



Department for
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& Industrial Strategy

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Dear Mr Scown,

Thank you for your open letter dated 1 October. I am responding on your points relating to the Court of Appeal judgment and payment of the National Minimum Wage (NMW) for sleep-in shifts, which fall within my Ministerial portfolio.

The Court of Appeal judgment regarding Mencap was published on 13 July 2018 and overturns the prevailing interpretation of the law over whether "sleep-in" shift workers are entitled to the NMW. In the Court of Appeal's judgment, employers are not required to pay the NMW for "sleep-in" shifts in the specific circumstances defined by the Court. This covers both arrears and future payments. This interpretation is reflected in updated public guidance that seeks to provide clarity to care providers, commissioners and workers:
<https://www.gov.uk/government/publications/calculating-the-minimum-wage>.

As you are aware, Unison has asked the Supreme Court for leave to appeal against the Court of Appeal judgment. If the Supreme Court agrees to consider the appeal, its judgment is unlikely to be issued before 2019 and possibly not until 2020. In the meantime, employers must continue to comply with the Court of Appeal's judgment in the Mencap case.

Her Majesty's Revenue and Customs (HMRC) has provided further guidance to care providers who have joined the Social Care Compliance Scheme, and it has integrated the Court of Appeal judgment into its work, so there is no question of employers being expected to repay arrears in line with the previous interpretation of the law.

The Government encourages employers to pay more than the minimum wage wherever possible, and we hope more care sector employers will consider doing so. The Government has continued to invest in the sector. The Government gave councils £2bn of additional funding for care in Spring Budget 2017, in part to support a sustainable market. We also provided a further £150m of adult social care support grant in the 2018/19 Local Government Finance Settlement to help manage market pressures. In addition, the Government has announced £650 million of new money for social care in 2019/20. This includes an additional £240 million for adult social care to alleviate winter pressures on the NHS; and a further £410 million to improve social care for older people, people with disabilities and children.

A number of representatives of care providers have expressed concern about "knee jerk" price reductions by commissioners that risk destabilising the social care market. The Department for Health and Social Care (DHSC) are also speaking to local authorities to be clear that they should not use this judgment as an opportunity to radically alter their fee-paying practices in an ad-hoc way. Commissioners and providers should be working together to determine a fair rate of pay for sleep-in shifts to fit their local labour market conditions.

We remain committed to the long-term sustainability of the social care system. The Government recognises that the social care sector plays a vital role in our society, and workers in the sector should be fairly rewarded for what they do. The National Living Wage (NLW) is key to ensuring that the lowest paid are fairly rewarded for their contribution to the economy, and it has already delivered the fastest pay rise for the lowest earners in 20 years. As also announced by the Chancellor in the Budget, the NLW will be raised to £8.21 from April 2019, 38 pence increase on this year's rate.

Thank you for writing to me on this important matter, and I trust that you find the above information useful.

Yours sincerely


KELLY TOLHURST MP
Minister for Small Business, Consumers & Corporate Responsibility