COALITION OF CARE AND SUPPORT PROVIDERS IN SCOTLAND

Briefing for care and support providers

Holiday Pay and Overtime

Sleepovers and National Minimum Wage

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Introduction

A number of recent employment law judgments in relation to holiday pay & overtime, as well as sleepovers & the national minimum wage, have caused considerable concern among employers in the care sector because of the implications for significant additional costs arising for service provision. Organisations are reviewing their practices in light of these decisions and the purpose of this paper, which has been drawn up by CCPS and Law At Work, is to provide guidance in relation to these important precedents.

Holiday pay and overtime

Current situation

The Employment Appeal Tribunal (EAT) handed down its decision in ***Bear Scotland Ltd v Fulton and Baxter, Hertel (UK) Ltd v Wood and others and Amec Group Limited v Law and others*** on 4 November 2014.

The decision offers some clarity to various European judgments on the issue of what payments should be included when calculating holiday pay; specifically whether or not regular paid overtime should be included.

Wider context

The right of all workers to paid annual leave stems from the European Union Working Time Directive (WTD). Article 7 of the WTD stipulates that all member states must ensure that every worker is entitled to paid annual leave of a minimum of 4 weeks. However the WTD provides no guidance as to the calculation of pay during such leave.

European Union member states are required to implement the WTD into domestic law and in the UK the relevant legislation is the Working Time Regulations 1998 (the Regulations). The Regulations stipulate that a worker will receive a week's pay for a week's leave and further references sections 221 – 224 of the Employment Rights Act 1996 (ERA) for guidance as to what constitutes a week's pay. Under the ERA a week's pay ***"is the amount which is payable by the employer under the contract of employment" where there are 'normal' working hours which do not vary***. Where an employee's hours of work vary from week to week, a week's pay shall be calculated by taking an average of weekly earnings over the 12 week reference period immediately prior to the period of annual leave.

The Regulations further provide workers in the UK with an additional eight days' leave per year.

There have been various cases prior to Bear Scotland where the question of 'normal weekly pay' has been examined in the context of annual leave. In ***Bamsey v Albon Engineering & Manufacturing*** an employee worked approximately 60 hours per week on average in the 12 week period before taking annual leave, but was paid holiday pay on the basis of the basic guaranteed 39 hours per week stipulated in his contract. The

case was taken all the way to the Court of Appeal where it was held that overtime would only count as "normal pay" where it was both compulsory and guaranteed. This was the position in domestic law until several more recent European decisions cast doubt on this position.

The Court of Justice of the European Union (CJEU) held in ***Williams v British Airways*** that where an element of a worker's pay packet could be said to be "intrinsically linked" to the work they are required to carry out under their contract, it should count when determining their "normal" pay (which would then form the basis of quantifying holiday pay). This included time away pay (insofar as it was not a genuine expenses payment), flying pay, and of course, their normal basic pay. The CJEU also stated that seniority payments would be included.

Most recently in ***Lock v British Gas Trading Ltd***, the CJEU held that commission payments which are regularly received by a worker form part of their "normal pay" and hence are included when calculating holiday pay. In this case, the commission received by the worker amounted to 60% of the worker's take-home pay.

Bear Scotland

The Bear Scotland cases sought to challenge the same question but this time on the basis that regular overtime should be included. As widely anticipated, the EAT found in favour of the employees on this point, holding that holiday pay should include payment in respect of all elements of a worker's normal remuneration, and this includes payments in respect of non-guaranteed overtime.

The key points to take from the decision are that:

- Holiday pay should be equivalent to a worker's "normal" pay. What is "normal" depends on whether the payment in question has been made for a sufficient period of time to justify the label of being "normal" (the regularity / pattern of payments will be relevant in this regard).
- Overtime which a worker is not permitted to refuse (i.e. guaranteed and non-guaranteed overtime) must count as part of their "normal" pay when calculating the pay they should receive on holiday.
- So far as historic underpayments of holiday pay are concerned, workers will normally only be able to recover underpayments in respect of the current holiday year and for future holiday years (with a small number being able to recover sums further back).

However, there are various intricacies that also need to be borne in mind.

- The Judgment only applies in respect to the 20 days' annual leave guaranteed under the Working Time Directive, not the additional 8 days' leave which is a purely domestic-driven right, set out in the Regulations. As such, workers can expect to receive a higher rate of holiday pay (that which includes overtime, allowances and commissions) for 20 out of their 28 days' holiday per year, with the remaining 8 days being paid at the level it previously was, unless their employer decides to pay all 28 days at the higher level.

- Where workers' previous periods of holiday are separated by a gap of less than 3 months, they may be able to recover underpayments for a longer period than the 3 month limit set out above, by arguing that the underpayments form part of a "series". Even in those cases however, it is unlikely that they will be able to go back in time to recover underpaid holiday for more than one holiday year (due to the way the EAT construed the difference between the European 20 days' leave and the domestic 8 days' leave as potentially breaking the "series" of deductions from pay).
- There is no definitive statement in the Judgment to confirm that purely voluntary overtime (that which the employer is not obliged to offer and the worker is not obliged to accept) would also be included. However, comments in the Judgment and the underlying ethos of the various European-level decisions could be said to lean towards the view that voluntary overtime which is regularly worked by a worker would count as part of their "normal" pay and hence should be included when calculating holiday pay.
- Whilst the domestic 12-week reference period for calculating average pay might be maintained going forward, there could be a change to this (brought about through case law or legislative change) due to the fact that some workers' pay is highly variable throughout the year and a 12-week snapshot could be misleading depending on the 12-week period captured. For example, a care worker who does far more overtime during certain periods (perhaps Christmas) would have a far higher average number of hours as their "normal pay" if they took leave in January. In such cases, a longer period may be necessary and justified. In one of the Opinions of an Advocate General, it was suggested that a 12-month reference period might be appropriate. This is not binding, however, and we shall have to wait and see how this issue is resolved.

Calculating backdated claims for enhanced holiday pay

Enhanced holiday pay, taking into account any overtime hours worked, only applies to the 20 days annual leave afforded under the European Directive. Employers are free to continue to calculate holiday pay for the additional 8 days provided by UK legislation by reference to 'basic salary'. On the basis that failing to include overtime in the calculation of holiday pay amounts to an unlawful deduction from wages, employees will be able to raise such a claim within the usual time frame of 3 months from the last unlawful deduction.

In Bear Scotland the question of whether claims for underpayment could be raised within three months of the most recent deduction i.e. linking all previous deductions, or whether each underpayment could be viewed separately, was examined. The EAT ruled that if there is a gap of more than three months between any two underpayments of qualifying holiday, the 'link' will be broken with the result that previous claims will be time barred. The EAT suggested that the first four weeks' annual leave taken by a worker in a holiday year will be viewed as their entitlement

under the WTD, so it is likely that in most cases more than three months will elapse between the first four weeks' leave in each holiday year. As it stands, this is likely to significantly curtail a worker's right to claim backdated holiday entitlement.

For the purpose of illustration let's assume that a company's holiday year runs from 1 January to 31 December and that the present date is 17 November. If a claim is raised on 17 November the 3 month time frame will be from 18 August to 17 November.

Jan	Feb	Mar	April	May	June	July	Aug	Sep	Oct	Nov	Dec Claim	No. of days
1	20 days							8 days			No	
2	20 days									8 days	Yes	20
3 2		10		5		3		8			No	
4	5			10			5		8		Yes	20
5 5		10						5		8	Yes	5
6	5					10		5			8 Yes	15

1 If all 20 days were taken more than 3 months ago (from 17 November) = no liability for backdated claims.
2 Some of the 20 days were taken within the last 3 months and no break (of more than 3 months) between the periods of annual leave = all 20 days can be claimed as a series of deductions.
3 None of the 20 days taken within the last 3 months = no liability for backdated claims.
4 If 5 of the 20 days taken within the last 3 months and breaks between periods of annual leave all less than 3 months = all 20 days can be claimed as a series of deductions.
5 If 5 of the 20 days taken within the last 3 months = liable for 5 days backdated holiday pay as there is a break of more than 3 months between the last two periods of annual leave.
6 If 5 of the 20 days taken within the last 3 months = liable for 15 days backdated holiday pay; break between last two periods of annual leave, less than 3 months but a break of more than three months between 1st and second period of annual leave.

Contracted Hours	Overtime Worked	Regularity of Overtime	Should Overtime be included in Holiday Pay?	Did BEAR affect this?
X	+ 10	Every week	Yes	No
X	+ 10	Some weeks – no regularity/ pattern	Yes	Yes
X	+ 10	Occasionally – no regularity/ pattern	Not as the decision stands, but this point was not specifically addressed in the Bear cases and the direction of travel would suggest if appealed this could be upheld in favour of the employee	No

Conclusion

The recent EAT decision will give some comfort as it had been feared potential back-payments for 16 years' holiday entitlements could be claimed. The government has given further comfort by introducing the Deductions from Wages (Limitation) Regulations 2014. These Regulations limit all unlawful deduction claims to two years before the date the ET1 is lodged thereby removing any chance employees have of bringing long-term claims for backdated holiday pay, either in the employment tribunal or civil courts. Note, however, that these new regulations don't apply to ET1s raised before 1 July 2015.

Notwithstanding the above, it is recommended that organisations carry out a diligence exercise to ascertain liability, including potential liability as a result of a TUPE transfer, and resolve issues where necessary. As a minimum it would be prudent to start paying correctly going forward. It goes without saying this will increase operating costs and industry with experts estimating this will equate to approximately a 3-5% increase on payroll.

Sleepovers and National Minimum Wage ("NMW")

The issue of holiday pay and overtime, as explored above, is one that employers in all sectors and industries will need to consider. By contrast, the matter of payment for sleepovers and how it relates to NMW regulations will only apply to those sectors and industries where employees are required to work sleepover shifts, including the care sector. This has become a major area of risk for employers in the sector in the light of recent rulings.

The greatest exposure to risk sits predominantly with organisations operating 'supported living' services for people with learning disabilities, mental health problems and complex care needs, particularly where these services have been subject to repeated re-tendering exercises which have impacted on staff pay and conditions.

Sleepover shifts can be a major feature of the support provided to vulnerable people living in the community. They have generally been commissioned and funded on a per night fee/allowance basis. Some supported living service models rely on high numbers of sleepovers being carried out by individual staff members within any reporting period. Tight staffing establishments and small individualised support teams can mean that it is not uncommon for many staff members in some organisations to carry out 2 to 3 sleepovers a week.

NMW: the basics

The NMW 1998 applies to most workers working or ordinarily working in the UK who are over compulsory school age. The law provides a specified minimum hourly rate to which most works are entitled and there are different rates for different ages of worker and all employers are obliged to pay it irrespective of size.

Note that the National Minimum Wage Regulations 2015 will come into force on 6 April 2015. These regulations seek to consolidate various pieces of legislation which govern the NMW and seek to simply and clarify the drafting. The new legislation has not made any substantive changes to the rules themselves.

Determining compliance with NMW

Whether a worker has received the NMW will depend on their average hourly rate and this is calculated on the basis of:

Total remuneration earned in relevant pay reference period	÷	Total number of hours worked relevant pay reference period

Step 1 – Identify the pay reference period

The pay reference period is the period used for calculating hourly pay. It is one month or, if the worker is paid by reference to a period that is shorter than a month, that period. Therefore, workers paid daily will have a pay reference period of one day, weekly paid workers will be weekly and so on.

Step 2 – Calculate total remuneration

Total remuneration in the relevant pay reference period consists of gross pay before deductions for income tax and NI less payments and deductions that count towards the NMW.

It includes basic salary, bonus, commission and other incentive payments based on performance, but not any premium paid for overtime or shift work. It also includes accommodation allowances. It does not include loans by the employer, advances of wages, lump sum payments on retirement, redundancy payments or tips/gratuities paid through payroll.

Step 3 – Calculate the 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 4 different types of work but the two of most relevance to the care sector are: time work and salaried work.

Step 4 – understand what is 'working time'

Time Work

Time work is work which is paid by reference to the time that a worker works, for example hourly-paid work. The majority of care staff are likely to be time workers.

Time that is counted as working time includes the number of hours the worker is actually working. Time not counted is time spent by the worker (i) absent from work (e.g. on holiday, on sick leave); or (ii) travelling between home and work.

Salaried hours work

Salaried hours work is work where the employee is paid for a fixed number of hours work a year, and is paid an annual salary in equal weekly or monthly instalments. The actual number of hours worked per month may vary, however, what matters for NMW purposes is the number of hours in the year – the 'basic hours' – averaged out over the monthly or weekly pay reference periods.

As with the time worker, time which is counted as working time includes the number of hours the worker is actually working. Similarly, time which is not counted is time spent by the worker travelling between home and work. However, time spent absent from work is treated as working time, provided the worker is paid their normal pay while absent. Rest breaks, holidays, sick leave and maternity leave will count if they form part of the worker's basic minimum hours under the contract. Therefore, the time spent and the payment received should be taken into account when calculating the hourly rate.

How are sleepovers treated for NMW purposes?

There are special rules in the NMW Regulations which provide that where a worker is not actually working, they are treated as doing time / salaried work if they are available (and are required to be available) at or near a place of work for the purpose of doing such work, subject to the following:

- where the worker's home is at or near the place of work, time the worker is entitled to spend at home is not treated as working time; or
- where the worker sleeps by arrangement at or near a place of work and is provided with suitable facilities for sleeping, time during the hours they are permitted to use those facilities for the purpose of sleeping shall only be treated as working time when the worker is awake for the purpose of working.

It should be noted, however, that the above rules only apply if the worker is "available for work" not if they are actually working. The crucial question is, therefore, whether a worker doing sleepovers is, in fact, "available for work" or actually working? This is not always an easy distinction to draw but there have been a number of cases which can help.

Sleepover case law

Case law has drawn a distinction in practice between cases where being present is itself part of the job, and those where it is not and the worker is genuinely only 'on call'.

The case of ***Whittlestone v BJP Home Support Ltd*** concerned a care worker who stayed at the homes of young adults who suffered from Down's syndrome. She was provided with a camp bed in the living room and was permitted to sleep, but had to be available between 11pm and 7am if required. She was paid a fixed rate of £40 for the eight hour period. The EAT held that she was entitled to be paid the NMW for the whole period during which she stayed in the home. It held that, crucially, she was required to be present throughout the period and would have been disciplined had she not been. The fact that her physical services were not called up on during the night was irrelevant since her job was to be present.

Similarly, in ***Esparon t/a Middle West Residential Care Home v Slavikovska***, a care assistant worked at a care home during the day and worked 'sleep-in shifts' through the night between 9pm and 7am for which she received £25 per night. She was allowed to sleep during these shifts but was required to be on the premises to carry out ad hoc duties and be on hand in emergencies. The tribunal at first instance concluded that all of her night-shift hours were working time for NMW purposes and the EAT upheld this decision. Guiding this decision was the fact that she was on the premises owing to the employer's legal obligation to have staff available at all times. It was, therefore, essential that she was present even if she did not do any work. As with the Whittlestone case, her job was to be present.

South Manchester Abbeyfield Society Ltd v Hopkins was a case in which the on-call time was genuinely on-call. This case concerned housekeepers for sheltered accommodation who were on-call during the night in a flat or bedroom provided by the employer. The EAT drew a distinction between the workers' "core working hours" which they worked during the day and the "on call" time during the night which was not working time for NMW purposes.

Finally, the *City of Edinburgh Council v Lauder* case concerned sheltered housing wardens who lived on site. The EAT held that the on-call time during which they were asleep was not working time. It held that the worker's "main job" was done during the hours of 8.30am and 5.30 pm which was separate from the overnight "on call" period which did not amount in its entirety to salaried hours work.

It should be noted, however, that the EAT in Whittlestone doubted the reasoning in Lauder and cautioned against an over-reliance on terms such as "on call" or "core hours". While these can be useful descriptions they are not defined in legislation and could be misleading

The key question is whether or not the worker is working while doing a sleepover shift. Unfortunately the EAT in Whittlestone did not give much guidance as to what amounts to "work", other than to say that it is to be "determined on a realistic appraisal of the circumstances in the light of the contract and the context within which it is made". While reference to "core hours" might be helpful in providing context, it should not be seen as a test.

Sleepover examples

Example A

A care worker is paid £7.40 per hour for "normal" shifts and £30 for a sleepover. The care worker works four 9 hour shifts a week and does one 8 hour sleepover. If the ay reference period is a week, is there an issue?

No. The employee is paid on average £6.74 per hour, which is in excess of the NMW.

Example B

A care worker is paid £6.90 per hour for "normal" shifts and £32 for a sleepover. The care worker works three 10 hour shifts and does two 7 hour sleepovers. If the pay reference period is a week, is there an issue?

Yes. The employee is paid on average £6.16 per hour, which is below the NMW.

Dangers of failing to comply with NMW

The NMW is enforced by HMRC and enforcement can be initiated either by a complaint from a worker, a third party or as result of targeted enforcement of a particular low-paying sector. Officers can carry out inspections at any time, without providing a reason, and can require employers to produce records to determine whether or not the employer has been compliant.

Where a compliance officer concludes that the NMW has not been paid, they may issue a notice of underpayment. This notice sets out the arrears of NMW to be repaid by the employer together with a requirement for the employer to pay a financial penalty to the Secretary of State within 28 days of service. The penalty is set at 100% of the total underpayment of the NMW. The minimum penalty is £100 and the maximum is £20,000. Note, however, that the government intends to extend the maximum £20,000 penalty to apply to each underpaid worker.

In addition to financial penalties, once a notice of underpayment is issued, HMRC will refer the case to BIS to consider naming the employer. Naming is intended to enable workers to make informed choices about who they work for and businesses to make informed decisions about who they do business with.

A worker who does not receive the NMW to which they are entitled may bring a claim for unlawful deduction from wages or breach of contract. Breach of contract claims can be brought up to five years after the breach in Scotland. In all cases it will be presumed that the worker has not been paid the NMW unless the employer can prove to the contrary.

A worker may also bring an unfair dismissal or a detriment claim in an employment tribunal if their employer dismisses them or takes any detrimental action against them.

Sleepover and NMW considerations

- Does the organisation do sleepover shifts?
- Is the worker working or just required to be available for work? In answering this question take into account whether or not organisation has a legal obligation that someone be present throughout the sleepover shift (as per Esparon). Also, consider if there is an expectation, or indeed a contractual term, that the worker will remain present throughout the shift and that if they leave they will be disciplined (as per Whittlestone). If the answer to either of these is in the affirmative then it is likely that all of the shift time is working time for NMW purposes.
- Determine compliance with NMW using the 4 steps above;
- Is the organisation NMW compliant?
    * If not, what is the level of exposure?
    * Consider the risks of failing to pay NMW (enforcement notice, financial penalty, naming and shaming) vs sitting
    * Consider ways of ensuring compliance going forward

- Consider if sleepovers are absolutely necessary / is there a different way of working?
    * Could care workers be on-call from their homes as opposed to at place of work?
    * Could you have waking night shift workers located centrally who respond to emergencies at different locations and perhaps sharing the cost with other service providers?
    * Any changes to this effect will necessarily involve re-negotiation with both the service user and with the funding authority
    * If sleepovers are necessary you could consider adjusting rates of pay to ensure compliance with NMW (perhaps accompanied by cost saving measures like a pay freeze).
    * Ensure a mix of "normal shifts" and sleepovers to ensure that the average rate of pay exceeds NMW.
    * Decrease length of sleepovers and increase the length of normal shifts to increase average hourly rate of pay.

Tendering, re-tendering and TUPE

It should be noted that liabilities relating to staff terms and conditions transfer under TUPE, so providers should gather as much information as possible as part of any related diligence process in order to understand and evaluate any such liabilities. Providers participating in re-tendering exercises relating to services that include or have included sleepover shifts will want to ensure that they are fully aware of any potential liabilities that they may inherit if the service is transferred to them following contract award.

Providers will also want to ensure that they calculate service costs accurately and realistically when submitting tenders, in the light of the implications of these rulings; and to approach with particular caution any invitations to tender in which service costs are 'capped' at a level that may not enable them to comply with employment law as it has been interpreted in the rulings described in this briefing.

Providers will also want to bear in mind that the National Minimum Wage is not static and that they will have to consider the impact of associated inflationary pressures on sleepover shifts as well as on 'normal' working hours.

Conclusion

In terms of options going forward, organisations have a decision to make as to whether or not to pay out in respect of underpayments or sit tight and see whether any action is taken. Clearly, it would be prudent to take into account the above factors and, in particular, the potential repercussions of failing to pay NMW in reaching a conclusion. At a minimum, it would be advisable to conduct a diligence exercise to determine if your organisation is exposed and, if so, to what extent.

A note on funding for care services

The vast majority of care and support services provided by third sector providers, including those that include sleepover shifts, are funded by public authorities (most commonly local authorities). This source of funding has come under significant pressure in recent years and the current financial climate for public services makes the potential additional costs arising from these rulings even more difficult to manage than they might otherwise have been.

CCPS is engaged in dialogue with key national stakeholders including COSLA and the Scottish Government in order to raise awareness of the issues for providers in the sector, and to highlight the potential risk to service provision presented both by increased costs and by the consequences for service providers of failing to comply with employment law as it has been interpreted in the cases described in this briefing.

CCPS will endeavor to keep its members informed of any further relevant developments.

About CCPS

CCPS is the Coalition of Care and Support Providers in Scotland. It exists to identify, represent, promote and safeguard the interests of third sector and not-for-profit social care and support providers in Scotland, so that they can maximise the impact they have on meeting social need.

CCPS aims to:

- Champion quality care and support provided by the third sector
- Challenge policy and practice that inhibits or undermines the sector's ability to provide quality care and support
- Prepare providers for future challenges and opportunities
- Support providers to understand, negotiate and influence the complex policy and practice environment in which they operate.

CCPS hosts the Workforce Development Network, funded by the Scottish Government to assist voluntary sector social services providers to fully contribute to the national workforce development agenda.

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