangements, where work is organised in a timely manner without big time disparities.

The government, a key party here, is not intervening because this arrangement is consistent with the legal and social approach towards the traditional gendered roles, which is not likely to mould with the EU equality approach because public policy and social capital (knock-on effect on industry practice) factors are more important. Though, what they could do is amend labour law provisions which strip women from rights and introduce the use of '0-hour' contracts as an 'opt-in' only, rather than a necessity. This would not encroach onto the free-market at large and would provide necessary protection for care workers in relation to travel time between service-users' home.