



BRIEFING PAPER

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National Minimum Wage: sleep-in care

By Doug Pyper

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Summary

In April 2017 the Employment Appeal Tribunal handed down judgment in [*Royal Mencap Society v Tomlinson-Blake*](#), providing further guidance on whether employees who undertake sleep-in duties are entitled the National Minimum Wage (NMW) for the time during which they are sleeping. The Tribunal held that, in some cases, carers who are required to be present throughout the night will be entitled to the NMW whether awake or asleep. While this proposition had been established by case law prior to the Mencap case, government guidance had not explained this clearly.

Social care providers have expressed concerns about their ability to meet the requirement to pay carers the NMW during sleep-in shifts. Moreover, many such providers may be exposed to claims for backdated pay.

To obtain backdated wages if underpaid, an employee could take a claim to the employment tribunal or the county court. In addition, the State enforces the NMW. If an employer has breached NMW law, HMRC may take enforcement action.

Following the Mencap decision and the realisation that government guidance had been “potentially misleading”, the Government has set up the Social Care Compliance Scheme and temporarily modified its policy on enforcing the NMW in the social care sector.

1. The legal framework

[Section 1\(1\)](#) of the *National Minimum Wage Act 1998* states that a worker:

shall be remunerated by his employer in respect of his **work** in any pay reference period

The question is: does sleeping during a shift constitute “work” under the Act? The tribunals, in interpreting the 1998 Act and supporting regulations, have concluded that in some circumstances it does.

Until recently, the most important decision on this point was from July 2013, [Whittlestone v BJP Home Support Ltd](#).¹ That case concerned a carer who was

provided with a camp bed and ... bedding which she could use to sleep overnight in the living room of the house occupied by the three young adults ... there was no evidence that whilst doing that, which she regularly did, she ever woke from her sleep in order to provide any specific care.²

Ms Whittlestone was paid a fixed amount of £40 for overnight work. BJP Home Support argued that she was simply on-call while sleeping and not working for the purposes of the NMW. The Employment Appeal Tribunal disagreed:

the evidence was that there had been agreement between the employer and the Claimant that she would work; she would have been disciplined if she had not been present throughout the period of time; she could not for instance slip out for a late night movie or for fish and chips.³

The key point was:

where **specific hours at a particular place are required, upon the pain of discipline** if they are not spent at that place, and **the worker is at the disposal of the employer during that period**, it will normally constitute time work⁴

In 2014 the Employment Appeal Tribunal handed down judgment in [Esparon t/a Middle West Residential Care Home v Slavikovska](#),⁵ which also held that workers would be undertaking time work if required to be present on the employers’ premises:

the Claimant’s job when she was required to sleep in on the premises was one where she was entitled to be paid simply for being on the premises, regardless of whether she worked or not or whether she carried out her regular duties. She was paid simply to be there.⁶

¹ [2014] IRLR 176

² Para 5

³ Para 58

⁴ Para 16

⁵ UKEAT/0217/12/DA

⁶ Para 56

The leading case on the issue is now the Employment Appeal Tribunal's decision in *Royal Mencap Society v Tomlinson-Blake*.⁷ The following paragraphs of the judgment summarise the legal position:

No single factor is determinative and the weight each factor carries (if any) will vary according to the facts of the particular case. The following are potentially relevant factors in determining whether a person is working by being present:

(i) The employer's particular purpose in engaging the worker may be relevant to the extent that it informs what the worker might be expected or required to do: for example, if the employer is subject to a regulatory or contractual requirement to have someone present during the particular period the worker is engaged to be present, that might indicate whether and the extent to which the worker is working by simply being present.

(ii) The extent to which the worker's activities are restricted by the requirement to be present and at the disposal of the employer may be relevant. This may include considering the extent to which the worker is required to remain on the premises throughout the shift on pain of discipline if he or she slips away to do something else.

(iii) The degree of responsibility undertaken by the worker may be relevant: see *Wray & J W Lees* at [13] where the EAT distinguished between the limited degree of responsibility in sleeping in at the premises to call out the emergency services in case of a break-in or a fire on the one hand, and a night sleeper in a home for the disabled where a heavier personal responsibility is placed on the worker in relation to duties that might have to be performed during the night.

(iv) The immediacy of the requirement to provide services if something untoward occurs or an emergency arises may also be relevant. In this regard, it may be relevant to determine whether the worker is the person who decides whether to intervene and then intervenes when necessary, or whether the worker is woken as and when needed by another worker with immediate responsibility for intervening.

...

46. Each case is likely to turn on the consideration of its own particular facts. There will be cases where the line is a difficult one to draw ...

Thus, whether someone undertaking a sleep-in shift is (or was) entitled to the NMW will depend on a range of factors. A "multifactorial evaluation necessary" when determining the question.⁸

⁷ [2017] UKEAT 0290_16_2104

⁸ *Ibid.*, para 82

2. Enforcement

As set out above, the *Mencap* decision did not newly establish that carers undertaking sleep-in shifts could be entitled to the NMW. Several earlier cases had already established that, and ACAS [guidance](#) from December 2013 had commented on it. However, it did bring the issue to widespread attention. Care workers throughout the country realised they might be owed back pay, while social care providers took stock of their potential liabilities.

There are two ways the NMW is enforced: by individuals and the State.⁹ Individuals can enforce their NMW rights via the tribunals or civil courts. If a worker is successful in his NMW claim, he could be owed up to six years' back pay. HMRC enforces the NMW on behalf of the Department for Business, Energy and Industrial Strategy (BEIS). If HMRC finds that an employer has underpaid worker(s), it will fine the employer, require it to provide back pay to affected workers, and name and shame them via a press release.¹⁰

Owing to these "specific and unforeseen circumstances",¹¹ and given the potential impact on the social care sector, the Government has temporarily modified its approach to enforcement and established the Social Care Compliance Scheme. HMRC issued a [policy statement](#) indicating that it would waive fines in respect of non-compliance found to have occurred **prior to July 2017**:

The government:

1. Re-affirms its expectation all employers pay workers according to the law, including the National Minimum Wage, which is explained in guidance entitled "Calculating the National Minimum Wage".
2. Will waive financial penalties faced by all employers found to have underpaid their workers for "sleep-in" shifts, when those shifts took place before 26 July 2017;
3. Has adopted a policy of suspending HM Revenue and Customs enforcement activity concerning payment of "sleep-in" shifts by social care providers, which will apply until 2 October 2017; and
4. Will work with representatives of the social care sector, during the period of that suspension, to see how it might be possible to minimise any impact on provision of social care as a result of this situation.¹²

⁹ For details of how the NMW is enforced, see [The National Minimum Wage: rates and enforcement](#), SN06898

¹⁰ See: BEIS, [National Minimum Wage Law: Enforcement Policy on HM Revenue & Customs enforcement, prosecutions and naming employers who break National Minimum Wage law](#), November 2017

¹¹ BEIS, [National Minimum Wage Law: Enforcement Policy on HM Revenue & Customs enforcement, prosecutions and naming employers who break National Minimum Wage law](#), November 2017, p12

¹² BEIS, [Enforcement of the National Minimum Wage in the social care sector](#), July 2017

BEIS followed this by updating its [enforcement guidance](#), setting out an interim approach to enforcement:

Under NMW regulations, sleep-in shifts can count as work for which NMW is payable. However, historically many providers have paid a flat rate below the NMW rate for such shifts. The result is that those providers are liable to pay (often substantial) sleeping time arrears. We set out below the Government's interim approach to the enforcement of those arrears. This is designed to maximise the prospects of workers being paid the full arrears owed to them as soon as possible, while at the same time protecting existing jobs and ensuring the continuity of service provision in the sector.

The need for a temporary, bespoke enforcement approach in this sector has arisen owing to specific and unforeseen circumstances. Initial evidence from the social care sector suggests there are likely to be substantial liabilities relating to sleeping time arrears owed by social care providers which may have accrued over a significant period. The scale of those liabilities could pose a significant risk to the normal operation of the social care market, risking insolvency for providers, job losses and non-payment of arrears for workers and withdrawal of services for vulnerable individuals.

This is a complex issue. Court and employment tribunal judgments have, over time, helped to clarify the position on what constitutes "work" in connection with sleeping time and therefore when the NMW is payable for sleep-in shifts. A recent key judgment set out that a multi-factorial approach should be adopted for assessing each sleeping time case. Government guidance has been updated following developments in the law, but for a period before February 2015 was potentially misleading on this issue.

In the Government's view, the combination of the critical importance of the social care sector, the significant period over which substantial liabilities for NMW may have accrued in that sector and the complexity of assessment of entitlement to NMW for sleep-in shifts warrant a temporary bespoke approach to enforcement. Any such approach must seek to maximise the payment of arrears to workers whilst having regard to the importance of maintaining stability in the sector in the interests of care recipients as well as providers and their workers.

On 1 November 2017, in recognition of the extraordinary circumstances affecting the social care sector, HMRC introduced the Social Care Compliance Scheme (SCCS). It is an interim enforcement scheme designed to facilitate a solution to the issue of NMW underpayment for sleep-in shifts in the social care sector. It represents a proportionate, time-limited, sector-specific approach which recognises the importance of continued care for vulnerable individuals whilst securing arrears of pay for care workers working sleep-in shifts. Information on the SCCS is available here: <https://www.gov.uk/guidance/tell-hmrc-if-youve-underpaid-national-minimum-wage-in-the-social-care-sector>. The timescales of the SCCS are based around HMRC's assessment of the period that would typically be needed to investigate a sleeping time case in the social care sector. Providers entering the SCCS will have the benefit of clarity around timescales for repayment.

HMRC officers will, taking into account certain criteria set out in the scheme, retain discretion over the operation of the SCCS case by case, including which providers will be permitted to enter the scheme and whether any providers should later be removed from the scheme and subject to normal enforcement processes (see

below). Officers will also take steps to check that employers are making adequate progress during the course of their self-review and will have discretion to deal appropriately with any exceptional circumstances. HMRC is issuing a separate employer information pack and officers will provide further guidance as necessary. The scheme will generally be open for providers to opt in to irrespective of whether they have been the subject of complaints to HMRC and this should help to extend the reach of the identification and payment of arrears, as compared with a normal enforcement approach.

If an employer chooses not to opt into the scheme, withdraws from it, or fails to meet their obligations once in the scheme (either in not conducting a robust self-review or in not repaying workers) then enforcement will be carried out as usual by HMRC. This means an investigation would be carried out, and an NoU issued if appropriate.

There are a limited number of HMRC investigations at an advanced stage that were paused in July 2017. For these cases and for some providers who are not accepted into the scheme (as discussed at paragraph 3.10.6 above), a bespoke financial assessment may be undertaken to establish the impact of repaying liabilities upon that employer's viability. Enforcement action may be delayed for these providers, allowing additional time for the repayment of sleeping time arrears, if the financial assessment establishes that such time is required to avoid threatening the loss of existing care workers' employment and/or the interests of vulnerable service users.

The SCCS was launched on 1 November 2017 and will end on 31 March 2019, by which time all providers must have shown that they have repaid their arrears relating to sleeping time. Nothing in the scheme prevents individual workers taking their own legal action (whether in the Employment Tribunal or Court) to recover arrears owing to them. They should seek legal advice before doing so.¹³

2.1 National minimum wage guidance

As noted in the BEIS statement above, Government guidance prior to 2014 was potentially misleading on the issue. The 2013 guidance stated the following on time when workers are sleeping:

Sleeping between duties

You may allow workers who are performing time work to sleep at or near their place of work and provide them with sleeping facilities. They are not entitled to the minimum wage while they are on standby or on call and are asleep or entitled to sleep. However, you must pay them the minimum wage for any time during which they are awake for working.

Time when a worker can sleep and is not working is not time for which you have to pay them the minimum wage.

However, if they have to get up and work, the time spent awake when they are getting ready for work and working is time for which the minimum wage.

¹³ BEIS, [National Minimum Wage Law: Enforcement Policy on HM Revenue & Customs enforcement, prosecutions and naming employers who break National Minimum Wage law](#), November 2017, pp12-13

If you provide sleeping facilities make sure your arrangement clearly sets out when the worker can sleep. If your arrangement does not clearly specify any sleeping time, it is likely you will have to pay the minimum wage for the full time when the worker is at the workplace - including time when they are asleep.¹⁴

Notably, this guidance was published after the *Whittlestone* judgment had been handed down.

The same passage in the current, April 2017 version of the guidance, states:

Employers must ascertain whether a worker is still subject to certain work- related responsibilities whilst asleep, to the extent that they could be deemed to be 'working'.

A worker, who is found to be working, even though they are asleep, is entitled to the minimum wage for the entire time they are at work. Workers may be found to be 'working' whilst asleep if, for example, there is a statutory requirement for them to be present or they would face disciplinary action if they left the workplace. They would then be entitled to the minimum wage.

There can be situations, however, where a worker is only available for work and is permitted to sleep and suitable sleeping facilities are provided at the workplace. In those cases, the individual will not be 'working' and the minimum wage will not be payable. However, the individual must be paid the minimum wage for any time they are awake for the purpose of working.¹⁵

2.2 Advice for social care providers

The Gov.uk website sets out the details of the Social Care Compliance Scheme [here](#), recommending that providers contact HMRC for advice:

Contact HMRC by telephone on 0300 123 4494 (8am to 4pm, Monday to Friday) for:

1. further information about the scheme
2. help deciding if your workers are working during a sleep-in shift
3. support calculating any underpayment you might find

¹⁴ BIS, [Calculating the minimum wage](#), December 2013, p30

¹⁵ BEIS, [National Minimum Wage and National Living Wage: Calculating the minimum wage](#), April 2017, p29

3. Comment in Parliament

[Social Services: Minimum Wage: Written question - 128962](#)

Asked by [Barbara Keeley](#)

(Worsley and Eccles South)

Asked on: 21 February 2018

Department of Health and Social Care

Social Services: Minimum Wage

128962

To ask the Secretary of State for Health and Social Care, what estimate his Department has made of the total sleep-in back pay liability for care providers in the Worsley and Eccles South constituency.

Answered by: [Caroline Dinenge](#)

Answered on: 26 February 2018

Information on total sleep-in back pay liability for care providers is not available for specific locations. The Government has worked with the sector, and commissioned further market analysis to assess the impact on the sector nationally, however this forms part of the evidence base that is being used to assess options and is subject to further analysis and refinement.

The Government recognises the pressures these liabilities are placing on providers of social care. We are exploring options to minimise any impact on the sector.

Grouped Questions: [128964](#)

[Social Services: Minimum Wage: Written question - HL5601](#)

Asked by [Baroness Campbell of Surbiton](#)

Asked on: 20 February 2018

Department for Business, Energy and Industrial Strategy

Social Services: Minimum Wage

HL5601

To ask Her Majesty's Government what assessment they have made of the impact on personal budget holders as a consequence of the retrospective implementation of the change in guidance on the national minimum wage and national living wage for sleep-in shifts for care workers.

Answered by: [Lord Henley](#)

Answered on: 27 February 2018

Court and Employment Appeal Tribunal judgments have clarified, over time, what constitutes "work" in connection with sleeping time and therefore when the national minimum or living wage (NMW) is payable for sleep-in shifts. The Government recognises that cumulative financial liabilities relating to sleep-in shifts could pose challenges to some social care providers and individuals, including personal budget holders.

The Government is currently engaging with the social care sector to understand the impact of those liabilities and is exploring options to minimise the impact on the sector, including opening discussions with the European Commission to determine whether any support, if deemed necessary, would be subject to EU state aid rules.

The Government launched the Social Care Compliance Scheme (SCCS) on 1 November 2017. It aims to maintain care service provision, protect existing jobs and maximise the prospects of workers being paid arrears as soon as possible. The SCCS is open to all care sector employers, including personal budget holders and self-funders. It means that individuals affected can benefit from a certain period of time to review what is owed. In practice, where an individual is the subject of an NMW investigation, we expect local authorities to work closely with HMRC to ensure the right outcome in light of the individual's needs where any liability is identified.

[Social Services: Minimum Wage: Written question - HL4099](#)

Asked by [Baroness McDonagh](#)

Asked on: 12 December 2017

Department of Health

Social Services: Minimum Wage

HL4099

To ask Her Majesty's Government how much is owed to social care workers for sleeping-in payments for the provision of statutory care that was commissioned by (1) government agencies, and (2) local authorities; and from what funds it is anticipated that those payments will be paid.

Answered by: [Lord O'Shaughnessy](#)

Answered on: 20 December 2017

The information requested is not held centrally.

Social care is usually commissioned by local authorities but it can also be commissioned by the National Health Service or paid for by self-funding individuals.

A piece of market analysis was commissioned over the summer to better understand the scale of the liabilities associated with sleep-in shifts.

The Government is in the process of further refining this work to provide more robust information. The interim enforcement approach announced by the Government on 1 November is designed to maximise the prospects of workers being paid arrears owed to them as soon as possible, while at the same time protecting existing jobs. The Government recognises the pressures these liabilities are placing on providers of social care, and we are exploring options to minimise any impact on the sector.

[Social Services: Minimum Wage: Written question - HL3477](#)

Asked by [Lord Beecham](#)

Asked on: 22 November 2017

Department for Communities and Local Government

Social Services: Minimum Wage

HL3477

To ask Her Majesty's Government what estimate they have made of the cost to local authorities of the new requirement to comply with a social care providers scheme linked to payments for sleep-in care; and whether the new burdens doctrine will apply to such costs.

Answered by: [Lord Bourne of Aberystwyth](#)

Answered on: 06 December 2017

Work conducted by the Government during the summer highlighted the risk posed to the social care sector as a consequence of historical liabilities associated with "Sleep-in" shifts. The Government is exploring options to minimise the impact on the social care sector, including holding discussions with the European Commission. On 1 November 2017, in recognition of the extraordinary circumstances affecting the social care sector, HMRC introduced the Social Care Compliance Scheme. This is an interim enforcement scheme designed to facilitate a solution to the issue of National Minimum Wage underpayment for sleep-in shifts in the social care sector.

[Social Services: Minimum Wage: Written question - 112735](#)

Asked by [Bill Esterson](#)

(Sefton Central)

Asked on: 13 November 2017

Department for Business, Energy and Industrial Strategy

Social Services: Minimum Wage

112735

To ask the Secretary of State for Business, Energy and Industrial Strategy, pursuant to the Answer of 10 November 2017 to Question 111014, on social services: living wage, what representations he has received from representatives of social care providers on compliance with the law on the national minimum wage.

Answered by: [Margot James](#)

Answered on: 17 November 2017

I have received several representations from social care providers over the past twelve months – and have met with organisations representing providers to discuss issues relating to the National Minimum Wage and its enforcement. I have also discussed similar issues with representatives of social care workers.

[Social Services: Written question - 109955](#)

Asked by [Mark Tami](#)

(Alyn and Deeside)

Asked on: 26 October 2017

Department of Health

Social Services

109955

To ask the Secretary of State for Health, how much additional funding local authorities will require in order to pay overnight care at rates commensurate to the national minimum wage; and what discussions he has had with the Chancellor of the Exchequer to secure that additional funding.

Answered by: [Jackie Doyle-Price](#)

Answered on: 02 November 2017

At the Spring Budget we announced an additional £2 billion to fund adult social care. As a result local government will be able to increase spending on social care in real terms over the next three years. The additional money was provided to support more people, ease pressures on the National Health Service, and to sustain a diverse care market.

The Government has taken account of the cost arising from enforcement of national minimum wage for sleep-in shifts in deciding to provide this sum of additional funding. Local government is best placed to target resources based on their understanding of the diversity and sustainability of local care markets.

[Social Services: Minimum Wage: Written question - 107910](#)

Asked by [Paul Blomfield](#)

(Sheffield Central)

Asked on: 16 October 2017

HM Treasury

Social Services: Minimum Wage

107910

To ask Mr Chancellor of the Exchequer, what proportion of social care employers found to be non-compliant with the national minimum wage have had arrears identified by self-correction since January 2016.

Answered by: [Mel Stride](#)

Answered on: 19 October 2017

The government is determined that everyone who is entitled to the National Minimum and Living Wage (NMW) receives it. Anyone who feels they have been underpaid NMW should contact the Acas helpline on 0300 123 1100. HMRC review all complaints that are referred to them.

Between January 2016 and 31 March 2017, HMRC closed 102 social care employer investigations where NMW arrears were identified. 42 employers out of this total (41%) were instructed to self-correct a limited amount of the identified arrears. HMRC does not provide in year data as this has not been verified, so data post 31 March 2017 cannot be provided at this time.

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