# CASEWORK BULLETIN

2010 Number 1

Law Centre (NI)

## 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 are always interested in complex and strategic cases.

Given the current climate, we are starting off with some of our employment cases. Please also visit www.lawcentreni.org to see our redundancy toolkit for advisers.

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**Assistant Director (Casework & Training)**
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## Employment

### Pregnant employees

We have continued to see cases involving breach of the statutory rights of pregnant employees, including discrimination and unfair dismissal. Calls to our advice line seem to indicate that the economic crisis has exacerbated this problem.

In one case, a pregnant employee was selected for redundancy and we lodged grievances on her behalf concerning unfair dismissal, pregnancy related discrimination and failure to offer her another suitable job that was available (employers must offer a pregnant employee a suitable available job in priority to other employees if they are making her redundant and such an opening exists). We were able to settle the case for £9,000 at the grievance stage before legal proceedings had to be issued.

We represented a client who had informed her employer that she was pregnant well in advance of the notification limit for Statutory Maternity Pay. The employer made it difficult for the client to take time out to attend her antenatal appointments and suggested that she would not have been awarded her recent pay rise if he had known that she was pregnant. He also failed to carry out a pregnancy risk assessment. She resigned after her employer tried to change her notice periods and other contractual terms and tried to cut short her hours of work significantly, which would reduce any Statutory Maternity Pay due on her maternity leave. The client claimed constructive dismissal, sex discrimination, sex discrimination on grounds of pregnancy and harassment. The tribunal found in favour of the client on all claims and awarded a total of £27,180.55, including an award of £18,000 for injury to feelings.

### Redundancy and unfair dismissal

We acted for an employee who had been selected for redundancy despite having the longest service in the company and a wider range of skills than most other employees. The employer had not followed the statutory dismissal procedure and had not shown the employee any selection criteria before dismissal. This made the dismissal automatically unfair. The employer said that the company did not have to use selection criteria because it was not a

large enough employer. Our client was convinced that he had been dismissed because of previous problems he had had with the foreman, including disputes about health and safety. Just before the listed tribunal hearing date, the case settled for £18,000.

In another case, our client complained about unfair dismissal and selection for redundancy, and the case settled after a preliminary tribunal hearing for £10,000. The case also involved a whistle blowing claim.

We acted for a client who had settled a matter of unfair dismissal through the Labour Relations Agency. The employer then defaulted on the agreement, saying that it would neither pay the agreed £4,000 nor give the agreed written reference. The client was told by the employer that it would cost her thousands of pounds to try to enforce the judgment. By entering into correspondence, we secured the payment in full to the client and the written reference was given, without the need for costly civil litigation.

We acted on behalf of a migrant worker in an unfair dismissal case referred to us by the CAB in Derry. The case was settled before the case management discussion and the client received the sum of £8,750.

Another client's case was settled for £10,000 at an early stage. Once again, he had been made redundant, but proper procedures were not followed and there was evidence that another employee was doing his job immediately afterwards. Redundancy was used as an excuse to dismiss when the employee queried changes to his contractual position.

As these settlement figures illustrate, awards for loss of earnings following unfair dismissal are now likely to be larger as tribunals accept that it is likely to take much longer to find another job.

### Unreasonable changes to contracts

We represented several employees who were being put under pressure to sign a new contract that substantially changed the terms of their employment. The employer was threatening to dismiss anyone who did not sign. We informed the employer that we would lodge unfair dismissal claims for our clients if this happened. We were then able to enter into correspondence and negotiation with the employer, eventually agreeing compromise terms acceptable to both parties.

Although employers can seek to justify a dismissal as fair because of failure to agree a reasonable change of contract, they must show that there is a pressing business need to impose a change and that it is reasonable, given the negative effects on employees, to override their objections.

In this case, we were confident that unilateral imposition of a term that allowed the employer to deduct an unlimited amount of money from wages for any damage to vehicles or contents, however caused, would not be seen as reasonable.

### Annual leave and sickness

We represented a client in a Working Time Regulation (1998) holidays case involving the impact of the ECJ decision in Case C 277-08 *Pereda v Madrid Movillidad SA* [2010] 1 CMLR 3. The case was settled for £1,579 after the issuing of the decision in *Pereda*. The ECJ held in the *Pereda* judgment that, if workers are on sick leave during previously arranged annual leave, they are entitled to take the an-

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nual leave at another time, even if it falls outside the annual leave year.

### Flexible working

In another case, our client resigned because of the employer's refusal to allow her request for flexible working to care for her child and the manner in which the request had been handled. We advised her in relation to claims of constructive dismissal and sex discrimination.

Employers refusing flexible working requests have to show that the decision is justifiable, as a greater proportion of such requests are made by women and an unjustifiable refusal could therefore amount to indirect sex discrimination.

In this case, there was also a claim of direct sex discrimination, as our client could point to male employees who had been allowed to work from home.

We entered into negotiations with the employer during the grievance process and the case settled for £18,000 without the need to issue legal proceedings.

### Sexual orientation discrimination

We represented an employee who had been subject to a campaign of homophobic taunting and bullying in the workplace. He eventually had to resign. Although he did not have the requisite year's service to allow him to claim constructive dismissal, we were able to advise him that he could take action under the Protection from Harassment (NI) Order 1997 through the civil courts or bring a claim for harassment due to sexual orientation to the industrial tribunal. We lodged the latter claim on his behalf and the case settled just before hearing. In addition to financial compensation (£,3000), the respondent organisation agreed to carry out training for all its staff in relation to bullying and harassment and sexual orientation issues, and to liaise with the Equality Commission to request the latest guidance on avoiding sexual orientation discrimination.

Although someone claiming sexual orientation discrimination does not have to identify her/his orientation, the respondent initially sought to defend the claim on the basis that our client was not, in fact, gay, so could not be protected by the legislation. We were able to rely on the Court of Appeal decision in *English v Thomas Sanderson Blinds Ltd (2008)* which established that homophobic abuse is actionable even if the subject is not gay, or not actually perceived by the harassers to be gay.

## Social security

### Training allowances for EC nationals

We recently acted for a client who was a dependant of an EC national with worker status. The client's training allowance for a college course he was undertaking had been stopped without notice. This was as a consequence of guidelines forwarded to the college by the Department for Employment and Learning (DEL). These guidelines stated that EC nationals were not entitled to the training allowance while residents of Northern Ireland were.

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We made representations to DEL arguing that the guidelines were in breach of EC law. As a result, new guidelines were adopted for individuals from other EC member states undertaking job skills training in Northern Ireland, and our client was paid all arrears of the training allowance.

### Overpayment of Carer's Allowance

We represented a client in relation to an overpayment of Carer's Allowance. The Department claimed that the overpayment arose due to the client misrepresenting and/or failing to disclose certain material facts, including that she was employed and earning more than the stipulated earnings during the relevant period.

We argued successfully at tribunal that the Department had failed to discharge the onus of proof and that our client had not misrepresented or failed to disclose.

### Housing costs

We acted for a client who was refused help with mortgage costs by the Social Security Agency in November 2009 under Social Security (Housing Costs Special Arrangements) (Amendment and Modification) Regulations 2008.

The Agency had claimed that the client did not satisfy the prescribed shorter qualifying period before full housing costs could be paid and, as such, could only be paid from May 2010.

We argued that the decision should be reconsidered on the basis of the Social Security (Housing Costs Special Arrangements) (Amendment) Regulations 2009 which came into force on 5 January 2010. These regulations shortened the prescribed qualifying period. The Agency referred the case for legal opinion and then accepted our interpretation of the 2009 regulations, revising the qualifying date for payment of housing costs to the client.

### Right to reside

In February of this year, the European Court of Justice (ECJ) gave two very helpful decisions, in *London Borough of Harrow v Ibrahim* and *Teixeira v London Borough of Lambeth.*

The ECJ decided that the child of an EU migrant worker has an independent right to reside in order to continue her/his education, under article 12 of EC Regulation 1612/68. The parent who is the primary carer of a child in education also has a right to reside. This continues even if the parent loses her/his job and is not self sufficient. The child's right to reside to access education will not end at 18 but will last until her/his education is completed. The right to reside of the parent who is the primary carer may continue after the child is 18, depending on the facts of the case. This right to reside provides access to means-tested benefits and access to public housing.

We have been able to use this case law in a number of right to reside appeals that we have been involved in.

The Department has now accepted that EU former workers who have children in education do have a right to reside for out of work benefits.

Guidance issued by the Department, however, suggests that A8 nationals who have not satisfied the rules of the Workers Registration Scheme will not be accepted as having a right to reside even where their children commenced education while they were in lawful employment.

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We are representing a Latvian client who is affected by this issue in a Jobseeker's Allowance (JSA) appeal which is being considered by the Social Security Commissioner. We will be asking the Commissioner to consider making a reference on the issue to the ECJ.

We have been corresponding with the European Commission about the operation of the right to reside rule, particularly in relation to nationals from the A8 states. We were delighted to hear in June 2010 that the College of Commissioners has decided to open an infringement procedure against the UK and that it intended to send a letter of formal notice to the UK authorities soon. This is the first stage in the procedure. If the UK and Commission cannot resolve the dispute through correspondence, then the Commission may decide to bring legal action against the UK at the ECJ.

The Commission is concerned that the right to reside rule is contrary to EU law insofar as it is excluding from social security benefits EU citizens who are covered by the EU Regulation on social security (1408/71 now replaced by Regulation 883/2004). It also believes that A8 citizens will have a right to reside where they have worked for more than twelve months if their last job was registered. We are relying on these arguments in a number of social security benefit appeals relating to right to reside.

We intend to seek a reference to the European Court concerning whether a Polish man who had worked in the UK for almost two years with the same employer but had had an interruption of more than 30 days in his registration can claim a right to reside under Article 7(3) of Directive 2004/38 and / or whether he has a right to claim Income-based JSA under Regulation 1408/71.

### Homelessness

We were recently contacted by a 59 year old Polish man with several health problems who had worked in Northern Ireland for more than two years before he lost his job in January 2009. He had become homeless and destitute and had failed to pursue a claim for Contributions-based JSA due to language difficulties.

We arranged for him to make a claim for JSA as he is anxious to find work. Although we contacted the Social Security Agency on 8 June, he was not able to obtain an interview to sign a jobseeking agreement until 2 July. In the meantime, we have submitted a claim for Disability Living Allowance (DLA) and he has been given accommodation by a local hostel.

### Interim payment of JSA while right to reside appeal is ongoing

In a similar case, we had to request interim payments of JSA for a Polish client while a right to reside appeal was ongoing. When these were refused, we obtained legal aid to challenge the refusal in the high court. The client was able to get temporary work and the judicial review did not go ahead. We are looking for similar cases to challenge the policy of the Department to refuse interim payments in such circumstances.

### Right to reside and Child Benefit

In the last bulletin, we mentioned that we had two appeals for a Latvian woman concerning right to reside and entitlement to Child Benefit. One of the appeals was settled when the Republic of Ireland agreed to pay 9,700 euro in arrears of Child Benefit and to make monthly payments. Although the couple both live in Northern Ireland, the husband works

across the border. The appeal regarding entitlement for the period before he began to work in the Republic is being considered by the Social Security Commissioner. It relates to the test case issue of whether the couple were entitled to Child Benefit under EU law while working but not registered.

### Disability Living Allowance

The last bulletin also mentioned the case of a man who had been in receipt of DLA before he moved to live in the Republic of Ireland in 2002. We had successfully challenged a decision to recover an alleged overpayment of £7,500 of DLA and had appealed again to try to establish ongoing entitlement to benefit. The man's care component of DLA has been reinstated and backdated for two years. We are continuing with the appeal in order to claim backdating to 2005 and to test whether the mobility component of DLA can be exported under EU law. This issue is going to the European Court under a separate referral.

One of our clients had challenged a decision that she was not entitled to DLA as she was here on a spousal visa which was stamped 'no recourse to public funds'. Her husband is English and they had met and married when he was working in the USA. When he returned to work in Northern Ireland she had joined him.

We won the appeal before the President of Appeal Tribunals arguing that she was the family member of an EEA national. The Department appealed this to the Social Security Commissioner, arguing that the EEA national must be exercising treaty rights for this to apply. As her husband is English and has never worked in another EU state, the Department argues he cannot benefit from this rule which would assist an Irish national married and working in the UK.

The Commissioner held a hearing of the appeal but has decided to delay judgment until the decision of a case being considered by the Grand Chamber of the European Court of Justice, on whether EU nationals who have not exercised treaty rights can rely on EU law. In the meantime, we helped our client obtain indefinite leave to remain in the UK and her DLA is currently in payment.

### Delay in appeal regarding national insurance contributions

We are representing an 87 year old man in an appeal concerning his entitlement to be credited with national insurance contributions for the period of 1957 to 1960 when he was detained without trial in Northern Ireland. He was released without charge and has no criminal record. Although the appeal was made in July 2009, there has been significant delay in it being forwarded it to the Appeals Service.

The case is a clear example of how inappropriate it is that these appeals are sent at an initial stage to the other party to the proceedings.

## Immigration

### Delays

We represented a client in an application for a residence card under EU law on the basis that the client was part of a couple in a durable relationship. The client withdrew the application after waiting for eighteen months for the matter to be resolved, during which time she was not permitted to work. The client then returned to Canada where she lodged an ap-

plication for an EEA family permit which was granted within a matter of days. The case highlights the significant delays here in processing such applications. During the eighteen months when the client's application was unresolved she was not permitted to work, making the situation all the more problematic.

### Indefinite leave to remain finally granted

We previously reported the case of a client who had been given leave to remain in the UK under a policy of the government at that time. He had lost his travel documents while abroad on holiday and the embassy had refused to issue him a new travel document to enable him to return to the UK.

At tribunal, we argued that that decision was unlawful and had displayed conspicuous unfairness (as was an important factor in *R (Rashid) v Secretary of State for the Home Department* [2005] EWCA Civ 744). We argued that denying the client indefinite leave to remain was contrary to Article 8 ECHR (Right to Respect for Private and Family Life).

While we were initially unsuccessful, we applied to the Court of Appeal. In the interim period, the client was informed that he had been given indefinite leave to remain. He was unable to work for a lengthy period of time due to the original decision of the embassy and as a result we are currently considering seeking compensation.

### Dual nationality

We are acting for a client where dual nationality is involved. At the client's tribunal hearing, it was held that a person with British citizenship cannot be regarded as 'residing in the UK in accordance with' the Immigration (EEA) Regulations 2006, even if s/he also holds citizenship of another member state, as s/he is not subject to the restrictions on residence in the regulations.

The tribunal's interpretation of the regulations was questioned, as it has been in *McCarthy v SSHD [2008] EWCA Civ 641.* Clearly, individuals in Northern Ireland are disproportionately affected by this issue, as the right of those from Northern Ireland to hold British and Irish Citizenship is enshrined in the Belfast Agreement.

We are now building a case to ask the Northern Ireland Court of Appeal to make a reference in this case so that it can be heard alongside the English case of *McCarthy.*

### Zimbabwe

We successfully represented a Zimbabwean national in an asylum appeal before the Immigration and Asylum Chamber. The decision to grant asylum in this case is a reflection of the tribunal's recognition of the risks arising in Zimbabwe at present.

## Community Care

### Direct payments in lieu of care services

We challenged the Belfast Health and Social Care Trust over a decision not to exercise its discretion to allow the spouse of a service user to receive direct payments. Under the Carers and Direct Payments (NI) Act 2002, the trust can exercise discretion to allow someone living in the same household as the service user

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to receive direct payments for services provided to the service user. The matter was settled on correspondence and the trust has agreed to make direct payments to our client's spouse. This case was referred by Age NI.

We were in correspondence with the South Eastern Health and Social Care Trust over the delay in administering direct payments in the case of a service user with a terminal illness. The trust proposed to make payment from a date some months after need was assessed and identified. The delay resulted in great financial hardship.

The Personal Social Services and Children's Services (Direct Payments) Regulations (NI) 2004 require that once the authority has decided that a person's needs call for provision of a particular social service, under the Health and Personal Social Services Order (NI) 1972, the trust must set up a direct payments scheme provided the payments can be managed.

Following correspondence with the trust, the delay was acknowledged and an agreement was made to start direct payments from the original assessment of need. This case was referred by the Centre for Independent Living.

### Withdrawal of services without re-assessment of care needs

We have applied for judicial review of a decision of the Western Health and Social Care Trust not to meet the assessed care needs of an elderly client. The trust withdrew her cleaning service without an appropriate re-assessment of her care needs and is failing to meet her night time care needs.

The leave application has been adjourned to enable the trust to carry out a further assessment of our client's care needs.

The legal issues concern the unlawful withdrawal of care services before a re-assessment of a service user's need has taken place, and the failure of the trust to meet the assessed care needs. There is case law precedent in this area which we will argue applies to our case: *R v Gloucestershire CC, ex parte Barry 1997 2 WLR 459 HL*.

### Assessment of social care needs

A client with Asperger's syndrome and bipolar disorder, referred by Autism NI, instructed the Law Centre that he required psychiatric support and the assistance of a support worker. The Law Centre arranged an up to date assessment of his needs by the Northern Health and Social Care Trust. Following correspondence, the matter was settled and the trust agreed to meet his assessed social care needs.

### Client on visitor's visa refused medical card

A student migrant approached Law Centre (NI) when her spouse, who was in Northern Ireland on a visitor's visa, was refused a medical card.

Regulations provide that people who are 'ordinarily resident' here are exempt from charges for services under the NHS including the services of GPs. The person should have an identifiable purpose for her/his residence here and that purpose must have a sufficient degree of continuity to be properly described as settled. The guidance suggests that it is unlikely that anyone coming to live here but intending to stay for less than six months will be ordinarily resident but there is no minimum period of residence.

In this case, the spouse's visa was valid for eight months and he was here to visit his wife who was here as a student for two years. Through correspondence with the relevant authority, entitlement was established and a medical card issued.

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# Mental health

### Consultation with nearest relative

We recently represented a client who was the 'nearest relative' of a patient who had been detained in hospital. The client stated he had objected to the admission but that his objection was ignored.

Article 5(3) of the Mental Health (NI) Order 1986 states that the Approved Social Worker applying for the admission must consult with the nearest relative. If the nearest relative objects to the admission, then the ASW must consult with a second social worker, as required by Article 5(4), who must agree to the admission.

At the Mental Health Review Tribunal, it was determined that as our client's objection, as nearest relative, was ignored, the detention was unlawful and the patient became voluntary with immediate effect.

This case reaffirms the importance of ensuring that the correct procedures are followed in the detention of patients.

### Guardianship

Earlier this year, we were granted leave to enable us to apply for judicial review of a decision of the Belfast Health and Social Care Trust to restrict a gentleman with mild learning disability and severe physical disabilities access to his family at his care home. The trust imposed a supervised contact regime on the applicant's parents and sister and also placed the applicant under guardianship to prevent him from leaving the care home at which he had resided for many years.

A key issue in this case is the lawfulness of the decision to supervise contact and its implications for the applicant's human rights, particularly under Article 8 ECHR (right to respect for private and family life). The trust had made the decision on the basis that he lacked capacity to decide for himself and it was able to do so in the applicant's best interests. However, where a trust is purporting to restrict or interfere with a person's rights in this way, we argue that it should seek a declaration from the High Court as authority for the action. The trust failed to secure such authority and therefore it is our case that its decision is contrary to our client's public law and human rights.

The trust argued that it had the necessary authority to restrict the applicant's contact with his family in this way by virtue of the powers afforded to it by the guardianship provisions in the Mental Health (NI) Order 1986. However, it is clear that the Order does not give an express power to the trust to do more than require a person to 'reside' at a place specified by the guardian.

We argue that the powers in the guardianship regime do not extend to matters concerning contact etc; therefore the trust is exceeding the powers given to it under the legislation by essentially restricting the applicant's liberty and rights under Article 8.

The case will be heard on 20 September. It will test the boundaries of the guardianship provisions and whether it can be lawful for the trust to use guardianship in this way.

**For copies of decisions referred to in this bulletin please contact Mary Blair, Law Centre (NI) librarian. Law Centre (NI) court judgments are available on line on the Northern Ireland Court Service website at:**

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