

### Personnel Committee – 11<sup>th</sup> October, 2016

#### Sleep in Payments

##### 1. Summary of report:

- 1.1 This report seeks to create a sleep in payment of £34.68 per sleep in for staff working in residential homes.

##### 2. Background papers:

- 2.1 NONE.

##### 3. Recommendation(s)

- 3.1 That the Committee: -
  - i) approves a payment of £34.68 per sleep in

##### 4. Background

- 4.1 Children's Residential Services (Children and Young People's Directorate) consists of 5 children's homes. Every home requires 24 hour staff cover. As part of the cover arrangements there is a requirement for employees to undertake sleep in duties on a rota basis. A sleep-in spans a 10 hour period between 10pm and 8am with the specific times being dependent upon the needs of the particular home.
- 4.2 In 2011, as part of the Single Status work, terms and conditions were changed which removed a sleep-in allowance to compensate for staff having to sleep in at their place of work. It was unclear what was expected to replace this, but it appears it was a 15% unsociable allowance for sleep in work.
- 4.3 Post single status, because of the huge cost of a 15% unsocial allowance, Children's Services have chosen to cover 'sleep in' through the standby payment arrangement – something that is at Directorate's discretion – rather than the 15% allowance. Staff have been in receipt of a standby payment of £29.50 per sleep in since single status. Standby Payments are currently set at the discretion of the Directorate.
- 4.4 Currently the nationally recognised rate for sleeping in duties is £34.68. Contractually it would be right to pay the recognised rate and would mitigate the potential for employees pursue claims for unfair pay. Employees working within our children's homes, and their Union advisors, have been voicing their

concerns about the rate of the allowance since the implementation of single status. The implementation of the national rate would will address their concerns and assist with recruitment and retention of a workforce that is invaluable in working with some of our most complex and vulnerable children and young people.

- 4.5 The recent terms and conditions changes have unified the standby payments across the Council. This ensures fairness and helps protect against equal pay challenges. Personnel Committee set the new standby rate at £20 per standby period. This will reduce the payment for staff in Children’s Residential Services.

**5. Proposal**

- 5.1 The proposal is pay the nationally recognised rate of £34.68 per sleeping in session per employee. Paying by individual sessions ensures resources are used well as employees are paid for what they actually do.

**6. Resource and Legal Considerations:**

- 6.1 This financial model is based on staff payments made over the last 12 months and approximate figures to illustrate the difference between payments.

	<b>Current Standby Payment</b> <i>£29.50/ sleep in</i>	<b>Proposed Standby payment</b> <i>£20/ sleep in</i>	<b>National Sleep in allowance</b> <i>£34.68/ sleep in</i>	<b>15% Unsociable Allowance</b>
Total	£11k	£7.5k	£12.7k	£120k
Difference to the current payment	N/A	£3.5k -	£1.7k +	£109k +
Hourly rate of pay across the monthly reference period	£7.95/hour	£8.28/hour	£8.44/hour	£8.33/hour
Does this meet/exceed the NMW	Yes	Yes	Yes	Yes

- 6.2 There is no recent case law or statute that says sleep ins are, of themselves, unlawful. The only issues are whether or not the time spent sleeping constitutes working time and, if so, whether or not the pay in respect of that working time falls below the national minimum wage. If it does fall below then plainly that would be unlawful.

Payment is measured over a reference period which is determined by the National Minimum Wage Regulations. The pay reference period is the period of time across each payment, usually weekly or monthly (monthly in this case).

The pay reference period must not exceed thirty one days. Any time spent during the sleep in period when employees are awoken to attend to residents would be paid at the normal hourly rate.

The case law referred to is Slavikovska v Esparon (t/a Middle West Residential Care Home) (2014) UKEAT/0217/12 and Whittlestone v BJP Home Support Ltd UKEAT/0128/13.

*Legal services have reviewed the case law and have advised as such; Looking at the case law and compliance with National Minimum Wage Regulations, there has been some distinction drawn between the cases where being present is itself part of the job, and those where it is not and the worker is genuinely 'on call'.*

*I am not sure that the difference matters if there is an acceptance that it all amounts to working time (because despite not actually working, they are required to be available). As long as the NMW is complied with for all hours that are working time over the reference period, then the Council will not be in danger of failing to comply with the NMW or attract any enforcement or penalty.*

*As long as NMW provisions are being complied with then it is up to the Council to decide, on affordability, whether it should pay sleep-in rates or standby.*

## **7. Citizen impact:**

- 7.1 The impact of not remunerating staff appropriately may be that staff become reluctant to undertake sleep ins which in turn may affect the service delivery to the service users within Residential homes and their families.

## **8. Performance and risk management issues:**

- 8.1 This matter has been raised directly by staff on a number of occasions to managers and more recently through their trade union representatives. Further concerns have been raised about whether the sleep in themselves are health and safety compliant. The council is satisfied that they are, as residential homes provide a 24 hour service and are therefore exempt from the working time regulation.

## **9.0 Equality Implications:**

- 9.1 An EQIA was carried out as part of the service redesign in December 2015. The proposed increase in sleep-in payments will not have any adverse impact on the services nor the staffing team as there is no proposed changes to the sleep-in policy or the service provision.

## **10.0 Consultation:**

*10.1* The Unions, Residential Managers and staff, finance and legal services have been consulted in relation to the proposed changes.

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## APPENDIX

### Benchmarking

	Sleep in	Comments from other Local Authorities
<b>Dudley</b>	<p>Green Book £34 sleep in. Is contractual in Children's and voluntary in Adults (but may make adults contractual or contract out as having difficulty getting volunteers.) Community Alarms assist and go out if needed 10:30pm to 7:30am. A full night has to be undertaken to receive the payment, no part payment made.</p>	<p>Waking night staff on duty (33% contract uplift on those working between 12-5). If volunteer to do waking night adhoc they get 15% uplift.</p>
<b>Coventry</b>	<p>Green Book £34 sleep in. The timing varies dependent on the location can cover 7.5 to 8.5 hours sleep in. Payment is not affected by the variation in length of sleep in. No part payment, either do sleep in or they don't.</p>	<p>A premium is paid for waking nights. Also a standby payment for when on standby.</p> <p>Are moving away from sleeping in payment (1<sup>st</sup> April) due to changes in case law regarding NMW. What they have is generally 2 staff on waking nights, and if a third person is needed for an emergency they have mobile call out. There are 2 people on mobile call out – these tend to be seniors, they tend to travel between the locations rather than have one base.</p> <p>Can be averaged out if they work a shift before/after equating to an average hourly rate above NMW (ok with longer shifts up to 13 hours WTR – but doesn't work with short</p>

		shifts). There was a discussion of paying sleeping in at an hourly rate of NMW rather than contract rate.
<b>Worcestershire CC</b>	Do pay sleeping in allowance but no consistency in the rates paid or the approach used. No consolidated information available.	
<b>Solihull</b>	Sleeping in payments are paid in limited circumstances in Adults Social Care (case law issue). Do not pay the green book – local rate is £25.55 per night – this allows up to 30 minutes call out per night with any additional hours worked (beyond the 30 mins) being paid at basic overtime rate Payment covers the period 11pm to 7am Same payment is paid even if the entire night is not worked.	As a result of case law/ judgements and the impact on minimum wage we have moved more towards ‘waking hours’ arrangements.
<b>Birmingham</b>	We pay the NJC arrangements of £34 per sleep in session – <b>however we are looking at this in light of the recent cases.</b>  The sleeping in time is dependent on the service area – but is 9 hours usually (10pm to 7 am) some areas flex on this. Night working payment arrangements have a different timescale. The only way they would do part of the shift is when they would be woken and then after 30 mins the contractual rate of pay would kick in.	

<p><b>Sandwell</b></p>	<p>Sandwell pays sleeping in duties in line with the Green Book. This is an extract from the HR intranet:</p> <p><b><i>If you are required to undertake sleeping in duties, payment will be made in accordance with the Green Book, the National Joint Council for Local Government Services and the Joint Negotiating Committee for Teachers in Residential Establishments, at the specified rate per night and with the associated 'disturbance' element. The current rate is £34.00 per night. This allowance includes 30 minutes call out / disturbance per night. Employees who sleep-in and who are disturbed are entitled to an allowance of £19.00 for each hour they are disturbed; after the first 30 minutes. The 30 minute rule applies once per night and applies irrespective of the number of times an employee is disturbed.</i></b></p> <p>A night is deemed to be between 8pm and 6am. To claim sleeping-in, the employee has to be on the premises (sleeping) overnight</p>	
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Please note the comments in the table above are from the councils, we are satisfied that the sleep in payment is not illegal as long as we satisfy the national minimum requirements.

## **ADDENDUM**

### **Sleep in – Briefing Note**

In order to ensure consistency the respective HR Business Partners from Children Services and Economy and Environment have explored any similarities between the two Directorates and conclude the following;

The Emergency Planning function within Economy & Environment operates the standby/callout rota on the goodwill of volunteers from across the Council.

During the consultation on the terms & conditions proposals, officer's indicated that if the proposed standby changes were implemented, they would struggle to recruit and retain staff volunteering for the emergency standby rota and therefore suggested that this group should be excluded from the changes to the standby payments. This group of volunteers have not been exempt from the changes and officers have been advised to explore contingency plans (*not excluding the possibility of making the standby rota contractual*).

Nevertheless, it is clear that there is no relevance to the matter raised in Economy and Environment to that of the sleep in payments within Residential homes in Children Services. Sleep in duties exist only within Children services and the purpose of the report is to ensure staff are remunerated appropriately for the duties undertaking.