

CASEWORK BULLETIN

2006 Number 2



Introduction

Welcome to our latest casework bulletin. The bulletin is designed to help our communication with our member agencies and describes some of the cases we are working on. It might give you some ideas for your own work or you might identify that you have a similar case to refer to us. Please use our morning telephone advice line if you want to find out more about any of these cases.

We are delighted to have a new staff member in our social security unit. His name is Abed Alhamid Natur and he will be working with us two days per week.

Ellen Weaver, immigration caseworker in our Western office, has left the Law Centre after many years. We are however committed to providing an immigration casework service in the Western area. Kate Jackson, also a member of our immigration unit, is leaving to take up work in the Republic of Ireland. Lois Hamilton, solicitor, is working with us until a permanent replacement is recruited.

New area of work

We will be launching a mental health legal service this autumn. We have two new solicitors starting with us in October: Louise Arthurs and Mary Traynor, who will specialise in mental health law. The aim of the service is to build capacity for effective advice and representation for people with mental health difficulties. We will be developing expertise on the provisions of the Mental Health (NI) Order 1986 and associated legislation and case law, offering an advice line service, delivering training and information and providing representation at both mental health review tribunals and the higher courts as necessary.

We are very excited about this new area of work and are looking forward to working with clients, members and statutory bodies in this field.

Maura McCallion

Assistant Director (Casework Services)

September 2006

Social Security



Judicial Review

We have continued to represent clients who have received overpayments of tax credits. When Dawn Primarolo, the Paymaster General, announced in November 2005 that recovery of overpayments would be suspended while the dispute process was ongoing, we promptly requested suspension of recovery in all the cases in which we were representing. Unfortunately, recovery continued until we eventually wrote to the Revenue's legal department threatening judicial review actions in two cases to force HMRC to suspend recovery in line with its policy. Recovery was suspended but we are anxious to ensure that this policy is introduced by HMRC in all cases and we welcome referrals on this issue.

Several cases have now been through the disputes process and we have ensured that overpayments of more than £30,000 have been written off. In other cases where the overpayments have not been written off, the Adjudicator has recommended that the Revenue pay compensation to clients who have received poor service. While the disputes procedure can be slow and difficult to deal with, it is worth pursuing.

Social Security Commissioner

Our successful test case result at tribunal level challenging the amended habitual residence test as it is applied to an A8 worker has been overturned by the Social Security Commissioner. The applicant is a Polish national who worked for over twelve months but was not registered under the Home Office Worker Registration Scheme. Following a breakdown in her relationship, she gave up work to look after her daughter and was turned down for Income Support on the grounds that she did not have a right to reside for the purposes of the habitual residence test. The Law Centre had successfully argued at Tribunal that the Accession Treaty 2003 does not derogate from Articles 12 and 39 of the EC Treaty and Article 7(2) of Regulation 1612/68 and Regulation 1408/71. It was argued that the current arrangements discriminate against A8 workers and are contrary to European law. The Commissioner found that the Tribunal had erred in its interpretation of European law in our client's favour but has granted her leave to appeal to the Court of Appeal.

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The Commissioner was asked at a recent hearing to consider the correct interpretation of European law for a returning UK national who, having worked in Germany, wished to claim Jobseeker's Allowance (JSA). The person had worked in Germany and then was not economically active before returning to the UK. He was subjected to a residence requirement and this is the basis of the appeal. The legal questions involve interpretation of the term 'worker' in European law (Regulation 1612/68), whether it is lawful and proportionate to subject him to a habitual residence test and require that he show an appreciable period of residence in the UK before being entitled to JSA. We have now been asked to draft the terms of a potential referral to the European Court of Justice. We will be suggesting that the questions for the Court, if referred, should be: (i) do principles of European Community law require an applicant be treated as habitually resident in the United Kingdom from his date of claim for Income-based JSA? and (ii) is the applicant a worker for the purposes of Regulation 1612/68?

Tribunal

We are acting for a mother in a shared care arrangement. A problem has arisen where there are competing claims for Child Tax Credit (CTC) when parents separate. As the law stands, if one parent in a shared care case makes an unsuccessful competing claim for CTC and appeals then the parent who has CTC is not a party to the appeal. This means s/he has no right to attend a hearing, to be represented or to appeal to the Social Security Commissioner. It is our opinion that it might be possible to challenge the legislative provisions under the ECHR and any advisers coming across this issue should contact Law Centre (NI).

We have also been representing in cases where couples claiming tax credits separate during the tax year and entitlement for the year is cancelled and not offset against entitlement the person would have as a single claimant or member of a new couple. These cases involve consideration of complex legal issues around the definition of a couple and can be appealed to a tribunal although HMRC only accepted that there were appeal rights after protracted correspondence. HMRC has also introduced a policy this year that it will consider an offset in such cases and we welcome referrals of cases where there have been problems enforcing this policy.

We were successful in an appeal in a 50/50 shared care case at Tribunal. The former wife had been receiving Income Support and Child Benefit for three children. Her former husband applied for and received CTC for the three children. The local social security office deducted his CTC from his Income Support. We argued that CTC income should be ignored for Income Support purposes.

We have had two clients who are having difficulties getting bail due to restrictions on their access to Housing Benefit as A8 nationals. We are looking into the options available to them and may appeal a negative decision on human rights grounds, possible discrimination in relation to the protection of their article 5 ECHR right to liberty.

We have been able to establish that a student who has been receipt of Disability Living Allowance (DLA) since before 1 June 1992 will be able to continue to receive that benefit even though he will be in Dublin studying for most of the year. This is a result of the transitional protection built in when the government decided that it would not pay DLA to those not normally resident in the UK. The receipt of DLA has also helped the student to continue to access funding from the Independent Living Fund.

Immigration



High Court - Judicial Review

We are awaiting a hearing in our judicial review challenge to the decision of the Home Office not to include our Albanian client in the family concession scheme for people who made asylum claims prior to October 2000.

Asylum and Immigration Tribunal

We were successful in a number of reconsideration hearings earlier this year and have several cases listed for reconsideration hearings in the autumn, mostly by video link to London. Success at this stage is significant given that the appeal procedures are designed to filter out unmeritorious arguments. One of our current reconsideration cases involves a client who has suffered torture, another is for an Iranian client who had been critical of the government.

Our success at the Asylum and Immigration Tribunal in one of our European law test cases has been challenged by the Home Office who has been granted a reconsideration hearing. The case concerns the right of a mother to stay in the UK with her Irish born child, whom she is able to support financially as she runs a business here. The case is a challenge to the current immigration rules and it is argued that, in several ways, the rules flout the letter and the spirit of last year's European Court of Justice ruling in *Chen and Zhu*. Most significantly, it is argued that the rules contradict the Court's explicit finding that the origin of the primary

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carer's resources is immaterial, in that they effectively preclude those resources from deriving from employment. We have a second test case at the same stage, referred by UNISON, where at the time of the child's birth both parents were working lawfully in the UK.

We were successful in an appeal against a refusal of an EEA residence document for the wife of an Irish man living in Northern Ireland. This young man left university as a result of mental health difficulties and has not been able to work since. Our argument that he retained his status as a worker even though he is permanently incapacitated was successful on appeal and as such his non EEA national wife was entitled to a residence document allowing her to live in the UK with him.

We are awaiting a hearing before the Asylum and Immigration Tribunal in a case where we are asking the judge to review the case law on carers in the context of article 8 ECHR, right to respect for private and family life. Our client wishes to be given leave to remain in the UK to allow her to care for her partner who has a disability.

Strategic applications

We are making several applications for EEA Registration Certificate and Residence Cards for non EEA nationals who are in a relationship in Northern Ireland with an EEA national, for example, an Irish national. We will be testing the new concept of a 'durable relationship'. Regulation 8 (5) of the Immigration (European Economic Area) Regulations 2006 provides that a person must be recognised as an extended family member if s/he is the partner of an EEA national and can provide information to the decision maker that s/he is in a durable relationship with the EEA national.

We were successful in an application made on humanitarian grounds for an elderly client in ill health. He was given leave to remain in the UK.

Employment



Industrial Tribunal

We recently settled three long running cases concerning pension entitlement. The settlement was for nearly £50,000. These cases had been in the system for nine years.

We successfully established unfair dismissal at tribunal for a client and settled it recently for £7,000 prior to a remedies hearing.

We have found that a number of cases referred to us involve the employer not using the statutory dismissal procedures. In one case, referred by Newtownards CAB, a settlement of £4,500 was agreed. In another, where a man was dismissed for behaviour which took place before an internet use policy was introduced, a settlement of £2,500 was agreed. A case was settled for £5,000 without issuing tribunal proceedings after early negotiations with the employer's solicitor. Our client was a 64 year old building clerk of works who was dismissed in his last year of employment before retirement. Again, the employer did not follow the statutory dismissal procedures.

A case of failure by an employer to follow the new rules on grievance and disciplinary procedure was settled for our client with a payment of £1,500. A further case is going to tribunal and may be a test case on the new grievance and disciplinary rules. Our eleven clients were dismissed without the correct procedures being followed.

We are awaiting the outcome of a tribunal hearing on our clients' claim for unlawful deduction of wages by their nursing home employer. One case recently in tribunal involved two migrant workers from the Philippines - a nurse and a care worker. They suffered (what we believe to be unlawful) deductions from final wages when allegedly paid for more holidays than entitled to on the termination of their employment. The case also involves a request for an uplift in compensation for the employer's failure to follow statutory grievance procedures. A decision is awaited from the Tribunal. This case was referred by Omagh Independent Advice Services. We successfully settled another unlawful deduction of wages case for two Polish clients who had their final pay packet reduced significantly by their Care Agency employer. These cases were referred by Bangor CAB. We also recently settled a case for a trainee car salesman who was dismissed after asking for the minimum wage.

A case where a client lost their job on the transfer of the ownership of a hotel was settled for £1,500 after the Law Centre intervened to make submissions on the application of TUPE regulations. This case was referred by Omagh Independent Advice Services.

Legal aid has been granted for Counsel's opinion on the possibility of a High Court action. The case has important implications for the implied contractual term of trust and confidence owed by an employer. The issue is to what extent it should act to secure benefits for a permanently incapacitated employee under a PHI contract which is in place with an insurance company. We will also be considering the ability of employees to sue insurance companies directly under the Contracts (Rights of Third Parties) Act 1999.

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**Community Care****High Court - Judicial Review**

We were successful in a judicial review case involving Armagh and Dungannon HSS Trust. The trust had decided that it had no power to give financial assistance with rent during a period when a client is required to pay rent on two houses, a property which is being adapted for his needs as a disabled person and temporary accommodation while the works are being carried out. The High Court issued a declaration that 'facilities' in s.2(e) of the Chronically Sick and Disabled Persons (NI) Act 1978 may include the cost of temporary accommodation costs for a person who is required, in order to secure greater safety, comfort or convenience, to vacate her/his home during the carrying out of any works of adaptation in her/his home. This case was referred by Housing Rights Service.

We have had a number of delayed hospital discharge cases in recent months which have been settled prior to judicial review proceedings being issued. In one case, our client was a young man who sustained a serious spinal injury. Ulster Community and Hospitals Trust had suggested that he temporarily go into residential nursing care rather than immediately fund an intensive domiciliary care package. The Law Centre brought human rights issues affecting our client to the attention of the trust and following correspondence our client was discharged home with an appropriate care package. We also had a delayed discharge case involving Sperrin Lakeland Trust and a man who suffered severe spinal injuries as a result of a motorbike accident. He was medically fit for discharge from hospital but was unable to return to the community as a result of the failure by Sperrin Lakeland Trust to provide appropriate services. The trust agreed to provide a care package after correspondence.

We receive a substantial number of enquiries on valuations by trusts of joint interests in property. In a case referred to us by Age Concern, a man who had been placed in residential care by South and East Belfast Trust had been deemed liable for the full cost of his placement. The trust had assessed his capital asset (a one third interest in a dwelling house) with a value of more than the allowable upper capital limit. A debt of some £20,000 had accumulated and the

trust was seeking to place a legal charge on the property. Prior to the issue of Judicial Proceedings, the trust agreed that the valuation of our client's capital was not in line with departmental guidance (CRAG) and should have had a 'nil' valuation. The trust had valued the 'property' and not our client's 'interest' in the property.

We have two cases involving the extent of a trust's responsibility for financially assisting migrant workers where the young adults concerned are vulnerable and destitute, in one case through mental health difficulties and in another as a result of recent childbirth. Both cases are at correspondence stage at present. In one case, we are working closely with Lisburn CAB.