

# EMPLOYMENT REGULATIONS

## Update on European Working Time Regulations and National Minimum Wage Regulations for voluntary sector care providers

December 2007

A number of members have been in touch recently with enquiries about the Working Time Regulations, which implement the European Working Time Directive (“WTD”), and the National Minimum Wage Regulations (“NMW”), particularly in relation to “on call” time and, in particular, sleepover shifts.

CCPS has put together the following summary in conjunction with legal specialist Jane Fraser of Maclay, Murray & Spens, LLP, with a view to clarifying the current position. This is a complicated area of employment legislation. Whilst the summary is intended to provide guidance, it should not be regarded as a complete or authoritative statement of the law, and it is not intended to advise members on what position they should adopt in their individual circumstances. Any member with concerns about their compliance with the requirements of the current legislation is advised to seek legal advice. Members should also be aware that there may be developments in new legislation or caselaw which affect the rights of workers.

© December 2007

Briefing prepared by Jane Fraser, Maclay, Murray & Spens LLP and Kirsten Gooday, CCPS

Community Care Providers Scotland  
9 Ellersly Road  
Edinburgh  
EH12 6HY  
T: 0131 337 3295  
F: 0131 347 1756  
[www.ccpscotland.org](http://www.ccpscotland.org)

CCPS is a Company limited by guarantee registered in Scotland No. 279913, recognised by the Office of the Scottish Charity Regulator as Charity No. SC029199.

This document is copyright protected and may not be reproduced, in part or in whole, without the permission of CCPS.



## **Working Time Regulations 1998**

The Working Time Regulations (“WTR”) are primarily concerned with the health and safety implications of working time. The WTR provide that “working time” means any period during which the worker is working, at the employer’s disposal and carrying out his or her activity or duties, or undertaking relevant training (which includes work experience or training provided on a training course or programme).

The WTR lay down the requirement for employers to provide workers with a minimum daily rest period (11 consecutive hours’ in each 24-hour working period) and adequate rest breaks (uninterrupted period of 20 minutes’ where work exceeds a 6 hour stretch). A ‘break’ is a period where the worker is not ‘working’. The provisions relating to rest periods or breaks may be modified by a collective or workforce agreement, subject to equivalent periods of compensatory rest being made available (effectively, time off in lieu).

The WTR also fix the maximum weekly working time at an average of 48 hours. In the UK, employees can voluntarily “opt-out” on an individual basis of the WTR in so far as they relate to the maximum 48 hour week - the agreement can be terminated by the employee giving notice (maximum 3 months).

One significant issue which has arisen in respect of the definition of ‘working time’ is the status of “on-call” time.

### **“On-call” time**

While there is widespread acceptance at an EU and at a national level that the implications of the various caselaw decisions regarding “on call” working time, particularly in the fields of health and social care, need to be dealt with, as yet no agreement on amending the WTR has been reached and it is not on the agenda for the next year.

For now, the European Court of Justice confirms that with regard to the WTR all time spent “on call” on site, including sleepovers, does count as working time.

The original 2002 DTI guidance on WTR, which stated that on-call time was not working time, was wrong, has been superseded by European Court of Justice caselaw, and should no longer be followed.

The current Department for Business, Enterprise and Regulatory Reform (former DTI) publication *Your Guide to the Working Time Regulations sections 1-4*<sup>1</sup> now states in section 2, under the heading ‘what is working time’ that:

“On 3 October 2000 the European Court of Justice gave judgement in a case concerning the status of ‘on-call’ time. The judgement related to doctors employed in primary health care teams although a similar approach has been taken by the courts in other areas. It indicated that ‘on-call’ time would be working time when a worker is required to be at his place of work.

[In contrast] when a worker is permitted to be away from the workplace when ‘on-call’ and accordingly free to pursue leisure activities, on-call time is not ‘working time’.”

There is no specific reference in the DBERR guide to “sleepover” time. However, this decision clearly has implications for all members who require any of their staff to be “on call” at their place of work.

## **UK employment tribunals and employment appeal tribunals**

There have not been many cases on WTR in the UK as the Tribunals deal only with issues relating to breaks and holiday pay and, unless collective action is being taken, the sums involved do not tend to justify taking claims all the way to Tribunal. The following cases, however, have come to the attention of members. UK Tribunals are bound by the European judgements on what is working time.

- *Anderson v Learmonth Hotel 2006* found that sleepover time was working time. Please note that this case was about the interpretation of a particular contract and does not set down any general rule to follow.

- *Davies et al v London Borough of Harrow 2003* found that all time during which an employee is required to be on site on-call is working time for the purposes of the WTR. The wardens here were required to be on call constantly from within the premises throughout their 5 day shift. The union involved in the case did not take issue with the new system brought in which provided for leaving the site and recall by pager.
- *MacCartney v Oversley House Management, 2006* found that a manager of sheltered accommodation who was required by her employer to remain “on call” to residents and for that purpose to remain on or close to her place of work, was “working” while on call even though her employer provided her with a home, at her place of work. This particular manager was contracted to work 24 hours a day, 4 days a week. She was allowed out only as far as the garden to walk her dog. The Employment Appeals Tribunal also found that the employee was entitled to be paid for all of the hours she worked.

In light of the European and domestic caselaw developments, members should be mindful of the distinction between employees who are “on call” at home who, during periods of inactivity, are not “working”, and employees who are “on call” at their place of work, who are “working”.

In particular, members should consider whether there is a requirement for their “on call” staff to remain at their workplace. If so, then for the purposes of the WTR, the staff are working, even if they are not actually performing their duties and are permitted to rest when their services are not required. This will inevitably impact on the individual employee’s rights (as set out in the WTR) in particular, the maximum weekly working time of 48 hours and the minimum daily rest period. Where staff may be away from the workplace when “on call” and can pursue their leisure interests, on call time will not be working time for the purposes of the WTR. Clearly, if a member of staff is actually called out to perform work, the time spent working, is working time. Specific recall times and/or providing that staff must be fit to work have not been tested and are therefore acceptable unless and until a ruling is given.

### **Action points – if answering yes to any of the following questions then review risk**

Do you have staff working more than an average of 48 hours if sleepovers are counted?

Do you have staff that remain on call on site during breaks (e.g. just grab a coffee when it’s quiet?)

Do you have staff working back, evening, day shift pattern which limits the break between days?

### **National Minimum Wage**

National Minimum Wage (NMW) provisions are entirely separate to the WTR provisions. The Government introduced NMW provisions to deal with the issue of low pay. There is no link whatsoever to the European WTD or the WTR. Tests to decide working time for WTR therefore have no relevance to deciding time that has to be counted for NMW compliance. Please therefore ignore WTR decisions when looking at NMW compliance and vice versa.

### **Checking compliance with NMW is a three step process**

Step 1: Calculate how many hours the employee is working in the pay period – check the contract for contracted hours.

If the employee then works sleepovers in addition to basic hours then the UK government guidance is the DTI document from October 2004, *A Detailed Guide to the National Minimum Wage*<sup>2</sup>, which contains detailed information on sleepover time at sections 136-7 (see box 1, page 4). Note however that the guidance refers to a period of time when the employee arranges with the employer that they are able to sleep and will not be disturbed. In most social care settings, staff on a sleepover may be able to sleep for a while if they are not required for work, but are unlikely to have negotiated an undisturbed period of sleep; therefore, case law suggests that all hours count (see p.4, particularly *Scottbridge Construction Ltd v Wright 2003*). If the employee works ‘as and when required’ then calculate how long it takes to carry out the duties.

## Box 1 Sleeping between duties

136 If a worker arranges with his employer to sleep at the place of work, and he is provided with suitable facilities for doing so, the time when he is permitted to sleep and is not working will not be treated as time when the minimum wage is payable. But if he has to get up and do some work during the night, the time spent awake and working will count as time when the minimum wage is payable.

137 A number of employment tribunal cases have touched on this issue. Provided the employment contract clearly sets out the period when the worker is permitted to sleep, and the employer provides suitable sleeping facilities, the worker need not be paid the minimum wage in respect of that period if he is not actually working. He must, however, be paid the minimum wage in respect of any time during the period when he is working or awake for the purposes of working. In cases where the employment contract does not clearly specify any sleeping time, however, the tribunals seem likely to conclude that the minimum wage should be paid for the full time when the worker is at work.

### Example 18: Sleeping time

A care assistant is employed at a residential care home and is required to be on the premises overnight from 10.00pm until 6.00am. He is allowed to sleep between the hours of 11.30pm and 4.30am if he is not required to care for a resident, and he is provided with a bed for this purpose. This sleeping period does not count for the minimum wage, but the minimum wage must be paid for the periods 10.00pm to 11.30pm and 4.30am to 6.00am. Thus the worker is entitled to a minimum of 3 hours' pay at the minimum wage rate each night. If the worker is woken to attend to a resident during the normal sleeping hours, he must be paid for the period he is awake. Therefore, if he is attending to a resident during the night and is awake from 2.00am to 3.00am for this purpose, he is entitled to the minimum wage for that hour.

Source: *A Detailed Guide to the National Minimum Wage*<sup>2</sup>

Where an employee is going to work 'as and when required' then a daily average agreement is possible where agreement can be reached in advance as to what hours will count.

Step 2: Calculate what the employee has been paid in the pay period. Sleepover allowances do not count if they are not consolidated.

Step 3: Divide the pay by the hours and if on or above NMW levels then complaint, if not then risk of action to recover shortfall.

Example 1 – basic hours of 36 hours per week plus works 2 x 10 hour sleepovers per week – count 56 hours. Weekly paid. Sleepover allowance of £25 per night. Employee would need to earn £309.12 to be compliant BEFORE allowance.

Example 2 – as before, but agreement reached that sleepover shifts will involve daily average of 2 hours work per night. Count 40 hours only i.e. 36 plus 4 for the sleepovers. Employee now compliant earning £220.80 BEFORE allowance.

### NMW cases

- *Auld vs Aberdeenshire Council 2007* found that on call time spent in sheltered housing warden's accommodation outside contracted basic hours was not to be counted for NMW purposes.
- *British Nursing Association v Inland Revenue 2002* found that persons providing a night service by telephone from home were 'working' through the shift period for the purposes of the NMW Regulations, although free to do whatever they wanted between telephone calls. The service operated from an office during the day. Found that the operators were at their 'place of work'.
- *Walton v Independent Living Organisations Ltd 2003* found that a live-in carer, required to be on the client's premises for a consecutive period of 72 hours each week to provide care as and when, was only entitled to payment in respect of the time specified in the daily average agreement.
- *Scottbridge Construction Ltd v Wright 2003* found that a night-watchman, who was permitted by his employer to sleep on the employer's premises whilst at work (although would remain on call), was entitled to payment for all hours he was required to be on the premises.

Earlier this year it was expected that the Aberdeenshire case, which was won by the Council, would be appealed with trade union support. The appeal was abandoned and the helpful decision stands.

### Union activity

An employee of a CCPS member organisation is being backed by the TGWU/Unite to raise a grievance about the rate of pay for sleepovers. This may be part of the TGWU ‘valuing the voluntary sector’ campaign, which lists sleepover time as one of the issues it wants to tackle.<sup>3</sup>

It is worth noting, however, that other members who recognise the TGWU report that in separate cases the union:

- has not challenged their system of ensuring that all hours worked over a 17 week period are not paid at less than the minimum wage; and
- accepted a reduction in sleep-in rate during recent negotiations when it was accepted that the organisation’s unit cost would be unacceptably high if they paid the hourly rate for sleepovers. Local agreements may, therefore, be possible.

Unions do not seem to be pursuing local authorities in relation to payments for sleepovers. At this stage, it is unclear how local authority staff are paid for sleepover shifts.

Members should bear in mind that where wages are not compliant claims can stretch back to 1999. Employees can enlist the help of HMRC enforcement officers.

### What have CCPS members been doing about this?

Members have reacted to the developing case law in a variety of ways. *This list makes no comment as to whether or not members’ actions are compliant with the WTR and the NMW Regulations and is provided for information only:*

- Paying a set fee for sleepover shifts;
- Paying a set fee for sleepover shifts if employees are woken twice or less and the usual hourly rate for the shift if they are woken three times or more;
- Paying minimum wage for all hours of a sleepover shift (having been successful in including this in contract price from a local authority);
- Paying minimum wage for hours during a sleepover shift when the employee is awake and asked to work;
- Ensuring that an employee’s salary divided by the number of hours worked, (normal working hours + sleepover hours) over a particular period does not equal less than the minimum wage per hour; and
- Paying an employee’s regular hourly rate for hours when the employee is awake and asked to work during a sleepover shift.

In view of the growing number of tribunal and court decisions in this area, members should ensure that their staff are being paid the national minimum wage, particularly where their pay is calculated according to the entire length of their shift, including the sleeping period. Where a member pays a set fee for sleepover shifts (irrespective of the number of disturbances which arise), particular consideration should be given as to whether the wage per hour for the remainder of the shift, is above the NMW, such that the “set fee” and the “working” payment averages out as more than the NMW over the entire period of the shift. Staff who are content with the working arrangements are much less likely to pursue claims but as a priority members should identify areas of non compliance and review whether there are strategies to deal with those issues.

#### References

- <sup>1</sup> [http://www.dti.gov.uk/employment/employment-legislation/employment-guidance/page28978.html#working\\_time\\_limits](http://www.dti.gov.uk/employment/employment-legislation/employment-guidance/page28978.html#working_time_limits)
- <sup>2</sup> <http://www.berr.gov.uk/files/file11671.pdf>
- <sup>3</sup> <http://www.tgwu.org.uk/Templates/Campaign.asp?NodeID=91916>

**It is clear that both WTR and NMW are continuing to cause practical concerns and difficulties. Given the degree of uncertainty around the issues contained in this briefing, social care employers, including CCPS members, are in a vulnerable position, and should consider carefully which course of action to take.**