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BRIEFING PAPER

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National Minimum Wage: sleep-in care

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Contents:

Contents

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Summary

In April 2017 the Employment Appeal Tribunal handed down judgment in *Royal Mencap Society v Tomlinson-Blake,* deciding that, in some cases, carers who are required to be present throughout the night will be entitled to the National Minimum Wage (NMW) whether awake or asleep. While this had been established by earlier case law, government guidance had been potentially misleading on the issue. Social care providers reacted to the judgment with concern about their ability to pay carers the NMW during sleep-in shifts and their exposure to claims for backdated pay.

Mencap appealed the decision. The Court of Appeal heard the case in March 2018 and handed down judgment on 13 July 2018, reversing the decision of the Employment Appeal Tribunal. The Court held that "**the only time that counts for NMW purposes is time when the worker is required to be awake for the purposes of working**".

Following the Employment Appeal Tribunal decision, the Government had set up the Social Care Compliance Scheme, to help social care providers comply with their backpay liabilities. In light of the Court of Appeal's judgment, it appears likely the Scheme will be suspended and possibly discontinued, pending the outcome of Unison's attempt to appeal to the Supreme Court. Recent reports have indicated that the Scheme is still operating.

This briefing is part of a series on the National Minimum Wage, including:

- National Minimum Wage: rates and enforcement
- Workers underpaid the minimum wage
- National Minimum Wage Statistics
- Economic impacts of the National Living Wage: in brief
- The National Minimum Wage: historical background
- The National Minimum Wage: volunteers and interns

1. The legal framework

Section 1(1) of the *National Minimum Wage Act 1998* states that a worker:

> shall be remunerated by his employer in respect of his work in any pay reference period

Section 2(1) empowers the Secretary of State to make regulations:

> for determining what is the hourly rate at which a person is to be regarded for the purposes of this Act as remunerated by his employer in respect of his work in any pay reference period

The current consolidated regulations are the *National Minimum Wage Regulations 2015 (SI 2015/621)*. The regulations, among other things, define different types of work. One of these is "time work", defined in regulation 30 as work "in respect of which a worker is entitled under their contract to be paid … by reference to the time worked".

The question is: does time spent sleeping during sleep-in care work constitute "time work", entitling workers to be paid the NMW for that time? In *Royal Mencap Society v Tomlinson-Blake (Care England intervening)*[1] the Court of Appeal decided that it does not, reversing the earlier decision of the Employment Appeal Tribunal.

1.1 Employment Appeal Tribunal decision

In March 2017 the Employment Appeal Tribunal (EAT) heard together several cases, all raising the same question:

> whether employees who sleep-in in order to carry out duties if required, engage in 'time work' for the full duration of the sleep-in shift or whether they are working for national minimum wage payment purposes only when they are awake to carry out any relevant duties.[2]

On 21 July the EAT handed down its judgment in *Royal Mencap Society v Tomlinson-Blake,* concluding that, in some cases, time spent sleeping during a shift would constitute time work. Whether or not it does would depend on a "multifactorial evaluation" of the circumstances: [3]

> No single factor is determinative and the weight each factor carries (if any) will vary according to the facts of the particular case. The following are potentially relevant factors in determining whether a person is working by being present:
>
> (i) The employer's particular purpose in engaging the worker may be relevant to the extent that it informs what the worker might be expected or required to do: for example, if the employer is subject to a regulatory or contractual requirement to have someone present during the particular period the worker is engaged to be present, that might indicate whether and the extent to which the worker is working by simply being present.
>
> (ii) The extent to which the worker's activities are restricted by the requirement to be present and at the disposal of the employer

1 [2018] EWCA Civ 1641
2 *Royal Mencap Society v Tomlinson-Blake* [2017] UKEAT 0290_16_2104
3 [2017] UKEAT 0290_16_2104

> may be relevant. This may include considering the extent to which the worker is required to remain on the premises throughout the shift on pain of discipline if he or she slips away to do something else.
>
> (iii) The degree of responsibility undertaken by the worker may be relevant: see Wray & J W Lees at [13] where the EAT distinguished between the limited degree of responsibility in sleeping in at the premises to call out the emergency services in case of a break-in or a fire on the one hand, and a night sleeper in a home for the disabled where a heavier personal responsibility is placed on the worker in relation to duties that might have to be performed during the night.
>
> (iv) The immediacy of the requirement to provide services if something untoward occurs or an emergency arises may also be relevant. In this regard, it may be relevant to determine whether the worker is the person who decides whether to intervene and then intervenes when necessary, or whether the worker is woken as and when needed by another worker with immediate responsibility for intervening.
>
> …
>
> 46. Each case is likely to turn on the consideration of its own particular facts. There will be cases where the line is a difficult one to draw …

One possible benefit of this multifactorial approach is it lends itself to flexible adaptation to individual cases. However, this flexibility could create difficulty for employers who need to be able to predict their workers' wage entitlement. As one barrister involved in the Court of Appeal case contended:

> The answer [to NMW entitlement], apparently, was to be gleaned from evaluation of a basket of factors (some identified, and some not), each to be given indeterminate weight by the diverse variety of employers, workers, trade unions, HMRC enforcement officers, employment tribunals and County Courts who would have to grapple with the problem of entitlement. The difficulty with these multi-factors was that they were potentially variable in their application and impact, were not predictably available to social care funders, employers and workers, and the weight to be given to them even when identified was completely uncertain. They required individual assessment, worker by worker and potentially shift by shift, of the nature of the duty potentially to be performed by the sleeping worker.[4]

Prior to the EAT's decision, the possibility of carers being entitled to the NMW for time spent sleeping had been considered by various other courts and tribunals. For example, in July 2013 the EAT, in *Whittlestone v BJP Home Support Ltd,*[5] held that:

> where specific hours at a particular place are required, upon the pain of discipline if they are not spent at that place, and the worker is at the disposal of the employer during that period, it will normally constitute time work[6]

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4 Timothy Brennen QC, 'Sleep-in shifts do not count as time work for national minimum wage', Deveraux Chambers blog, 23 July 2018
5 [2014] IRLR 176
6 Para 16

The case concerned a carer who was

> provided with a camp bed and … bedding which she could use to sleep overnight in the living room of the house occupied by the three young adults … there was no evidence that whilst doing that, which she regularly did, she ever woke from her sleep in order to provide any specific care.[7]

Similarly, in 2014 the EAT handed down judgment in *Esparon t/a Middle West Residential Care Home v Slavikovska*,[8] reiterating that a worker would be undertaking time work if required to be present on an employer's premises:

> the Claimant's job when she was required to sleep in on the premises was one where she was entitled to be paid simply for being on the premises, regardless of whether she worked or not or whether she carried out her regular duties. She was paid simply to be there.[9]

Notwithstanding these and other earlier authorities, the EAT's decision in *Royal Mencap Society v Tomlinson-Blake* came as a surprise to many in the social care sector, partly due to the fact Government guidance had been "potentially misleading" on the issue (see below, under 'National minimum wage guidance'). Social care providers expressed concern about the extent of their back-pay liabilities and their ability to meet future staffing costs. Mencap appealed to the Court of Appeal.

1.2 The Court of Appeal's decision

The Court of Appeal heard Mencap's appeal in March 2018 and handed down judgment on 13 July 2017.[10] The judgment turned on the somewhat complex distinction between **actual "time work"** and time during which the worker is **available for work**, which in some circumstances counts as time work.

Regulation 30 of the *National Minimum Wage Regulations 2015*[11] defines time work:

> Time work is work, other than salaried hours work, in respect of which a worker is entitled under their contract to be paid—
>
> (a) by reference to the time worked by the worker

If an individual engages in time work they are entitled to be paid the NMW. The judgments summarised above had held that sleep-in care workers could be undertaking time work even if asleep.

If a worker is not undertaking actual time work, the hours they spend available for work may nonetheless count as time work, by virtue of regulation 32. Regulation 32(1) provides that:

> Time work includes hours when a worker is available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home.

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7 Para 5
8 UKEAT/0217/12/DA
9 Para 56
10 *Royal Mencap Society v Tomlinson-Blake* [2018] EWCA Civ 1641
11 The judgment refers to both the 2015 regulations and its predecessors, which are in most senses materially the same

Thus, being available for work can be included, by regulation 32(1), within the definition of time work, giving rise to NMW entitlement. However, regulation 32(2) states that regulation 32(1) does not apply to time spent sleeping:

> hours when a worker is "available" only includes hours when the worker **is awake for the purposes of working**, even if a worker by arrangement sleeps at or near a place of work and the employer provides suitable facilities for sleeping.

The effect of regulation 32(2) is to prevent time, during which workers are available to work but are sleeping, from being included, by regulation 32(1) within the definition of time work.

Crucially – and this is key to understanding the judgments - regulation 32 only comes into play if the worker is not engaging in actual time work under regulation 30. If they are, they are regarded as working rather than available for work; as such regulation 32, and the exception in regulation 32(2) for time spent sleeping, would not affect their entitlement the NMW. It was on this point that the Court of Appeal's judgment departed from the EAT's.

The EAT had held that sleeping time could count as time work rather than time available for work, and thus regulation 32, together with its exception, would not come into play.

In giving the lead judgment for the Court of Appeal Lord Justice Underhill disagreed with the EAT, concluding that:

> I believe that sleepers-in … are to be characterised for the purpose of the Regulations as available for work … rather than actually working … and so fall within the terms of the sleep-in exception … The result is that the only time that counts for NMW purposes is time when the worker is required to be awake for the purposes of working.[12]

1.3 Appeal to the Supreme Court

Following the Court of Appeal's judgment, the trade union Unison published a press release criticising the decision, stating that:

> sleep-in shifts should count as working time, and should be paid at hourly minimum wage rates or higher.
>
> The union argues that most care workers on sleep-in shifts aren't sleeping. Most nights they have to get up to care for people, are on constant call, and are not free to come and go from their place of work.[13]

On 8 August 2018 Unison, which had supported Ms Thomlinson Blake's claim since the outset, said it had sought leave to appeal to the Supreme Court. In a press statement the same day said:

> Now, says the union's head of legal services Adam Creme, "there will be a period of time when the Supreme Court considers the application, but it is reasonable to expect the court will agree to hear an appeal.

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12 Para 86
13 Sleep-in shifts judgment is a huge mistake, Unison press release, 13 July 2018

"Assuming this is agreed, UNISON will be taking the appeal forward and fighting for our members.

"We believe the Court of Appeal got this decision completely wrong and will do everything we can to reverse it."[14]

[14] UNISON seeks leave to appeal on sleep-in case, Unison website, 8 August 2018

2. The Social Care Compliance Scheme

As set out above, the EAT's decision in *Mencap* did not newly establish that carers undertaking sleep-in shifts could be entitled to the NMW for time spent sleeping. Several earlier cases had established that, and ACAS guidance from December 2013 had commented on it. However, it brought the issue to widespread attention. Care workers realised they might be owed back pay, while social care providers took stock of their liabilities.

Aside from individual tribunal claims, the right to the NMW is enforced by HMRC on behalf of the Department for Business, Energy and Industrial Strategy (BEIS), which is responsible for NMW policy.[15] If HMRC finds an employer has underpaid worker(s), it will fine the employer, require it to provide back pay to affected workers, and name and shame them via a press release.[16]

Owing to the "specific and unforeseen circumstances"[17] following the EAT's decision, and given its potential impact on the social care sector, the Government temporarily modified its approach to enforcement and established the Social Care Compliance Scheme. HMRC issued a policy statement indicating that it would waive fines in respect of non-compliance found to have occurred **prior to July 2017**.[18] BEIS followed this by updating its enforcement guidance, setting out an interim approach to enforcement, noting that:

> Government guidance has been updated following developments in the law, but for a period before February 2015 **was potentially misleading on this issue**.[19]

In light of the Court of Appeal's judgment, it appears likely the Social Care Compliance Scheme will be suspended and possibly discontinued, pending the outcome of Unison's attempt to appeal to the Supreme Court. However, recent reports indicate the Scheme is still operating and that HMRC wrote to social care providers stating:

> HMRC have decided that it is appropriate to continue to operate the Social Care Compliance Scheme (SCCS) allowing participating employers to complete a self-review, taking the judgement into consideration, and make a declaration to HMRC.[20]

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15 For details of how the NMW is enforced, see *The National Minimum Wage: rates and enforcement*, SN06898

16 See: BEIS, *National Minimum Wage Law: Enforcement Policy on HM Revenue & Customs enforcement, prosecutions and naming employers who break National Minimum Wage law*, November 2017

17 BEIS, *National Minimum Wage Law: Enforcement Policy on HM Revenue & Customs enforcement, prosecutions and naming employers who break National Minimum Wage law*, November 2017, p12

18 BEIS, *Enforcement of the National Minimum Wage in the social care sector*, July 2017

19 BEIS, *National Minimum Wage Law: Enforcement Policy on HM Revenue & Customs enforcement, prosecutions and naming employers who break National Minimum Wage law*, November 2017, pp12-13

20 VODG raises concerns as HMRC "jumped the gun" ahead of official guidance on sleep in payments, VODG website [accessed 7 September 2018]

This has prompted criticism from charities who argue that HMRC's actions are "adding confusion and raising more unanswered questions".[21]

2.1 National minimum wage guidance

As noted in the BEIS statement discussed above, Government guidance prior to 2014 was potentially misleading on the sleep-in care issue.

The 2013 guidance stated the following on time when workers are sleeping:

> **Sleeping between duties**
>
> You may allow workers who are performing time work to sleep at or near their place of work and provide them with sleeping facilities. They are not entitled to the minimum wage while they are on standby or on call and are asleep or entitled to sleep. However, you must pay them the minimum wage for any time during which they are awake for working.
>
> **Time when a worker can sleep and is not working is not time for which you have to pay them the minimum wage.** However, if they have to get up and work, the time spent awake when they are getting ready for work and working is time for which the minimum wage.
>
> If you provide sleeping facilities make sure your arrangement clearly sets out when the worker can sleep. If your arrangement does not clearly specify any sleeping time, it is likely you will have to pay the minimum wage for the full time when the worker is at the workplace - including time when they are asleep.[22]

Notably, this guidance was published after the *Whittlestone* judgment had been handed down (see above discussion of the EAT judgment).

The same passage in the updated, April 2017 version of the guidance, states:

> Employers must ascertain whether a worker is still subject to certain work- related responsibilities whilst asleep, to the extent that they could be deemed to be 'working'.
>
> **A worker, who is found to be working, even though they are asleep, is entitled to the minimum wage for the entire time they are at work**. Workers may be found to be 'working' whilst asleep if, for example, there is a statutory requirement for them to be present or they would face disciplinary action if they left the workplace. They would then be entitled to the minimum wage.
>
> There can be situations, however, where a worker is only available for work and is permitted to sleep and suitable sleeping facilities are provided at the workplace. In those cases, the individual will not be 'working' and the minimum wage will not be payable.

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21 Ibid

22 BIS, *Calculating the minimum wage*, December 2013, p30

> However, the individual must be paid the minimum wage for any time they are awake for the purpose of working.[23]

Media reports indicated that, until February 2016, HMRC National Minimum Wage inspectors worked to guidance indicating that sleeping time would not attract the National Minimum Wage.[24]

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23 BEIS, *National Minimum Wage and National Living Wage: Calculating the minimum wage*, April 2017, p29

24 Wage inspectors accused of 'outrageous inconsistency' over care worker pay, *Guardian*, 15 May 2017

3. Social care sector comment

Adult social care services in England are facing significant funding pressures, due to the combination of a growing and ageing population, increasingly complex care needs, reductions in funding to local government and increases in care costs.[25]

Following the EAT judgment, social care providers were concerned about their ability to meet the requirement to pay carers the NMW during sleep-in shifts, and the potential impact of up to six years of backdated payments. Research commissioned by the sector estimated costs of up to £400 million for backdated pay and up to £200 million a year in ongoing annual salary costs.[26] Many in the sector, including the Local Government Association (LGA), called on the Government to provide additional funding to cover backdated pay costs. Responding to the launch of the Government's Social Care Compliance Scheme in November 2017, the Chairman of the LGA's Community Wellbeing Board, Cllr Izzi Seccombe, said:

> The fact that employers won't have to settle any back-payment for sleep-in costs until March 2019 is helpful and buys some much-needed time to further understand the size and potential impact of the historic liability. But this announcement does not end the uncertainty for providers, care workers, the people they care for and their families, and those who pay for their own care or employ a personal assistant through a personal budget.[27]

A number of charities and care providers, including Care England, Learning Disability England, Learning Disability Voices, the Association for Real Change and the Voluntary Organisations Disability Group, formed a #SolveSleepIns Alliance to campaign for additional Government funding to resolve the "sleep-in funding crisis".[28] An Early Day Motion [EDM 1072 Back Pay for Sleep-in Residential Workers Crisis], tabled by Ian Mearns on 14 March 2018, similarly urged the Government to fully fund sleep-in back pay.

The Court of Appeal's decision resolves many of these concerns. Unless the decision is overturned on appeal to the Supreme Court, sleep-in care workers will not be entitled to backdated pay. Following the Court of Appeal's decision, Mencap issued a statement indicating that the judgment was welcome, insofar as it relieved the possibility of backdated pay claims, but that it would nonetheless, going forward, pay sleep-in carers at a higher rate than the legal minimum:

> The Court's decision has removed the uncertainty about how the law on the National Living Wage applies to sleep-ins. The prospect of having to make large unfunded back payments had threatened

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25 See House of Commons Library briefing paper CBP07903 *Adult Social Care Funding (England)* for an analysis of social care funding pressures.

26 Local Government Association, Update on discussions for payment of sleep-in shifts in social care, 3 August 2017, p4

27 'Councils respond to sleep-in back pay announcement', *Local Government Association Press Release*, 2 November 2017

28 Charity commission head urged to mediate in row over care workers' pay, *Guardian*, 18 June 2018

> to bankrupt many providers, jeopardising the care of vulnerable people and the employment of their carers.
>
> "Many hardworking care workers were given false expectations of an entitlement to back pay and they must be feeling very disappointed. We did not want to bring this case. We had to do so because of the mayhem throughout the sector that would have been caused by previous court decisions and Government enforcement action, including serious damage to Mencap's work in supporting people with learning disabilities.
>
> "What is clear though, is that dedicated care workers deserve a better deal. They work hard and support some of the most vulnerable people in society, but many are among the lowest paid. We and many other providers have been paying for sleep-ins at a higher rate for over a year now, and we intend to continue despite the Court's decision. We now call on Government to fulfil its responsibilities by legislating so that all carers are entitled to this, and their employers are funded accordingly. We also call on Government to ensure that the social care sector and, in particular, the specialised support that is required for people with a learning disability is properly funded and its workers are paid what they deserve in the future."[29]

A similar sentiment was expressed in an article by the Chief Executive of CASCAIDr, an adult social care advice charity:

> CASCAIDr's view is that this judgment will not actually affect the current practice of paying NMW for all night shift work, necessitated by the fact that the NMW has had to be paid since Mencap first lost its case, because of the state of the market in adult social care more generally.
>
> For workers who have been paid the NMW for every hour, since the original judgment in 2016, CASCAIDr thinks it is extremely unlikely that they will be expected to take a cut in salary now, just because one could contend that they don't have to be paid NMW at night.[30]

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29 Mencap statement, Mencap website, 23 July 2018

30 Belinda Schwehr, 'What the Mencap sleep-in payments judgment means for the sector', *Community Care*, 13 July 2018

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