Employment Law Brief

with

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After the year that care workers have had, the decision of the Supreme Court in the combined cases of Royal Mencap Society v Tomlinson Blake and Shannon v Rampersad must come as a blow. In a very clear ruling, giving no room for further argument on the issue, the Court ruled that a sleepover shift does not count as working time for the purposes of calculating a worker's entitlement under the National Minimum Wage.

To be clear what we are talking about, a sleepover shift involves a worker being required to remain on the premises, but not being given any specific duties. Instead, he or she is permitted to sleep and will be given appropriate facilities to do so. If an emergency occurs the worker will be woken up and will have to deal with whatever has happened – but will then be able to return to sleep.

It is fair to say that the various Regulations made under the National Minimum Wage Act 1998 have not always been completely clear about how such arrangements are to be treated. The latest version – from 2015 – says that having to be available for work at or near the employer's premises counts as working time but only if the worker is 'awake for the purposes of working' (Reg 32(2)). The traditional view of this has been that a worker who is allowed to sleep on the premises is available for work but will only be treated as working when actually woken up because they are needed.

Over the years, however, the argument was made that such a worker is not merely 'available' for work – they are actually working. Even when they are asleep, they are still serving the employer's needs. If sleeping on the premises is actually one of their duties – perhaps enabling the employer to meet regulatory requirements about the number of staff members on the premises at any one time – then Reg 32(2) might not apply. That idea gained such traction in case law that it essentially became the new orthodoxy and HMRC started enforcing the minimum wage in care homes on that basis.

Whatever the merits of the argument – and I always found it rather elegant and attractive – the Supreme Court has roundly rejected it. It didn't do so after a lengthy examination of the Regulations themselves, however. Instead, it looked back to 1998 and the intention behind the original law.

When the New Labour Government was introducing the minimum wage, it faced widespread scepticism and opposition from the business community, and it was keen to assuage their concerns. It therefore appointed the Low Pay Commission - made up of academics and representatives of both sides of industry - to make recommendations on how the minimum wage should work. In its first report it looked specifically at the issue of sleepover shifts and said this:

'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'.

The Parliamentary record made it clear that the Government accepted that recommendation – apart from anything else, the National Minimum Wage Act required it to highlight any recommendations that it rejected, and it certainly didn't reject this one. So, the Supreme Court decided that the Regulations had to be interpreted in line with the intention of Parliament at the time the Minimum Wage was introduced – and there

was nothing to indicate that Parliament's intention was any different when various other versions of the Regulations were drafted over the years.

This is what lawyers call the 'purposive' approach to statutory interpretation. It looks at the purpose behind the legislation and avoids getting bogged down in technical arguments about the drafting.

Whether you think the Court is right or wrong does not matter much – it is called the 'Supreme Court' for a reason. The law is whatever the Court says it is. In this case that means that sleepover shifts do not count as working time except when a worker is woken up to perform a particular task. The Supreme Court is not saying that care workers are not working when they do a sleepover shift – just that the work they are doing does not qualify for the minimum wage. As a side note we should remember that it is well established that such shifts do count as working time for the purposes of the Working Time Regulations – but that is a separate issue concerned with rest breaks and the 48-hour week. It has nothing to do with payment.

It is noticeable that the Low Pay Commission in 1998 spoke of workers agreeing their 'allowance'. It was assumed that sleepover shifts attracted a fixed payment that may not correspond with the full minimum wage, but which was better than nothing. The Commission also assumed that there would be a mechanism by which care workers could negotiate an allowance that was fair and reasonable. This was the heady era of early New Labour and the assumption was that it would mark a resurgence of trade union power and a massive extension of collective bargaining. Of course, things did not turn out quite that way.

The fact is that while it may be hoped that care workers will be paid an allowance for sleepover shifts – the claimant was certainly given such an allowance in the Mencap case – there is no legal right to one. If the shift does not count for minimum wage purposes, then there is no obligation to pay anything for it at all unless the contract says otherwise. Employers can if they wish include a requirement to work sleepovers as part of their standard contracts and pay nothing for them at all – except for those times when the worker is 'awake for the purposes of working'.

I would like to think that this is an issue the Government would look at. As it reviews the provision of social care in the UK it could surely give some thought to providing for a fair overnight allowance – even if less than full minimum wage entitlement – for those in the sector being asked to work sleepover shifts. Given all that our care workers have had to put up with over the last year or so, that seems like the least we could do.

Don't forget to check more about Darren Newman on his blog at A Range of Reasonable Responses or on twitter at @DazNewman