

Finance and Resources Committee

2pm, Wednesday, 13 May 2015

Impact on Providers of Recent Employment Appeal Tribunal Judgements - Night Time 'Sleepover' Support Costs

Item number 7.3
Report number
Executive/routine
Wards

Executive summary

The Employment Appeal Tribunal (EAT) recently ruled that where a care worker was required to work 'sleep in' night shifts at a designated site, and be available to carry out duties during these sleep-in sessions, such shifts constitute 'time work' for the purposes of National Minimum Wage legislation. The EAT found that the care worker was entitled to be paid at the rate of the National Minimum Wage for hours worked including those during these sleep-in shifts.

This report sets out details of the resulting cost pressure faced directly by providers of sleepover services and indirectly by the Council.

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Night Time Sleepover Costs

Recommendations

Committee is asked to note:

- 1.1 the significant cost pressure arising directly for providers and indirectly for the Council following the EAT ruling;
- 1.2 the risk of legal challenge faced by providers if they do not comply with NMW legislation
- 1.3 the risks arising for the Council in the event providers are unable to recover the increased costs they face and stop providing sleepover services

and agree

- 1.4 payment rates made by the Council for each hour of sleepover service purchased should be increased, with effect from 1 April 2015, to the level of the National Minimum Wage
- 1.5 to consider a potential source of funding to meet this pressure

Background

Current Position

- 2.1 All Council's make provision for paid carers to be available to vulnerable people and people with disabilities living in care homes or in their own homes who are assessed as being at potential risk during the night. Typically, staff work a 'sleepover' shift from 10pm until 7am during which, although they are allowed to sleep, they must respond to any situations which may arise during the night. Currently, staff working sleepover shifts receive an allowance for doing so.
- 2.2 Contracted providers of care and support services in Edinburgh provide staff to work 100 sleepover shifts every night of the year. The Council currently makes an average gross payment of £40 per shift, spending a total of £1,460,000 per annum.
- 2.3 A further 100 sleepover shifts are purchased from contracted staffing agency's each week to cover staff vacancy's, annual leave and sickness in Council run care services. The current average payment made for these shifts, inclusive of agency fees, is £45.86p, which equates to £238,472 per annum.
- 2.4 60 recipients of Direct Payments use part of the payment made to them to buy an average of 235 sleepovers each week. The average gross allowance paid to staff is £40 per night, which equates to £488,000 per annum.

- 2.5 While the exact number of sleepover shifts will vary depending on service user needs, on average the Council funds around 54,000 sleepovers each year at a cost of c£2,186,472.

Main report

- 3.1 In August 2014 the Employment Appeal Tribunal ruled in the case of *Esparon V Slavikovska* that where a care worker was required to work a number of ‘sleep-in’ night shifts at a site designated by their employer, and be available for work during these sleep-ins, these shifts constituted ‘time work’ for the purposes of the National Minimum Wage (NMW) legislation. The NMW is currently £6.50p per hour for most workers.
- 3.2 This means if any worker is paid on average less than the NMW over their pay reference period they will be entitled to have their pay increased to ensure that they receive the NMW for each hour worked. This will particularly affect low paid workers in the private, voluntary and temporary staff sectors. Staff who are paid significantly above the NMW who do sleep-ins are unlikely to be affected, because, on average, their pay will not fall below the NMW over their pay reference period. The examples below illustrate how the impact on an individual can be calculated.

Examples

- Worker A is paid weekly
 - They work 30 hours a week at **£7** per hour
 - They also do 2 X 9 hour sleep-ins each of which is paid at £40
 - Overall, they have worked 48 hours and have been paid £290
 - Their average hourly pay is £6.04, which is **less** than the NMW
 - So they are entitled to an increase in their hourly rate to at least the NMW level
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- Worker B is paid weekly
 - They work 30 hours a week at **£8** per hour
 - They also do one sleep in of 9 hours, for which they are paid £40
 - Overall, they have worked 39 hours and have been paid £280
 - Their average hourly pay is £7.17p, which is more than the NMW
 - So they are not entitled to a pay rise, under NMW regulations
- 3.3 As the EAT ruling requires a shift from payment of an allowance to payment per hour, employers will also require to make additional National Insurance, holiday and pension payments in respect of sleepover hours worked.
- 3.3 In December 2014 COSLA advised Council’s *“the key legal responsibility to comply with the Tribunal ruling sits with the employer (i.e. the provider).”* It went on to say: *“Notwithstanding this position, it is our view that a local authority, as the commissioner of the service(s) vulnerable to the implications of the ruling, has a wider set of responsibilities to engage with and support providers in*

dealing with the effects of the legal ruling. We would advise authorities to take a proactive approach to dialogue with providers on the basis the implication of the ruling involves a strong element of shared risk.”

Calculation of the Financial Impact in Edinburgh

- 3.4 In January 2015 Officers met with contracted providers of care and support staff to discuss the issues raised by the EAT ruling and agreed with them that (a) providers would seek independent legal advice as to whether they were affected by the ruling and if so (b) using the methodology set out in the examples above they would calculate the likely financial impact on them of the ruling and share this with the Council.
- 3.5 All 25 regular providers of sleepover services reported they had been advised they were affected by the EAT ruling. Five providers, who between them provide 10,000 sleepovers each year, do not anticipate any resulting cost pressure as their pay rates are significantly higher than the NMW. These five are all large national organisations with a diverse service portfolio. They include the Church of Scotland, Penumbra and Castle Rock Edinvar Housing Association. All five have indicated they would not wish to extend the provision of sleepover services beyond those provided in homes which they own and manage.
- 3.6 The remaining 20 providers, who deliver a total of 26,500 sleepovers each year, are in the main smaller, local providers who offer pay rates closer to the NMW. They have collectively identified the cost pressures arising for them as totalling £800,300 per annum. This figure has been calculated by costing the payment of 9hours X NMW/£6.50p = £58.50 per hour, plus an average additional 20% (total of £70.20p per shift) in respect of National Insurance, holiday and pension payments and provider management costs and subtracting the £40 payment currently made by the Council.
- 3.7 Officers also met with contracted agency providers of temporary staff to the Council. They reported their legal advisors have recommended they immediately implement payment of the NMW and make additional National Insurance, holiday and pension contributions for all sleepover shifts provided. As a result the agency average charge will rise to £77.85p per night. In this case the resulting cost pressures will be addressed by service managers.
- 3.7 The lowest net rate paid to Personal Assistants employed by recipients of Direct Payments who purchase sleepovers is significantly higher than the NMW at £8.64per hour. As a result we are satisfied staff employed by recipients are unlikely to be affected by the EAT ruling.
- 3.8 On 23 February 2015 the Low Pay Commission announced it planned to recommend an increase in the NMW to £6.70p per hour from 1 October 2015.

- 3.9 Adding the planned 3% mid financial year increase in NMW and the related 0.25% increase in employer contributions to the cost pressure of £800,300 outlined above, the overall financial impact of the EAT ruling on providers of sleepover support services in Edinburgh in the 2015/16 year will be to increase their costs by an estimated **£826,300**.
- 3.10 While there is a lack of clarity on whether increased payments due to staff should be backdated and for how long, all providers plan to uplift rates paid for sleepovers to NMW levels from 1 April 2015. The Council has already made clear it cannot assist with the costs of any retrospective payments providers may be required to make.

Operational Impact

- 3.10 COSLA is correct in stating responsibility for complying with the EAT ruling and meeting the resulting increase in costs rests with providers. It is also the case there are no contractual obligations on City of Edinburgh Council to meet cost increases arising from EAT or other legal rulings.
- 3.11 However, unless the Council supports providers in meeting the cost pressures arising from the EAT ruling they will, understandably, opt to exit the sleepover market. Any sharp reduction in supply will inevitably mean further increases in the cost of providing sleepovers for the Council, over and above those arising from the EAT ruling. The Council does not itself have the capacity to supply these services in the volume required and doing so would in any event incur higher costs than those charged by 3rd party providers.
- 3.12 Cost and other pressures resulting from any reduction in supply are likely to be further exacerbated as service users, for whom we are unable to source sleepover services, can no longer be safely supported at home and require transfer to often scarce and always more expensive residential care settings.
- 3.13 Our largest local contracted provider of sleep in staff has indicated that the Trades Union representing its staff, Unite, has agreed not to progress claims for unlawful payment on behalf of its staff on the understanding the provider addresses the matter by 1 April 2015. While the provider plans to do so, it has indicated it will reluctantly have to stop providing sleep in staff in the event the Council does not increase its payment rate to facilitate compliance with NMW legislation. A second contracted provider has advised it is already facing 2 claims against it for unlawful payment of wages.
- 3.15 Given the significant risks arising for the Council of a large scale exit by providers from the delivery of sleep in staff, Committee are asked to agree the report recommendation.

Measures of success

- 4.1 The Council achieves best value in the delivery of all night time support services provided to service users.

Financial impact

- 5.1 The full year cost of increasing payment rates will be £826,300. The financial implications will be considered as part of the review of the 2015/16 Health and Social Care budget which will be reported to the June Finance and Resources Committee.

Risk, policy, compliance and governance impact

- 6.1 The EAT ruling referred to in this report requires employers to consider its conclusions and whether these impact upon the arrangements in place for sleep-ins and ensure compliance with NMW obligations. The risks faced by the Council should it choose not to support providers in doing so and ensuring that the NMW is paid for each hour of time worked are set out in Section 3.11 and 3.12 above.

Equalities impact

- 7.1 There are no equalities impacts arising directly from this report.

Sustainability impact

- 8.1 There are no sustainability impacts arising directly from this report.

Consultation and engagement

- 9.1 All providers of sleepover services have been consulted on the impacts arising for them of the EAT ruling and have contributed to the production of this report.

Background reading / external references

Employment Appeal Tribunal Ruling: Esparon v Slavikovska, UKEAT/0217/12/DA

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Links

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