

Sleepovers, Travelling Time and the National Minimum Wage: Case Law Update

Introduction

Many UNISON members in the care sector are regularly required to provide overnight care, either in a care home or in an individual client's own home. Some employers are paying a sleepover allowance, which works out at much lower than the employee's hourly rate for the time spent on sleepovers.

Other care workers have several clients in the community and need to travel from one client to another several times during a working day. Here, some employers pay nothing for the time spent travelling.

The National Minimum Wage Regulations

Introduced in 1999, The NMW Regulations provided workers with a right to be paid a minimum hourly rate for all the hours they worked. The regulations describe 4 types of work: time work, salaried work, output work and unmeasured work.

'Time work' includes travelling time where the work being done is 'assignment work.'

A worker's hourly rate is calculated by taking their total earnings over the pay reference period and dividing it by the number of hours of 'work.' The pay reference period is either a month or a shorter period if the worker is paid by reference to a shorter period, e.g. 4 weekly or weekly.

Whether or not someone is 'working' has been considered by the courts on a number of occasions, most recently by the Employment Appeal Tribunal in Whittlestone V BJP Home Support Ltd.

The Facts

Mrs Whittleston was employed to by BJP to provide care services to clients. She was paid £6.35 per hour under her contract for the time which she actually spent providing care at the home of a service user. The time she spent travelling from one service user to another was not counted. She was also required to undertake shifts from 11pm to 7am, termed 'sleepovers' when she was provided with a camp bed and bedding at the service user's home for which she received a £40 per week sleepover allowance.

KEY POINTS:

- **The National Minimum Wage Regulations apply to all work done under a contract of employment**
- **It is irrelevant whether any particular activity is undertaken or any particular demand is placed on the worker**
- **Travelling to and from work does not attract the National Minimum Wage, but travelling between assignments does**



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She applied to an Employment Tribunal claiming the National Minimum Wage for all the hours worked from arriving at her first service user to leaving the last and for all the hours during sleepover shifts.

The Employment Tribunal rejected her claims, holding that she was not 'working' when she was travelling between clients, nor when she was on a 'sleepover' shift, and she appealed to the EAT.

The Employment Appeal Tribunal Judgment

Firstly, the EAT noted that what is 'work' for the purposes of the NWM was to be determined only by reference to the Regulations and did not take account of the definition under the Working Time Regulations.

The EAT Judge held that where a person's presence at a place of work is part of their work, the hours spent there, irrespective of the level of activity, are classed as time work. Therefore, as Mrs Whittlestone was required by her contract to be present at the service user's home throughout the night, and would have been disciplined if she left at any point, she was undertaking 'work' and was entitled to the NWM.

With regard to travelling time, the EAT Judge overturned the Employment Tribunal as they had failed to consider whether Mrs Whittlestone was on assignment work. The only travelling time that would not count as time work was where she had time to travel home between assignments.

What does this mean?

The question of what is, or is not, 'work' under the National Minimum Wage Regulations has vexed tribunals and the Appeal Tribunal since the Regulations were introduced.

Hopefully now, this judgment from the President of the Employment Appeal Tribunal will end disputes over sleepovers and travelling time undertaken by care workers, both of which will generally be 'work.'

What should branches do?

Consider whether members are potentially being paid less than the National Minimum Wage, currently £6.31 per hour. Bear in mind that the hourly rate will be calculated by working out the total pay and dividing it by all the hours worked by the member including sleepovers and travelling between assignments.

If members are being paid below the NWM, raise this with the employer with a view to renegotiating pay and conditions, including arrears of pay. Where an employer is unwilling to engage, contact the Regional Organiser for further advice.

Further Reading

http://www.bailii.org/uk/cases/UKEAT/2013/0128_13_1907.html

Action for Branches

- Consider which groups of members may be paid less than the NMW.
- Undertake workplace mapping to identify employers who use sleepovers and assignment based shifts.
- Take worked examples from a range of members and calculate any shortfall in pay.
- Invite the employer to discuss how they propose meeting their duty to pay the NMW.
- Refer to the Region/Legal Services if no progress with the employer.



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