Supreme Court ruling provides welcome clarity but highlights ongoing need for a fair rate of pay for overnight work supporting disabled people

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The Voluntary Organisations Disability Group (VODG) is calling on government to instruct the Low Pay Commission to establish a fair rate of pay for social care workers who provide overnight support following today's Supreme Court decision on 'sleep in' shifts.

The Supreme Court has upheld a 2018 Court of Appeal decision that social care workers who sleep during night shifts are entitled to the national minimum wage (NMW) only when they are awake and supporting people who require overnight support services.

The decision ends a legal process that began in 2016.

Workers providing overnight support to people using care services are permitted to sleep during their shift but are present throughout the night to meet any support needs.

Historically, most care workers received a flat rate payment for each sleep in shift – typically around £35. This was topped up by pay at the NMW hourly rate when they were awake and providing care or support. VODG is also urging government to issue guidance to commissioners that they should not reduce payment for sleep in shifts pending the Low Pay Commission review.

VODG, an infrastructure body representing more than 100 voluntary sector organisations that work alongside disabled people, has been campaigning on this issue for a number of years.

Dr Rhidian Hughes, chief executive of VODG, said: "Clearly, there are no winners or losers in this case. While the judgement provides some welcome clarity to this issue, there is still significant uncertainty that can only be resolved by the Low Pay Commission carrying out a consultation and review, and for the Department of Health and Social Care to bring forward a workforce strategy for the social care sector.

"We are concerned of potential knee jerk reactions of local authority commissioners up and down the country which could see funding reduced, and therefore the pay of staff affected.

"The coronavirus (COVID-19) pandemic has highlighted the extent to which social care is a vital part of a civilised society. We need to value those who care for disabled people, including when they are available at night, and that includes a fair rate of pay.

"Social care providers, who were already operating in a challenging financial landscape before the pandemic, now face significant new financial, workforce and health and safety pressures

"This decision, coming as care workers remain on the frontline of the pandemic, illustrates that they deserve fair reward for work that supports disabled people to be more independent.

"The government must instruct the Low Pay Commission to consult with providers, commissioners and other stakeholders and then recommend a fair rate of pay for sleep in shift. Ministers must also ensure that local authorities have the funding to make that a reality in their contracts with social care providers."

VODG has highlighted for many years that official guidance, inconsistent HMRC approaches and a range of legal decisions have created confusion around appropriate pay arrangements for sleep in shifts.

Dr Hughes added: "This case was not about what care workers should be paid – it was about the narrow interpretation of national minimum wage regulations. Now the sector has some clarity on this issue, there is an opportunity to introduce a system that enables government, commissioners, and providers to place proper value on the work of social care professionals, and on the vital care and support they provide to

disabled people.

“The ad hoc arrangements of the past must be replaced with a new reality – one that provides sustainable, clear, and fair funding arrangements for sleep in shifts.

“We cannot have a postcode lottery in pay for social care workers doing such important work. Anything that worsens retention will only impact on disabled people who rely on social care services and lower the quality of care.”

ENDS

For more information or to request an interview, please contact Erika Murigi on media.press@vodg.org.uk or by calling 0330 043 0156.

Notes to editors:

VODG is an infrastructure body representing organisations within the voluntary sector who work alongside disabled people. Our members’ work is focused on enabling disabled people of all ages to live the lives they choose. VODG believes that an ambitious, trusted and vibrant voluntary sector that works together plays a unique role in achieving this aim. VODG members work with around a million disabled people, employ more than 85,000 staff and have a combined annual turnover in excess of £2.8 billion.

Timeline – the path to the Supreme Court

Pre-2016: Most sleep in shifts were paid at a flat rate – typically £35-£45 per shift. This was in line with government guidance. Annual uplifts to the NMW meant that a gap between the flat rate payment and NMW began to widen year on year.

2016: An employment tribunal found a former Royal Mencap Society care worker (Mencap v Tomlinson-Blake) was entitled to receive the NMW for each hour of sleep in shifts completed, plus six years of back payments.

2017: An employment appeal tribunal (EAT) upheld that decision. Although the tribunals backed Tomlinson-Blake, they rejected the worker’s claim in another case – Shannon v Rampersad – which forms part of the Supreme Court judgment. Although the EAT backed Tomlinson-Blake, they rejected the claim in Shannon v Rampersad (where a night care assistant in a residential care home was not "working" for the purposes of calculating the NMW simply by being "on-call" in his flat on the premises). A distinction was drawn by the EAT between cases where night workers were held to be "working" throughout their shift even if they were entitled to sleep, and those cases where the worker was simply "on call". This illustrates the uncertainty in current arrangements.

2018: The Court of Appeal, overturning the EAT decision in the Royal Mencap Society case, ruled that employees are only entitled to the national minimum wage when carrying out their duties, not for the full duration of their overnight shift. The Court of Appeal held that while they were “available” to work during these shifts, they spent little time doing actual work.

February 2020: The Supreme Court heard Unison's appeal against the Court of Appeal decisions in Mencap and Shannon over two days.

March 2021: The Supreme Court judgment is handed down and upholds the 2018 Court of Appeal ruling.

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