



Legal update — February 2019

Employment

Mencap will go to the Supreme Court!

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Unison has won permission to appeal the Court of Appeal's decision in the Mencap case (*Focus Care Agency Ltd v Roberts, Frudd and another v The Partington Group Ltd and Royal Mencap Society v Tomlinson-Blake*) to the Supreme Court.

What's the time frame?

It's likely that the Supreme Court will hear the case any time from October 2019 to March 2020.

The parties to the case now have up to 16 weeks to put forward their time estimate (though they are encouraged to submit their estimate before this deadline if possible). Cases are currently listed for hearing approximately 6 to 12 months after that.

Practical considerations for care providers

This news means that while the end is in sight in this litigation, uncertainty continues as to whether the national minimum wage (NMW) is payable for sleep-ins. We know that care providers are currently engaged in price negotiations for the year 2019/20 and will need to bear in mind that, depending on the Supreme Court's decision, sleep-ins may attract the NMW for the entire duration of the shift.

This will also need to be considered when it comes to putting together end of year accounts. Care providers will need to consider the possibility that sleep-ins may become payable in full, and not just for the time when staff are carrying out their duties, and factor this into any accounts they submit.

Which way will it go?

Will the appeal be heard by a Supreme Court as liberal as the one currently presided over by Lady Hale? She is due to stand down as President of the Supreme Court in January 2020 on reaching the age of 75 which is the official retirement age. Currently the justices are lobbying to have that retirement age abolished, but unless that happens between now and the Mencap hearing, it is possible that a successor to Lady Hale will have been appointed when the issue of sleep-ins is

considered again. That might change the way in which the court approaches the issue.

The law still stands

In the meantime, it's worth noting that the law still stands and currently employees doing sleep-in shifts are only entitled to the NMW when they are awake and carrying out duties. As far as employee relations are concerned, the message to relay is that this remains the position unless the Supreme Court decides differently.

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