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Update: Mencap sleep-ins case heard by the Supreme Court

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This week, the Supreme Court has heard what will be a landmark case for the care sector. In the long running case of Tomlinson-Blake v Mencap, the Court has been asked to consider whether ‘sleep-in time’ should be classified as working time, and therefore be subject to the requirements of the NMW Regulations 2015.

The case

The case involves a care worker who worked for the learning disability charity Mencap providing support to vulnerable adults. She worked a sleep-in shift from 10pm until 7am during which no specific tasks were allocated, but there was a continuing obligation to remain at her post and keep a ‘listening ear’ out during the night in case her support was needed. She was expected to intervene where requires and respond to requests for help. The care worker was paid a flat rate of £22.35 plus one hour's pay of £6.70 for each shift (£29.05 in total).

In 2015 an Employment Tribunal and the EAT found that the care-worker was entitled to receive NMW for each hour of sleep-in shifts completed, plus 6 years’ worth of back payments. The tribunal relied on the fact that the care worker was required to be present and would have been disciplined if she were to have left her post.

In 2018 the Court of Appeal allowed an appeal brought by Mencap, holding that sleep-in workers are entitled to be paid the NMW only when they are awake to carry out any relevant duties (and therefore not for hours when they are asleep at their place of work during a sleep-in shift). The reasoning behind this decision was that care workers who are required to sleep at (or near) their workplace and be available to provide assistance were available for work rather than actually working.

The key point relied upon by the Court of Appeal was the distinction made in the National Minimum Wage Regulations 2015 that the worker must be awake for the purpose of working in order for time spent at work to be considered working time. Lord Justices Ryder, Underhill, and Singh in reversing the decision of the EAT held that "sleepers-in... are to be characterised for the purpose of the regulations as available for work… rather than actually working… and so fall within the terms of the sleep-in exception the regulation."

The Supreme Court sat for two days this week to hear Ms Tomlinson-Blake’s appeal against the CoA decision. Whilst the Court gave no indication of their decision, Lord Kerr did comment that the case would be a difficult one for the Court to decide.

Importance of the decision

For many years the practice among care providers has been to pay staff carrying out sleep-in shifts a flat rate, on the basis that NMW was not payable. If the appeal is successful it will mean that this approach was incorrect and this will have massive cost implications for care providers. Care charities estimate a sector-wide potential liability of £400m, with Mencap alone stating that it has a £20m liability and is at risk of insolvency if required to pay it. Various care charities have warned that as many as two-thirds of employers in the care sector face insolvency if they were required to pay the back-pay bill. The decision in this case also comes at the same time as the sector is being subjected to massive funding cuts as well as facing an increase in the National Minimum and Living Wages for its workers.

Given the potential consequences, care providers should start taking pragmatic steps to deal with the outcome of this appeal should it go against Mencap.

Initially, providers should seek to review the contracts with their staff, identifying those contracts which may become unsustainable in light of future wage rises. Where potentially unviable contracts are identified, providers should liaise with the local authorities responsible for commissioning care services to discuss increases to funding to cover the potential wage increases. However, the reality of this is that many authorities are themselves struggling and may not be able to support an increased budget for social care services. Exiting unsustainable contracts should be the final straw for care providers, however the reality is that there may be circumstances in which serving notice is the only suitable option available.

What is clear is that there are many unknowns until the Supreme Court decision is handed down. Providers must take it upon themselves to begin taking steps to prepare to face a potential further increase in their personnel costs, and significant back pay liability. It is clear that no matter what the decision, providers and the Government must work together to find a viable solution which avoids a ‘race to the bottom’ in the sector and which would undeniably jeopardise care standards. It is likely that the Government would reopen its compliance scheme for care sector employers to assist with making back payments and employers should keep an eye out for more news on this.

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