

Welcome to the second casework bulletin for 2014.

The report presents a selection of cases to highlight our work and show where you may be able to get advice or refer cases on to us. We are always interested in complex and strategic cases.

Some of the cases presented here are cases which go into Tribunal and beyond. Others reflect the determined and often long running efforts by the caseworkers to pursue favourable outcomes for the client through correspondence and other means.

Do remember to come to our practitioner group meetings if you want to discuss these and other cases in more detail. The dates of upcoming meetings are on [www.lawcentreni.org](http://www.lawcentreni.org) and members of the Law Centre receive email reminders.

We welcome feedback on our work so if this 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)

## Community care



### 'Best interests' in organising nursing home accommodation

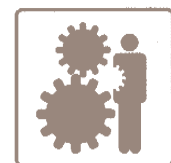
We represented a woman who had a complaint against her local health and social care trust. Her father is an adult with dementia and lacks capacity to make his own social care decisions. She was unhappy with the approach taken by the trust when a decision was required about where he should reside permanently. She felt that the trust had failed to adhere to best interest principles when making decisions about an appropriate nursing home placement for her father.

We lodged a complaint on her behalf. The trust then apologised for any distress caused and

acknowledged its delays in achieving a best interests outcome.

The trust also agreed to organise further training for staff to avoid any delays with similar cases in the future, and to review best interests decision processes and documentation.

## Employment



### Compensation for unfair dismissal and age discrimination

Law Centre (NI) represented a 67 year old man who was dismissed from his employment after 42 years' service. The Law Centre issued proceedings before the Industrial Tribunal for unfair dismissal

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and age discrimination and the claim settled shortly before hearing with our client receiving substantial compensation.

This case was referred by a solicitor member.

### **Unfair pressure put on employee off on sick leave to quit employment**

We recently assisted in a case where an employee, who was off on sick leave, was threatened with disciplinary action if he did not accept a financial offer to leave the employment. We advised him to lodge a grievance, whereupon the employer initiated the disciplinary action against him that had been threatened. Following considerable acrimonious correspondence, the case settled for £15,000 without going to tribunal.

This case was referred by the Labour Relations Agency.

### **Transfer of undertakings**

We avoided legal proceedings through entering into detailed correspondence on behalf of an employee at risk of losing his monthly bonus following the transfer of his employment under the TUPE Regulations.

The new employer proposed to remove his bonus unless he agreed to change his contract to that employer's standard contract. As one of the main purposes of the TUPE Regulations is to ensure the employee's terms and conditions remain the same after the transfer, we wrote to the new employer setting out the legal arguments.

The written contract described the introduction of the bonus scheme as discretionary, and the new employer argued that this meant that it was not

contractually enforceable and therefore outside the ambit of TUPE. We set out the caselaw in which the courts have established that the mere labelling of a bonus scheme as discretionary does not allow the employer an unfettered discretion to remove or fail to pay a bonus payment. Furthermore, the employer's discretion, if it exists, should be exercised rationally and in good faith in accordance with the decision of the Court of Appeal in *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ 1287.

Moreover, irrespective of what conclusion a tribunal might reach on the contractual status of the bonus, there would still be legal repercussions for the employer, which we set out in our correspondence. Regulation 4(9) of TUPE leaves it open to an employee to consider her/himself dismissed if there is a substantial change in working conditions to the employee's material detriment linked to the transfer of an undertaking. The change in working conditions does not have to be a change of contract. Clearly, even if the bonus was not contractual, losing £230 a month would be a substantial detriment for our client, and an unfair dismissal claim could be the result.

Setting out the legal position forcefully and in detail through correspondence, whilst emphasising our client's wish to engage in dialogue to resolve matters without any legal action, was ultimately successful.

The company withdrew its proposal and agreed to continue paying the bonus. Our client's employment was preserved and legal action proved unnecessary.

This case was referred by the Labour Relations Agency.

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## Immigration



### Family reunion

The Law Centre helped two teenagers be reunited with their family after they were separated for four years. Their mother, a Filipino national, is married to a dual British/Irish citizen living in Northern Ireland with whom she has two other children, both British/Irish citizens. The young people's applications for EEA family permits to join their mother and stepfather in the UK were refused because the stepfather is a British citizen and therefore no longer falls within the definition of EEA national in the Immigration (EEA) Regulations. We represented them in bringing an appeal to the First Tier Tribunal (IAC).

The stepfather is permanently incapacitated following a serious accident a few years ago. He married the clients' mother in the Philippines and spent as much time as possible with the family in the Philippines until a death in his Northern Ireland family meant he had to return to care for his disabled brother and elderly father. Due to his own disabilities, he struggled with the care arrangements and his wife joined him in the UK, leaving the two older children in the Philippines temporarily.

The mother applied for a residence card but this application was lost by the (then) UKBA, leading to a delay of a number of years in obtaining supporting documents for a new application and waiting for a decision. Finally, she was granted permanent residence on the basis of being a family member of a worker who has ceased activity due to permanent incapacity.

Following the death of their grandfather in the Philippines and emigration of their aunt, the teenagers were left alone and applied for EEA family permits to join their parents here. The application was refused and we lodged an appeal.

The Home Office withdrew the refusal decision after receiving supporting documents. This left the decision for reconsideration by the Entry Clearance Officer, who with consideration of our skeleton argument and supporting documents, granted our clients EEA family permits.

The young people can now be reunited with their parents in the UK.

### Derivative right of residence for siblings of an Irish child

The Law Centre recently helped a family who had one Irish child and whose other children were non-EU citizens. The Home Office refused the family's application for a derivative residence card for their non-EU children because their sibling is not a British citizen.

The immigration tribunal agreed with our argument that the caselaw established in the Zambrano case applied, and the clients received their residence card.

We are currently following up on similar cases.

This case was referred by UNISON.

### Derivative right of residence for domestic violence victim

We represented a woman who had to leave her husband because she was a victim of domestic violence and who had neither British nor EEA citizenship. Only two of her four children were

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British citizens. Although she had an EEA residence card issued for five years on the basis of her marriage to an Irish national, her right to rely on this card fell away when, following separation, it could no longer be established whether the Irish national husband was exercising treaty rights as a worker in the UK. The subsequent divorce further rendered the residence card redundant as she was no longer a family member for the purposes of the EEA regulations.

We lodged applications for derivative residence cards following the Zambrano case and subsequent amendments to the EEA regulations, on the basis that our client was the primary carer of her British citizen children. We also lodged applications for her other two children, as dependants on a primary carer.

We were eventually successful after a long delay. Our client and her two non-EU children have been granted five year derivative residence cards. As the carer of four children, she was very vulnerable and although a derivative right of residence does not currently lead to settlement in the UK, she is delighted to have regularised her and her children's immigration status for the foreseeable future.

The husband had first claimed asylum in the Republic of Ireland but when his wife obtained refugee status in the UK, he applied to join her from Dublin. After there was no decision from the Home Office in six months, he went ahead and joined his family.

When the couple notified the Tax Credits Office, Child Tax Credit stopped as the husband did not have a National Insurance Number, although there is provision for this to be waived where the partner is a person subject to immigration control. His partner, as a refugee, did not fall under that category. Despite many attempts, the couple had made no progress when they contacted the Law Centre for help. They had been receiving £50 per week from the Red Cross when they were in fact entitled to £320 Child Tax Credit per week.

We decided to challenge the decision through an emergency judicial review as the family had been left with no income for over two months for their children. We sent a pre action letter requesting urgent payment of benefit within seven days. A week later, HMRC confirmed that the claim was processed but that it would take up to seven days to make payment. We sent a further pre action letter on requesting an emergency payment within 24 hours and advising that if it was not made we would seek a judicial review against the refusal to make an interim payment and failure to have an effective system of emergency payments.

A payment of £2613.69 was lodged the same day to the family account.

## Social security



### Interruption to Child Tax Credit payment – lack of system of emergency payments

The Law Centre was contacted by a refugee whose payments of Child Tax Credit for her six children were stopped after her husband had joined her from Dublin.

### ESA claimants moving between Great Britain and Northern Ireland

The Law Centre successfully represented a man who moved from England to Northern Ireland and was told that he would have to make a

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fresh claim for Income-related Employment and Support Allowance (ESA) and go through a further assessment period at a lower rate of benefit, even though he had recently passed the Work Capability Assessment in England.

As a result of pre-action correspondence, the Department for Social Development agreed to include Income-related ESA claimants in an extra statutory scheme, paid this man more than £600 of arrears and cancelled his reassessment. We have been able to help several other people in the same circumstances access the extra statutory scheme.

This case was referred by Citizens Advice and Belfast Welcome Centre.

benefits and made a compensation payment. We also got in touch with HMRC to resolve the Child Tax Credit and Child Benefit issues.

The client's husband, a Syrian national, then joined the family and claimed asylum following advice from our immigration unit. Child Tax Credit payments stopped pending a further claim and the Law Centre intervened again to resolve HMRC delays.

Meanwhile, the community care unit ensured that the family received emergency help from the local health and social care trust.

The family now receives Jobseeker's Allowance, Housing Benefit, Child Tax Credit and Child Benefit.

## Social security, Immigration and Community Care

### Working across units to resolve complex needs

Working together across our social security, immigration and community care legal advice units, the Law Centre helped a UK national who had fled the conflict in Syria with her children. A series of incorrect decisions on the habitual residence test and the fast-track procedure for claiming benefits had created a snowball effect, depriving the family of Income Support, Housing Benefit, Child Tax Credit and Child Benefit. The family had been left destitute and at risk of being evicted from their accommodation.

Due to the obvious errors and to the emergency of the family situation, we contacted the Decision Making and Appeals unit directly. Following our representations, the Department backdated the

## Legal Support Project



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

### Unfair dismissal

The claimant started working as a Production Operative with the respondent, a manufacturing company, on 24 October 2011. The claimant alleged that on 23 August 2013 at the end of his shift, he was told by his manager that he was being made redundant with immediate effect because the company needed to reduce the wage bill.

The claimant made a complaint to the industrial tribunal claiming unfair dismissal and alleging that the company failed to follow the statutory dismissal procedures. The claimant also claimed breach of

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contract on the basis that the company did not give him notice of the termination of his employment.

Prior to hearing and without admission of liability by the company, the case was settled, with the company agreeing to pay the claimant £6,000 in compensation.

### **Working together: LSP and Social security unit**

The Legal Support Project (LSP) represented a man who was referred in February 2012 from the Law Centre's social security advice line. He had been refused an award of Employment and Support Allowance on conversion from Incapacity Benefit. He appealed against the decision with the support of a LSP volunteer.

He suffers from severe back and leg pain, as well as discomfort in his wrists and shoulders, following an accident at work. He has to take very strong pain medication.

He was represented by an LSP volunteer at the hearing of his appeal in August 2012. That appeal was disallowed.

The case was subsequently referred back to the Law Centre's specialist Social Security Unit. The Social Security Tribunal's decision was successfully appealed to the Commissioner and the original decision disallowing him ESA was set aside.

Following this, he was again represented at a fresh social security appeal hearing by an LSP volunteer representative. This time his appeal was allowed and he was awarded the work related activity component. He is now entitled to receive a backdated payment of approximately £10,000.

## **Contact Law Centre (NI)**

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When reading Law Centre documents, please pay attention to their date of publication as legislation may have changed since they were published.

**For copies of decisions referred to in his 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](http://www.courtsni.gov.uk/en-GB/Judicial+Decisions)**



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