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Being paid for sleeping at work: what does this include?

Royal Mencap Society (Respondent) v Tomlinson-Blake (Appellant) Shannon (Appellant) v Rampersad and another (T/A Clifton House Residential Home) (Respondents) [2021] UKSC 8

IN BRIEF

The Supreme Court upheld the decision of the Court of Appeal that two care workers were not entitled to be paid the national minimum wage for all of the time that they were sleeping at their place of work.

These appeals were brought by two care workers who were "sleep-in" workers, that is, by arrangement they were permitted to sleep at or near their place of work, and the appeals concern the calculation of the time spent by them for the purposes of the National Minimum Wage ("NMW").

The NMW was established by the National Minimum Wage Act 1998 ("the 1998 Act"). Various aspects of the calculation of the NMW are governed by regulations and the two sets of regulations with which the judgments were concerned were the National Minimum Wage Regulations 1999 ("the 1999 regulations") and National Minimum Wage Regulations 2015 ("the 2015 regulations"). The calculation differs according to whether the work is "salaried hours work", "time work", "output work" or "unmeasured work" as defined by the regulations.

The judgments were concerned only with time work and salaried hours work. The regulations provide that in general time when a worker is required to be available at or near his employer's place of business for the purposes of doing time work is included in calculating time work and salaried hours work but there are exceptions: (1) where the worker

is permitted to sleep during the shift and (2) where the worker is at home. These appeals are concerned with the former exception.

This provides in summary that the time during which the worker is permitted to sleep shall only be treated as being time work or salaried hours work when the worker is "awake for the purpose of working".

Mrs Tomlinson-Blake was a highly qualified care support worker who provided care to two vulnerable adults at their own home. When she worked at night, she was permitted to sleep but had to remain at her place of work. She had no duties to perform except to "keep a listening ear out" while asleep and to attend to emergencies, which were infrequent. For each night shift, she was paid an allowance plus one hour's pay at the NMW rate. She brought proceedings to recover arrears of wages on the basis that she was entitled to be paid the NMW for each hour of her sleep-in shift. Her work was time work. The employment tribunal (the "ET") and, on appeal, the employment appeal tribunal (the "EAT") found that Mrs Tomlinson-Blake was not merely available for work but actually working throughout her shift, even when asleep. Therefore, each hour of her sleep-in shift had to be included in the NMW calculation.

Mr Shannon was an on-call night care assistant at a residential care home. He was provided with free accommodation at the care home and paid a fixed amount per week. He was required to be present in the accommodation from 10 pm to 7 am. He was permitted to sleep during that period, but had to assist if the night care worker on duty required his assistance during those hours. In practice he was rarely called upon. He brought proceedings among other reasons to recover arrears of salary on the basis that he was entitled to be paid the NMW for each hour that he was required to be on-call. Mr Shannon's work was salaried hours work. The ET and the EAT dismissed Mr Shannon's claim.

Further appeals in both proceedings were heard together by the Court of Appeal, which held that neither Mrs Tomlinson-Blake nor Mr Shannon was entitled to be paid the NMW for all the hours of their respective sleep-in shifts. The appellants then appealed to the Supreme Court.

The Supreme Court unanimously dismissed the appeals.

In ascertaining the meaning of the regulations, the court gave weight to the recommendations of the Low Pay Commission. This is a statutory body that was set up by the 1998 Act and its membership is widely drawn from both sides of industry and those with relevant knowledge and expertise. The government is bound by the 1998 Act to implement the LPC's recommendations about the NMW on matters referred to it which require regulation unless it provides reasons to Parliament for not doing so. The government accepted the LPC's recommendation on sleep-in shifts in its first report. That recommendation was that sleep-in workers should receive an allowance and not the NMW unless they are awake for the purposes of working, and that recommendation was repeated in later reports of the LPC. The Supreme Court concluded that the meaning of the sleep-in provisions in the 1999 regulations and the 2015 regulations was that, if the worker was permitted to sleep during the shift and was only required to respond to emergencies, the hours in question were not included in the NMW calculation for time work or salaried hours work unless the worker was awake for the purpose of working. Previous cases cited were wrongly decided and should be overruled.

Accordingly, in the case of each appeal, the time when by arrangement Mrs Tomlinson-Blake and Mr Shannon were permitted to sleep should only be taken into account for the purpose of calculating whether they were paid the NMW to the extent that they were awake for the purposes of working and the entire shift did not fall to be taken into account for this purpose.

Joe McManus of Kennedys and a member of the Catastrophic Injury SFT comments that insurers can breathe a sigh of relief as this decision means that sleep in care rates will not change and should not affect the value of care claims.