CASEWORK BULLETIN

2013 Number 1

Law Centre (NI)

Welcome to our casework 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.

We welcome feedback on our work so if the report raises any comments please get in touch. Our advice line operates from the Belfast office, 028 9024 4401, and the Western Area office, 028 7126 2433, from 9.30am to 1pm Monday to Friday.

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

Social security

ESA - Ability to use a wheelchair

COMMISSIONER'S DECISION C1/12-13(ESA)

We recently represented in an appeal to the Social Security Commissioner concerning the application of activity 1 to Schedule 2 of the ESA (General) Regs. (NI) 2008.

The claimant was suffering from the long term effects of having broken his leg some years prior to the date of the decision under appeal. He required a walking stick to aid mobilization. He also experienced restricted movement in his shoulder and wrist which impacted on his ability to propel a manual wheelchair.

A Decision Maker had awarded him 6 points based on the fact that his upper limb restriction would have impaired his ability to propel a manual wheelchair and therefore he could not mobilize himself a distance of more than 200 metres.

The Tribunal on the other hand decided that, despite his upper limb restrictions, a manual wheelchair could reasonably be used and removed the points awarded by the Decision Maker.

Given that the Tribunal awarded 9 points based on difficulties with standing and sitting, had it accepted the points awarded by the Department for upper limb restriction, the appellant would have scored 15 points and would have satisfied the test.

We appealed to the Commissioner in light of our concern that tribunals appeared to be taking the view that if a person does not appear to have limitations of upper limb function (or that those limitations would not impair ability), in the absence of evidence to the contrary, the inference is that a wheelchair can reasonably be used.

The effect of this approach has been that an

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increasing number of disabled claimants who have significantly restricted mobility are failing to attract any points through the general application of this activity at tribunal.

The Commissioner gave useful guidance to tribunals on factors to consider in the application of the mobilization activity. In particular, he noted that the activities and descriptors which comprise the WCA do not allow for an accurate assessment of upper limb restriction which might impact on a person's ability to self-propel a manual wheelchair.

There may be scope for applying the principles outlined by the Commissioner to the use of other aids and appliances in the interpretation of other activities and descriptors on the WCA and when Personal Independence Payment is introduced.

Read the decision here: http://iaccess.communityaccess.gov.uk/NIDOC/Users/ViewAttachment.aspx?r=cwT2ZwYVES0

The Law Centre wrote a summary and analysis of this decision: www.lawcentreni.org/Publications/Frontline/Frontline-88.pdf (pages 22 and 23).

DLA – guidance and supervision

We were recently successful before a Social Security Commissioner in a Disability Living Allowance case. The claimant had a severe mental illness and needed encouragement and persuasion to walk. The Commissioner noted that guidance and supervision should be taken into account even when given indoors before going out to walk. The presence of someone for reassurance when walking can constitute guidance or supervision. This followed a Commissioner's decision in Britain (CDLA 42/94).

The tribunal had discounted such support and adopted too narrow a view of guidance and support. When refusing to grant leave to appeal (subsequently overridden by the Commissioner), the tribunal had expanded on the grounds for its decision. The Commissioner noted that, while caution should be exercised in such a practice, it can be considered appropriate provided the comments elucidate the grounds for the tribunal's decision but do not augment or vary the existing statement of reasons.

Child Benefit and right to reside

The claimant was an A8 country national who was lawfully working in the UK under a twelve month work permit on 1 May 2004, the date of accession. At that time she did not need to register and would have been regarded as a 'Qualified Person.' However, she did not complete the twelve months work under the work permit and rather returned to her home country before returning to take up alternative full time employment in Northern Ireland some six months later. Her new employer contacted the Workers Registration Scheme and was led to believe that registration was not necessary. When she subsequently claimed Child Benefit after more than twelve months, the claim was refused on right to reside grounds and she appealed. She was at all times in full time employment, paying tax and national insurance and there was no claim made for means tested benefits.

The original tribunal disallowed the appeal and applied the principles of Patmalniece to Child Benefit finding that the claimant was not entitled to Child Benefit as she did not have a right to reside.

We then took the case to the Commissioners. Commissioner Mullan, substituting his own decision that the appellant was entitled to Child Benefit, expressly considered Patmalniece and

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refused to extend it to Child Benefit which had an 'ordinary residence and right to reside' rather than a 'habitual residence and right to reside test.'

Commissioner Mullan proceeded to consider whether, if he was wrong that the right to reside test was directly discriminatory on the grounds of nationality, indirect discrimination could be objectively justified. He found that where a person has achieved a sufficient degree of economic and social integration within the host state indirect discrimination may not be objectively justified.

This is an important decision which may have much wider significance than its own facts and also extend to other benefits.

We were able to advise the person in the course of the appeal of an entitlement to Child Benefit in the Republic of Ireland from January 2007 and able to assist her in obtaining 10,000 Euros of a backdated award. This recent decision will mean that arrears of Child Benefit of around £600 will now be due to be paid by Child Benefit.

This case has ramifications for claims of both Child Benefit and Child Tax Credit as was the subject of an article in the recent CPAG Welfare Rights Bulletin (www.cpag.org.uk/content/child-benefit-wrong-residence-test). HMRC has sought leave to appeal the decision to the Court of Appeal.

Tax credits

This case involving A8 nationals was referred to us by Belfast Migrant Centre.

The couple had worked and registered their employment under the Home Office Workers Registration Scheme. The couple's children continued to live in their home country with their grandmother. A claim for tax credits was made to include the children. The couple changed their status to self employed after opening a shop. After a delay of a year, the couple was told that their award was being terminated as the couple no longer had a right to reside.

After Law Centre intervention the award was restored with payment of more than £10,000 in arrears of tax credits.

Tax credits and Child Benefit payment delays

We have helped several people with delays in processing of claims for Child Benefit. There is an ongoing problem with this, especially for refugees and migrants. HMRC often takes at least six months to process these claims and delays can lead to significant hardship and problems for clients who are vulnerable. Intervention by our caseworkers can significantly speed the process. There is a special fast track process for these claims; for more information, contact the Law Centre's social security advisers.

Postponing and adjourning appeals

The Law Centre was asked to act as 'amicus curiae' in an appeal to a Social Security Commissioner on a question of law from a tribunal decision.

The appeal involved entitlement to DLA but the question of law which arose on appeal to the Commissioner concerned a tribunal's powers to postpone or adjourn a hearing, particularly when an appellant had not turned up to the hearing of the appeal. The Chief Commissioner decided that the appeal involved a question of law of special difficulty and di-

rected that it be heard by a Tribunal of Commissioners.

The appellant had indicated that he would not be attending the hearing of his appeal and as a result the Commissioners asked the Law Centre to act as 'amicus curiae' and provide legal argument to the Commissioners on the points of law which arose. The case examined in depth the regulations and principles which govern postponements and adjournments by tribunals. The Commissioners held that:

- When an appellant makes an application for postponement, there is a mandatory obligation on the clerk to do one of three things: grant the application, refuse the application or pass the application to a legally qualified panel member (LQM) for her/him to make a decision. If passed to a LQM, s/he must decide to either grant or refuse the application. The appellant must be notified of the decision to either refuse or grant the application.

- The power to postpone only exists prior to the commencement of the hearing. Once the hearing begins, adjournment is the appropriate mechanism.

- There will be cases where a postponement application is not determined prior to the hearing. In those cases, the appellant's application for postponement should be placed before the tribunal and a decision made by the tribunal whether or not to adjourn the appeal hearing. This would also apply where a postponement application by the appellant was unsuccessful.

- In cases where an appellant does not attend the hearing of the appeal, the LQM is required to decide whether the appeal can proceed without the appellant. If the LQM determines to proceed with the appeal, the tribunal as a whole must make a decision whether to adjourn. Any application by the appellant for postponement or other explanation for her/his absence should be taken into account by the LQM and the tribunal in making these determinations.

- The number of times a hearing has been postponed or adjourned previously is not in itself a factor that can affect a decision to adjourn. It is to be assumed that each postponement or adjournment decision was properly made. However, the reasons for those past postponements or adjournments are a factor which can and should be taken into account when considering the reason for the present application.

Mental health

JR47 – Victory in delayed discharge from Muckamore

This year saw the successful outcome of a protracted legal process on the delayed discharge of long term mental health and learning disability patients. This started when we sought judicial review to challenge the Department of Health, Social Services and Public Safety's failure to provide a person with accommodation in the community in a timely fashion, following his eligibility for discharge. The case was referred by Tell It Like It Is.

The judicial review was initially refused on all grounds. Happily, the relevant trust did locate accommodation for the person soon after the

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judgment. We then lodged an appeal against the judgment as it had wider implications, and the Court of Appeal hearing was successful in its outcome of remittal back to High Court.

The remitted proceedings were heard by the original judge, focusing on whether the authorities are under a duty to assess patients in hospital who appear to be in need of community care services.

In a landmark judgment on 31 January 2013, the High Court found that the DHSSPS and Belfast Health and Social Care Trust owed a legal duty to assess and review, on a regular basis, the community care needs of long stay residents in learning disability hospitals.

The case establishes the extent of the Department's and trusts duties to assess and review community care needs in compliance with the People First Guidance and work towards resettling people with a learning disability in the community.

Campaigning by Muckamore hospital residents and this court action have ensured that the voice of people with a learning disability has been heard. Northern Ireland Executive's First Programme for Government included a key goal that by 2013 (now rescheduled for 2015) anyone with a mental health problem or learning disability is promptly and suitably treated in the community and no one remains unnecessarily in hospital. We hope this judgment will ensure that this target becomes a reality and that adults in Northern Ireland no longer have a hospital as their permanent address. We are now seeking to deal with a number of other cases in Muckamore with the support of Mencap and Tell It Like It Is.

The implications of this case potentially reach beyond the boundaries of the hospital setting and could impact on all individuals in the community who appear to be in need of community care services. A copy of the judgment is available here: www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2013/[2013]%20NIQB%207/j_j_McCL8735Final.htm. The Law Centre has published a briefing explaining the implications of the judgment: www.lawcentreni.org/Publications/Law%20Centre%20Information%20Briefings/Implications-of-JR47-Judgement-May-2013.pdf

Judicial review - JMCA v Belfast Health and Social Care Trust

We sought judicial review on behalf of a person who was placed under a guardianship order through the Mental Health Order (NI) 1986, and who was not permitted by the trust to leave his residence without an escort to supervise him. The issue was whether the statutory framework gives the trust the power to impose such a condition.

As a preliminary issue, the trust raised doubts about our client's capacity to instruct legal representatives. Capacity assessments were made and the court asked for an opinion from the Official Solicitors office. The court held that he does have the capacity to instruct solicitors.

This ruling is significant in that it signals the importance the court places on a person with disabilities to have an equal right to conduct legal proceedings in their own name, when they are able to do so.

The court then gave us leave to pursue the substantive issue. The judge agreed that it was an issue of public importance and our client was granted a Protective Costs Order (PCO) enabling him to continue with the case with knowledge of his maximum costs liability whatever the outcome of the case.

To have achieved a PCO demonstrates the court's appreciation of who should carry the

financial burden in determining issues of general public importance. The decision also contributes to development of the law as regards the Cornerhouse case guidance which stated that a PCO should not be granted if the applicant has a private interest in the outcome of proceedings. This develops the thinking espoused in *Re McHugh's Application [2007] NICA 26* that there was nothing in principle to prevent such a person getting a PCO, although it was not granted in that particular case. The case has established a positive precedent in this respect.

The Public Interest Litigation Support (PILS) project provided financial assistance for our client in this case.

The case was heard in full in January and judgment was given in July. The appeal was unsuccessful and we are considering an appeal to the Court of Appeal.

Immigration

Right to reside and non EEA parents of an Irish child

The appellants are the parents of an Irish child. They had been granted leave to remain in the UK under the immigration rules as 'Chen' parents (the child is an EEA qualified person on grounds of self-sufficiency). Prior to the expiry of their leave to remain they applied for permanent residence under European law – as they had been in the UK on that basis for more than five years. UKBA refused their application because they did not qualify under the EEA regulations. UKBA also asserted no right of appeal.

The immigration judge held that there was a right of appeal and accepted that their child had acquired permanent residence. He also found that they should have been granted permanent residence and that they have a right to work in the UK. UKBA appealed the determination and the Upper Tribunal appeal was heard in November 2012. The Upper Tribunal agreed with the immigration judge that there was a right of appeal but concluded that there was not a right of permanent residence under the terms of the Citizen's Directive or other provisions of EU law. The appellant has now decided to make a fresh application for permanent residence.

Travel between Northern Ireland and Republic of Ireland

Our client is a non-European national who resides lawfully in Donegal. Some of his Irish born children live with their mother in Dublin. In order to travel to see his children he sometimes goes via Northern Ireland so as to make the journey much shorter. As a non-European, he requires permission to enter the UK. He entered the UK unlawfully while transiting Northern Ireland on returning from visiting his children in January 2012. He was detained by UKBA and then released. Shortly after that incident he applied for permission to enter the UK by way of a visit visa to Northern Ireland with his young Irish born son. That application was refused by the British Embassy in Dublin. We represented him at the appeal against this decision before the immigration tribunal in Belfast.

As part of the refusal by the British Embassy in Dublin, he was informed that, having previously entered the UK illegally and having been removed from the UK, he was the subject of a ten year ban from ever entering the UK during that period.

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We appealed on grounds that as he is lawfully resident in the Republic of Ireland and the father of an Irish citizen child, the impact of the decision to refuse had to be assessed in light of the EU Irish Citizen child's free movement rights which are effectively meaningless (as he is only four years old) unless he is travelling with one of his parents. We were successful before the appeal in that the immigration judge referred it back to the British Embassy in Dublin to assess the EU law impact of its decision. UKBA did not challenge this appeal, the Embassy reviewed the decision and issued our client with a six month visitor visa to enter the UK. He has since been granted Irish citizenship.

This case highlights the need for those lawfully resident in the Republic of Ireland or lawfully resident in Northern Ireland who are subject to immigration control within both jurisdictions, to be given permission to be in the other state.

Non EEA spouses of EEA nationals

A Chinese national married to a dual Irish/British citizen received a letter refusing to consider her application for permanent residence as the spouse of an EEA national who is permanently incapacitated.

A preliminary issue at the hearing of the appeal which we commenced on her behalf was establishing that the letter issued to her contained an 'immigration decision' attracting a right of appeal and therefore establishing that the First-Tier Tribunal (FTT) had jurisdiction to hear the appeal.

The appeal was successful at the First Tier Tribunal and she was granted permanent residence under the provisions of the Immigration (EEA) Regulations 2006.

We were successful in another appeal against a decision not to grant permanent residence to an EEA family member of a Bulgarian national under the Immigration (EEA) Regulations 2006.

Community care

JR60 – Right to a private life and access to social services records

We are taking a judicial review on behalf of a woman who was referred to us by the Pro-Bono Unit of the Bar Library in Belfast. The case is of wide public interest and involves the strategic matter of Article 8 of the ECHR, the right to a private life and access to social services records.

The barristers involved are acting on a pro-bono basis and a Protective Costs Order is in place to protect the applicant from any liability as to legal costs.

The applicant had been a child in care. She is seeking the return of the original social care records from the time she spent under the care of the Western and Southern Health and Social Care Trusts. She is also seeking the destruction of any copies held by the trusts. The trusts have refused to accede to this request.

The applicant believes that these records, which contain highly sensitive material, should be within her exclusive control and possession and the trust's decision to continue retaining these records is disproportionate and in breach of her Article 8 right to private life.

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She also argues that the trusts are acting unlawfully, having no legal basis on which to hold the records.

The case has now been heard and judgment is awaited.

Specialist extra-jurisdictional needs assessment

We are acting on behalf of an adult with severe and complex needs arising from her autism diagnosis.

The health and social care trust responsible for her care has carried out a number of assessments of need over a period of years. Disagreements had arisen between the trust and our client's family as to the accuracy of these assessments.

We argued for an independent specialist assessment of need to be requisitioned by the trust from an expert autism facility outside of the jurisdiction of Northern Ireland.

The trust accepted our legal argument and agreed to make arrangements for and fund a twelve week residential assessment placement in order that the individual's needs could be comprehensively assessed.

Disabled facilities grant for housing adaptations

We acted on behalf of an adult with a learning disability and severe physical health issues.

Her family had made an application to the Northern Ireland Housing Executive for a Disabled Facilities Grant to fund housing adaptations at her home to better meet her needs.

Before making the grant available, the Northern Ireland Housing Executive required a recommendation from the relevant health and social care trust as to the need for the adaptations concerned. The trust had refused to provide this recommendation.

We requisitioned medical and other evidence on our client's behalf which attested to her physical and psychological needs necessitating the adaptations.

Following a review of the case, the trust accepted our legal argument and agreed to recommend the adaptations in full.

Provision of day care services for adult with autism

We acted on behalf of a young man with autism and associated learning disability. Following his transition from school into adult social care services at age nineteen, the health and social care trust responsible for his care had failed to provide a day care service to him.

We argued that the trust concerned was breaching its legal duties in failing to provide an adequate and suitable service to meet his individual needs.

The trust accepted our legal arguments and has now arranged for the provision of a tailored day care service for him.

Employment

Agricultural workers wages and unfair dismissal

We secured £50,000 for an agricultural worker who had worked for many years below the correct rate of pay and had never been given annual leave. The worker had been

working seven days a week, often for 52 weeks in the year. We helped with a claim under the Agricultural Wages Regulations, as well as claims for unlawful deduction from wages, redundancy pay, unfair dismissal and breach of the Working Time regulations.

Claim from RPS in circumstances of possible TUPE transfer

We acted for thirteen people who had been employed by a number of crèches which closed suddenly in May 2012. The crèches had to close after the employer left the country without telling the employees. In total, approximately 40 employees lost their jobs. We understand that about 23 took tribunal proceedings.

The cases were referred to us by Omagh Independent Advice Service and Dungannon CAB. We originally were advising both agencies via our advice line as the cases appeared to involve a straightforward claim for redundancy payments from the Redundancy Payments Service. However, at a case management discussion the possibility that there had been a transfer of undertakings (TUPE) to new owners was raised. If a TUPE transfer had occurred and it was shown that the employees had been dismissed because of or in connection with the transfer, the Redundancy Payment Service would not have been liable for any redundancy payment.

Thirteen of the employees opted to join the two new owners of the crèches (the two new respondents in the proceedings) and we came on record for them. At a hearing in February 2013 on five lead cases, the industrial tribunal found the employees had been dismissed for a reason wholly unconnected to any possible transfer (redundancy) and thus dismissed the case against the two other respondents.

This decision has cleared the way for all affected employees to apply for default judgments to the tribunal which will enable them to recover redundancy payments from DEL.

Transfer of assets of business to a second limited company

We have recently acted for several groups of employees who have encountered problems around the transfer or proposed transfer of their employment. As these cases illustrate, employers often actively try to circumvent the TUPE Regulations, or rely on employees not being aware of their rights. This area of employment law is very complicated and technical, so the reality is that an employee who does not have access to proper legal advice may not be able to identify when her/his rights are being removed, and will be highly unlikely to be able to bring a case forward without representation.

In this case, referred by Citizens Advice, we represented two employees where the business had changed hands and they had been assured that their employment would continue on the same terms and conditions. The new employer had met with them during the consultation process before the transfer, and all appeared to be proceeding smoothly. However, on the day of the transfer they were presented with new contracts that made sweeping changes to their terms, reducing their wages, cutting their holidays and varying their hours of work. They were told that if they did not sign agency staff would be brought in to replace them that afternoon. Following advice from the Law Centre, they resigned and claimed constructive dismissal.

It subsequently emerged that the business had been taken over by one limited company (company A), but that the premises and intangible assets had subsequently been transferred from that company to a second limited company (company B). Company B was said to have initially loaned money to company A to

buy the business. In fact both companies had been recently set up, and were wholly owned and controlled by the same person.

We lodged tribunal proceedings against both companies, but the respondents maintained, in two Case Management Discussion hearings, that company B should be released from the case as it was not the employer of the two claimants because company A ran the day-to-day business.

On each occasion we submitted that company B could be held to be the proper employer, as it effectively owned all the worthwhile assets of the business, the transfer having taken place over a number of transactions. We were also able to show that company B had paid for deliveries of goods to the business premises.

Ultimately we were successful as the Tribunal Chairman refused the employer's applications to release company B from the proceedings.

Following negotiations, the cases settled with the employees receiving a substantial proportion of what they would have been entitled to if they had been made redundant. For one of them, who had worked in the business for over forty years, this was an entitlement that he had built up over his entire working life.

Had the employer managed to remove company B from the case, the employees could have gone on to secure a judgement against company A, but that company would have promptly folded and been declared insolvent, as it had no assets.

This case illustrates the complicated legal issues that can confront employees trying to understand where they stand or enforce their rights.

Beyond the abuse of the rights of individual employees, the circumstances of this case are likely to be of further particular public concern. If the employer had succeeded in removing company B, company A would have become insolvent, and liability would then have ended up resting with DEL Insolvency Branch. Any compensation for our clients would have had to come from the National Insurance Fund and the public purse rather than the ultimate employer.

Legal Support Project

The Legal Support Project (LSP) works with volunteers who provide pro-bono support for claimants at social security and industrial tribunals.

Social security

Overpayment of Incapacity Benefit

The appellant had been overpaid more than £8,000 in Incapacity Benefit for allegedly failing to disclose receipt of an occupational pension. The appellant was clear that the Department had been notified by telephone about the pension. The Department, however, did not accept this as it held no record of the disclosure. In order for this overpayment to be recoverable, the burden remains with the Department to show the appellant was responsible.

We contended on behalf of the appellant that it is not sufficient for the Department to argue that if disclosure had taken place there would be a record. Rather, the Department

must first demonstrate that there were sufficient administrative procedures in place at the time to record disclosure. The Department was unable to do this in this case. In addition, a full copy of the file had been requested by the appellant's representative under the Data Protection Act 1998. The Department was unable to comply with this request as it had lost some of the file.

The social security appeal tribunal decided that the Department was unable to demonstrate that (on the balance of probabilities) if disclosure had taken place there would be a record in the appellant's file. Therefore the overpayment was non-recoverable and the appeal was allowed.

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

Employment

Constructive unfair dismissal

The claimant worked as a supervisor on a helpline. The claimant alleged that, following a period of sick leave, on her first day back to work she was required to attend a Pre-Capability/Disciplinary meeting (without prior notice) rather than the Return to Work interview that she had expected. The claimant pursued the internal grievance and appeal procedure about the manner in which she had been treated, neither of which was upheld. As a result the claimant resigned her post and made a claim to the industrial tribunal. The claimant alleged that the respondent's treatment of her on her return to work and its subsequent failure to uphold her grievance amounted to a fundamental breach of her contract of employment and that she had been constructively unfairly dismissed.

Prior to the hearing, the case was settled with the respondent agreeing to pay the claimant £18,000 compensation.

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