The Cost of Care: Night-time Carers Are Not Entitled to Minimum Wage During Periods of Sleep

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Today, 19 March 2021, the Supreme Court handed down judgment in the conjoined appeals of *Royal Mencap Society v Tomlinson-Blake; Shannon v Rampersad and another (T/A Clifton House Residential Home)* [2021] UKSC 8. This is an employment law case that will be of real interest to personal injury practitioners.

The judgment is available here.

The headlines of the result might read: 'Night-time carers only get the minimum wage when required to be awake for work'. Put another way, their hours of sleep are not to be included in the National Minimum Wage ["NMW"] calculation.

Within just hours, at least in the 'court of public opinion', the Supreme Court's decision has provoked a strongly critical reaction, along the lines of this being another blow to under-valued care workers. Responses from (or on behalf of) the 'carers' community' include that a sleep-over is indeed a working shift because an awareness needs to be maintained between what constitutes a nocturnal emergency and what is a routine noise in the night.

For her part, Mrs Tomlinson-Blake was a highly qualified care support worker. She provided care to two vulnerable adults at their own home. When working at night, she was permitted to sleep but had to remain at her place of work. She had no duties to perform except to "keep a listening ear out" while asleep and to attend to emergencies, which were infrequent. For each night shift, she was paid an allowance plus one hour's pay at the NMW rate. She brought proceedings to recover arrears of wages on the basis that she was entitled to be paid the NMW for each hour of her sleep-in shift – her work was time work. For his part, Mr Shannon was an on-call night care assistant at a residential care home – he was salaried.

Amongst employment lawyers, the Court of Appeal's decision [2018] EWCA Civ 1641 (again in favour of the employers) excited a deal of excoriating comment, noting that it had, amongst other things, cut a swathe through a consensus of EAT decisions. The Court of Appeal categorised sleepers-in as merely *available for work* rather than *actually working* (by reference to the National Minimum Wage Regulations). Lady Arden concludes that the meaning of the sleep-in provisions in the National Minimum Wage Regulations (of 1999 and 2015) 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, unless the worker is awake for the purpose of working: [44]-[47].

This decision should engage personal injury lawyers tasked with assessing large care claims. The short but fundamental point is that one constituency that will likely welcome the Supreme Court's judgment is insurers – indeed also re-insurers, given the seven-figure claims that can attach to some care packages. Had the Supreme Court today decided that the minimum wage applies to sleep-in care, this would have led to a significant increase in the rates applied in those cases where less than the minimum wage is being paid at night. Another group that may be relieved are those that have settled their care claims – any significant hike in the cost of care packages predicated on sleeping night care would have led to settlements being under-funded. Going forward, in cases of catastrophic personal injury, *where night-time care is indicated*, whether it should be 'sleeping' or 'waking' has become all the more acute of an issue, given the much higher costs associated with the latter.

Two additional comments. First, in what was a unanimous decision reached by the Supreme Court, as Lady Arden acknowledges in an elegant tribute to Lord Kerr of Tonaghmore at [76], but for his untimely and much-lamented death, he rather than she would have given the leading judgment. Secondly, the debate will move on – or back – to the political arena, given (i) the acknowledged ongoing Social Care crisis, (ii) the fact that a majority of night-time care workers are female – and older – and (iii) 2020/2021 concerns about whether, in blunt short-hand, 'claps for carers' are the sufficient recognition.