CASEWORK BULLETIN

2012 Number 1

Law Centre (NI)

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.

Do remember to come to our practitioner group meetings if you want to discuss cases like this in more detail. The dates of upcoming meetings are on www.lawcentreni.org.

Jennifer Greenfield, Assistant Director, Casework and Training, Law Centre (NI)

Community Care

Health and social care records

We are representing a person who was in two Northern Ireland Health and Social Care Trusts as a child and, now as an adult, is seeking the return of the original social care records relating to the time spent in care. She is also seeking the destruction of any copies held by the trusts. The trusts have refused to accede to the request.

The case, an ongoing judicial review, is of wider public interest and involves the strategic issue of Article 8 of the European Convention on Human Rights (right to a private life).

Our argument is that these records, which contain highly sensitive material, should be within our client's exclusive control and possession and the trusts' decision to retain them is disproportionate and in breach of Article 8. We are also arguing that the trusts are acting unlawfully, having no legal basis upon which to hold the records.

Leave for judicial review has been granted and the matter is due to be listed for hearing in the next court term.

The case was referred to the Law Centre by the Pro-Bono Unit of the Bar Library in Belfast. The barristers involved are acting on a pro-bono basis and a Protective Costs Order is in place to protect our client from any liability for costs. Support has also been provided by the Public Interest Litigation Support (PILs) project.

Delayed discharge from hospital

We acted on behalf of a person who had remained in an acute hospital setting despite having been declared medically fit for discharge for nine months. She had various health issues and required peg-feeding but wished to return home with a domiciliary care package.

Issues had arisen about who was responsible for training domiciliary carers on peg-feeding and who would be responsible for deeming the carers competent to carry out the tasks involved.

We negotiated a resolution with the trust and the client was able to return home with an appropriate care package.

Access to NHS GP services

A Japanese national and her young son had both been refused registration as NHS patients with a local GP. The basis for the deci-

sion was that they were not considered 'ordinarily resident' in Northern Ireland. Following our representations, the decision was reversed and both mother and son were registered on the NHS list of their chosen GP.

Care for spinal injury patients

We acted on behalf of a person with an acquired spinal injury. After a period of in-patient treatment in a local hospital, the person was eager to return home to live but wanted bowel care needs to be addressed via a particular method which the existing trust policy in relation to bowel care for people with spinal injuries did not permit.

Following negotiations and in consideration of the human rights issues involved (in particular Article 3 and Article 8 of ECHR) the trust agreed to accede to the request.

Direct payments in lieu of services

A 65 year old woman with physical disabilities had unsuccessfully applied for direct payments in lieu of services from her local trust. In correspondence, we challenged the trust's refusal and she was granted direct payments and then placed on a waiting list.

We challenged the legality of placing her on a waiting list. Judicial review proceedings were avoided when, following further correspondence, the trust agreed to make payments immediately.

Mental health

Judicial review

This case was a referral to us from the Tell is Like it Is Group. The applicant who has a learning disability was a patient in Muckamore Abbey Hospital awaiting discharge to a home in the community, since he had become eligible for discharge in 2000. His treatment had been completed and he had been informed that no suitable placements were available to meet his needs in the community. Having been a long stay patient, he had nowhere else to live and thus remained in hospital awaiting accommodation.

This case highlighted an important point of legal and public interest, namely the delay in the provision of aftercare, including a home in the community, to individuals with learning disabilities who no longer required treatment in hospital.

We set out to challenge the DHSSPS's failure to:

(a) provide the applicant with accommodation in the community in a timely fashion, following his eligibility for discharge (based on breach of domestic legislation under the Health & Personal Social Services Order 1972 & The Health & Social Care Reform (NI) Act 2009;

(b) that in failing to provide the applicant with a home in the community the DHSSPS had breached his rights under Arts 8 &14 ECHR;

(c) the DHSSPS had breached the applicant's legitimate expectation to receive such provision;

(d) the DHSSPS had failed to apply Article 19 of the UNCRPD (United Nations Convention on the Rights of Persons with Disabilities) in that it had taken the appropriate steps to facilitate the integration of the applicant into the community.

We view this case as part of our strategic policy work in light of the ongoing work with the Department on implementing a single piece of capacity legislation and also in terms of the wider debate on resources, which resonates most profoundly within the fields of community care and mental health law.

The judicial review was refused on all grounds. However, happily the relevant trust did locate accommodation and our client was accommodated in the community soon after the judgment.

We lodged an appeal on our client's behalf to the Court of Appeal and the Court remitted the matter back to the judge who gave the original judgment. The re-hearing of the issues is due to focus on the question of whether the DHSSPS and trusts are under a duty to assess the needs of individuals who may have potential community care needs throughout Northern Ireland.

Guardianship order - capacity confirmed

A person was placed under a Guardianship order through the Mental Health Order (NI) 1986, and on his instructions we have initiated a judicial review because the trust will not permit him to leave his residence without an escort to supervise him. The issue is whether the statutory framework gives the trust the power to impose such a condition.

The Public Interest Litigation Support [PILS] project is providing financial assistance for him to bring the application.

By way of preliminary issue, the trust raised doubts about our client's capacity to instruct legal representatives. Capacity assessments were made. The court asked for an opinion from the Official Solicitors office. On 30 May 2012, the court held that our client does have the capacity to instruct solicitors.

This ruling is significant because it signals the importance the court places on a person with disabilities' equal right to conduct legal proceedings in her/his own name, when s/he is able to do so.

We still await the court's ruling on leave to pursue the substantive issue of supervision and whether the case is of such public importance as to merit a Protective Costs Order.

Challenge to detention

One of our recent cases involved a judicial review against a decision by a Mental Health Review Tribunal, challenging the quality of the evidence relied upon by the tribunal in its decision to continue detention. A significant part of the tribunal's reasoning centred on the assertion by the doctor of fear felt during an interview with the client. However, no such record was made in the hospital notes at the time.

The court recently dismissed the application on the basis that it had become an academic point as the person was discharged from detention in the meantime.

There was a procedural issue of interest in this case. A point argued by the respondent against leave being granted was that the applicant had not exhausted all his remedies before coming to the judicial review court by reference to Article 72 of the Mental Health Order 1986. This argument was not accepted and leave was granted.

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Social security

DLA and non-EEA relatives of EEA nationals

An American citizen had moved to Northern Ireland after her English husband got a job here. Her spousal visa said that she could not have recourse to public funds. Commissioner Mullan decided that she could receive Disability Living Allowance (DLA) as she was the family member of an EEA national and she came within an exception to the general rule.

In reaching his decision, the Commissioner considered and expressly declined to follow a GB precedent, which decided that 'EEA national' in the relevant legislation must be interpreted narrowly to mean an EEA national who was exercising EU Treaty rights. This decision is also relevant to Attendance Allowance, Carers Allowance, Child Benefit and Social Fund payments.

DLA decision to revise prior to re-hearing

In a recent case, we persuaded the Social Security Agency to revise a decision to refuse Disability Living Allowance to a man who suffers from a degenerative spinal condition.

Our client had been refused DLA on the basis of a negative expert medical practitioner (EMP) report but was awarded the middle rate care and higher rate mobility components of DLA following a fresh application a year later.

He had appealed the initial refusal but received a negative paper-based decision from the appeal tribunal. We then represented him and obtained a successful decision from the Commissioner following further appeal. The case was returned to the appeal tribunal to be heard by a differently constituted panel.

At this stage we approached the Social Security Agency to request a revision of the initial decision. This request was ultimately successful due to strong evidence from the client's GP about the extent of his condition at the time the initial award was refused. Following revision, the client received a back-dated payment of DLA at the rate he is currently on.

Importantly, when requesting the revision, we pointed out to the Social Security Agency that a decision to revise would be in keeping with the President of the Appeals Service's recommendation that the preferred course of action is to try and have appeals resolved before going to hearing in those cases where it is possible.

DLA exportability

We are taking a case involving determination of the exportability of DLA care and operation of anti-test case rules which is pending before a tribunal regarding how far backdating will go. This is our first challenge to the operation of test case rules in light of EU law. We have succeeded in having DLA care reinstated and backdated for two years and a payment of £7500 in arrears was made.

Contributory ESA

The Law Centre is currently representing a man who was in receipt of Contributory ESA in Britain, but who lost his award when he returned to Northern Ireland. This was due to the fact that reciprocal arrangements between Northern Ireland and GB have not been updated to include ESA, leaving him having to make a fresh claim. The fresh claim did not satisfy the national insurance contribution conditions. We are in discussions with the Department to ensure a reciprocal agreement for Contributory ESA is introduced.

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Child Tax Credit and Child Benefit payment delays

We have represented a number of people who have experienced long delays in the processing of their claims for Child Benefit and Child Tax Credit (CTC) where there has been an issue regarding the immigration status of the claimants.

Most recently, we were contacted by a woman who had waited five months on payment of CTC for her three children. Despite many phone calls she had received no decision and she also received conflicting information.

We sent a pre-action protocol letter to HMRC requesting that statutory decision making duties be followed and advising them that we would seek judicial review to compel a decision on the claim if one was not made promptly. Our client then received a decision and arrears within fourteen days.

The matter is now being pursued through the HMRC complaints system.

Tax credits - valid claims

We have a tax credit appeal pending before President of Appeal Tribunals regarding whether determination that a claim has not been validly made carries appeal rights. This case also raises right to reside issues and may lead to a judicial review in the future as we intend to ask for discretionary payment if appeal is unsuccessful.

Overpayment

A woman was referred to us by a local solicitors practice. At that point she was being prosecuted for fraud in respect of an overpayment of over £23,000 in Income Support for a past period. She had not appealed the overpayment decision.

The client's barrister wanted us to look at the Department's case for prosecution in relation to the law used in arriving at the overpayment decision and the overpayment amount, and to ascertain if any of the overpayment could be reduced by underlying entitlement to other benefits.

Her solicitors had also forwarded to us a psychiatric report. It came to light in this report that the woman could not read very well and could not logically follow a sentence. Ultimately, the Department did not pursue the prosecution and the case was dropped.

With this information we wrote to Debt Centre NI requesting a waiver of the overpayment. After consideration, Debt Centre NI decided to revise the decision in relation to the overpayment and return any monies deducted to date from her benefits.

Right to reside

We are representing a number of people in right to reside appeals both at tribunal and Commissioner levels.

We would urge advisers to contact us for advice where a right to reside is an issue in a case. Appeals should be lodged in order to protect a claimant's potential entitlement pending the outcome of test cases which are ongoing.

Housing Benefit – test cases sought

We are also aware that changes to Housing Benefit rules are causing a lot of hardship to claimants. Since January 2012 most single claimants under 35 are being reassessed and their Housing Benefit is being reduced to the rate of a room in a shared house.

We are currently representing a man who has custody of his daughter for three nights each week but has had his Housing Benefit cut.

We would like to hear from any other Housing Benefit claimants affected by this rule who have joint custody arrangements for children.

Immigration

Detention of pregnant mother

The Law Centre's civil proceedings against the UK Border Agency for its actions in detaining a pregnant mother and separating her from her young child last year continue.

The Particulars of Claim and Defence have now been exchanged and the Law Centre has obtained legal aid within these proceedings to clarify the remit of the Official Solicitor and to ascertain if a suitable 'next friend' for the child can be identified.

Removal to Republic of Ireland of people seeking asylum

We are seeking leave to bring judicial review proceedings against the UK Border Agency in relation to the Agency's decision to transfer a number of Sudanese nationals, who wish to seek asylum here, to the Republic of Ireland, under the Dublin II Convention.

We are prepared to argue that these removals from the UK to Dublin are unlawful, under the European and international legislation that regulates the fundamental rights and living conditions of residents of the European Union and determines the EU member state responsible to examine an application from an asylum seeker.

In 2011, the then Asylum and Immigration Tribunal held that all non-Arab Darfuris are at risk of persecution in Darfur and cannot reasonably be expected to relocate elsewhere in Sudan. Non-Arab Darfuris should therefore usually succeed in securing international protection in the UK. However, the judgement does not apply in the Republic of Ireland, from where Darfuris may be returned to Sudan.

Under the Borders, Immigration and Citizenship Act 2009, the UK Border Agency must have arrangements in place to safeguard and promote the welfare of children in discharging its functions. We also contend that these duties were not complied with in these cases.

These cases are grouped together with several cases on the same points represented by other lawyers, and one of the Law Centre's cases has been designated as the lead case in these proceedings. The High Court granted permission to apply for judicial review on 4 May 2012. The full hearing of the judicial review is listed in October.

Political asylum

An Iranian mother and her infant child were finally recognised as refugees after a lengthy battle with the Home Office.

The Law Centre acted from the outset of proceedings and introduced academic expert evidence to the tribunal in relation to the Iranian justice system and the potential consequences for the appellant of her perceived dissident activities.

The UK Border Agency had refused the mother's initial application for asylum and the First-Tier Tribunal then dismissed her appeal against that refusal. We sought permission

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to appeal to the Upper Tribunal against the First-Tier Tribunal's decision, at which time the Home Office offered a short grant of discretionary leave.

The grant for discretionary leave then became the subject of an upgrade appeal, by which the mother argued that she and her young son should be fully recognised as refugees. The First-Tier Tribunal allowed this appeal, finding the mother to have a genuine fear of persecution in Iran due to her imputed political beliefs and both were granted five years' stay.

Marriage and immigration

We were successful in an appeal before tribunal on the issue of an alleged sham marriage, whereby the appellant and her daughter were both refused EEA Family permits to join their EEA sponsor in the UK.

The refusal decision rested heavily on a previous determination from an immigration judge, which failed to take into account the cultural context of the marriage and family life. Both appeals were allowed and the sponsor's wife and daughter are coming to join the sponsor in the UK.

Both appellants are Nigerian nationals, and wished to join the mother's husband, a dual French/Nigerian national working in the UK. The initial application was refused on the basis that there was no evidence that she was in a genuine relationship with her EEA sponsor. We argued that the UKBA and the previous determination failed to take into account the patriarchal nature of society and marriage in Nigeria.

UKBA had raised doubts in respect of both the paternity and maternity of the child but DNA evidence was produced to quash these allegations.

Dual nationality and EU law

We were successful in an appeal before tribunal on the issue of dual nationality and EU law, in spite of the earlier decision of the European Court of Justice in McCarthy. The McCarthy judgement had held that a dual British/Irish national family member cannot exercise Treaty rights in the UK if s/he has never had an EU law right to reside in the Republic of Ireland.

The appellant was refused permanent residence under EEA law on basis that her husband (an EEA national) was not a 'qualified person' for a continuous period of five years. We appealed on the basis that the EEA national remained an employed person (and therefore a qualified person) despite nominal earnings. The appeal was allowed and the immigration judge found that the appellant should be granted permanent residence in the UK.

The appellant is a national of Turkmenistan, who had resided with her husband, a dual British/Irish National, for the past seven years in Northern Ireland. They have a six year old daughter. There was therefore a very strong argument in terms of the right to private and family life and the best interests of the child.

Trafficking

We secured discretionary leave for three years for a fifteen year old Nigerian girl who suffered from severe mental health issues as a result of rape and trauma. We organised her referral to the National Referral Mechanism as a victim of trafficking, which resulted in a positive decision from UKBA.

She had been referred to the Law Centre via social services and placed under the care of a psychiatric team following several suicide attempts. From initial instructions, it was clear that she was a victim of trafficking and substan-

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tial trauma. We made strong representations to UKBA to grant her discretionary leave without her having to undergo interview, given her fragile mental state.

We were successful in obtaining one year discretionary leave for four Ghanaian fishermen under the National Referral Mechanism. They were rescued by PSNI and their claims were based on the fact that they were subject to labour exploitation.

Waiving substantive hearing for client in fragile mental case

An asylum applicant from a Middle Eastern country was awarded refugee status without undergoing a full, substantive Home Office interview about his application.

We had made detailed representations to the UK Border Agency, with supportive evidence from our client's mental health social worker and from a clinical psychologist at the Centre for the Study of Emotion and Law. We contended that the format of a video-link interview, that was proposed, and the interview environment had been shown to exacerbate our vulnerable client's post traumatic stress disorder symptoms and that he should not be fully interviewed. We also made detailed written representation, to set out the details of his claim to be recognised as a refugee. There was no need to pursue an appeal to the tribunal in this case, as he was awarded refugee status after his initial claim.

This case was initially referred to the Law Centre by staff in a psychiatric hospital in Northern Ireland.

Our Policy Unit has raised concerns about the use of video-link in interviews and court proceedings with the UKBA.

Dual nationality and right to bring non-EU family members to UK

The Court of Appeal case of Nyoike considered whether a person who holds dual British/Irish nationality but has never lived and/or worked in the Republic of Ireland can rely on EU law to support an application for non-EU family members to come to the UK.

In this case, the Home Office has said that, as the step-father (the dual citizen in this case) has lived all his life in Northern Ireland, he cannot rely on EU law as he is fundamentally here as a British citizen.

The relevant regulation which governs the administrative procedure involved in getting a non-EU national to the UK is Reg 12 Immigration (EEA) Regulations 2006. One of the requirements set out in this regulation is that the EU national be 'residing in accordance with the Regulations'. The tribunal decided that this must be interpreted as meaning in accordance with the whole of the regulations, including the provision on removal of EU citizens from the UK. The tribunal held that a British citizen, albeit dual Irish/British, cannot be removed from the UK and therefore cannot comply with the Regulation 12 requirement. Unlike the rest of the UK, this case has very clear implications for people in Northern Ireland seeking to bring non-EU family members here to reside under EU law. It also raises the issue of the weight to be afforded to the Belfast Agreement and the right to choose to be an Irish, British or dual citizen.

The case was put on hold pending the outcome in *McCarthy* before the European Court of Justice. The judgment in McCarthy was handed down last year and in August 2011 UKBA agreed that as current regulations did not require movement across member states and until the regulations came into effect, then McCarthy could not be applied on this point (the regulations have now been amended, taking effect from 16 July).

On the day before the listed Court of Appeal hearing, the Crown Solicitors' office confirmed that the Embassy in Kenya had already been informed by UKBA to issue the family permits.

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Employment

Employees who suffer detriment due to TUPE transfers

We successfully settled a TUPE transfer case referred to us by Antrim CAB.

An employee found himself in a very difficult situation when his employer informed him that his employment would be transferring to another employer, whose premises were a considerable distance away. Having investigated all public transport alternatives, he let his employer know that, as a non-driver, it was impossible for him to get to the new site. Setting out at 6am on the first available bus, three bus journeys and a five mile walk would be required to get him there, and the last bus for the first leg of his homeward journey would have left before he finished work.

As is often the case where employment transfers are taking place, the situation became very complicated. The employee was left in limbo between the two employers, with each stating that responsibility lay with the other. As a result his employment did not transfer and came to an end.

We issued proceedings with the industrial Tribunal against both employers to cover all options and safeguard the employee's position: whether the tribunal eventually decided that TUPE applied or not; whether he should have transferred or not; and whether he should be held to have been dismissed or to have resigned.

The case settled just before the tribunal hearing. The employers agreed to pay a combined settlement of £3,000 with an express agreement that the employee had been dismissed.

As a result, Antrim CAB and the Law Centre were able to correspond with the insurance company who paid out on the mortgage policy whereas previously it had argued that because he had resigned he was not entitled.

Happily, our client had gained new employment in the meantime.

Unfair redundancy and racial discrimination

We recently represented two Polish workers who had been made redundant following a redundancy selection exercise. One of the main criteria used was the score achieved in a psychological profiling test. The test was not translated, nor was an interpreter provided, even though the workers could not speak or read English at all. They ended up ticking answers randomly and were then selected to be made redundant.

We brought claims of unfair dismissal and race discrimination before the Industrial Tribunal that were listed for a five day hearing. On the third day of the hearing, after we had cross-examined the employer's witnesses at length, the employer approached us seeking to settle. Each case settled for £7,000, representing roughly a year's loss of earnings (our clients were low paid part time workers) and an additional sum for injury to feelings.

Employee settles constructive dismissal case

We acted for a woman who had worked for just over two years as a book-keeper in a small business. The employer had in the past unilaterally reduced her hours from 40 to 32 hours and had also reduced her pay. She had accepted these changes as she needed the job but the final straw came when she returned from sick leave to be told by her employer that he was reducing her hours to eight hours a week. She resigned and claimed constructive dismissal.

The case settled for £2,700 shortly after proceedings to the industrial tribunal were issued.

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The woman had found work elsewhere very quickly and was happy to put the matter behind her.

Seven employees receive DEL payments

We acted for seven employees who worked at a bar. Two employees turned up for work one Sunday morning to find it was being dismantled. None had had any notice that the bar was due to close or that it was in difficulty.

We issued letters before action for automatic unfair dismissal, outstanding wages, notice pay, holiday pay and redundancy payments. The employer became insolvent before proceedings were issued and the Department for Employment and Learning paid the employees the redundancy pay, notice pay and wages owing.

Reinstatement

In late November we settled a case for a construction worker who was made redundant without any consultation or statutory procedures being followed.

We secured his reinstatement (ie all back pay paid and continuity of service preserved) and he is happy to be back working with his employer.

'Damages' clause held to be a penalty clause

We won a case at tribunal, *Catherine Curran v Moran's Retail Group*, in August 2011.

Catherine Curran worked as a manager in a filling station. She terminated her employment as she was unhappy with some matters at work. She did not work her full contractual notice and the employer deducted her full final salary (£676) and told her she owed a further £119. The deduction was made under a clause in the contract that in the event of her failing to work her full contractual notice she would forfeit a sum equivalent to wages for the un-worked period from any monies lawfully due to her. Our client had signed the contract containing this clause.

We argued that the clause was a penalty clause because it was designed to penalise an employee for leaving without notice, rather than being a genuine 'liquidated damages clause'. A liquidated damages clause is a clause designed to represent a genuine pre-estimate of loss resulting from a breach by a party to the contract.

The tribunal accepted our argument and our client has now been repaid the amount that had been unlawfully deducted. As the relevant clause was held to be a penalty clause, the employer is now prohibited from pursuing our client for the 'debt" in the civil courts.

This case serves as a warning to employers not to withhold wages from workers unless they have lawful grounds for so doing and comply strictly with the requirements of Article 45 of the Employment Rights (NI) Order in deducting any wages.

Automatic unfair dismissal – reporting health and safety concerns

We were instructed by a driver who had been dismissed by his employer for refusal to drive a lorry that he believed to be unsafe.

The vehicle's reversing lights, rear spotlight and warning siren were out of order, so there was no way for other road users or pedestrians to know that it was about to reverse. He had drawn the danger to his employer's attention. After a near-miss with another vehicle, he had said that he would not drive the vehicle again until it was fixed, as he believed it posed a threat to health and safety and that he would be breaking the law driving it.

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The employer dismissed him for the stand he had taken, even though another driver had nearly had an accident with the lorry involving a pedestrian due to these defects in the meantime.

As he had not been employed for a year he could not claim unfair dismissal, and it appeared that this had been a factor in the employer believing that it could get rid of him. However, we lodged claims of automatic unfair dismissal on his behalf, which do not require a year's service. Where an employee is dismissed because s/he has made a report about a health and safety issue or taken certain action to avoid an imminent risk to health and safety, then an automatic unfair dismissal claim can arise. It can also be automatic unfair dismissal where an employee is dismissed because of having made a public interest disclosure – 'blown the whistle' - that s/he believes that the law is being broken.

Our client managed to get another job fairly quickly but was very angry at the way his employer had behaved and the attitude that had been taken to his legitimate concerns. The employer contacted us very quickly after legal proceedings had been issued and agreed to compensate our client for his loss (£1,700) and to carry out a full review of its systems for dealing with reporting of health and safety issues. The protections for health and safety reports and whistleblowers are of vital importance in ensuring that workers feel that they can draw attention to dangerous situations or illegal behaviour.

Breach of contract

We were instructed by a woman who had left a secure job to go to work for a start-up company.

As a condition of joining the new organisation she negotiated a six month notice clause. It had also been agreed that she would receive private healthcare cover and pension payments at a certain level. Terms were agreed verbally and the employer never provided a written statement of terms and conditions. However, prior to resigning her secure job the client had emailed the employer a summary of the terms she required for joining the company and she argued that the employer agreed to the terms by phone the day before she resigned to join the company.

She was dismissed from employment after four months and the employer refused to honour the notice clause. The employer also never made any pension or healthcare contributions.

The case was successfully settled a few weeks before hearing.

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