

Good intentions not enough in wage calculations

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Accurate calculations of the National Minimum Wage continue to cause headaches for employers, with an employment tribunal acknowledging the complexity, saying there is no single key to unlock every case.

Recently, unintentional underpayments in staff pay packets have affected major retailers like John Lewis and Tesco, while others have been waiting for an employment tribunal decision on when sleeping night shift staff are eligible for the National Minimum Wage ([NMW](#)).

For John Lewis, a staff-friendly policy of aggregated wages to provide regular monthly income has resulted in the company having to pay £36m for underpayments over a six-year period, despite most under-payments being technical, rather than actual. Staff wages were smoothed out over the year so they received the same amount each month, rather than being paid for the exact hours worked. The problem arose when individuals worked extra hours in a month and the aggregate monthly payment was less than the payment due for the hours worked under the [NMW Regulations](#).

Argos and Tesco have made similar payroll mistakes. Tesco is having to compensate 14,000 staff at a cost of £10m for employees who had made salary contributions to pensions, childcare and other schemes which resulted in their pay falling below the [National Living Wage](#) level. Tesco has blamed its payroll software for the error, but for many employers the difficulty lies in correctly interpreting the [NMW Regulations](#).

One such thorny area is payment for employees who sleep overnight in the workplace or who are on call. Previously, such workers were often paid a flat rate for when they were sleeping and their normal hourly rate when they were required to attend to their duties. This approach was challenged on the basis that it did not comply with the [NMW Regulations](#), and three such cases

were recently heard together by the Employment Appeal Tribunal: [Focus Care Agency Ltd v Roberts](#), [Frudd v The Partington Group Ltd](#) and [Royal Mencap Society v Tomlinson-Blake](#).

For employers hoping for certainty on the issue there has been frustration, with the Tribunal saying that there is no 'bright line' and that businesses must conduct a 'multifactorial evaluation'. Their findings highlighted four key factors.

- 1. The reason for engaging the worker:** if an employee is on site to comply with a regulatory or contractual obligation, then the individual is more likely to be classed as working throughout their whole shift, even if they are asleep or with nothing to do.
- 2. Restrictions on the worker's activities:** if a worker would be disciplined for failing to remain on stand-by, for example by leaving the premises, then the NMW is more likely to apply than in situations where someone can come and go as they please.
- 3. The degree of responsibility:** if a worker is required to keep a listening ear and respond, such as a care worker, they are more likely to be treated as 'working' than someone who is at home on-call.
- 4. The immediacy of the requirement to provide services:** this includes both the speed and the level of responsibility of a worker. If they are the one who will decide whether to intervene and then take the action, they are more likely to be categorised as working than someone who is woken and instructed by the responsible member of staff.

Our employment lawyer, Karen Cole noted:

"The Tribunal's decision highlights just how tricky this area of the law can be, but compliance is a serious

business. It is sometimes difficult to understand what's right and what's wrong, and borderline cases will be difficult to decide, but if there's any doubt it pays to investigate further as getting it wrong may mean a company faces claims for back-pay, which can go back six years. As well as the financial costs, there may be enforcement action by [HMRC](#), along with reputational damage."

The National Living Wage is a premium tier of the NMW for eligible workers aged over 25.

For those eligible workers aged under 25, there are further categories of age-related rates. Since April 2017:

- **25 and over - £7.50**
- **21 to 24 - £7.05**
- **18 to 20 - £5.60**
- **Under 18 - £4.05**
- **Apprentice - £3.50**

Although given as hourly rates, the NMW Regulations apply to any eligible worker, whether or not they are paid by the hour, and calculations must be made according to the payment basis. For example, someone paid annually or by piece-work can use a formula to work out the equivalent hourly rate and check if they're being paid the right amount.

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Note: This is not legal advice; it is intended to provide information of general interest about current legal issues.

