

Introduction

Welcome to our e-bulletin where we share some of our interesting cases. We hope this gives you some ideas for your own work and alerts you to when it might be possible to take advice or refer cases on to us. We appreciate the strategic and complex referrals we have been getting so far this year so please keep them coming!

We have one new staff member since our last bulletin. Caroline Cooley solicitor has replaced Jo Wilson as the community care legal adviser in our Western office.

Maura McCallion

Assistant Director (Casework Services)

July 2009

Social security



Tax credit overpayment

A client who had been through two stages of the HMRC complaints procedure phoned for advice regarding alleged overpayments of tax credits for the years 2007/2008 and 2008/2009. These had arisen due to an error in recording her child's year of birth as 1997 instead of 2007.

The Law Centre informed the legal department of HMRC that there would be grounds for judicial review if HMRC did not comply with its statutory duty to issue a decision advising the client of appeal rights. HMRC agreed to waive recovery in this case as all claims are cross checked with Child Benefit, which did show the correct date of birth and should have prompted it to make

further enquiries. As it did not do this, it accepted that its error caused the overpayment.

Waiver of recovery of Income Support overpayment

Our client received compensation when her husband was the victim of a sectarian murder. She claimed benefit several years after receiving the compensation but did not declare it on the original claim form as she did not think it was relevant. The compensation money has been spent and she faced a large repayment although now living on a low income. The Department agreed to waive an overpayment of around £25,000, has accepted that she is now within the capital rules and has reinstated her Income Support.

Backdating of entitlement to the Severe Disability Premium (SDP)

We were successful before the Social Security Commissioner in case C4/08-09(DLA). The Commissioner considered the position where a claimant has been awarded the care component of DLA at the middle rate (while meeting the other requirements for entitlement to SDP) but fails to inform the Income Support office of this fact. The Commissioner's judgment means that there is no doubt now that where a claimant becomes entitled to the appropriate rate of DLA but fails to inform her/his local office for some time, the award of the SDP should still be backdated to the date that the claimant became entitled to DLA.

This is assuming, of course, that the claimant continued to satisfy the other criteria for SDP throughout the backdating period and an IS10 form will still probably be issued in order to confirm this.

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Community care



Charging for intermediate care

We corresponded with Belfast Trust on charging for intermediate care in contravention of departmental guidelines. The client was discharged from hospital into an intermediate care unit but remained there longer than anticipated due to the trust's difficulties in arranging her domiciliary care package. She was then charged the full fees for her entire stay although her extended stay was nothing to do with her and was beyond her control. The departmental guidelines suggest that intermediate care should not normally exceed six weeks.

The trust agreed that it would pay outstanding fees.

Inappropriate accommodation

A client in his late fifties with a form of dementia was discharged from hospital in March 2005 into residential care. This was not a suitable placement for a man of his age and disability. His placement was initially temporary but the South Eastern Trust (previously the Down Lisburn Trust) failed to find him suitable alternative accommodation. In 2008, the trust decided that he would have to remain in residential care. He became withdrawn and depressed and had difficulty getting motivated each day.

The Law Centre identified significant failings in the monitoring of this client's care. We arranged up to date assessments of need and attended a number of multi disciplinary meetings on his behalf.

We also assisted the family in an application for supported living accommodation in Lisburn to which the trust was initially opposed. The trust argued that residential care was now the most suitable accommodation for the client.

Following representation to the panel assessing applications to the supported living accommodation, the client was offered accommodation. He moved in February 2009. He has improved significantly and socialises with other residents.

Difference between home care fees charged and the rate Trusts are willing to pay for care

We have had a number of cases where family members have been asked to pay a 'top up' fee to ensure that a disabled or older relative can secure a care home placement. Our concern is that individuals, many of whom are on low incomes, are being left to handle the consequences of an ongoing difficulty between the public and private/ independent sector as to appropriate funding for long term care.

A client in the Belfast Trust area was unhappy about a supplement charge imposed by a residential care home. The matter was settled through correspondence and the trust agreed to pay the supplement charge as part of the care home fees.

We raised the issue of a potential breach of departmental guidance with Belfast Trust in relation to a request for a third party top up payment for nursing home fees. The client had been placed in the home which met all her needs. No other home had been identified by the trust prior to her placement. The trust agreed to pay top up payment to enable her to remain in the home.

Recognition of carer's needs

We corresponded with the Northern Trust on the assessment and provision of services for an elderly man with physical disabilities who cares full time for his wife who has advanced dementia.

The trust had initially been of the view that the services provided to the wife were sufficient to meet the husband's needs as well. The trust then conducted further assessments

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on the carer's own needs as a service user in his own right.

Additional services, including direct payments, are now being provided to meet the man's individual needs.

Immigration



Extreme delay in dealing with asylum application

A Chinese national contacted us in 2008 about a letter forwarded from his previous solicitor saying that the Home Office had made a decision on his asylum claim on the grounds of religious persecution in 2000, the year after he arrived in the UK. The client had not been aware of this and was not given the opportunity to appeal.

The Law Centre lodged an appeal and raised the failure to comply with the 1984 Notice regulations. It was conceded that our client had never in fact been refused asylum as no decision was ever served. A decision was then eventually made in April 2009, some ten years after his arrival in the UK, to grant our client refugee status.

Delay in dealing with exceptionally compassionate application

Leave was granted to the Law Centre to bring judicial review proceedings against the UK Border Agency on behalf of a severely disabled and ill US national. We argued that there was an unreasonable delay and a failure by the government body to follow its own guidelines on exceptionally compassionate cases. The UKBA granted leave to remain before the case proceeded to full hearing. As the client now had permission to stay in the Northern Ireland with his family, the High Court refused to make a ruling on the legality of the delay.

Impact of abuse

A Zimbabwean woman's history of previous abuse left her very vulnerable to an abusive live-in work situation when she arrived in Northern Ireland. She eventually was helped to leave her employer and claimed asylum. The delay in claiming asylum and the impact on her credibility arose at her asylum interview. We made representations to ensure that her case was considered in the context of her history. She was then granted refugee status.

The Law Centre was delighted to win an appeal on asylum grounds for a woman from Pakistan who had suffered severe family violence and whose welfare and life would have been unprotected by the state in her home country. Evidence from a Pakistani NGO was considered by the court. A previous immigration judge had refused the appeal. Reconsideration proceedings took over two years but this success resulted in the grant of five years' leave to remain for the client.

Deportation

The Law Centre secured bail for a European national who had served his prison sentence but was being held in indefinite administrative detention by the immigration authorities. The Law Centre relied upon new UKBA guidance which allowed the prisoner to be released in advance of an address being provided by the Probation Service, to avoid a breach of his ECHR article 5 rights. The Law Centre then successfully appealed against his deportation.

Employment



Exploitation of migrant workers

The Law Centre represented two Polish workers at the Industrial Tribunal in a case alleging race discrimination. Our clients' case was that they were being paid a lower hourly

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rate than their Northern Irish colleagues. The case was strongly resisted by the employer and the hearing lasted seven days.

The tribunal issued its decision in March and held unanimously that our clients had been discriminated against on grounds of nationality and made a total award in excess of £22,000 to the workers. In addition to loss of earnings, the award included compensation of £5,800 to each worker for injury to feelings. The tribunal highlighted that this was in recognition of the 'significant injury to feelings' and the fact that the treatment was not a one off incident but stretched over a period of more than two years. The tribunal also awarded an uplift of ten per cent on the overall award for the employer's complete failure to follow the statutory grievance procedures.

There has been a marked increase in the number of calls relating to the dismissal of pregnant migrant workers. In one recent case the employer settled before proceedings were issued. We believe this was due to the very strong evidence about our client's circumstances.

Redundancy

We advised two employees who were made redundant without notice and who received no redundancy payment or pay in lieu of notice. As the employer was in financial difficulties, we negotiated for the settlement to be made in staged payments.

Mental health

Unlawful detention in Muckamore Abbey Hospital

On our client's application for judicial review, the High Court held that the tribunal's power to direct a patient's discharge at a future date in circumstances where there is a mandatory duty to discharge is unlawful.

Our client, a 25 year old man with severe mental impairment, had been detained in hospital for treatment since 2002. A Tribunal convened in April 2008 and decided that the criteria for continuing detention were not satisfied. Notwithstanding, in order to facilitate the making of suitable aftercare arrangements, the tribunal deferred our client's discharge for six weeks in accordance with the tribunal's power under Article 77(2) MHO 1986. One reason for the deferral was the lack of adequate arrangements for aftercare provision at the time of hearing, a significant problem which has been highlighted in the media. The High Court ruled that if the detention criteria are not met there is no power to continue to hold someone in hospital even if community care arrangements are not in place.

Wrong burden of proof applied by Mental Health Review Tribunal

Two of the tribunals in which we were representing people detained in hospital led to judicial reviews. The tribunals clearly applied the wrong burden of proof, looking to the person detained to prove that he or she was not lawfully detained rather than placing the onus on the detaining authority to justify its decision. The placing of the burden of proof on the detaining authority was a change that was introduced in order to ensure compliance with the Human Rights Act 1998. At the application for leave stage in the High Court, the tribunals conceded that they had acted unlawfully.

Restrictive hospital environment not required

We represented a woman diagnosed with schizophrenia and dementia at her Mental Health Review Tribunal which resulted in her discharge from the detention order. The tribunal accepted that the trust had not satisfied the legal criteria for detention in the

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psychiatric hospital and were particularly concerned that the trust had not considered a more community based option.

As a result of her discharge, she is living in a residential care home and agreed to stay at the home as long as the trust made arrangements for her to be taken out for coffee and shopping and to the museum/library. The trust also accepted, on our submission, that given that residential care had not been the client's preferred choice, it should make a guardianship application. This means that the care home fees are paid by the trust and the client continues to have protection/safeguards under the mental health legislation.

Scrutiny of lengthy detentions in hospital

We represented a patient at a tribunal at which her detention was upheld. The client's decision making capacity is impaired and this impacts on her ability to initiate reviews of her situation. She has been in the psychiatric hospital for about 30 years. When a person does not apply to the tribunal her or himself, there is a duty on the trust to refer her/him to the tribunal. This is to take place every two years in long term detentions.

The Law Centre considers that the current legislation is not specific enough about the time frame for referral and that the period of two years without independent judicial scrutiny is too long. We are exploring how a judicial review could be taken to test this.

In this case, an obstacle to bringing a test case has been the fact that client has savings which bring her over the limit for legal aid. This is usual for patients who spend long periods of time in hospital as they have limited opportunity to spend their benefits. There is a difficulty in accessing justice, however, as she does not have sufficient money to bear the costs of an unsuccessful case. We are interested in referrals of similar cases to build up a picture of the difficulties.

For copies of decisions referred to in this bulletin please contact Mary Blair, Law Centre (NI) librarian.

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www.courtsni.gov.uk/en-GB/Judicial+Decisions/

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