

Legal update — July 2018

Employment Sleep-ins: a solution for now?

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The Court of Appeal has today held in *Focus Care Agency Ltd v Roberts, Frudd and another v The Partington Group Ltd, and Royal Mencap Society v Tomlinson-Blake* (The Mencap case) that employees are not entitled to the national minimum wage (NMW) for the full duration of their sleep-in shift who sleep-in as they are engaged in "time work", and are only therefore entitled to the NMW when they are awake and carrying out duties. This decision comes as a great relief to care providers who have been facing an ever-increasing pressure on budgets, although the response from unions and support workers has not been positive. The judgment is very clear and without an appeal will stand as a definitive summary of the law for the foreseeable future.

The independent survey which Trowers & Hamblins LLP published in May 2018 with Agenda Consulting, the most comprehensive overview to date of the sleep in pay crisis, highlighted the damaging costs and consequences for providers, many of whom simply did not have the budget to make up the NMW shortfall in their sleep in payments or to tackle the issue of back pay. Our survey here shows that only 7% of social care contracts are fully funded to bear these costs.



Source: Shutterstock

The central issue considered by the Court of Appeal in the Mencap case was 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 NMW purposes only when they are awake to carry out any relevant duties. Mencap and the other employers argued successfully that as the employees were time workers the following wording in the NMW should apply: "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.". As such when workers are sleeping they are not entitled to the NMW.

A lot turns on whether the case is appealed and the word on the street is that it is likely. Unison has 28 days to appeal to the Supreme Court for leave to appeal, which is granted in 29% of all such applications.

Practical issues

The case raises more questions than it answers as it has overturned previous decisions. Care providers have a lot of questions to consider

- If you pay NMW for sleep -ins do you now stop? If so how do you manage that message to staff?
- Will commissioners continue to contribute to the cost of contracts? According to our survey, although only 7% are fully funded, commissioners contribute something to 49% of contracts.
- If you have paid backpay to staff, do you now recover that from employees that have been paid? There have been a few employment cases brought by employees, and it would in those cases, be impossible to recover money paid under COT3s and settlement agreements, but not everyone has used those.
- If you have joined the SCCS, what happens? HMRC has not yet issued any statement on

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how that might continue, but it is difficult to see that those who have joined should do anything other than file a return stating their outstanding balance is nil.

- Should care providers continue to work out contingent liability - once you know what it is and if the appeal goes ahead it is disclosable, and that might not be beneficial.
- If you haven't paid sleep ins but have plans to do so, do you start now? (18% of providers responding to the survey said yes). There would seem no need to do so, and commissioners may be unwilling to fund it, but it may be important for staff relations.

Clearly the biggest challenge reflected in the social media response today is how to continue to engage staff who may be expecting back pay. This is not easy for care providers, when turnover in the sector is relatively high and recruitment and retention remains a challenge.

If you are using unmeasured time workforce agreements the court declined to consider them but it is difficult to see how they would be effective in light of this definitive judgment.

Conclusion

This is another turn in the sleep in story, and we will keep you posted on whether UNISON is granted leave to appeal.

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