Summary of submission by

IMPACT SIPTU and Unite

On behalf of members
(social care workers and others)
employed by
HSE and Section 38 and Section 39 Funded Agencies

Claim:

Various issues arising from the Organisation of Working Time Act 1997, and appropriate rate of pay

Labour Court Hearing: **11th September 2014 at 11.30**

IMPACT Representative: **Louise O'Donnell**
SIPTU Representative: **Paul Bell**
Unite Representative: **William Quigley**

Claim

The union side is seeking that the employer:
Comply in full with the Organisation of Working Time Act, 1997 in relation to:
The counting of the hours referred to as "Sleepover Hours" as working time; and
The provisions of breaks during working time and between shifts as prescribed by the Working Time Directive. and
Pay the appropriate rate for the hours referred to as "Sleepovers" in accordance with existing norms within the health sector and the wider public sector.

BACKGROUND

The Organisation of Working Time Act, 1997 implemented directive 93/104/EC of 23rd November 1993 of the Council of the European Communities concerning certain aspects of the organisation of working time to make provision in relation to the conditions of employment of employees and the protections of the health and safety of employees.

In the early days of the implementation of both the Directive and the Working Time Act there was a view that on-call time could either be active on-call or inactive on-call at the place of work and that inactive on-call did not count for the purposes of the Directive. This is what gave rise to notion of Sleepover and the payment for sleepover.

In 2000, the report of the Expert Groups on various health professionals, recommended that "A payment of IR£25.00 for "sleeping in" should apply and that sleeping in time to be a continuous period of 8 hours between 8.00pm and 8.00am and outside of the normal 39 hours duty.....

On 3rd October 2002 the European Court of Justice issued a finding in relation to a case called the Simap case (see Appendix 2).
They found " The answer to question 2(a) to 3 (c) is therefore that time spent on-call by doctors in primary health care teams must be regarded in its entirety as working time and where appropriate as overtime within the meaning of Directive 93/104/EC if they are required to be present at the health centre".

On 9th September 2003 the European Court of Justice issued a judgement in relation to a case called Jaeger
)."The European Court of Justice in its ruling on this case found as follows:
Paragraph 63 of the judgement states:
"According to the Court the decisive factor in considering if the characteristic features of the concept of working time within the meaning of Directive 93/104/EC are present in the case of time spent on-call by doctors in the hospital itself, is that they are required to be present at the place determined by the employer and to be available to the employer in order to be able to provide their service immediately in case of need. In fact, as may be inferred from paragraph 48 of the Judgement in Simap, these obligations which make it impossible for the doctors concerned to choose the place where they stay during waiting periods, must be regarded as coming within the ambit of the performance of their duties".
Paragraph 64 goes on to state:
"The conclusion is not altered by the mere fact that the employer makes available to the doctor a rest room in which he can stay for as long as his professional service is not required".
Paragraph65
……It follows from all the forgoing that the conclusions reached by the Court in the Simap judgement according to which time spent on-call by doctors in primary health care teams, where they are required to be physically present in the health centre, must be regarded in its entirety as working time within the meaning of the directive irrespective of the work actually performed by the persons concerned, must also apply in regard to on-call duty performed under the same regime by doctors such as Mr Jaeger in the hospital where he is employed".
The key findings in both these cases which are of relevance to the unions' positions are:
1) Irrespective of whether you actually carry out work if you are on-call on the employer's premises, the entirety of the time must be counted as working time and;
2) where appropriate it must be classed as overtime.
It is the union side's position that these cases clearly indicate that what is colloquially referred to as Sleepover is covered by the Organisation of Working Time Act and must be classed as working time. The Directive and the Act only recognise two types of time, either working time or rest time. It is the unions' contention that management have been in breach of this legislation since 2003.
From 2005 onwards both IMPACT and SIPTU have been actively seeking engagement with management in relation to the implementation of the Working Time Directive.
During this period of time the unions individually and collectively referred a number of cases to Rights Commissioners and the Labour Court.

On 1st August 2012 IMPACT again wrote to Mr John Delamere seeking a meeting in relation to sleepovers and we suggested an agenda of:
1) Compliance with the Organisation of Working Time Act in relation to sleepover and appropriate breaks between shifts;
2) Shift duration;
3) Appropriate rosters to comply with the requirements of the Act;
4) An appropriate rate of pay for sleepover hours.

We received a response on 7th August 2012 indicating that management would be in touch in September 2012 with a view to arranging a meeting.
A meeting was held in February 2013. However, no progress was made and the meeting broke down. The issue was then referred on behalf of IMPACT and SIPTU to the Labour Relations Commission.

The first conciliation conference took place on 7th May 2013.. At that meeting it was agreed that the union side would draw up the list of issues that they wished to see addressed. This was then submitted to the conciliation officer by letter on 8th May 2013 –

The next conciliation hearing took place on 14th October 2013. At that hearing management tabled a document setting out the definition of a sleepover, the times when it would occur and noted that it was in addition to the normal contracted weekly working hours for the grade. Management again tried to minimise the impact of the sleepover and compared it to a normal life at home. However they again took no cognisance of either the Jaeger or the Simap rulings.
. In this particular document one of the issues raised by management was the proposals for reducing the numbers of sleepovers. One of their proposals was to force staff to move people from full time hours to part time hours so that they could increase the number of sleepovers and still keep them within the 48 hours and to force part time workers to do more sleepovers. They were unaware that it was not legal for them to discriminate against part time workers in this manner.
At the conciliation hearing in November presentations were made by a number of the employments and while the HSE Children and Family indicated they may be able to look at moving people back to two sleepovers a week, which would give people a 55 hour working week, most of the other

employers indicated that they could not do it as it would involve huge costs.

Management confirmed at this conciliation hearing that staff on top of their 39 hour week could be expected to do 7 sleepover shifts in a fortnight (56 hours in total, which averages at 67 hours a week). No concrete proposals were tabled in terms of how we would get down to 2 sleepovers and how, going forward, full compliance would be achieved. At that stage the unions terminated the engagement and advised that we wanted, in accordance with the Haddington Road Agreement, to refer the issue to the Labour Court.
Management would not agree to the referral, which left the unions with no option but to refer the case under Section 21 of the Industrial Relations Act.
A Section 20 hearing was scheduled for 30th January 2014. At the hearing the court expressed concern that the case had been referred under Section 20 and therefore only binding on the union side. The court was of the view that the matter should be sent back to the Labour Relations Commission for completion of discussions and finalisation of all matters in dispute no later than 31st May 2014.

A meeting was held between the Conciliation Officer, Mr Brendan Cunningham, and the leads from the union and employers side and 10 issues were identified by the unions as requiring to be addressed

A conciliation hearing was scheduled for 27th March 2014, at which time it was expected that management would respond to the 10 issues. At the conciliation hearing on 27th March management indicated they were not in a position to respond but undertook to do so in advance of the next conciliation hearing, which was scheduled for 29th April 2014. On 28th April 2014 the union side received managements response to the items outlined in the Conciliation Officers letter of 28th February 2014.
While management accepted in their response that sleepover counts as working time in the context of the European Working Time Directive, and that the average working week, combining core working hours and sleepovers, should be 48 hours per week on average in order to comply with the EWTD regulations, the rest of their response was still based on the 2000 Expert Group Report and took no recognition of the fact that this report had been superseded by 2 European Court cases, Simap and Jaegar.

At the Conciliation hearing on 29th April 2014 management talked us through the document. It was agreed with the Conciliation Officer that the union side would submit a response to management and a response was submitted on 14th May 2014.
Again the union side rebuffed management's argument and pointed to the fact that the Expert Group of 2000 was based on assumptions that had since been overruled by both the Simap and Jaegar cases in 2002 and 2003 respectively.

A final conciliation hearing was held on 27th May 2014 at which stage it was agreed that no further progress could be made on the issues and it was agreed with the Conciliation Officer to jointly refer the issue to the Labour Court for determination.

UNIONS POSITION:

At Appendix 15 we have included samples of contracts. There are a large number of employers involved in this process so we have not been in a position to provide contracts from each employment.
What can be clearly seen from the contracts attached is that the staff in this category work a 39 hour week. In most of the contracts there is no mention made of sleepovers, while some mention that "From time to time you may be required to work outside of these hours." Other contracts state "You will be rostered for a normal working fortnight of x hours and may be required to work unsociable hours, including nights Sundays and bank holidays or shift hours as required by the organisation".
It is the unions' position that "Sleepover hours" having been defined as working time, should be carried out as part of the contracted hours and in circumstances where this is not practicable should, as is the norm in the public sector when you work outside your contracted hours, be paid as overtime.

we have included samples of rosters, which clearly show that sleepover hours are not being counted as working time and that staff are not getting the required breaks or rest periods as set out in the Working Time Act. For example, one of the rosters included show staff starting work at 4.00pm on Friday afternoon and working straight through until 10.00am on Monday without any rest or breaks or receiving compensatory rests as legally required.
It is the unions' side position that management have failed to implement the findings in Simap and Jaeger cases in respect of the categories of staff represented here today. It is also our contention that management were fully aware of these cases. It is clear from the judgement that on-call/

sleepover, call it what you like, where you are required to be present at your employer's place of business, regardless of what duties you may or may not carry out, is and must be counted as working time.

It is also the unions' position that management are in breach of Section 6, 11, 12 (1), 12 (2) and 15 of the Organisation of Working Time Act and Section 4, in that these workers are not exempt grades and the employers have not sought to enter into a collective agreement in relation to the provisions of Sections 11, 12 (1) and 12 (2) or Section 15 of the Act.
Following on from that it is the unions' position that sleepover should form part of the normal contracted hours, i.e. 39 hours, and where this is not possible should be paid as overtime.
We have attached for the Court's information an extract from a NERA document confirming that overnight workers are entitled to payment for all hours worked.
We believe that this supports the unions' position that where the sleepover cannot be carried out as part of the normal contracted hours that it should then be paid as overtime, which is the norm within the public sector.

We would draw the Court's attention to Section 3 of the HSE Terms and Conditions of Employment document and the first line under the heading "Overtime", which states "The following principles govern the grant of overtime: "Employees may be paid overtime rates for hours worked in excess of the whole time hours for the category/grade."
The unions' position is that from the time it became clear that "sleeping time" fell to be counted as working time that our members should have been paid according to these rates and we believe that the appropriate date for this is 9th September 2003, when the Jaeger judgement was issued.

COST INCREASING:
We are aware that management will claim that this is a cost increasing claim. However, we do not accept that. Management should not financially benefit as they have for the last ten years, from breaking the law and the fact that it will now, ten years later, cost them to comply with the law cannot be a defence. I would draw the Court's attention to paragraph 66 of the Jaeger judgement, in which it states "Interpretation cannot be called in question by the objections based on economic and organisational consequences, which according to the 5 member states which submitted observations under Article 20 of the EC Statute of the Court of Justice, would result from the extension to a case such as that in the main proceedings, of the solution adopted in Simap judgement." We believe that this supports our argument that management cannot use as a defence objection based on economic and organisational consequences.
We would also draw the Court's attention to Appeal Decision AD1262CD/12/135 where in the case of the worker concerned management had argued cost increasing and the Court found against them.
We believe the same principle applies in this case. It is unreasonable to expect the claimants in this case to work overtime and not get paid the same rate as their colleagues in the sector.

We would also draw your attention to Labour Court Recommendation LCR20671 What the unions re claiming is that our members are entitled to get paid overtime in the same manner and at the same rates as their colleagues in the sector as set out in the HSE staff manual.

CONCLUSION

It is the unions' side contention that management are in breach of Sections 4, 6, 11, 12(1), 12 (2) and 15 of the Organisation of Working Time Act and that breaches have been on-going for a period in excess of 10 years, with management fully aware that they were not compliant. We are seeking for the breaches to be rectified immediately and the members affected to be compensated.

Management in the document they submitted to the LRC in bullet point 4 advised that in relation to the Children and Family Agency that they would propose to work towards a 2 sleepover per week average over a period of 1 year, in addition to normal working time of 39 hours and they would expect that the minimum 80% of work locations would adhere to the 2 sleepover maximum and the required rest period between shifts by Quarter 1 2015. This deadline is totally unacceptable as management had previously indicated that this would have been achieved by Quarter 2 2014. It is also clear from the submission that management are unaware that averaging for a 12 month period is a further breach of the Working Time Directive. In relation to the intellectual disabilities sector management, in the same document, have stated that they would commit to moving to a situation whereby 1/3rd of service providers would be in a position to reach a situation of a maximum of 2 sleepovers per week on average, in addition to the core working week of 39th hours, by the end of Quarter 2 in 2015 and that they would aim to move towards such a scenario in an additional 1/3rd of locations by the end of 2015. They do not say when they would hope to achieve it for the final 1/3rd.

What is important to note here is that the 2 sleepover still is a 55 hours week and is still breaching the Organisation of Working Time Act. Management have given no indication of when they would hope to be compliant with the Act.

It is our contention that since at least 2003 management have breached their own guidelines in relation to the payment of overtime for work carried out outside of contract hours, and we are seeking that this be corrected and applied retrospectively to the date of the Jaeger judgement (September 2003), and finally we claim that, despite being aware of same, and the implications that the judgements held for staff, management failed to implement the findings in the Simap and Jaeger judgements and we are seeking immediate implementation of these findings and compensation for failure by management to implement in a timely manner.

Finally, we would draw to the attention of the Court the fact that, despite agreeing under Haddington Road– "The parties commit to completing the process currently under way under the auspices of the LRC no later than 31st December 2013" - management made provision in the 2013 and 2014 HSE National Service Plan in terms of resolving the issues for our colleagues, the NCHPs, but no provision was made for addressing the issues for this category of workers and this was confirmed by Ms Laverne McGuinness, Deputy Director, HSE, at the launch of the Service Plan.

We would ask the Court to find in our favour.