

In the Know…

National Minimum Wage and Sleep Ins

As April approaches bringing the new National Minimum Wage and National Living Wage increases, we felt it was appropriate to remind you of the current position regarding the interaction of the minimum rates and those who perform sleep ins. Here, we take a look at three cases.

Three important cases

- All cases were decided before the introduction of the National Living Wage and so refer only to the application of the National Minimum Wage. However, the principles will clearly also now apply to the National Living Wage.
- The circumstances of all are likely to sound familiar to many employers in the care sector.

When the employee cannot leave their post

- In *Whittlestone v BJP Support Ltd*, the employee was not permitted to leave the workplace during the sleep in shift i.e. it would be considered a disciplinary offence if she popped out to the shop;
- The Employment Appeal Tribunal (EAT) found that the hours spent asleep were to be classed as working time because of this restriction;
- This meant that all of the employee's sleeping hours would attract the National Minimum Wage.

When there are minimum requirements/ guarantees relating to numbers of staff

- In *Slavikovska v Esparon*, the EAT found that where there is a statutory requirement for a minimum number of employees to be present at the workplace at any one time, then all hours spent asleep by those workers will count as working time;
- Therefore, all of the hours spent asleep for all of those employees would attract National Minimum Wage;
- This would also apply, the EAT found, where there was no statutory requirement for a minimum number of staff but where the employer guaranteed a certain number of staff at any one time in its literature or service level agreement;
- The Government has subsequently amended its official guidance on the payment of the National Minimum Wage to take into consideration both the *Whittlestone* and *Slavikovksa* cases.

When the employee lives on site

- A different result was found by the EAT in *Shannon v Rampersad t/a Clifton House Residential Home* when an employee who performed sleep in shifts lived in a flat on site at the care home where he worked, and was permitted to spend sleep in shifts in his flat. He was also the second in line for call outs; there was another member of staff who was to be called upon before he was;
- The EAT decided that the hours spent asleep were not working hours in these circumstances, and therefore did not attract National Minimum Wage;
- However, this decision has been appealed to the Court of Appeal and is due to be heard before 5th June 2017.

Success Tips

• It is important to remember that an employer must pay on average the minimum pay rates for each hour worked per pay reference period;

• This means that total pay should be divided by the number of hours deemed as work (to include the hours where necessary as shown above) and the result should be at least the relevant minimum pay rate for a worker of that age.

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Peninsula, Victoria Place, Manchester, M4 4FB

0844 892 2772 peninsula-uk.com