Employment

Sleeping on the job? Court of Appeal overturns EAT on national minimum wage for sleep-in workers

Posted on 04 September, 2018 by | Katya Hosking

Until recently, a series of EAT decisions stretching back more than a decade appeared to establish that some sleep-in workers were entitled to be paid at the rate of the national minimum wage (NMW) for every hour of their shifts, including time when they were asleep. In *Royal Mencap Society v Tomlinson-Blake (Care England intervening)* [2018] EWCA Civ 1641, the Court of Appeal has rejected this position, holding that only the time when such workers are awake for the purpose of working will count for NMW calculations.

The background

Many employers, from factories to care homes to call centres, require workers to perform tasks overnight. Sometimes, however, the tasks only arise intermittently and unpredictably, so that an employer just needs someone to be on call, ready to perform a task when needed. When tasks are sufficiently infrequent, the employer may arrange for the worker to sleep for all or most of the night and provide suitable facilities for doing so.

Simple enough, perhaps; but the question of precisely which hours should count under the National Minimum Wage Regulations 1999 and 2015 has proved far from simple.

The NMW Regulations

As might be expected, hours which are spent actually working are always included in the calculation.

Under regulation 32 of the 2015 Regulations (and its predecessor under the 1999 Regulations, regulation 15) the calculation for time work also includes time when a worker is available, and required to be available, at or near a place of work for the purposes of working. However, this is subject to two exceptions:

- Time spent at home is not included, even if the worker is required to be there and to remain available for work.
- If the employer permits the worker to sleep during a shift, and provides facilities for sleeping, then only the hours when the worker is awake for the purposes of working will count.

There are similar provisions in respect of salaried hours work in regulation 27 (formerly regulation 16), which apply once the worker has exceeded basic hours.

Regulations 15/32 and 16/27 only apply when someone is not actually working. They are sometimes described as "deeming" provisions, in that they treat time when someone is merely required to be available for work **as if** it were time spent working. It follows that the exceptions under those regulations, for home work and sleeping time, do not arise when someone is actually working.

The EAT in *Mencap v Tomlinson-Blake*

Traditionally, sleep-in care workers have been paid an allowance for the whole shift, at below NMW rates, plus NMW rates for any time when they are actually called upon to work. Government guidance issued in December 2013 appeared to support this approach (see *BIS: Calculating the minimum wage (December 2013), page 30*).

However, the EAT, in a series of decisions from *Burrow Down Support Services Ltd v Rossiter* [2008] ICR 1172 to *Mencap v Tomlinson-Blake* (reported as *Focus Care Agency v Roberts* [2017] ICR 1186), decided that some sleep-in workers were **actually** working throughout their shifts, not merely **deemed** to be working. These workers were not therefore covered by the exception for sleeping time under regulations 15/32 or 16/27, and were entitled to NMW rates even when sleeping.

In *Focus Care Agency* at [31] Simler P identified in the authorities a "clear dichotomy" between "*those cases where an employee is working merely by being present at the employer's premises … whether or not provided with sleeping accommodation and those where the employee is provided with sleeping accommodation and is simply on-call*". She decided that classifying a particular case as being on one side or the other required a multifactorial evaluation, with no single factor being determinative, and no exhaustive list of factors provided.

Ms Tomlinson-Blake was an experienced care worker who supported two men with substantial learning disabilities living in a privately owned property. Some of her shifts were sleep-in shifts from 10.00 pm to 7.00 am and she was provided with her own bedroom in the house. During her sleep-in shifts she was required to remain at the house and intervene if she judged that her support was necessary, which the ET found had happened on six occasions in a 16-month period. She was positively expected to get a good night's sleep.

In finding that she was working throughout her shift, the ET took into account:

- Mencap's regulatory obligation to have someone on the premises;
- Mencap's obligation under its contract with the council to have a carer present at a service user's home, and
- the fact that Ms Tomlinson-Blake had to be present and listening out, even when asleep, ready to judge whether intervention was required.

The EAT upheld the finding on the basis of this multifactorial evaluation..

The Court of Appeal in *Mencap v Tomlinson-Blake*

The Court of Appeal disagreed.

Underhill LJ accepted that some workers, such as night watchmen, might at times sleep during a night shift as well as performing other expected duties, and might be entitled to NMW rates throughout their shifts. In contrast, however, he held that the essence of a "sleep-in" contract is that the worker by arrangement sleeps at the workplace and is given suitable facilities for doing so. Under such a contract the worker is available for work, but is not actually working, and the sleep-in exception in regulations 15/32 and 16/27 applies.

In reaching this conclusion he drew on the recommendations in the first Low Pay Commission report, to which the Secretary of State was required to have regard in promulgating the NMW Regulations. That report dealt expressly with sleep-in workers:

> "Certain workers, such as those who are required to be on-call and sleep on their employer's premises (e.g. in residential homes or youth hostels), need special treatment. For hours when workers are paid to sleep on the premises, we recommend that workers and employers should agree their allowance, as they do now. But workers should be entitled to the National Minimum Wage for all times when they are awake and required to be available for work." (*First Report of the Low Pay Commission (Cm 3976) (June 1998), paragraph 4.34, page 61*

.)

A new bright line?

It has always been clear, then, that there is a line between working and being available for work. The EAT cases including, and since, *Burrow Down* had placed sleep-in care workers on the "working" side of the line rather than the "available for work" side. The Court of Appeal has now said *Burrow Down* and its successors were wrongly decided. Someone who is sleeping-in is available for working, rather than working.

The decision has come as a relief to organisations in the social care sector, where the prospect of paying arrears as well as increased future costs had threatened to tip an underfunded sector into crisis. The effect also extends to “self-funders”, individuals or families who pay for their own care.

The Court of Appeal refused permission to appeal to the Supreme Court, but Unison has sought leave to appeal to the Supreme Court, and a decision is awaited. Of more immediate concern will be HMRC’s interim scheme, the Social Care Compliance Scheme (SCCC), which remains in place. It was intended to rationalise the enforcement of arrears of NMW in the social care sector, having regard to the changing guidance which BEIS and HMRC had been giving. Employers in the scheme are still required to complete their self-reviews by 31 December 2018 (or in some cases earlier), yet the Government’s own guidance on calculating the NMW simply notes the judgment in *Mencap* and promises further guidance shortly. It is understood that those who are within the scheme have been told that they are free to calculate their arrears by reference to the Court of Appeal decision in *Mencap.*

From the perspective of care workers who thought they would be receiving back pay, the judgment in *Mencap* removes the prospect of payments which—until July—they thought they had earned. It should be noted that for much of the relevant time government guidance was to the effect that NMW rates did not apply: nonetheless, it is clear from the tweets on the #awakeonasleepin campaign that many of them feel angry and disappointed.

It is unfortunate, therefore, that the campaign confuses the content of the law following *Mencap* with the difficulty of enforcing it. It may be true that many care workers are in fact awake and working on night shifts for which they are paid a flat rate below NMW, but that is not endorsed by the decision in *Mencap*. Ms Tomlinson-Blake, it should be recalled, was expected to sleep throughout her shift and usually did so, having been required to wake and provide care only six times in 16 months. The Court of Appeal found she was only entitled to the NMW on those six occasions.

However, many care staff on shifts which are described as ‘sleep-ins’ are awake for much of the night, for the purpose of working. Such workers are entitled to the rate of NMW.

The Court of Appeal’s judgment in *Mencap* does not alter the fact that such workers are likely working, or awake for the purpose of working, for the whole of their shifts. After all, Underhill LJ recognised that “regular, if intermittent, patrolling or monitoring duties throughout the night” as carried out by night security staff “would put them comfortably on the “actual work” side of the line…” ([79], note 6).

The real difficulty is that the EAT’s judgment in *Mencap* had effectively removed the need to distinguish between these workers and Ms Tomlinson-Blake because they would all be receiving the rate of NMW for each hour of a shift. That is because virtually all sleep-in care workers will fulfill the same criteria applied to Ms Tomlinson-Blake by the EAT.

The Court of Appeal has reintroduced the need to distinguish between care workers. It has also, for those workers in Ms Tomlinson-Blake’s position, reintroduced the need to record how often and for how long they are required to wake up and provide care. Unfortunately, both workers and employers, as well as trade unions, advice workers, lawyers and courts and tribunals are having to navigate these fine distinctions without up-to-date guidance.

A previous version of this blog was published on 22 August 2018 by Practical Law Company. This can be viewed here

Katya Hosking is rapidly developing her employment practice and has experience in unfair dismissal, discrimination, harassment and victimisation, whistleblowing, employee status and unlawful deduction of wages. Having worked as a university equality officer before coming to the Bar, she retains a particular interest in discrimination and disability, and recently drafted pleadings in a complex reasonable adjustments claim against a university.