



Commissioning Sleep In Shifts in Adult Social Care

Dear Director of Adult Social Services,

The Court of Appeal judgment regarding Mencap was published on 13 July 2018 and overturned the prevailing interpretation of the law over whether “sleep-in” shift workers are entitled to the National Minimum Wage. In the Court of Appeal’s judgment employers are not required to pay the National Minimum Wage for “sleep-in” shifts in the specific circumstances defined by the Court. This covers both arrears and future payments.

On 8 November 2018, the Department for Business, Energy and Industrial Strategy updated their guidance on calculating the National Minimum Wage for sleep-in shifts. This guidance represents the correct interpretation of the law as it stands, and should be followed. However, I recognise that it is important that Local Authorities have as much clarity as possible in relation to care providers’ legal obligations to pay the National Minimum Wage and National Living Wage.

HMRC decided to keep the voluntary Social Care Compliance Scheme open in order to allow employers to apply the new test set out by the Court of Appeal judgment in the Mencap case, and to enable employers to self-review by 31 December 2018 and to pay any arrears, also relating to issues other than sleep-in shifts, which might be owed by 31 March 2019. A number of employers on the Scheme are the subject of worker complaints, also for non-sleep-in issues, and HMRC are obliged to consider all worker complaints. HMRC provided further guidance to employers who had joined the Scheme, and it integrated the Court of Appeal judgment into its work.

Representatives of care providers have expressed concern about rapid price reductions for sleep-ins by commissioners that risk destabilising the social care market. Commissioners of adult social care were given market shaping duties by the Care Act, and must work with providers to determine a fair rate of pay based on local market conditions. I would expect the same of local authorities in respect of children’s social care. Whilst I recognise that local authorities have many competing pressures on resources, this judgment should not be used as an opportunity to make ad-hoc changes to the fees paid to providers without consultation, or in a way that destabilises the sector. In the Spring Budget 2017, an additional £2 billion of funding was made available for local authorities to fund adult social care. A key purpose of this new funding was to support the social care market. The Government took account of the cost arising from enforcement of national minimum wage for sleep-in shifts going forward in deciding to provide this sum of additional funding.

The Supreme Court has agreed to consider Unison's appeal against the Court of Appeal judgment. However, its judgment is unlikely to be issued before late 2019 or more likely in mid-2020, unless expedited. In the meantime, the Court of Appeal judgment constitutes the current interpretation of the law and all employers must comply with the law as it stands. Commissioners should be working with providers to ensure that they are not only complying with the legislation, but are ensuring workers are fairly remunerated for the important work they do. Until the outcome of any Supreme Court decision is known, there continues to be a risk that the current legal interpretation of the law may again be reversed, bringing back historic liabilities. Local authorities should bear this risk in mind in discussions on fee rates.

The long-term stability of the social care system is a top Government priority. We need a sustainable social care system to ensure services continue to deliver for our ageing population and the increasing number of people of working age who require care services. This is why we will be publishing a Green Paper at the earliest opportunity. The Green Paper will consider the fundamental issues facing the adult social care system, including the future sustainability of the market.

Social care funding for future years will be settled in the Spending Review, where the overall approach to funding local government will be considered in the round.

I recognise that the work carried out by the social care sector provides a vital role in our society, and workers in the sector should be fairly rewarded for what they do. Ultimately, it is in the interests of commissioners, providers, and recipients of care services to have a stable, functioning care sector.

I look forward to working with you in the future to ensure that this long-term stability is achieved.

A handwritten signature in black ink, appearing to read 'Caroline Dinénage', with a stylized, cursive script.

CAROLINE DINENAGE