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Dear Member

National Minimum Wage Issues Relating to Sleep-ins

You may recall that VODG and Care England met with Nick Boles MP, Minister of State of Skills, in September 2015 to discuss concerns around the law in relation to payment for sleep-ins. In particular, the case law which suggests that the National Minimum Wage ("NMW") (and from April 2016) the National Living Wage ("NLW") must be paid taking into account every hour of a sleep-in, even when a worker sleeps throughout that shift. The submission made to Nick Boles is attached.

VODG and Care England had felt that Nick Boles had listened carefully to the points that were made. However, the response indicates that Nick Boles considers that the current rules are, in his words, correct (albeit he has chosen his words very carefully). We have advised VODG and Care England not to circulate this response to all members at this stage as it is something that could then have to be disclosed in any legal proceedings on the issue and his response accepts that clearer guidance is needed.

Nick Boles has invited VODG and Care England to work with the Government to develop clearer guidance to assist in meeting responsibilities. VODG and Care England will be working hard to ensure this guidance addresses the inconsistencies in current guidance and case law and have requested the same guidance is also given to Commissioners. Whilst updated guidance will be welcome it does not give providers any comfort about how this risk is managed with the NLW being less than 10 weeks from implementation. We therefore agreed to provide a short advice note to VODG and Care England members in relation to this issue.

So what are the options?

1. Pay the NMW/NLW on average taking into account every hour of a sleep in shift.

   The safest view for members to take is that every hour counts for minimum wage purposes and to ensure that, on average, over the full pay reference period their employees who work sleep-ins are paid the national minimum/living wage. Our view is that in lots of cases this may be commercially unviable without a change in approach

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from commissioners. The view that every hour counts stems from cases called Whittlestone and Esparon which we expect you are familiar with. A number of providers are seeking to take this approach and limit risk through a variety of means such as:

- Limiting the number of sleep ins carried out each week;
- Increasing the flat rate paid for each sleep in;
- Negotiating with commissioners; and
- Checking compliance at the end of each pay reference period and making top up payments where someone's pay has fallen below NMW. The cost of this approach will obviously increase in April when the NLW comes in to force.

2. Continue to play a flat rate for sleep ins and only count hours when someone is awake and working for NMW purposes, treating the sleep in shift as time work.

   There is a recent case which could be used to argue that a different approach should be taken, called Shannon v Rampersad UKEAT/0050/15/LA. We have attached our detailed briefing on this case. In short, whilst this case was quite fact specific, it was found that a sleep-in shift, carried out in a flat above a care home did not mean that the person carrying out the shift was working for every hour of the sleep-in. The Employment Appeal Tribunal Judge appears to have used it as a chance to state his own view on the regulations. He acknowledges Whittlestone but says that he wants to set out his own view. We consider that this could be an indication of a move away from the decision in Whittlestone at EAT level. Mr Justice Langstaff who decided Whittlestone was the President of the EAT. He is no longer the EAT president. We think it could be possible to argue that the Whittlestone and Esparon cases (and by implication other previous cases) are wrongly decided and that the specific exemption in Regulation 32 that appears to address the issue should apply. We would support that view. However, a provider running this argument could have to go to at least the Court of Appeal to have a positive outcome and there is no guarantee as to how the Court of Appeal would view the issue. This is therefore a high risk strategy.

3. Continue to play a flat rate for sleep ins, treating the sleep in shift as unmeasured work and entering into a daily average agreement to agree the number of hours, on average, someone works during the sleep in.

   There is a Court of Appeal case called Walton v Independent Living Organisation which looks at whether all time spent present in a service users home when carrying out live in care counts for minimum wage purposes. That case considered what type of work Miss Walton was working when carrying out live in care. The Court of Appeal's conclusion was that she was working unmeasured work and that it could not be said that she was working throughout the 24 hour period. Therefore, in her case, the only hours that counted were those covered under a daily average agreement.

Our view is that it is possible to try and argue that sleep-in shifts are also unmeasured work. We have helped lots of providers to position their sleep-in arrangements as unmeasured work to give them a better chance of arguing that every hour of a sleep-in shift does not count. This has been an argument that has been accepted by HMRC in many inspections we have assisted with. It has not yet been tested in the Employment Tribunals directly in relation to sleep-ins as far as we are aware. There was an Employment Tribunal decision published earlier this year which considered the argument again in relation to live in care. The Claimant in that case sought to rely on Whittlestone but the Judge preferred the argument that the work was unmeasured work and that the employee could not be said to have been working throughout a 24 hour shift.

We have helped a number of providers seek to position their sleep ins as unmeasured work to seek to mitigate the risk of successful claims.

Should you require any more detailed advice on this topic please do not hesitate to contact me.

Kind regards

Yours sincerely

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National Minimum Wage and Sleep-ins

A briefing from Care England and VODG for the Minister of State for Skills, Nick Boles MP

Introduction

Collectively our members are committed to paying the national minimum wage and many of our members pay well above the minimum wage. However, many members have operated a system for many years where they have paid staff a flat rate for working a sleep-in and have not paid the minimum wage for every hour of a sleep-in. Typically this rate varies from member to member from around £25 to £40 per sleep in. During a sleep in a worker is not required to carry out any duties unless a service user wakes up and needs support. They are provided with suitable facilities for sleeping. We understand that many staff enjoy working sleep-ins precisely as they are not regularly called on to work and regardless of that are paid a flat rate for carrying out the sleep-in. Our members typically also pay an hourly rate or provide time off in lieu if the person is woken up for the purposes of working. The service users supported through sleep-ins will typically be funded by way of local authority funding and the funders typically pay providers a flat rate (which is less than the national minimum wage if every hour counts).

<u>The regulations – key points</u>

1. 2015 The National Minimum Wage regulations No 621 came into force 6th April 2015 and no case law has considered them yet.

2. 2015 regulations were not intended to change the National Minimum Wage Regulations but instead to simply consolidate the existing NMW regulations so they are likely to be interpreted in the same way as the 1999 regulations.

3. As a result the 2015 regulations paragraph 32 is the current government intention with respect to NMW and sleep ins and reflects the 1999 regulation 15(1A). Para 32 says:

Time work where worker is available at or near a place of work

(1) Time work includes hours when a worker is available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home.

(2) (2) In paragraph (1), hours when a worker is "available" only includes hours when the worker is awake for the purposes of working, even if a worker by arrangement sleeps at or near a place of work and the employer provides suitable facilities for sleeping.

4. The situation spelt out in paragraph 3 above reflects the custom and practice within the care home sector currently.

The problem

5 There are two Employment Appeal Tribunal decisions which have concluded that a worker carrying out a sleep in duty is working for every hour of a sleep in shift even if they sleep throughout the shift and are not called on to carry out duties. This means they are required to be paid the NMW for every hour of a sleep in even if they sleep throughout the shift. These are the cases of Whittlestone v BJP Homecare Support UKEAT/0128/13/BA and Esparon v Slaviskova UKEAT/0217/12/DA. We have provided a copy of the Whittlestone decision. Mrs Whittlestone undertook sleep in shifts from 11pm until 7am the following morning and there was no evidence she ever woke up from her sleep to provide any care. The reason for the EAT's decision is that they concluded that Regulation 15 (1) has no application if something has already be deemed to be time work under Regulation 3, see paragraph 15 of the decision. We are advised that section 32 of the 2015 Regulations would not apply to sleep ins if the Whittlestone case is followed as it reflects 15 (1A). We do not believe that the Whittlestone decision reflects parliaments intention when drafting Regulation 15 (1A).

6 This view is supported by a contradictory decision reached by the Court of Appeal in 2003 in a case called Walton v Independent Living Organisation, a copy is provided. This case considered what type of work a Live in carer was working for NMW purposes and whether Miss Walton should be paid the NMW for the 24 hours she was required to be present in a service users home. You will see, at paragraph 12 of the judgement, that the case discussed the Low Pay Commission recommendations that:

"Certain workers, such as those 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 NMW for all the times when they are awake and *required to be available for work."*

7 The Walton judgement noted at paragraph 13 that the 1999 Regulations had implemented the Low Pay Commission Regulations.

8 It is clear from paragraph 36 of the judgement that Lady Justice Arden believed this was done through Regulation 3 and 15 of the 1999 regulations in respect of time work, and from paragraph 42 of the judgement that she believed they amounted to an exemption. The Court of Appeal concluded that Miss Walton was not working time work and therefore they could not apply Regulation 15 (1) in that case. They still concluded that Miss Walton couldn't be continually performing her duties throughout the 24 hour period she was required to be present. This conclusion conflicts with the EAT decisions referred to above. There are further separate government advice documents which themselves are also contradictory. The 'Minimum wage for different types of work' guidance on the GOV.UK site attached says not to include for the purposes of the NMW time spent:

"Not working but at the workplace or available for work at or near the workplace during a time when workers are allowed to sleep (and you provide a place to sleep)"

BIS NMW 'Calculating the minimum wage' document dated February 2015, on the other hand, notes in example 1 on page 31 that where a person would be disciplined if they left the care home and are doing an overnight shift then:

It is likely that the person would be considered to be 'working' for the whole of the overnight shift even when they are sleeping.

9 The LPC advice mentioned above further stressed that the care sector needed special treatment which, in essence, para 15(1) of the 1999 regulations and now 32 of the current regulations was intended to allow.

10 Providers and their Local Authority and CCG commissioners are left without a clear direction as to the action they should take and the funds they need to commit to sleep ins. The notion that NMW be paid for every sleep in hour regardless of whether the person is asleep or awake does not meet the current way the sector works or the way LAs fund the care given.

New Living Wage

11 In light of the fact that care is not funded according to a rate per hour currently for sleep ins, any suggestion that this needs to be changed will come at a considerable extra cost for providers and the LAs and CCGs who commission the care. The advent of the NLW, from April 2016, will increase that cost exponentially, posing a considerable risk to the sustainability of providers and putting already stretched public sector commissioners under even greater pressure to find the necessary funds to meet this extra demand.

The risks

12 LA and CCG commissioners will not be able to fund the increased costs and providers will therefore be unsustainable and no longer able to provide the care services for people with learning disabilities and other long term conditions for whom the sleep ins are essential for their safety. The introduction of the NLW is set to magnify an existing problem and risks further destabilising the social care market.

The solution

13 We understand that the 2015 NMW regulations will have to be amended to make reference to the NLW. In which case, we urge the government to look again, as part of that process, to amend the regulations to make it clear that time spent asleep on an overnight shift is exempt from the NMW/NLW rate, as was originally intended in paragraphs 15(1A) of the 1999 regulations and paragraph 32(2) of the 2015 regulations. Suggested wording to make the regulations clear might be to change Regulation 32 (2) to state:

14 In paragraph (1), hours when a worker is "available" only includes hours when the worker is awake for the purposes of working. Time a worker is entitled to spend sleeping at or near a place of work where the employer provides suitable facilities for sleeping will not be hours of time work.

15 This amendment would have the effect that the hours someone is entitled to sleep during a sleep in shift would not be time work. Under Regulation 44 that would mean it could still be

argued that the work is unmeasured work and that every hour of the sleep in counts if no daily average agreement (under regulation 50) is in place. We would therefore also suggest an addition to Regulation 45 to state:

(2) Time a worker is entitled to spend sleeping at or near a place of work where the employer provides suitable facilities for sleeping will not be treated as hours of unmeasured work.

16 As this is a situation that needs urgent attention we would ask that, should the government be minded to address the problems identified by looking again at the regulations, then the Minister make a statement to the House that the government will be looking into this as a matter of urgency with a set timetable, which, we hope, will then give interim guidance as to the way forward for council and NHS commissioners, providers and Employment Tribunals.

Care England and VODG

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For more information please contact

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Another twist in the tale of sleep-ins and National Minimum Wage (NMW)

Care Providers who have been wrestling with the challenges around NMW payments for sleep-ins will welcome an EAT decision that a salaried worker sleeping at a residential care home was not entitled to the NMW for every hour of their shift.

Introduction

The most common approach to sleep-in shifts across the care sector has been to pay a flat rate for a sleep in shift, rather than pay an hourly rate for each hour of the sleep in shift. Many providers then reviewed their approach in light of developments in case law. In particular the cases of *Whittlestone* and *Esparon*, concluded that where a care worker worked a sleep in shift, they were entitled to the NMW for each hour of the sleep -in shift.

A new Employment Appeal Tribunal (EAT) case, *Shannon v Rampersad & Rampersad T/A Clifton House Residential Home UKEAT/0050/15/LA*, has just been published which reaches a different view giving a ray of hope for the underfunded care sector on this issue.

Facts

The Claimant, Mr Shannon, was employed as a salaried worker at Clifton House – a registered residential care home. Clifton House was regulated and inspected by the Care Quality Commission. Under their statutory obligations, there was no prescribed ratio of care staff required at all times at the home, but the care provider had a responsibility to ensure that staffing levels were appropriate in order to meet the needs of the service users.

The Claimant was employed as a night worker with permanent accommodation in a flat within Clifton House. The Claimant was paid a salary of £50 per week, rising eventually to £90 per week. The Claimant was contractually required to be in the flat from 10pm until 7am, but was able to sleep during those hours. Where needed, the Claimant was required to respond to any request for assistance from another night care worker on duty at the home. In practice, the Claimant was very rarely asked to assist the night care worker. The Claimant also had a day job as a driver with another company.

Following the Claimant's dismissal from his employment at Clifton House in October 2013, he made a claim for £239,490, being the NMW for his full night on-call hours since the National Minimum Wage Act came into force on 1 April 1999.

Decision

The EAT agreed with the findings made by the Employment Tribunal in this case and confirmed that the Claimant was not entitled to the NMW for all hours of the night shift, but only those hours when he was awake and actually carrying out care duties and therefore working.

It was agreed between the parties that the Claimant was engaged in salaried hours work, as defined in Regulation 4 of the National Minimum Wage Regulations 1999 ("NMWR"). In considering whether the Claimant was entitled to be paid for every hour of the sleep-in, the Tribunal was therefore required to consider Regulation 16 of the NMWR (which is equivalent to Regulation 15 on time work considered in *Whittlestone* and *Esparon*).

Regulation 16 includes the exemption (as did Regulation 15 on time work) that if a person is engaged on salaried work and they sleep at their place of work and are provided with facilities to do this, only the time when they are awake for the purposes of working will count for the

purposes of the NMW. The Tribunal found, which was accepted by the EAT, that this exemption applied and therefore only those times when the Claimant was awake for the purposes of working counted as working hours. This conclusion is different to the decision in *Whittlestone* where the EAT stated that the exemption only applies for work that would not otherwise count as time work. It is worth highlighting that *Whittlestone* was considered in this case with the EAT concluding that the particular facts of *Whittlestone* meant that the worker was simply working by being present, whereas here the Claimant was only required to respond to call for assistance on rare occasions and only time spent when the Claimant was awake for the purpose of working counted as salaried hours in accordance with Regulation 16(1A).

It is also worth highlighting that the Tribunal and the EAT considered the argument used in *Esparon* that the requirement to undertake night shifts was because of the statutory regulations concerning staffing in care homes. The conclusion in this latest case is that the Claimant's attendance at the premises throughout the night shift was necessary in order for Clifton House to comply with its statutory obligation, but it appears to us that the Judge distinguished this from the statutory duty on the Claimant to undertake care duties during this time. They concluded that the statutory obligation was met by having a waking and sleeping-in member of staff (the Claimant) employed during the night. This seems to draw a distinction between the Claimant being required to be present and carrying out work.

Comments

- This case dealt with the 1999 NMW Regulations. It will be equally relevant to the 2015 NMW Regulations which came into force in April 2015.
- This case will also be relevant to situations where a worker is working time work. It highlights the possibility of courts interpreting the legislation in relation to time work, and time spent asleep at a place of work where a person can be called on to perform duties, differently than the EAT has in *Whittlestone* and *Esparon*, and therefore concluding that time someone can spend sleeping is not working time for which care workers are entitled to receive the NMW.
- The case again highlights the importance of the arrangements for sleep-ins being clear in relation to what is required of the care worker when on a night shift. The arrangements should make clear that when undertaking a sleep-in care workers are not required to carry out contractual duties, unless asked for assistance and mere presence does not of itself mean that the worker is working.
- The Regulatory obligation to ensure that appropriate staffing levels are in place is not necessarily sufficient to automatically draw a conclusion that any worker required to be present at the service is actually working. Even in those circumstances it is possible to argue that only time when the worker is awake and actually performing work, is the only time for which NMW is payable.
- Once again it does not appear to have been considered whether due to the method of payment, the Claimant was working unmeasured time, as opposed to salaried work. However, this does not appear to be a point which was argued at the EAT.

What should care providers do?

There is now finally an EAT case, which takes into account the previous decisions, and which concludes that employees carrying out a sleep-in duty are only working when actually awake and performing work for salary work purposes. Providers therefore now have a recent decision, albeit one on particularly unique facts, to support the standard approach to sleep-in shifts across the care sector.

Unfortunately, the decision does not provide any certainty and could be appealed. The logic behind rejecting the *Whittlestone* decision is not clearly explained and there are therefore conflicting EAT authorities. Our advice therefore remains to:

- Check whether employee's average pay over a pay reference period is above NMW when taking into account every hour of a sleep-in. Being mindful of the increase in the NMW on 1 October to £6.70 and the likely increase to £7.20 for staff aged 25 or over from April 2016.
- Where you are not confident that is the case:
  - Ensure you have a clear policy in place in respect of night work which highlights the difference between waking nights and sleep in shifts – explaining what a person working a sleep in shift is free to do.
  - Consider to what extent you are required contractually or from a regulatory perspective to have staff "working" as opposed to being present to deal with emergencies.
- In light of the extent of the risks consider structuring your arrangements so as to enable you to argue that your employees undertaking sleep-ins are working unmeasured time, making use of daily average agreements.

For more information

If you would like to discuss your arrangements or related issues, please contact Anna Dabek (http://newsroom.anthonycollins.com/profiles/dabeka) or Matthew Gregson (http://newsroom.anthonycollins.com/profiles/matthewg).