Sleep-in shift workers – how do we pay them now?

The care sector has been plunged back into uncertainty following the Supreme Court's decision last week to allow Unison's appeal against the Court of Appeal's decision in Royal*Mencap Society v Tomlinson-Blake* about working time and minimum wage payments.

What the law says

The minimum wage regulations say that a worker who is not actually working may be treated as working if they are available (and are required to be available) at or near a place of work for the purpose of doing such work, except where:

1. The worker's home is at or near the place of work, time the worker is entitled to spend at home is not

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working time;

2. The worker sleeps by arrangement at or near a place of work and is provided with suitable facilities for sleeping, *time during the hours they are permitted to use those facilities to sleep is only treated as working time when the worker is awake for the purpose of working*.

The Mencap case

The Mencap case began in the Employment Tribunal in 2015 and the Tribunal found that former Mencap care worker, Claire Tomlinson-Blake, was entitled to receive the national minimum wage for each hour of sleep-in shifts completed as this amounted to 'time work'. Mrs Tomlinson-Blake was expected to sleep for most of her shift period unless woken if assistance was needed during the night. She was paid a fixed sum for the shift plus additional wages if she was called upon for more than an hour in the night.

This decision meant that businesses, charities and local authority employers could no longer pay a flat rate for night work which did not equate to national minimum wage for each hour of the shift and they were also faced with having to potentially pay up to £400 million in back pay to sleep-in care workers. This was catastrophic news for care sector employers and particularly those that rely on local government funding at set rates which would likely not even cover the worker's pay for that shift, let alone the additional costs attributable to providing care services.

Appeal

Mencap lodged an appeal in the Employment Appeal Tribunal which also found that a worker was performing time work throughout their shift and so should be paid for every hour on shift.

Mencap pressed on and appealed to the Court of Appeal. In 2018, the Judge decided that care workers who are required to sleep at or near their place of work and be available to provide assistance if required, are *available for work* rather than actually working. As such, they are not entitled to be paid national minimum wage for the whole sleep-in shift but only for the time they are actually awake for the purposes of working. Back pay claims were also dismissed against care charities that had followed previous government advice on the matter.

This Court of Appeal decision remains good law, for the time being at least. The appeal will not be heard until towards the end of 2019 at the earliest. We will keep you updated.

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If you would like advice and assistance on pay and working time issues, please do not hesitate to contact Kevin Barnett or any other member of the Employment Team.

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