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West Midlands employers
PEOPLE & LEADERSHIP SOLUTIONS

HR Bulletin

E-Update 86 – July 2018

This annual event is a calendar must... We are pleased to confirm that Darren Newman our resident employment lawyer will be returning again!

West Midlands Employers (WME) Employment Law Update with Darren Newman

at Sandwell Council House on Friday 19th October 2018

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WME sleepover shifts

*In a dramatic reversal of previous case law, the Court of Appeal in **Royal Mencap Society v Tomlinson Blake** has ruled that workers on a sleepover shift are not working when they are asleep with the result that those hours do not have to count towards their minimum wage entitlement. But is this the final word on the subject or is there more uncertainty ahead?*

Although the Court of Appeal has overturned the finding of the Tribunal that the whole of a sleepover shift had to count towards the calculation of working time, the Court does not actually disagree with the underlying legal analysis that I explained in this bulletin back in May 2017 (E-Update 72). Regulation 32 of the National Minimum Wage Regulations 2015 says that time when a worker must be available for work at or near the workplace will count as working time – except when arrangements are made for the employee to spend that time sleeping. In that case it is only the time when the worker is 'awake for the purposes of working' that counts.

The Court of Appeal agrees with previous decisions to the effect that this sleepover exception only applies in cases where the worker is 'available for work' rather than actually working. This analysis boils the issue down into a single question. When a worker comes into work and goes to bed with the intention of sleeping through the night unless specifically woken up to deal with a particular issue, is that worker working or just making him or herself available for work if needed? The EAT said that this depended on a range of factors and it is here that the Court of Appeal disagrees. It simply rules that a worker who is asleep cannot also be working. That has some common-sense appeal, but I'm not convinced the issue is so straightforward.

Some of the criticism I have seen of this case centres on the undeniable fact that a worker on a sleepover shift is not free simply to go home – his or her presence in the workplace is contractually required. But that factor alone cannot be determinative. If merely being required to be present at work was enough to establish that the worker was working, then there would be no need for reg 32 to provide for that explicitly. The existence of reg 32 in itself shows that the intention was that mere attendance at the workplace is not enough to establish that the worker is working. That is why the EAT emphasised the need to look at a range of other factors before reaching a view.

In the Court of Appeal's opinion, however, it was 'self-evidently' the intention of the sleep-in exception to deal comprehensively with the issue. The Court relies on the initial reports of the Low Pay Commission when the minimum wage legislation was being designed, which made it clear that time spent on a sleepover shift should not count as working time. Regulation 32, says the Court, was intended to give effect to that policy and it did so on the assumption that anyone on a sleepover shift is merely making him or herself available for work if required.

We then get to the crux of the reasoning. Lord Justice Underhill says, 'it would not be a natural use of language, in a context which distinguishes between (actually) working and being available for work, to describe someone as "working" when they are positively expected to be asleep throughout all or most of the relevant period'.

The judgement is 100 paragraphs long but when you pick it apart it really comes down to this point. The Court thinks that it is obvious someone who is asleep cannot also be working. I think, however, that while this may seem obvious from the bench of the Court of Appeal, it might be rather less so to those who have to leave their family for the night to go and sleep in a care home.

A worker who is sleeping over in the workplace is not necessarily there 'just in case'. There may be legal requirements that the home be staffed 24 hours a day, the presence of the staff member might be necessary for insurance purposes and the round-the clock availability of staff may be an important feature of the care home's sales pitch to customers. By remaining present throughout the night, the employee is performing a specific task that is of benefit to the employer. If this isn't work, what is?

It is disappointing that the Court of Appeal thought the issue was so obvious that it was not worth even analysing. The result is that there is a clear opportunity for the workers in this case to appeal. The Supreme Court likes dealing with big legal questions and I suspect it will relish getting its teeth into the nature and meaning of work.

But an appeal to the Supreme Court could take a year or more to reach a final outcome. In the meantime, the position is that there is no obligation on employers to include the time that a worker spends sleeping in the calculation of minimum wage entitlement. The way our system works is that the Court of Appeal is not claiming to have changed the law – it is describing the law as it always was. This leaves the HMRC with some questions to answer over its rather gung-ho approach to enforcement of the minimum wage in relation to sleepover shifts. At the time of writing the HMRC's Social Care Compliance Scheme – which encourages employers to avoid enforcement action by paying full back-pay to workers– still seems to be open. Clearly it needs to be mothballed – and HMRC guidance urgently needs to be updated to reflect what we now understand the position to be. Now that we have this ruling, HMRC will need to put all enforcement action in cases based on sleepover shifts on hold until we know that the case has been finally resolved.

Keep in Touch

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