Mencap: no entitlement to the National Minimum Wage for sleep-in shifts

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The Supreme Court's long-awaited decision in the joint appeal of Mencap and Shannon will have employers in the care sector breathing a collective sigh of relief.

In the joint appeal of *Mencap/Shannon*, the court concluded that workers performing 'sleep-in' shifts are not entitled to be paid the National Minimum Wage (NMW) for the duration of their shifts (but only for periods in which they are awake for the purposes of working).

The decision, on the one hand, will be seen by many as a blow to workers in this sector, perpetuating the wider problem of the undervaluing of care work. On the other hand, the court's conclusion signals the removal of the sword of Damocles that had been hanging over employers in this sector in the form of potentially devastating historical liabilities for NMW.

The facts and appellate history

Both cases concerned workers who performed sleep in shifts, albeit in slightly different contexts. In common, however, was the contention that the appellants were entitled to be paid the NMW for each of the hours of their sleep-in shift.

Mrs Tomlinson-Blake was a care support worker who, in addition to providing day care for Mencap for two vulnerable adults at their home, performed overnight sleep-in shifts for a fixed rate of £22.35, plus one hour's pay at a rate of £6.70. During those shifts, she was required to remain at the home but was permitted to sleep; the requirement was for her to keep a 'listening ear' (even while asleep) and to respond as appropriate to any emergency. The evidence showed that in the period of 16 months preceding the tribunal hearing, she had been disturbed about six times.

Mr Shannon lived at the residential care home where he was an on-call night care assistant. He was required to remain on site from 10pm to 7am each night and to assist the night care worker on duty if called upon (though, in practice, this rarely happened). He was provided with free accommodation and utilities, and was paid a fixed sum of £50 per week (which later rose to £90). His claim for back pay at the NMW amounted to almost £240,000.

Mrs Tomlinson-Blake's claim had succeeded before the employment tribunal and the EAT, both concluding that she was 'working' for the duration of her sleep-in shift within the meaning of reg 30 of the 2015 Regulations and not subject to the sleep-in exception in reg 32. Mr Shannon's claim, however, had failed at both tribunal and EAT level, the respective tribunals pointing to the sleep-in and home exceptions contained in reg 16 of the 1999 Regulations (the 2015 Regulations not having been in force during his employment).

The appeals were joined before the Court of Appeal, which unanimously allowed Mencap's appeal and dismissed Mr Shannon's appeal. Neither Mrs Tomlinson-Blake nor Mr Shannon were working for the purposes of the legislation, but were merely available for work, and it followed that they did not have any entitlement to NMW as a result of the sleep-in exception in the respective regulations.

An exercise in statutory interpretation

The Supreme Court, like the Court of Appeal, began by analysing the case by reference to the legislation, before turning to the case law. Lady Arden made clear that the fact that an employee is subject to an employer's instructions or is allowing an employer to fulfil a duty to someone else (for example a contractual duty) will not necessarily entitle him or her to a wage. Many will find those propositions, perhaps understandably, difficult to accept in principle, but they formed part of the court's starting premise that 'not all activity which restricts the worker's ability to act as he pleases is work for the purposes of the NMW'.

The wording in the respective regulations was similar. The 2015 Regulations (which were said not to introduce any substantive change to the 1999 Regulations) provide:

'not all activity which restricts the worker's ability to act as he pleases is work for the purposes of the NMW'

Regulation 30:
'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;
(b) by reference to a measure of output in a period of time where the worker is required to work for the whole of that period; or
(c) for work that would fall within sub-paragraph (b) but for the worker having an entitlement to be paid by reference to the period of time alone when the output does not exceed a particular level.'

Regulation 32:
'(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.'

The Supreme Court drew upon the Low Pay Commission's (LPC) report from 1998, which had recommended that 'when workers are paid to sleep on the premises … workers and employers should agree their allowance, as they do now. But workers should be entitled to the National Minimum Wage for all times when they are awake and required to be available for work'. That report was an important aid to statutory interpretation because of the role of the LPC within the NMW Act 1998, which was (and continues to be) to advise the Government and build consensus in relation to wages matters, feeding into the legislative process. These matters are, unsurprisingly, not without controversy.

The NMW Act 1998 requires the Secretary of State to refer certain matters to the LPC. If the Secretary of State does not agree with recommendations of the LPC that would require new regulations to implement, then he or she has to inform Parliament of this and give reasons why. The 1998 LPC report had been largely accepted by the Government, and there was therefore a presumption that the ensuing regulations in fact implement the LPC's recommendations, including in relation to sleep-in workers.

The court considered that, taking that approach, the meaning of the sleep-in exception was clear. Workers are not 'working' (whether time work or salaried work) for the purposes of the legislation if they are not awake and, even if they are awake, they are only entitled to NMW when they are 'awake for the purposes of working'. The court emphasised the distinction drawn in the respective Regulations between actually 'working' (under reg 3 of the 2015 Regulations) and being 'available for work' (under reg 32). Both Mrs Tomlinson-Blake and Mr Shannon were merely available for work rather than actually working, and therefore were not entitled to NMW, other than when they were awake for the purposes of working.

Authorities – including British Nursing – overruled

The Supreme Court overruled a number of cases that it considered had been decided on the erroneous basis that someone could be said to be actually working (rather than merely available for work) when they were positively expected to sleep during the relevant period.

Notably, the court overruled the Court of Appeal decision in *British Nursing*. In that case, the court had held that call centre workers who were required to answer the phone only intermittently during a night shift (but who were otherwise permitted to sleep) were working for the purposes of the 1999 Regulations. Lady Arden considered this was inconsistent with the Regulations because of the dichotomy that they draw between 'working' and 'available for work'.

The upshot of Lady Arden's analysis would be that home workers (whether asleep or awake), in addition to sleep-in workers, are merely available for work rather than actually working, because of the sleep-in and home exceptions enshrined in reg 32 of the 2015 Regulations. Such workers would therefore only be entitled to NMW when they are actually working. Lord Kitchin agreed with that analysis. Lords Carnwath and Wilson agreed that *British Nursing* should be overruled but concluded that it was not necessary to resolve the issue of the treatment of home-working generally, since it did not arise on the facts.

The effect of the differing judgments on this point is to create an even split among the justices as to the correct approach to the treatment of home-workers' eligibility for NMW. The uncertainty created by that split (and the persuasive nature of Lady Arden and Lord Kitchin's judgments) will be of concern to many, not least given the vast numbers of workers working from home due

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to restrictions imposed by the Government during the coronavirus pandemic.

Observations and conclusion

Undoubtedly, many sleep-in workers will feel insulted by the court's conclusion. It is perhaps to be borne in mind, however, that employers operating in this sector are generally service providers dependent on Government funding to meet the needs of their service users. The problem goes beyond the private wage-work bargain, descending into the contentious political issues of both the funding of social care and different models for the provision of such care. That political issue is not within the purview of the courts, whose role as ever is to apply the law as it is. If the court were to have read down the sleep-in exception in this case, it is difficult to see what purpose it would retain. The fact that some or many may consider that the law ought to be different is, ultimately, a matter for the Government (with the input of the LPC) and Parliament.

While the care sector is clearly most directly affected by the decision, its consequences have the potential to extend much further. The court's treatment of *British Nursing*, and the lack of unanimity on the home-working exception, creates uncertainty for home-workers.

Paras 57 and 99 (in Lady Arden and Lord Kitchin's judgments respectively) plainly leave scope for a finding that intermittent working from home might still amount to actually working, which will provide some comfort. But identifying the precise boundaries of that question – and what side of the line any given working arrangement falls on – will no doubt be the subject of future litigation which will take time to work its way to the appellate courts.

The fact that that uncertainty will now prevail during a period of both economic decline and unprecedented levels of home-working is undesirable. Short of legislative intervention, however, it is difficult to see how it will be resolved anytime soon, leaving large numbers of workers potentially vulnerable to an approach to cost cutting that may now unexpectedly find credence in the law.

KEY:

Mencap/Shannon	*Royal Mencap Society v Tomlinson-Blake; Shannon v Rampersad (t/a Clifton House Residential Home)* [2021] UKSC 8
NMW	National Minimum Wage
LPC	Low Pay Commission
NMW Act 1998	National Minimum Wage Act 1998
1999 Regulations	National Minimum Wage Regulations (SI 1999/584)
2015 Regulations	National Minimum Wage Regulations 2015 (SI 2015/621)
British Nursing	*British Nursing Assoc v Inland Revenue* [2002] EWCA Civ 494