

REPRESENTATIVES BRIEFING

RESIDENTIAL WORK



BACKGROUND TO THE CAMPAIGN

Many Unite members are required to work shifts which incorporate a residential element, often known as 'sleep-ins'. If, during sleep-in time, a member is working or at the employer's disposal, i.e. available to work should an emergency occur or work has to be carried out, this will constitute working time for the purposes of Working Time Regulations 1998. Some employers continue to ignore this, despite the case law that clearly sets out the position. Members who are working such shifts are entitled to receive the National Minimum Wage.

There are two key issues that arise from this:

1. Pay whilst carrying out a residential shift
2. Rest breaks

PAY

Under Regulation 3 of the Working Time Regulation, a worker is entitled to be paid at a rate which equates to the National Minimum Wage. It is not possible to average this pay out over a specified period of time, i.e. over a week or month. As a worker, you have to receive the National Minimum Wage for each hour of working time. Often an employer will pay a nightly allowance with additional remuneration for the actual hours worked. This is unlawful as your pay could well fall below the National Minimum Wage. You must receive the National Minimum Wage or above for the actual hours worked. However, it is lawful for the employer to pay an enhancement for the hours that you had to deal with an emergency. Even if a worker slept for the duration of their shift, they would still have to be paid the National Minimum Wage for each hour that they were on duty and available for work.

REST BREAKS

The Working Time Regulations make provision for rest breaks. In order for a period of on-call time during which a worker is not actively carrying out his or her duties to count as a rest period, they must be able to leave the premises. Clearly, if you are permitted to leave the premises but sleeping, this is not working time (working time and rest periods being mutually exclusive). A worker is entitled to a minimum of half an hour rest during a shift of a continuous stretch of 6 hours or more working time. A worker has to have 11 consecutive hours rest in each 24 hours, so rostering staff need to take notice of this. If workers are on call from home, this does not constitute working time, apart from the hours that they have to work.

OPT-OUTS

No one can be forced to sign an opt-out of the Working Time Regulations. However if you signed an opt-out to the Regulations, you still have to be paid the National Minimum Wage for the hours that you work. The opt-out has to be renewed annually and therefore Unite suspects that many employees are working without having signed a current opt-out which could mean that your employer is acting unlawfully.

The Working Time Regulations were introduced as a health and safety piece of legislation and therefore **we would encourage staff not to sign an opt-out.**

ACTION

Your employer is not paying the minimum of the National Minimum Wage for a sleep in shift

If your employer is not paying the National Minimum Wage for a sleep-in shift you are entitled to bring a claim against them for unlawful deduction of wages. If this is the case, it is likely that there will be many people in your workplace who are also in the same position.

1. Talk to your Regional Officer about the situation
2. Encourage all your colleagues to join Unite
3. Talk to management about your rights

Your employer is not abiding by the Working Time Regulation requirements for rest breaks

You may find that you do not take adequate rest breaks on your shift or that you do not have enough time off between your shifts. You may also find that you are working in excess of 48 hours a week, which includes sleep-in time.

1. Talk to your Regional Officer
2. Ensure that you are working within the 48 hour working limit of the Working Time Regulations
3. If you have signed an opt-out, your employer may be breaking their requirement under the regulation

Your Employer is not counting 'sleep-ins' in the calculation of your holiday entitlement.

The time you are at work, whether working or sleeping at a residential project is working time for the purposes of the Working Time Regulations. Therefore, the calculation of your annual leave ought to include the hours you were at work but sleeping as part of your residential shift.

RESIDENTIAL POLICY

It is likely that your residential or sleep-in policy is out of date and therefore you should review this with your Unite Regional Officer to ensure that this is lawful, and that it protects staff and ensures that they receive the remuneration to which they are entitled.

For more information about any of the issues raised in this leaflet, please talk to your Regional Officer who will be able to advise how you should proceed.

FOR MORE INFORMATION

Working Times Regulations (1998)

The Harrow Judgement (2003)

National Minimum Wage Regulations (1999)

CASE LAW SUMMARIES

1. Burrow Down Support Services v. Mr Rossiter EAT decision 25.6.2008

The Employment Tribunal held that an employee who worked as a night watchman and could sleep for much of his shift on facilities provided for that purpose was entitled to the National Minimum Wage for each hour of the shift. This decision was based on the authorities of the Court of appeal decision in *British Nursing Association v. Inland Revenue* and the Inner House of the Court of Session decision in *Scottbridge Construction Ltd v. Wright*. The employers argue that these authorities were based on the un-amended version of regulation 15 of the National Minimum Wage regulations 1999 and that the amended version fundamentally altered the law. The EAT rejected this argument and dismissed the appeal.

The claimant's contention in this case was that he should receive the National Minimum Wage for each hour of his shift, whereas the employer argued that they were not obliged to pay him for the time when he was able to sleep and did so. He was only entitled to be paid the Minimum Wage for the period when he was required to work. This argument was rejected by the EAT who relied on the above authorities to conclude that the claimant was at work for the whole shift and therefore was entitled to be paid the national minimum wage even for those period when he was asleep

"It is wholly inappropriate for the employer while requiring an employee to be present for a specific number of hours, to pay him only for a small proportion of those hours in respect of the amount of time that reflects what he is physically doing on the premises. The solution for an employer who wishes an employee to be present as a night watchman or the equivalent is to provide him with alternative and additional work on the premises.. Lord Johnston in *Scottbridge*."

2. Mr A.Smith V Oxfordshire Learning Disability NHS Trust EAT decision 12.05.2009

The Appellant was a care worker in a residential home, and was required on occasion to sleep in at the home in return for a flat rate sleep in allowance which equated to an hourly rate of £2.70. It was conceded by the employer that his time doing so was "time work" within the meaning of the National Minimum Wage Regulations 1999 and accordingly fell to be taken into account in calculating whether the National Minimum Wage had been paid. The Appellant argued that the sleep in payment fell to be excluded because it constituted an allowance. The EAT ruled that the payment was not an allowance for the meaning of the regulations and accordingly ought to be taken into account.

The appellant was employed to work 15 hours a week, and in addition his contract indicated that he may be required to participate in a roster of sleep ins on the premises in accordance with the Trust's sleep in policy. This provided for payment at the current Whitley Council rates. At the time of the case, there was no longer a Whitley Council rate but a payment of £25 per sleep in had been agreed at the Trust's JCNC.

The EAT concluded that the employee was entitled to be paid the National Minimum Wage for the whole of the sleepover, but the £25 allowance has to be taken into consideration, it was not an allowance for the purposed of the regulations.

3. Ms Kirugo V Turning Point Watford Employment Tribunal September 2009

The claimants claim for breach of contract on the part of the Defendants for failing to pay her the National Minimum Wage whilst working as a night sleeper succeeds. The claimant was awarded the difference between the national minimum wage and the sleep in allowance for all of the sleep ins that she had done going back to March 2005.

The tribunal took into consideration the above authorities and reached the following conclusions:

1. The first issue to be decided is whether a sleep in shift is time work within regulation 3 of the National Minimum Wage Regulations or salaried work under Regulation 4. The tribunal concluded that the additional payments made to the claimant for sleeping in duties do not constitute work done under a contract to do salaried work and it therefore follows that they count as time work.
2. The Respondent argued that if the claimant's weekly salary was added to the sleepover, and this was divided by the total number of hours worked in a week, including the sleepover, then the average figure of remuneration would have been above the National Minimum Wage. The tribunal ruled that as the sleepovers counted a time work not salaried work, this calculation was irrelevant. The claimant was entitled the National Minimum Wage for the 8 hours of the sleep in.
3. The Respondents argument that she was only entitled to be paid for the period she was awake was rejected, as the claimant was at work for the whole 8 hour shift. It was irrelevant that another member of staff was employed to be awake.
4. The authoritative law was contained in the *Burrow Down* decision, and the claimant was entitled to be paid the National Minimum Wage even though she was asleep for the vast amount of the shift.