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— SOLICITORS —

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Employment Law BULLETIN

Welcome to our December employment law bulletin.

In this issue we note cases from the Employment Appeal Tribunal and the European Court of Justice.

In *ICTS UK Ltd v Mahdi* the EAT considered the short term task exception to the rules on service provision change on TUPE transfers. It considered that events following a putative service provision change are relevant in determining whether it was the client's intention that the contract awarded be short term and therefore caught by the short term task exception.

In *Administrador de Infraestructuras Ferroviarias (ADIF) v Luis Aira Pascual* the European Court considered the application of the business transfer rules under the Acquired Rights Directive to a case where a public authority took back in-house a service that it had previously outsourced to a service provider.

In *Pujante Rivera v Gestora Clubs Dir SL and another* the European Court confirmed that a resignation following a substantial change in working conditions is a 'redundancy' for the purposes of the EU Collective Redundancies Directive.

In *Greenfield v The Care Bureau Ltd* the European Court considered how holiday entitlement should be calculated where a part time worker moves to full time hours.

In *Pnaiser v NHS England and Coventry City Council* the EAT considered a claim of unlawful discrimination made by a prospective employee against both a former employer and a prospective employer in a case where a job offer was withdrawn following a negative reference given over the telephone.

In *Hyde Housing Association Ltd v Layton* the EAT considered whether TUPE can apply when an economic entity is transferred to multiple transferees which include the original transferor.

In *Schwarzenbach t/a Thames-Side Court Estate v Jones* the EAT considered the rules protecting continuity of employment when an employer moves from one associated employer to another. The EAT confirms that whether employers are 'associated' depends on the legal definition of control by virtue of a majority shareholding. In this case the employment tribunal was entitled to infer such control from the facts in the case.

Our client briefing is devoted to the knotty question of whether time spent sleeping at an employer's premises counts as working hours for the purposes of entitlement to the national minimum wage.

Finally, may I remind you of our forthcoming events:

Click any event title for further details.

TUPE and service provision change

Everything you need to know about outsourcing

- Breakfast Seminar, 2nd February 2016

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Contents

Wherever you see this logo more detail is available on the BAILII website

1: The Chancellor's Autumn Statement 2015 - key issues for employers

The Apprenticeship Levy

George Osborne has announced further details of the Apprenticeship Levy and a response to the recent consultation on the levy has now been published and is available ***here***.

The levy will come into effect in April 2017 and will be recovered through the PAYE system. The levy will be at the rate of 0.5% of an employer's pay bill. Each employer will receive a £15,000 allowance, which in effect means that only employers with a pay bill of over £3 million will pay the levy. The levy will be applicable to all UK employers.

The purpose of the levy is to support the creation of 3 million new apprenticeships by 2020. All employers in England will be able to access vouchers to use towards funding and supporting apprenticeships. Where vouchers are not used within a two year period, they will expire and the funding will be accessible to other employers. Arrangements for access to funding for employers in Scotland, Wales and Northern Ireland will be made through the devolved administrations for those regions.

Reform of public sector employment

The Chancellor announced a further public sector consultation on the terms of exit payments, with the aim of reducing the cost of redundancy payments and bringing the public sector into line with the private sector.

He also announced a review of sickness absence in the public sector, to be followed by a consultation on how to minimise the impact of sickness absence on public service delivery.

Helping sick and disabled people back to work

The Government intends to continue to develop the Fit for Work Service, a service aimed at improving links between health services and employment. A White Paper is planned for 2016 which will include consideration of the role employers can play in increasing the employment of disabled people.

Taxation of employee benefits

The Chancellor announced that evidence would be taken on the current tax treatment of living accommodation provided by employers. A call for evidence was announced regarding salary sacrifice arrangements. Following this, the Government will decide whether to take action in response to the proliferation of such schemes. A simplification of the tax rules on employee share schemes was also announced.

2: Government guidance on the recruitment and retention of transgender staff

Detailed guidance on recruiting and retaining transgender staff has been published by the Government Equalities Office and is available ***here.***

The guidance assists employers in ensuring that recruitment practices are non-discriminatory and in developing a culture of understanding and acceptance of diversity with particular reference to transgender issues. It offers practical advice on the creation of 'trans-friendly' application forms and the use of equality monitoring forms.

The document contains helpful suggestions for employers about employees who are transitioning from one gender to another and includes advice on dealing with bullying, harassment and discrimination related to transgender people within the workplace.

The legal framework for the protection from discrimination of transgender people and those associated with them within the Equality Act 2010 is explained. The effects of the Gender Recognition Act 2004 are also outlined (this is the legislation which allows transgender people to change their legal gender and protects the privacy of someone who has applied for a Gender Recognition Certificate).

An action plan template for employees intending to transition is provided by the guidance, as is a useful glossary of relevant terms and a list of further sources of information and advice.

3: TUPE and short term contracts

Are events following a putative service provision change relevant in determining whether it was the client's intention that the contract awarded be short term, and caught by the short term task exception?

Yes, said the EAT in ***ICTS UK Limited v Mahdi***.

ICTS had a contract to provide security services to Middlesex University at one of its former campuses. Middlesex sold the site but ICTS continued as service provider. The new owner then put the security service out to tender. Mr Mahdi lost his job when the contract was taken over by a new contractor, First Call.

First Call disputed there was a TUPE transfer on a number of grounds, one of which was that whereas ICTS had a contract to secure an operating site, First Call had a contract simply to look after the site pending its redevelopment by the new owner. The new contract was, therefore, First Call said, a contract for a single specific task of short term duration and so excluded from being a service provision change by virtue of TUPE, Reg 3(3)(a)(ii).

The exclusion only applies, however, where it is the client's *intention* that the activities concerned are to be carried out in connection with a task of short term duration. An employment judge accepted Fist Call's argument that when the contract had been granted it was the intention that the contract was to be for a limited period, to look after the site pending construction.

But by the time of the hearing no planning permission had been obtained and no building work had commenced. On appeal, the EAT said this may have been relevant, and should have been taken into account by the employment judge. The employment judge therefore erred in law in not doing so, and the case was remitted for a re-hearing by the employment tribunal.

Given that the EAT has already decided, in *Robert Sage Ltd v O'Connell* [2014] IRLR 428 that an intention is more than a 'hope and wish', subsequent events, said the EAT, can be relevant in deciding a client's intention for the purposes of Reg 3(3)(a)(ii).

4: In-sourcing and the Acquired Rights Directive

In ***Administrador de Infraestructuras Ferroviarias (ADIF) v Luis Aira Pascual*** the European Court has considered the application of the business transfer rules under the Acquired Rights Directive to a case where a public authority which had outsourced the management of transport units at Bilbao terminal in Spain to a contractor then took the service back in house. ADIF is a public undertaking responsible for the service of handling intermodal transport units (shipping containers) at Bilbao terminal. The service is provided to Renfe Operadora. ADIF outsourced the management of that service to Algeposa. Algeposa provided that service in ADIF's own facilities, using cranes which belonged to ADIF. Use of the cranes was necessary in order to provide the service. In June 2013 ADIF informed Algeposa that it did not wish to extend the agreement beyond the end of the month on the ground that as from that date it would provide the service itself in house with its own staff. ADIF therefore indicated to Algeposa that it was not going to take over Algeposa's rights and obligations as regard to Algeposa's employees. Consequentially Algeposa carried out a collective dismissal of a number of workers, including Mr Aira Pascual, who had hitherto been assigned to the performance of this service. Mr Pascual bought a claim before the Bilbao Labour Tribunal asserting there was in fact a transfer of an undertaking and therefore his dismissal should be annulled or declared unlawful and that ADIF should be ordered to reinstate him within its staff. The Labour Tribunal upheld Mr Pascual's claim and awarded him compensation. It also held that the dismissal was contrary to article 44 of the Spanish Workers' Statute as interpreted in line with the Acquired Rights Directive. ADIF appealed to the High Court of Justice of the Basque Country which, in turn, considered that the position was insufficiently clear and referred the matter to the European Court.

In giving its opinion the Court noted that the Directive applies to public undertakings engaged in economic activities whether or not they are operating for gain. So the mere fact that the transferee was a public law body could not be a ground for ignoring the Directive. The Court also noted that the Directive is capable of applying to a situation in which an undertaking decides to terminate its contract with that other undertaking and carry out that work itself.

In order to determine whether there was a transfer of an economic entity retaining its identity however it was necessary to consider all the facts characterising the transaction in question, including in particular the type of undertaking or business, whether or not tangible assets such as buildings and moveable property are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended.

In particular in assessing these factors a national court must take into account, among other matters, the type of undertaking or business concerned.

A case on similar facts had already been the subject of a judgment in the European Court (*CLECE* (Case C-463/09)) where a local authority had taken back in house a cleaning service and had declined to take on the contractor's employees, sourcing its requirements for the future elsewhere. It considered that there was no transfer of an undertaking in such a situation. But, as the European Court pointed out in *Pascual, CLECE* was a case where the undertaking was essentially labour intensive or based on manpower, requiring no significant assets for its operation.

But in the present case, it appeared that the equipment that ADIF made available to Algeposa, in particular the cranes, were essential to the activity in issue in the main proceedings. They were put at Algeposa's disposal and Algeposa could not carry out the contract without them. Likewise ADIF needed to regain the assets to continue the activity. And of course it is trite law that it is immaterial whether or not ownership of tangible assets transferred. Use of material assets was

made available. So because this was, in contrast to CLECE, essentially an asset reliant undertaking, the failure of ADIF to take on the old contractor's employees was not fatal to the transfer of an undertaking.

The outcome therefore was that the Acquired Rights Directive does cover a situation where a public undertaking entrusts, via public service operating agreement, the performance of an activity providing essential facilities and equipment to perform that activity, so that when that agreement is terminated without taking over the employees of the old contractor, those employees have a claim for breach of the Directive.

Of course, in the UK the above facts would give rise to a service provision change under regulation 3(1)(b) of TUPE. But in the rest of Europe, the service provision change rules do not apply and it is in those instances that the application of the Directive on in-sourcing depends on whether, in a labour intensive function, the staff are taken over or whether, in a asset reliant function (as in *Pascual*) assets are taken over.

5: Is a resignation following a substantial change in working conditions a 'redundancy' for the purposes of the EU Collective Redundancies Directive?

Yes, held the ECJ in ***Pujante Rivera v Gestora Clubs Dir SL and another***.

This case concerned a number of dismissals made by a Spanish company. The claimant brought proceedings against his former employer, arguing that it had not complied with its obligations to consult collectively. At question was the number of redundancies occurring in the 90-day period before the last dismissal. In particular, the ECJ was asked to consider whether one employee's resignation in consequence of a unilaterally imposed 25% reduction in salary should be included in the number of redundancies to be counted.

The ECJ determined that a resignation will count in the number of redundancies for the purpose of the Collective Redundancies Directive where:

- the redundancy is in response to a unilaterally imposed change to an essential element of the contract;
- the change is made for a reason unrelated to the individual; and
- the change is to the employee's detriment.

Given that the purpose of the Directive is to protect workers in collective redundancy situations, the ECJ made clear that a resignation in response to an imposed substantial change of this nature could not be said to have been a termination sought by the worker.

The application of the collective redundancy consultation obligations in the Directive (implemented in the UK through the Trade Union and Labour Relations (Consolidation) Act 1992) to situations where employees are dismissed and re-engaged on varied terms has been established for some time. This recent decision of the ECJ confirms that any *resignations* in consequence of the imposed change are likely also to be counted when determining whether collective consultation obligations have been triggered.

6: Under EU law a new holiday entitlement calculation must be made when a worker increases or decreases their hours

In ***Greenfield v The Care Bureau Ltd***, the ECJ considered how holiday entitlement should be calculated where a part-time worker moves to full time hours.

Ms Greenfield worked for The Care Bureau as a care worker. Her contract of employment stated that her working hours and the days over which she worked would differ from week to week. She initially worked just one day a week (for a period of twelve weeks). While working these part-time hours, in July 2012, Ms Greenfield took seven days' paid leave. As this was equivalent to seven weeks' leave on her current working pattern, it went beyond her holiday entitlement (which was the minimum 5.6 weeks' leave under the Working Time Regulations 1998 (WTR)).

Ms Greenfield's hours increased to full time in August 2012. In November 2012, she requested a further week's leave. Her request was refused on the ground that she had already exhausted her holiday entitlement by taking seven days' leave in July.

Ms Greenfield's employment terminated in May 2013 and she brought a claim in the employment tribunal for pay in lieu of leave not taken. Her claim was successful in the first instance, but on reconsideration of its judgment the tribunal revoked its decision in order to refer questions to the ECJ.

The ECJ determined that a new calculation must be made when a worker begins a new working pattern in order to determine the worker's leave entitlement going forward. Annual leave entitlement can be calculated in units of weeks, days or hours as necessary depending on the working pattern of the worker.

The Court stated that a reduction in working hours cannot reduce the right to annual leave which has already been accrued and so will have no retrospective effect on holiday entitlement. It clarified that there is no connection between leave taken and the working pattern being worked at the time that leave is taken. It would be unlawful, therefore, to refuse a worker's request for leave after such leave has been accrued, no matter the hours worked at the time when that leave is taken.

In Ms Greenfield's case, the Court determined that the leave taken in July 2012, which exceeded the right to paid annual leave accumulated during that period, should be deducted from any leave accrued during the period of full time working (from August 2012 until the termination of her employment) before calculating any pay in lieu of leave not taken. The Court also made clear that there is no difference between the way in which holiday entitlement is calculated and the way in which pay in lieu of leave not taken should be calculated on termination.

The determination of the ECJ in this case is not unexpected, as it reiterates the principle that workers are entitled to paid leave based on time worked under the contract. It is interesting to note that domestic law may not be compliant with EU law in that the WTR provide that a worker is entitled to a week's pay for a week's leave and that the date for calculating that pay is the first day of leave. Unfortunately, this point was not addressed in the judgment.

7: A verbal reference citing disability-related absence alongside unsuitability for the role was discrimination arising from disability

In ***Pnaiser v NHS England and Coventry City Council*** the EAT substituted a finding of unlawful discrimination against both a former employer and a prospective employer in a case where a job offer was withdrawn following a negative reference given over the telephone.

The case concerned Ms Pnaiser who worked as a manager within Coventry Primary Care Trust (PCT) and was seconded to Coventry City Council (the Council). Over a period of about two years she underwent treatment for a gynaecological condition which constituted a disability, including two operations. She was absent from work for significant periods of time due to this condition and her medical treatment. Nevertheless, Ms Pnaiser received a positive appraisal from her line manager at the Council (Ms Tennant).

Ms Pnaiser agreed to being made redundant during a restructure following the abolition of the PCT and prior to a transfer of the service to the Council. A reference was agreed as part of a settlement agreement.

Ms Pnaiser applied for a role with NHS England which was slightly more senior to the roles she had undertaken at the PCT and the Council. The recruiting manager at NHS England noted during her interview that she was an 'excellent candidate' and she was offered the job subject to satisfactory references. A period of negotiation over salary and place of work ensued and references were sought. Ms Pnaiser accepted the position.

Following the provision of the agreed written reference, the recruiting manager telephoned Ms Tennant for further clarification. The exact content of the conversation was disputed at tribunal, but it was found that Ms Tennant made reference to the disability-related absence, expressed her opinion that the claimant would not cope with the stress of a promoted role, and implied that her sickness absences had affected her performance at the Council. The recruiting manager admitted to having had second thoughts about recruiting the claimant before the phone call to Ms Tennant. It was his evidence that Ms Tennant stated that she would not employ the claimant in the prospective role and that he did not ask Ms Tennant the reason for this.

The job offer was subsequently withdrawn and Ms Pnaiser brought claims against both the Council and NHS England for discrimination arising from disability.

For discrimination claims to be established, the claimant must first show that there is a 'prima facie' case that discrimination has occurred. In other words, the tribunal must find that there are facts from which it could decide, in the absence of any other explanation, that discrimination occurred. If the claimant succeeds at this stage, the burden of proof will shift to the respondent to show that a discriminatory reason was not part of the reason for the treatment.

At first instance, the ET dismissed the claims, finding that there was no prima facie case for discrimination.

On appeal, the EAT found that the tribunal had erred in applying a test which presented too high a hurdle for the claimant. The ET had applied a test which required the claimant to show that the only inference that could be drawn was a discriminatory one. In other words, because there could be another inference (for example that the unfavourable treatment was because of the unsuitability of the candidate for the role and not because of her disability-related absences), the ET found that the claimant had not done enough to shift the burden of proof and require the employer to show that the reason for the treatment was not a discriminatory one.

The EAT stated that it was clear there were findings of facts from which the tribunal could have inferred that the negative comments in the verbal reference were at least partly because of disability-related absences. The judgment makes clear that the 'something arising from disability' (here disability-related absence) need not be the main or sole reason for the unfavourable treatment, but must have at least a significant (or more than trivial) influence on the unfavourable treatment.

The EAT took the fairly unusual step of substituting findings of fact for those of the ET and upholding claims of unlawful discrimination against both the former employer and the prospective employer. The case was remitted to the ET for a remedies hearing.

Employers should be aware of the risks of discrimination claims extending beyond the termination of employment and on engaging new recruits. Taking into account sickness absences which are related to disability can leave the employer open to claims. The former employer in this case may also have exposed itself to a breach of contract claim as the verbal reference contradicted an agreed written reference set out in a settlement agreement.

8: TUPE and change in the identity of the employer

It is trite law that TUPE and the Acquired Rights Directive upon which it is based both require a change of employer for transfer protection to apply. So, for example, when a company is taken over by way of the acquisition of shares in that company, the employment contract is unaffected, the company remains the employer, and TUPE does not apply.

In another context in ***Hyde Housing Association Ltd v Layton*** the EAT had to consider two questions. First could there be a relevant transfer for TUPE purposes where an employee moves from an employment contract with one employer to an employment contract with several employers, including the original employer? Secondly, can TUPE apply when an economic entity is transferred to multiple transferees, including the original transferor?

In this case, the claimant was employed by Martlet Homes Limited as a decorator. Martlet is a registered provider of social housing in the South East. On 28 December 2007 the claimant was told that Martlet would join the Hyde Group, becoming a subsidiary of Hyde Housing Association Ltd ('HHA'). This would occur from 1st January 2008 but his employment would remain with Martlet. The Hyde Group is not a separate legal entity. With effect from 1st January 2008 under a stock management agreement between Martlet and HHA, Martlet additionally took over the management of some 4,500 HHA homes located in Surrey, Sussex and Hampshire under the trading name of Hyde Martlet, an internal business unit. For its part, the Hyde Group became responsible for providing centralised HR and payroll services to Martlet and from 1st August 2008 the claimant's payslip changed to show HHA as his employer and his P60 for April 2009 showed HHA's PAYE reference number rather than Martlet's. Notwithstanding those changes the employment tribunal was satisfied there had been no relevant transfer for TUPE purposes in 2008. HHA was simply acting as Martlet's agent in paying the claimant's salary and the claimant continued to be employed solely by Martlet up to 1st August 2013.

From 2008 the Hyde Group decided to commence a restructure of its services. This meant reemploying individuals on new terms and conditions. On 18th July 2013 the Hyde Group wrote to the claimant confirming an offer of the position of 'Repairs Specialist - Internal'. A contract of employment was enclosed which stated that his employer was to be the Hyde Group, meaning he would be jointly and severally employed by all members of the Hyde Group at any time.

The claimant did not sign the new contract but carried on working as usual, wearing the same Hyde Martlet uniform and driving the same van with a Hyde Martlet logo on it.

Eventually the Hyde Group gave the claimant notice of termination of his present employment and was offered reengagement on the terms and conditions set out in the new joint contract of employment. He accepted this but reserved his right to claim unfair dismissal in respect of the termination of his previous contract. Although, of course, he was in standing to make a claim for unfair dismissal whether or not there was a TUPE transfer, the issue of whether TUPE applied throughout this change process was relevant to whether the dismissal might be automatically unfair or just unfair under general principles. The employment tribunal held there had been a TUPE transfer. Regulation 3(1)(a) required there to be a transfer 'to another person'. But this did not have to be to a single entity. So in the tribunal's view, responsibility for carrying out the business of the unit transferred from Martlet to Martlet and other members of the Hyde Group. That, in the employment tribunal's view, was a change of employer and therefore TUPE applied. HHA appealed.

In the EAT HHJ Eady QC reviewed at length the background to the Acquired Rights Directive and TUPE and the specific need for a change of employer. The learned judge considered that it was perfectly possible for there to be a transfer of an undertaking from one employer to multiple transferees. However where that transfer was to multiple employers, all of whom were jointly and severally liable, that grouping of employers including the original employer, there was no transfer under Regulation 3(1)(a) because the employer remained the same.

Control of the business remained in the hands of Martlet. That reality did not change. The claimant's practical employment relationship also remained with Martlet. That reality was altered only by the contractual addition of other organisations which were jointly and severally liable for his employment. The new employer or employers must be different legal entities from the first employer and this was not the case here. Thus:

> 'In my judgment, it is that principle which ultimately provides the answer in this case: Martlet retains liability for the claimant's employment; that legal position remained unchanged. That Martlet's liability is now on a joint and several basis with the other respondents does not change the position relevant to the claimant. The identity of his employer has not changed in a way that is legally relevant for TUPE purposes, whether taking the word of the regulations on their face or reading them in the light of a purposive construction derived from EU law.'

9: Transfer of employment to an associated employer and continuity of employment

Section 218(6) of the Employment Rights Act 1996 provides that if an employee of an employer is taken into the employment of another employer who, at the time when the employee enters the second employer's employment, is an 'associated employer' of the first employer then the period of the employment with the first employer counts as a period of employment with the second employer and continuity is bridged.

In ***Schwarzenbach t/a Thames-Side Court Estate v Jones*** Mr Jones was employed by the Schwarzenbach family/Thames-Side from 3rd June 2013 until his dismissal on 6th January 2014. He wanted to claim unfair dismissal, but on the face of it had insufficient continuity of employment to bring a claim. However, from 20th June 2011 until 31st May 2013 the claimant had been employed by a previous company called Culden Faw Limited. He relied on that prior employment as giving him the requisite continuity of employment for a claim as he contended that the Schwarzenbach family and Culden Faw were associated employers under the ERA. The employment tribunal agreed. Schwarzenbach appealed.

The facts were that Thames-Side were owners of a residential estate in Oxfordshire. From June 2011 the claimant had been employed as an estate maintenance worker by Culden Faw Limited which managed the business estate. Culden Faw Limited was owned by an offshore company and its ownership was obscure. However the Schwarzenbachs were officers of Culden Faw Limited. Very limited evidence was brought to the employment tribunal about the true control of Culden Faw Limited. The employment tribunal therefore drew an inference that there was indirect control. The legal definition of control, under the cases (see, e.g. *Secretary of State for Employment v Newbold* [1981] IRLR 305) is that this means *legal* control in the sense of a majority shareholding. *De facto* control is not enough.

The case went to appeal and was heard by HHJ Eady QC in the EAT. The EAT held that the employment tribunal was entitled to infer what it could from the limited facts that had been put forward by the employer. It recorded an inference that there was an ultimate beneficiary or beneficiaries and that such person or persons were within the Schwarzenbach family. It also considered the question of whether there was evidence of any other decision taker either outside the family or independent of it and was entitled to conclude there was no such evidence. It then inferred that legal control, whether exercised directly or indirectly, vested in the Schwarzenbachs. Therefore the employment tribunal had not decided the issue on the basis of *de facto* control. It was prepared to have regard to that issue but only to the extent appropriate when drawing inferences as to what was the position in terms of *de jure* control in terms of the ultimate shareholding and voting control.

10: Client briefing: Time spent sleeping and the National Minimum Wage (NMW)

This client briefing just provides an overview of the law in this area. You should talk to a lawyer for a complete understanding of how it may affect your particular circumstances.

Workers are entitled to be paid at least the NMW hourly rate (and from April 2016 the National Living Wage if they are aged 25 or over). BIS have published updated guidance to assist employers when calculating the NMW. The guidance is available ***here***.

Employers should be aware that staff who are required to 'sleep-in' at or near their place of work may be entitled to have those sleep-in hours counted when calculating whether the statutory minimum is being paid.

This may not cause any issues where workers earn significantly over the NMW, as they are likely to be paid over the NMW even when hours spent sleeping-in are added to their core hours. It could, however, be an issue where workers who earn close to the NMW are required to sleep-in. Hours spent sleeping may have to be added to other working hours in order to ensure such workers are being paid at least the NMW.

The law

According to the NMW legislation, a worker is entitled to the NMW for time when they are:

- actually working; or
- available and required to be available at or near a place of work for the purposes of working.

But a worker who is 'available' for work rather than working will not be entitled to the NMW for

- at home; or
- not awake for the purposes of working (even if a worker by arrangement sleeps at or near a place of work and the employer provides suitable facilities for sleeping).

In other words, these workers will only be counted as working for the periods of time when they are actually called upon to assist during the night.

The interpretation of this legislation in the courts has not been straight-forward. However, a pattern of case law has developed in recent years. Where it has been found that a worker is *actually working simply by being present*, the courts have ruled that the worker is entitled to have sleep-in hours counted for NMW purposes. In such cases, it has been found to be irrelevant that a worker is at home, allowed to sleep and/or rarely called upon during the night. Where a worker's presence has not been found to be legally obligatory, the courts have ruled that only the time spent responding to calls during the night should be counted in the NMW calculation.

An example

Let us consider the example of a care assistant who is paid an allowance of £40 to be on-call between the hours of 8pm and 8am. He is not the only member of staff available on or near the premises. A care manager is available who would be called on initially to respond to any incidents. Legally, the requirement for staff presence during the night is fulfilled by the presence of the care manager. The care assistant lives on site. He is called upon occasionally during the night to support the care manager. When his core hours and on-call hours are added together, it is found that he is being paid below the NMW.

In order to decide whether this is an issue for the employer, case law suggests the following as a guide.

Factors which suggest sleep-in hours will count towards the NMW calculation:

1. It would be a disciplinary matter if the worker was found to be absent during the on-call hours.
2. The worker's presence on the premises during the night fulfils a legal obligation of the employer.
3. It is the job simply to be there and he or she is being paid just to be present.

Factors which suggest sleep-in hours will not count towards the NMW calculation:

1. The worker's presence on the premises is not required by law - the presence of other staff fulfils any legal obligation.
2. The worker is free to come and go during the night.

In this example, the care assistant is unlikely to be found to be working simply by being there. Because his presence is not fulfilling a legal obligation, it is likely that he will fall into the exception for workers who are available for work and at home. Only the time the care assistant spends 'awake for the purposes of working' - that is responding to calls for assistance - will be counted towards his working hours.

The NMW calculation

The Government guidance should be followed when carrying out the NMW calculation as there may be particular circumstances which affect the calculation (for example, where accommodation is provided by the employer).

If you determine that a worker is entitled to have sleep-in hours counted for the purpose of the NMW, the calculation will, broadly, be made in the following way:

1. Determine the pay period (the intervals at which the worker is paid - for example every 30 days).
2. Calculate the worker's actual pay over the pay period (including sleep-in payments).
3. Divide the worker's pay in the pay period by the number of hours worked (including sleep-in hours) in the pay period to calculate the hourly rate being paid.

If the resulting hourly rate is below the NMW rate (currently £6.70 an hour for a worker aged 21 and over), the employer will not be complying with the statutory minimum. Where the calculation shows that the worker is paid above the NMW hourly rate for their total hours in the reference period, the employer will be compliant and it is irrelevant that the sleep-in hours are not themselves paid at the NMW rate.

Enforcement by HMRC and/or the worker

Action to enforce payment of the NMW can be taken by HMRC. Penalties are currently set at 100% of arrears and the maximum penalty per worker is £20,000. The Government intends to increase the penalty to 200% of arrears and is planning more rigorous enforcement, including naming and shaming and criminal prosecution of the worst-offending employers.

Workers can bring an unlawful deduction of wages claim in the employment tribunal for the shortfall in wages. Such a claim can be brought up to three months after the deduction or the last in a series of deductions. Since 1 July 2015, only arrears going back two years from the latest deduction can be claimed in this way. Alternatively, a worker can bring a breach of contract claim in the county court (or in the employment tribunal after employment has terminated) for arrears going back six years.

If you'd like to contact us please email john.mcmullen@wrigleys.co.uk