#76 HR Newsletter December 2015: NMW

Macnaughton McGregor
Training Learning Impact

Does the presence on site automatically entitle a worker to the National minimum wage?

A recent case extracts sheds light on this tricky topic

In Shannon v Rampersad and Rampersad T/A Clifton House Residential Home UKEAT/0050/15, the Employment Appeal Tribunal (EAT) held that a care home assistant who lived in an on-site flat and was required to be in that flat between certain hours at night to respond to requests for assistance was not entitled to be paid for the hours during which he was not responding to a request or was asleep.

Clifton House is a registered residential care home, providing care for elderly residents. Mr Shannon was employed at Clifton House as an on-call night care assistant. He was provided with free accommodation, with utilities included, in an on-site flat.

He was required to be in the flat from 10pm until 7am. He was able to sleep during those hours but had to respond to any requests for assistance by the night care worker on duty at the home (although he was rarely asked to assist during these times). He was paid a weekly rate and was therefore a salaried worker for the purposes of the national minimum wage legislation.

After Clifton House was acquired by Mr and Mrs Rampersad, relationships became strained and Mr Shannon was dismissed. In addition to a claim for unfair dismissal, Mr Shannon claimed that he should have been paid the national minimum wage (NMW) for the hours that he was required to be in the flat.

The employment tribunal (ET) had to decide whether Mr Shannon was entitled to be paid for the overnight hours, including the time he had been asleep, or only when he had been awake and actually performing work assisting the night care worker on duty.

The case was decided under the provisions of the National Minimum Wage Regulations 1999, which have now been consolidated into the National Minimum Wage Regulations 2015.

Regulation 16 of the National Minimum Wage Regulations 1999 deals with the treatment of time when a worker is available at or near a place of work for the purpose of doing salaried hours work.

Under Regulation 16(1), a worker is not to be regarded as working if their home is at or near their place of work and they are entitled to spend the time on call at home.

Under Regulation 16(1A), where a worker sleeps at or near a place of work and is provided with suitable facilities for sleeping, only time when the worker is awake for the purposes of working is treated as salaried hours work.

The ET held that the exception in Regulation 16(1) applied. Mr Shannon's home was at his place of work and the time in question was spent at home. The exception in regulation 16(1A) therefore applied and only time spent working counted as salaried hours. The ET concluded that he was not working throughout each night shift, only on those rare occasions when he was called upon to do so by the night care worker on duty. He was paid the NMW for those limited occasions, hence his claim failed.

Mr Shannon appealed both decisions. In respect of the NMW point, he argued that the ET had erred in finding that he was not working throughout his shift when his presence was required for Mr and Mrs Rampersad to meet the statutory obligation to have adequate staffing levels in the home.

He further argued that the ET took into account irrelevant factors, namely the presence of another worker on the night shift, that Mr Shannon was content with his working arrangements and that the working arrangement was unusual.

EAT decision

The EAT held that, whilst Mr Shannon was "available" for work during his sleep-in hours, he was available at his home (which was at his place of work) and he was entitled to spend the entire shift at home. He therefore fell within regulation 16(1) and regulation 16(1A) was potentially engaged.

Accordingly, only those times when Mr Shannon was awake for the purpose of working counted as working hours. His flat-rate pay, plus accommodation, meant that he was at all times in receipt of the national minimum wage.

The ET had been entitled to take into account the fact that another night-worker had been on duty at the home and that Mr Shannon had been rarely called on to work. The ET had directed itself correctly as to the law and had applied it correctly to the facts. The fact that Mr Shannon was happy with the unusual arrangement did not form part of the ET's reasoning.

Further, Mr Shannon's attendance for work throughout the night had not been necessary in order for the Rampersads to comply with their statutory obligation.

The EAT concluded that mere presence did not of itself necessarily entitle a worker to the NMW for the whole shift.

This case deals with areas of the law which were described by the EAT as "knotty": the application of the NMW legislation to on-call workers. These areas have generated much case law in recent times and will no doubt continue to do so, particularly when the national living wage is introduced in April 2016.

The EAT acknowledged that on-call arrangements are a particularly fact sensitive area but, on reviewing the case law, it was satisfied that the circumstances could be distinguished from the authorities that had been considered. The EAT concluded that those cases where the NMW had been found payable could be distinguished on the basis that, in those cases, the workers were working merely by being present at the employer's premises (e.g. cases involving night watchmen and telephone operators). What may have ultimately distinguished these circumstances from those cases where the NMW was held to be payable was the fact that the flat was Mr Shannon's home.

Given that a failure to pay the NMW can also lead to civil and criminal liabilities and being named by BIS as an underpaying employer, cautious employers may take the approach of paying the NMW for all hours on call and not just the time spent working. However, in light of the additional financial pressures that this may create, employers may wish to wait and see how the case law continues to develop in this area.

(extracted from a report by Bond Dickinson)