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Sleeping on the job: Payment rights for sleep-in care workers

In a hugely significant decision, The Court of Appeal has held that employees sleeping at their employers' premises while 'on call' are not entitled to be paid the National Minimum Wage for the entire shift.

The case came before the employment tribunal (ET) in 2016. The employee was a 'sleep-in' care worker at residential accommodation operated by Mencap.

During the day, she was paid an hourly rate in accordance with the NMW. During the night, she was paid a flat-rate allowance along with additional payments if she was required during the night and her sleep was disturbed.

The ET's decision was based on its observation that the fact that the claimant may sometimes have had nothing to do during sleep-in shifts, and that she was entitled to sleep, did not detract from the fact that she was required to be there – and so an entirely different situation to that of a person being on-call and capable of being contacted and reacting to that contact. The ET held that the claimant was entitled to be paid the NMW for the entirety of her sleep-in shift.

Mencap appealed and the case went to the Employment Appeal Tribunal (EAT) in 2017. The EAT upheld the ET's decision that the claimant was entitled to the NMW for the entirety of her sleep-in shift.

The EAT held that a multifactorial approach was required to the question of whether an individual on a sleep-in shift was "working", and consideration needed to be given to:

- The employer's purpose in engaging the worker;
- The extent to which the worker's activities are restricted by the requirement to be present;
- The degree of responsibility undertaken by the worker and the duties that might arise; and
- The immediacy of the requirement to provide services if something untoward occurs.

Having applied this approach, the EAT found that the claimant was working for the entirety of her sleep-in shift.

Court of Appeal decision

The Court of Appeal held that where a worker is contractually obliged to spend the night at or near their workplace on the basis that they are expected to sleep for all or most of the period – but may be woken if required to undertake some specific activity – then on a straightforward reading of the National Minimum Wage Regulations (2015) those workers should be classed as being available for work, rather than actually working. As a result, they fall within the terms of the sleep-in exemption in Regulation 32(2). The result is that they will only be entitled to have their sleep-in hours counted for NMW purposes where they are, and are required to be, awake for the purpose of performing some specific activity.

Jonathan Dale, Employment

Comment

The CoA judgment no doubt brought huge relief to employers in the care sector. Based on the previous tribunal decision it had been estimated that the potential liability would amount to £400 million in backpay and it threatened to force smaller employers out of business.

The decision also provides clarity by ruling that workers who sleep at premises while "on call" for emergencies are merely available for work – and not entitled to the NMW until actually called upon. It remains to be seen whether this decision will be appealed to the Supreme Court.

If you would like more information and advice on any aspect of employment law, please get in touch with Jonathan Dale, head of our employment team, by calling 01482 325 242 or emailing jonathan.dale@andrewjackson.co.uk

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