



Legal update — August 2018

Employment

Unison seeks to leave to appeal Mencap decision

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As expected, following the Court of Appeal's decision in Royal Mencap Society v Tomlinson-Blake and Shannon v Rampersad (t/a Clifton House Residential Home) (the Mencap case), Unison has submitted an application for permission to appeal to the Supreme Court.

In the Mencap case it was held that employees are not entitled to the national minimum wage (NMW) for the full duration of their sleep-in shift because the work they are carrying out is "time work", and they are therefore only entitled to the NMW when they are awake and carrying out duties. Although the decision came as a great relief to care providers who have been faced with an ever-increasing pressure on budgets, it has also raised a number of practical challenges.

Tricky issues

We know that many of you are grappling with a variety of issues ranging from whether those of you who currently pay the NMW for sleep-ins should stop, to whether any back pay payments already made can be recovered. There's also the issue of whether commissioners will continue to contribute to the cost of contracts and what will happen to the SCCS which, following the decision in the Mencap case, is now (for the meantime at least) effectively redundant.

Staff engagement is another issue of importance. No doubt many of you will be facing disgruntled staff who may have been expecting back pay payments prior to the Mencap decision. The issue of keeping these staff happy is one which must be raising considerable challenges.

When will we know what's happening?

Leave to appeal to the Supreme Court is granted in 29% of all such applications so it remains to be seen whether Unison's application will be successful. The application generally takes 3 months or so, though there is a chance that Unison's application will be dealt with sooner. In any event, we should know whether the

application has met with success by the beginning of October, if not before.

If permission is granted then the Supreme Court will list the appeal for a hearing. This would probably be in the second half of 2019, though it's hard to give an accurate sense of timeframes at this stage.

We will keep you posted on whether Unison's application is successful.

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