National Minimum Wage – A better night's sleep

By Andrew MacPhail

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The national minimum wage constitutes an important right of great significance to many workers; all the more so in these times of squeezed family finances.

Inevitably, despite the original NMW regulations having come into effect back in 1999, some areas have remained uncertain. One such area, as covered by this article, is the applicability of the NMW to "sleep-in" shifts.

"Sleep-in" shifts are common in some sectors; they are widely used in care work. The key question in "sleep-in" cases is usually whether the work in question qualifies as "time work" under the relevant definition.

Regulation 30 provides:

> *"Time work is work, other than salaried hours work, in respect of which a worker is entitled under their contract to be paid – (a) by reference to the time worked by the worker;.....".*

"Sleep-in" shifts are not usually salaried hours work. So, in such cases, one would usually focus on whether the sleep-in shifts qualify as "work" as per regulation 30.

However the legislation also includes regulation 32, which provides as follows:

> *"(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) 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."*

Employers have often sought to rely on regulation 32 as a means to argue that sleep-in shifts are not covered by the NMW.

Such an argument was pursued by Mencap in their recent appeal to the EAT (conjoined with other appeals: *Focus Care Agency & Ors v Mr B Roberts & Ors* UKEAT/0143/16/DM & Ors). It was argued that regulation 32 informed and explained what regulation 30 meant, and that the two must be read and given effect together.

The conjoined appeals were heard together by the President, the Honourable Mrs Justice Simler DBE. Rejecting the argument, the President concluded that regulation 32 had no relevance if work qualifies as time work under regulation 30 in any event.

So, turning back to regulation 30, what of "sleep-in" shifts? Do they constitute time work under the definition at regulation 30? Can a worker be working, for the purposes of regulation 30, when asleep?

As recognised by the President, "the fact that an employee has little or nothing to do during certain hours ..... does not mean that he or she is not working. Regulation 30 is not to be equated with any particular level of activity"; and ".... an individual may be working merely by being present.....". It follows therefore that "sleep-in" shifts can potentially qualify.

However not all "sleep-in" shifts qualify; and as pointed out by the President, the distinction between the cases which qualify and those which do not "is easy to state but can be difficult to identify and apply in every case, and the reasons for a particular case falling on one side rather than the other side of the line can sometimes be difficult to discern."

The President concluded that a multifactorial test is to be applied; and that each case will turn on its own facts.

However, ETs will be assisted by the indication given by the President of some factors which may potentially be of relevance, depending on the circumstances:

- the employer's particular purpose in engaging the worker, e.g. regulatory or contractual requirement;
- the extent to which the worker's activities are restricted by the requirement to be present and at the disposal of the employer;
- the degree of responsibility undertaken by the worker may be relevant; and
- the immediacy of the requirement to provide services if something untoward occurs or an emergency arises.

The President concluded: “No single factor is determinative and the weight each factor carries (if any) will vary according to the acts of the particular case.”

The writer understands that the judgment is under appeal by Mencap to the Court of Appeal. However, for the meantime at least, the judgment will assist practitioners being invited to advise in the area.

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