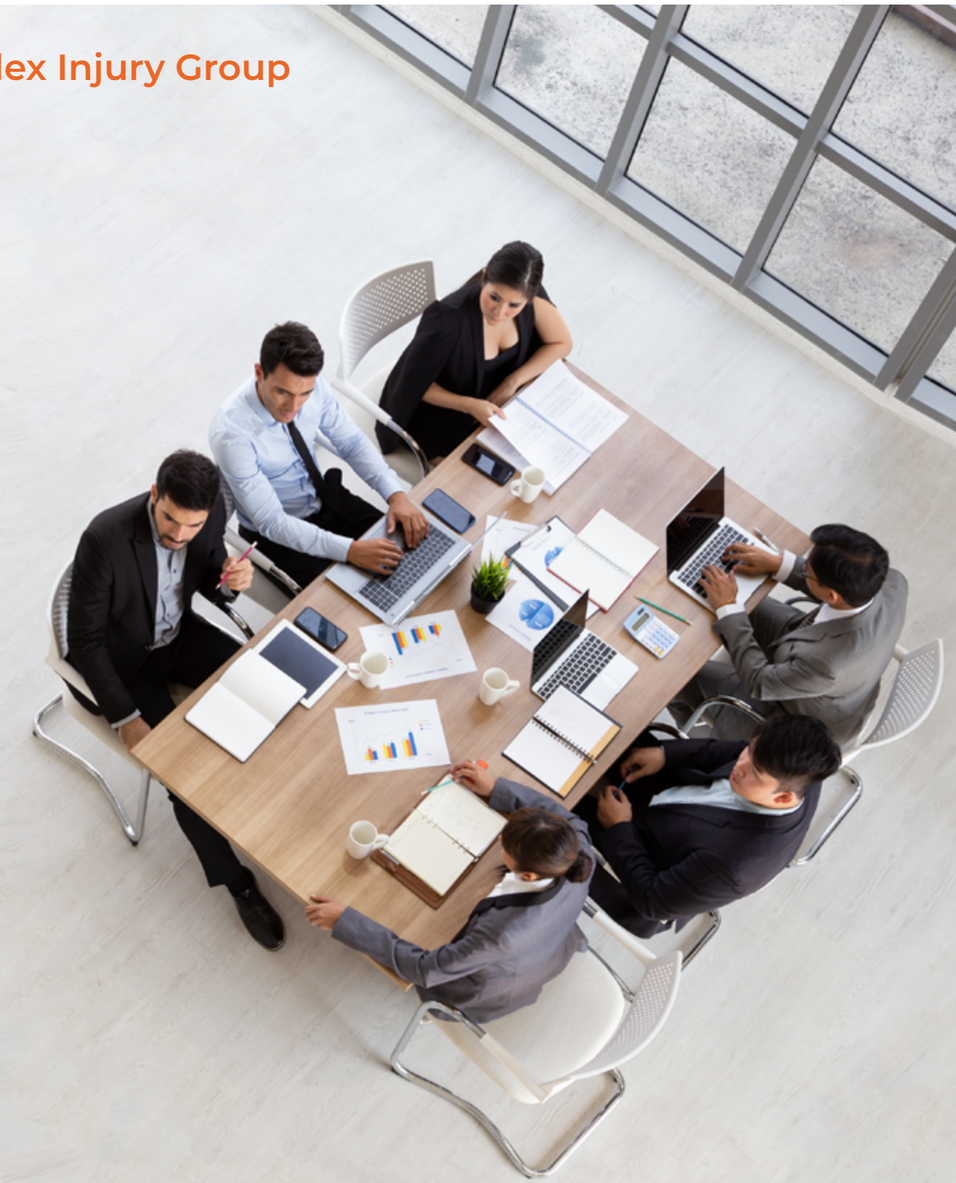
Insight 194

from Horwich Farrelly's Large & Complex Injury Group



WELCOME TO INSIGHT

Welcome to this week's edition of Insight in which we consider:

The Supreme Court judgments in the joined cases of *Royal Mencap Society v Tomlinson-Blake* and *Shannon v Rampersad and another (T/A Clifton House Residential Home)*, on whether home workers who are required to remain at home on their shift and/or residential care workers who 'sleep in', are entitled to the national minimum wage for time that is not spent actually performing some specific activity, and the impact that may have on claims for care following injury.

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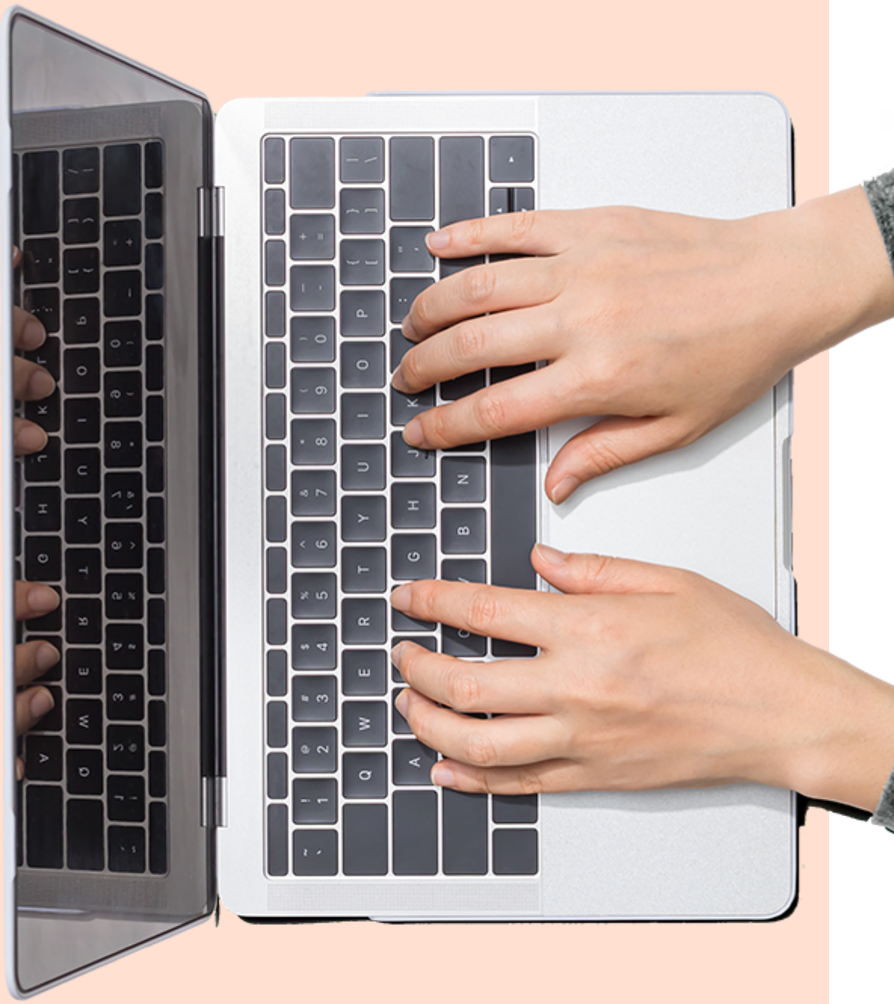


Awake for the purposes of working?

Background

The cases were heard by the Supreme Court in February 2020, after both had followed their respective paths through the Employment Tribunal and Employment Appeal Tribunal, being joined for appeal purposes at the Court of Appeal stage.

Royal Mencap Society v Tomlinson-Blake

In the first appeal ("Mencap Appeal"), Royal Mencap Society ("Mencap") provides care and support for vulnerable adults under a contract with a local authority. Mrs Tomlinson-Blake is a highly qualified and extensively trained care support worker employed by Mencap since 2004. She provides care and support to two men, each in a private property. They both have autism and substantial learning difficulties.

Mrs Tomlinson-Blake's usual work pattern involved a day shift and a morning shift, for which she received appropriate salaried remuneration. She was also required to carry out a sleep-in shift from 10pm to 7am at a flat rate of £22.35, plus one hour's pay of £6.70 (£29.05 in total). No specific tasks were allocated in the sleep-in shift. However, she needed to keep a 'listening ear' out during the night in case her support was needed and expected to intervene where required or respond to requests for help. That need to intervene was found to be real and infrequent – six times over the preceding 16 months. Absent such interventions, she was entitled to sleep throughout. Where her sleep was disturbed and she needed to provide night-time support, the first hour was not additionally remunerated, while any further hours were paid for in full.

Her claim in the Employment Tribunal ("ET") was that she was entitled to have all the hours spent sleeping in counted as working time for minimum wage purposes. The ET and (on appeal by Mencap) the Employment Appeal Tribunal ("EAT") upheld her claim.

Shannon v Rampersad and another (T/A Clifton House Residential Home)

In the second appeal ("Shannon Appeal"), Clifton House is a registered residential care home in Surrey. It provides care for up to 16 elderly residents. Before Mr and Mrs Rampershad took over the care home in 2013, it was owned by a Mr Sparshott. In 1993, he offered Mr Shannon employment as an "on-call night care assistant" with accommodation in the studio within the care home ("the Studio"). He was required to be in the Studio from 10pm to 7am. He was able to sleep during those hours but had to respond to any request for assistance by the night care worker on duty at the home.

In return, he received free accommodation and £50 per week (later £90 per week). The original arrangement was for him to take some time away on holiday. However, from 1996 onwards, he slept there every night. In practice, he was very rarely asked to assist the night care worker. He had day jobs as a driver from time to time.

His claim in the ET was that he was entitled to have all hours between 10pm and 7am counted as salaried hours work for minimum wage purposes for 365 days per year. The arrears due to him on that basis were calculated to amount to almost £240,000. The ET dismissed his claim for such minimum wage arrears. The EAT affirmed the ET's decision.

Court of Appeal

Further appeals in both proceedings were heard together by the Court of Appeal, which held, in July 2018, that neither claimant was entitled to be paid the National Minimum Wage (NMW) for all the hours of their respective sleep-in shifts. It held that they are only entitled to be paid the NMW when they are required to be awake and working. Both appealed to the Supreme Court.

Supreme Court

Heard in February 2020 before Lord Kerr, Lord Wilson, Lord Carnwath, Lady Arden and Lord Kitchin, the unanimous judgment was handed down by Lady Arden on 19 March 2021 and the reasoning is as follows:

The NMW was established by the National Minimum Wage Act 1998 ("the 1998 Act") and is an hourly rate that is fixed by the government following a report from the Low Pay Commission ("the LPC"). Various aspects of the calculation of the NMW are governed by regulations and the two being considered here are the National Minimum Wage Regulations 1999 ("the 1999 regulations") and National Minimum Wage Regulations 2015 ("the 2015 regulations").

The calculation differs according to whether the work is "salaried hours work", "time work", "output work" or "unmeasured work" as defined by the regulations. The judgments are concerned only with time work and salaried hours work. The regulations provide that in general, time when a worker is required to be available at or near his employer's place of business for the purposes of doing time work is included in calculating time work and salaried hours work, but there are exceptions:

(1) where the worker is permitted to sleep during the shift

(2) where the worker is at home.

These appeals are concerned with the first exception. Essentially this provides that the time during which the worker is permitted to sleep shall only be treated as being time work or salaried hours work when the worker is "awake for the purpose of working".

Their Lordships took particular note of the report of the LPC, which showed that the Commission had not intended sleep-in shifts to be eligible for the NMW when they first reported to the government prior to the original NMW Regulations being introduced.

The government is bound by the 1998 Act to implement the LPC's recommendations about the NMW on matters referred to it which require regulation unless it provides reasons to Parliament for not doing so. The government accepted the LPC's recommendation on sleep-in shifts in its first report. That recommendation was that sleep-in workers should receive an allowance and not the NMW unless they are awake for the purposes of working, and that recommendation was repeated in later reports of the LPC.

Lady Arden concluded that the meaning of the sleep-in provisions in the 1999 regulations and the 2015 regulations is that, if the worker is permitted to sleep during the shift and is only required to respond to emergencies, the hours in question are not included in the NMW calculation for time work or salaried hours work unless the worker is awake for the purpose of working.

"to be available for work a person must be both awake and awake for the purposes of working and not simply awake"

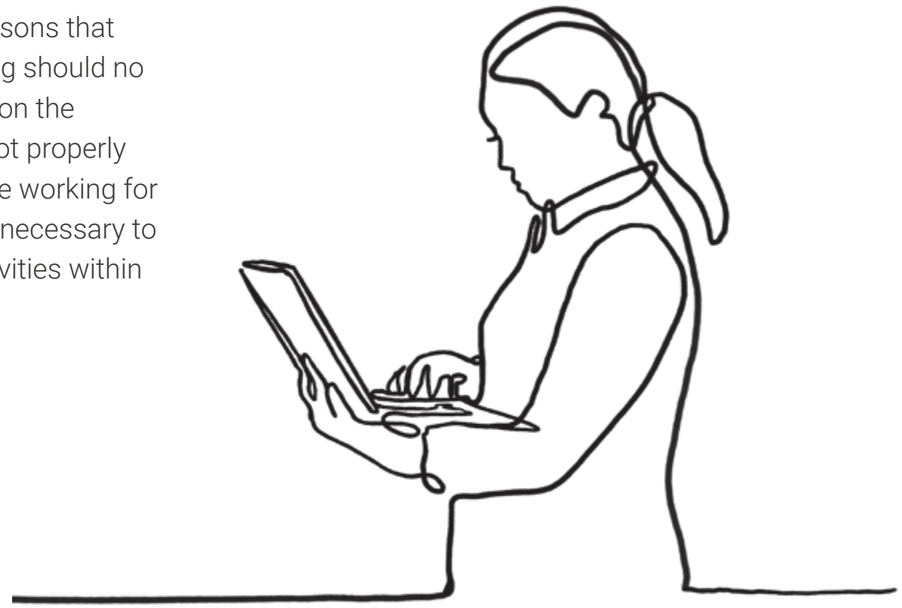
She went on to state that previous cases, including *Burrow Down Support Services Ltd v Rossiter [2008] ICR 1172*, *British Nursing Association v Inland Revenue [2002] EWCA Civ 494 ("British Nursing")* and *Scottbridge Construction Ltd v Wright [2003] IRLR 21* were wrongly decided and should be overruled.

Lord Carnwath (with Lord Wilson) agreed that the appeals should be dismissed for the reasons that Lady Arden gave, and that British Nursing should no longer be regarded as authoritative, but on the ground that the Court of Appeal could not properly have concluded that the employees were working for the whole of their shifts, and that it is unnecessary to consider the treatment of particular activities within that period.

Conclusion

The Supreme Court unanimously dismissed the appeals and upheld the Court of Appeal decision that workers are only entitled to have their hours counted for NMW purposes when they are awake and required to be available for work. Workers are not entitled to the NMW for the entirety of their sleep-in shifts if they are generally expected to be able to sleep.

However, they made it clear that if a care worker is required to "work" by responding to a service user's care needs or required to perform any other duties during a "sleep in" shift, that time will count as "time work" and be subject to the NMW.



Commentary:

These decisions are fact specific - the claimants were "expected" to sleep throughout their shifts. It is also important to note that this decision concerned "time work" for the purposes of the NMW Regulations rather than "work" for the Working Time Regulations.

This judgment has been welcomed by the care sector. Had the claimants succeeded, many employers could have faced very significant claims for underpayment at an already very difficult time for the sector. Interestingly, Mencap have acknowledge the disappointment that many will have felt and called for the Government to reform legislation for sleep-in care which it calls "out of date and unfair".

Personal injury claimants who have settled claims on the basis of flat rates for night-time carers will not be unhappy. However, in ongoing cases where night care is needed following catastrophic injury, the specific details of night care - sleeping versus waking - will be ever more closely scrutinised.

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