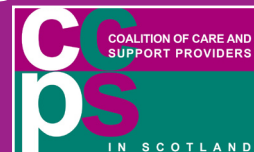


CCPS - COALITION OF CARE AND SUPPORT PROVIDERS IN SCOTLAND

Working Time and National Minimum Wage:

Summary of recent legal updates

December 2010



CCPS issued a briefing in November 2007 on the Working Time Directive and National Minimum Wage. In response to a recent campaign by the UNITE union, encouraging their members to consider their shift patterns and what they should and should not be paid for, and cases covering sleepover duties and allowances, legal specialist Jane Fraser of Maclay, Murray & Spens LLP has produced the following briefing, reviewing the most recent cases and providing an updated summary of the legal position.

This remains a complicated area of employment legislation. Whilst this 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 case law which affect the rights of workers.

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 of 11 consecutive hours in each 24-hour working period and adequate rest breaks (an uninterrupted period of 20 minutes where work exceeds a six 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).

Since the last CCPS briefing in December 2007, the European Commission has undertaken a review of the provisions of the European Working Time Directive (EWTD). An amended text was published in June 2008, although the amendment proposal restricting or abolishing the use of the opt-out from maximum weekly working time was not agreed (this was a key win for the UK Government).

The opt out provision has, alongside other proposed amendments, proved to be a major sticking point. As the proposals were subject to the co-decision procedure a Conciliation Committee was convened, consisting of delegates from Parliament, the Council and the Commission (acting essentially as referee) with a view to reaching agreement on a revised text for the EWTD. On 27 April 2009, negotiations came to an end without agreement being reached. The Commission effectively recommenced the process in March 2010 when it launched a “first-phase” consultation with the social partners to review the options for amendment of the EWTD. CCPS will keep members updated if this consultation results in any amendments.

Guidance from tribunals

The following cases confirm the up to date law in this area. UK Tribunals are bound by 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.

- *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 EAT also found that the employee was entitled to be paid for all of the hours she worked. The decision remains authoritative in this area.

- *Hughes v G and L Jones t/a Graylyns Residential Home 2008*

Mrs Hughes was a part-time care assistant paid for an eight-hour week. In addition to these hours, she was on call between 9 pm and 8 am, seven days a week. She occupied a flat on site at reduced rent in order that she might be available when called upon. The EAT held that her working time was 85 hours a week (eight hours of actual work and 77 hours on call).

Members should therefore continue to 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”.

If there is a requirement for “on call” staff to remain at their workplace, 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 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. Recall times should, however, be sensible; the *MacCartney* case cited above had recall times of two minutes, which would be likely to be considered unreasonable.

On call and compensatory rest

It is accepted that situations may arise where it is not practicable to comply with the minimum statutory rest break periods, for example where there is a need for particular members of staff to provide for ‘continuity of care’ due to a staff shortage (as a result of staff absences) or where a small group of staff are required to provide “round the clock” cover at a unit. In these circumstances, the staff concerned must be provided with compensatory rest (effectively a time off in lieu system).

The EAT in *Hughes v Corps of Commissionaires Management Ltd (No.2) 2010* considered the nature of compensatory rest in the context of a rest break. In that case the EAT held that the rest break must be an uninterrupted period when the worker is not at the employer’s disposal, and that the worker must know in advance that it will be uninterrupted. Therefore, the obligation to be effectively “on-call”, and therefore available in case you are needed, was incompatible with taking a rest break. However, it was not incompatible with taking compensatory rest. In that case, the worker was a lone security guard. It was not possible to guarantee an uninterrupted break, in case something happened requiring his attention. However, he was allowed to choose when he took his 20-minute break, and in the even of interruption, was allowed to start the whole break again. The EAT held this was compensatory rest, even though the worker was effectively on-call.

Where staff are consistently working more than 48 hours a week on average (including second jobs) or are unable to take their minimum rest breaks, members should consider whether they are prepared to take the risk of enforcement by the HSE/Environmental Health and/or Tribunals, or alternatively whether there is any practical way of reducing staff hours, having staff enter individual opt outs of the 48 hour average limit and/or modifying or excluding the WTR limits - through use of a collective or workforce agreement.

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, or day shift patterns which limit 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.

Recent NMW cases have considered ‘sleepover allowances’ and sleepover shifts.

As before, however, whether a worker has received the NMW will depend on their average hourly rate, which is calculated on the basis of:

- The total **pay** earned over the relevant **pay reference period**, divided by
- The total number of **hours** worked over the reference period.

This briefing covers the issues of: what counts as pay, what is the pay reference period, and how to calculate the number of hours worked.

Calculating pay

The pay that should be taken into account when calculating the average hourly rate is:

- The worker’s total gross pay
- Plus any payments or benefits that should be taken into account (but not overtime or shift premium)
- Less any deductions that should be taken into account.

Benefits

The value of most benefits in kind will not count towards the NMW.

The only non-cash benefit provided to the worker that should be taken into account is the value of any accommodation provided by the employer, as evaluated under regulation 36 (the accommodation allowance or off-set). This is the number of days in the reference period for which accommodation was provided multiplied by the applicable accommodation allowance (the rate is set annually).

Where accommodation is provided as a benefit in kind (that is without charge), the employer can add an amount equal to the accommodation allowance onto the total remuneration when calculating pay for NMW purposes. Where accommodation is not provided as a benefit in kind, but the worker pays rent (whether or not deducted directly from wages), any rent up to the value of the accommodation allowance can be disregarded but any excess will be treated as a deduction so as to reduce the pay for NMW purposes.

Premium rates paid for overtime or shift work

The amount by which the overtime or shift payment exceeds the lowest rate that is normally payable is not taken into account in calculating pay for the purposes of NMW. Therefore, if the worker normally receives £5 an hour but is paid £8 an hour for any overtime worked, only £5 an hour is taken into account. However, if the worker receives different rates for different jobs, rather than premium rates for the same job, the whole rate should be taken into account. This is the case even if the worker is only paid at the premium rate.

A recent case provides an illustration. In *Hamilton House Medical Ltd v Hillier EAT 2009*, Mrs Hillier's basic rate of pay was stated to be £5.01, a figure below the national minimum wage rate. However, because she worked nights, she received more than 1.3 times her basic rate of pay for nights worked during the week (£6.67) and approx 1.6 times her basic rate for weekend nights (£8.09). The employer argued that it had met its obligation to pay at least the minimum wage, because Mrs H always received either £6.67 or £8.09 per hour. However, the EAT held that the employer had failed to meet its minimum wage obligations as Mrs H's basic rate of pay was less than the minimum wage.

Allowances

Any unconsolidated allowances or payments that are not attributable to the employee's performance, for example London weighting or an on-call allowance should not normally be taken into account for NMW. However if such payments are consolidated into the standard pay they will count towards the NMW.

The EAT considered the meaning of "allowance" in this context in *Smith v Oxfordshire Learning Disability NHS Trust 2009*. It was held by a majority that a "sleeping in allowance" of £25, which was paid to a care home worker each time he was required to sleep on the premises, was not an "allowance" within the meaning of the National Minimum Wage Regulations. It followed that the payments would be taken into account when calculating the worker's average hourly pay for national minimum wage purposes. The EAT found that an "allowance" must be attributable to something over and above, or distinct from, a worker doing his basic job. Rather, it was a payment - in fact, the only payment - for his performing the sleep-in duty.

The majority's conclusion followed the EAT's decision in *Burrow Down Support Services Limited v Rossiter 2008* that the £20 a night paid to a "night sleeper" in a care home was not an "allowance", but a fixed sum "payable automatically as part of the consideration for the work performed".

In the majority's view, Mr Smith's "sleep in allowance" was "inherently different" from the unsocial hours enhancements to which Mr Smith was separately entitled for the hours immediately before and after a sleep-in, and the night work enhancements that he would have been paid had his sleep been disturbed. These enhancements, which were paid on top of the basic remuneration for the job, were good examples of genuine "allowances" under the NMW Regulations (and should therefore not be taken into account for NMW).

The basic rate of pay before shift or overtime payments must therefore be above NMW. If staff receive only a sleep over payment for the sleep over shift then it appears that this will count. Weekend premium rates or enhanced rates for unsocial hours will not count. Allowances paid in addition to a basic rate of pay for working a particular shift will not count.

Pay reference period

The pay reference period for calculating hourly pay will be one month, or, if the worker is paid by reference to a period that is shorter than a month, that shorter period.

Number of Hours Worked

The number of hours that the worker has worked during the reference period is calculated differently depending on the type of work done by the worker.

There are four types of work defined in the NMWA 1998:

- Time work (hourly paid work)
- Salaried hours work
- Output work
- Unmeasured work

The most common types of work are time/salaried work. The number of hours worked by a time/salaried worker consists of time that the worker is:

- Actually working;
- At work and is obliged to be available for work, even if no work is actually provided (for example while on call or while equipment is being mended). The case of *British Nursing Association v Inland Revenue (National Minimum Wage Compliance Team) 2002* remains the authority for this, where the Court of Appeal held that nurses providing a night service by telephone from home were doing “time work” through their shift, and were not merely on call (for salaried workers *MacCartney* and *Hughes* detailed above at WTR remain the authority);
- On standby or on call at or near the place of work. However time spent on standby or on call at home does not count, regardless of where the worker works. In the most recent case, *South Manchester Abbeyfield Society Ltd v Hopkins and Anr 2010* the EAT has distinguished cases where the worker is working merely by being on the premises, for example night-watchmen, and cases where the employee is provided with sleeping accommodation and is simply on call. In this second case the hours may well all count for the purposes of the WTR but cannot be all be brought into account for NMW, when only the hours when staff are awake can be included (see below).

The following time spent by the worker will not count as hours worked:

- Rest breaks (for example a recognised lunch hour), even if the worker works voluntarily during that time, but not if the worker is required to work
- Time spent absent from work (for example, on holiday, sick leave or maternity leave)
- Time spent travelling between home and work
- Time spent taking part in industrial action
- Time spent sleeping between duties, provided the employer agrees that the worker may sleep at the place or work and the worker is provided with suitable facilities. This only applies if the contract states the times at which the worker can sleep.

Action points – if answering yes to either of the following questions then review risk

Do you pay a fixed sleepover allowance and have staff who are regularly awake and working during the night?

Are you relying on unsocial hours allowances or overtime premia to comply with NMW?

It is clear that both WTR and NMW are continuing to cause practical concerns and difficulties. Members should bear in mind that where wages are not compliant then claims can stretch back to 1999. Employees can enlist the help of HMRC enforcement officers.

In view of 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 average 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 are advised to identify dangers areas of non compliance and review whether there are strategies to deal with those issues.

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.