CASEWORK BULLETIN

2011 Number 1

Law Centre (NI)

Introduction

Welcome to our casework 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!

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Assistant Director (Casework & Training)
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Employment

Redundancy

The Law Centre continues to field a large number of calls on redundancy issues. We have represented several employees in cases where they have been unfairly selected for redundancy. One case usefully highlighted a number of the important legal issues to look out for in assessing the fairness of a redundancy dismissal. Our client was working for a large employer, who had carried out a redundancy selection procedure. However, when that procedure was scrutinised more closely, it was found to be defective.

The employer did hold a meeting before making the employee redundant but did not give him a copy of the redundancy selection criteria used and his scores before the meeting. The employee was given these at the same time as being told he was dismissed. This meant that he had no chance to look at the process used or to raise any points that could be relevant to the decision. The Employment Appeal Tribunal, in *Alexander -v- Bridgen Enterprises Ltd* (2006) UKEAT/0107/6, has held that this renders any subsequent dismissal automatically unfair as the requirements of the statutory dismissal procedure have not been met.

The statutory procedure is designed to ensure an employee gets a fair chance to argue a case and that all the issues are aired. There were a number of other problems with the procedure used that the employee could have raised if given the chance.

First, the employer had used selection criteria that were subjective (for example, attitude) rather than objective. Secondly, the employer had not used objectively verifiable criteria in relation to job performance and had failed to look at and use the records available (timesheets and performance test results). Thirdly, the marks actually awarded for several of the criteria used were incorrectly calculated and open to challenge.

The cumulative effect of these procedural defects was likely to render any dismissal unfair even if the statutory procedure had been properly followed.

The employer had also used attendance as a criterion, but had marked the employee down for an authorised absence and for an occasion when he had to accompany his wife to hospital due to a medical emergency. The latter absence was one that was entitled to be taken by law. Relying on it as part of the reason for dismissing an employee was clearly not reasonable.

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Although this large employer had been using this procedure for years and initially considered that it had a strong defence, we were able to illustrate the mistakes that had been made. The employee had managed to get another job just before the hearing, and the case settled for £8,750, which covered the financial loss suffered.

In another case, an employee had been selected for redundancy but felt that the criteria for selection for alternative employment had been altered to favour another employee. It emerged that the dismissal of the employee and another left a workplace that was wholly of one religious background, with our client having been subjected to inappropriate remarks of a religious/political nature from a superior during her employment. Following our advice she raised her concerns about this treatment, and was shortly afterward told that she faced disciplinary proceedings for allegedly removing company property. We wrote a detailed grievance letter for her, including the victimisation she suffered for mentioning discrimination, and the employer immediately entered into negotiation to resolve the case before any legal proceedings had to be taken.

The case settled for £10,000, with an agreed reference and detailed clauses to protect the employee from any retaliatory action by the employer that could damage her future career.

Pregnant workers

We continue to find that pregnant staff are particularly vulnerable at the moment. We took on a case of a pregnant migrant worker who had been placed in a factory through an agency. She was absent from work due to pregnancy related illness and sent in a sick line that revealed that she was pregnant. The same day the factory asked the agency to provide another worker in her place. The case settled for £1,000, primarily reflecting injury to feelings as the work was casual and might have come to an end in due course anyway. As the employee was on a very low wage and had sick dependants to care for, the settlement was very significant for her.

Immigration

European law in the Upper Tribunal

We acted recently for a non-EEA national, referred to us by CAB and Women's Aid. She had arrived on a fiancée visa and married, but prior to submitting application for spousal visa, the marriage broke down as a result of domestic violence. Our client submitted an application for an EEA residence card on the basis that her spouse is an Irish national, who had worked in the UK and was now permanently incapacitated. The UK Border Agency (UKBA) refused her application because of a lack of evidence that the spouse was a 'qualified person' under EEA regulations. On appeal, the judge accepted that when the spouse became permanently incapacitated he had been working and our client is entitled to a residence card.

UKBA appealed to the Upper Tribunal on grounds that as her spouse only obtained Irish citizenship in December 2008, he had not been exercising Treaty rights and was not a qualified person when he became permanently incapacitated. The Upper Tribunal considered Irish nationality law and found that

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the spouse was an Irish national at that time and our client is therefore entitled to an EEA residence card.

While waiting for Upper Tribunal decision, our client's employer checked with UKBA whether she was entitled to work. The UKBA advised that she was not. While we tried to resolve the situation, she was suspended without pay and was left to rely on friends for support. We prepared a judicial review application and at that stage, UKBA changed its position and confirmed that she was and is entitled to work.

Ten year ban on entry to the UK

In December, we successfully lodged a judicial review in the High Court. The case involved challenging a refusal by the Immigration Tribunal to allow an extension of time to appeal. Our client was out of country with his three young children while his wife resided and worked in the UK. He applied for himself and the children to come and join his wife in the UK.

The visa was refused on the grounds that he had failed to disclose a previous application. This was an oversight on his behalf but this failure to disclose information had serious ramifications. If he was not permitted to appeal this decision and put forward his case, he would be subject to a ten year ban on re-entry to the UK. Appeals in the children's names were lodged but our client failed to lodge an in-time appeal for himself, believing that he could appeal at a later date. However, these appeals are intrinsically linked.

We therefore applied for permission to lodge an out of time appeal, given the impact of the potential ten year ban, coupled with the ongoing issue of family separation. This was refused and we initiated judicial review proceedings. The High Court judge ruled that it would be unjust not to extend time in this case and determined that the tribunal had failed to give any or proper weight to the particular circumstances of the case. We have now gone back to the tribunal to request that our client's appeal be heard along with his children's cases.

We were successful in a recent appeal at the tribunal against another ten year ban. Our Chinese clients had applied for visitors' visas to visit their daughter in the UK. They were refused on the basis that they had used deception in the past and the government asserted that they should be subject to a ten year ban on re-entry. They were coming to visit their daughter, who is married to an Irish national and residing in Northern Ireland. On their last trip to the UK, they travelled to Dublin on a day trip, not realising that the Republic of Ireland is a separate jurisdiction, and therefore unaware that they were required to obtain a visa to cross the border. When stopped during a random Gardai check, they were told that they should have obtained a visa but were allowed to continue their journey. They were told to ensure that they had entry clearance the next time they travelled over the border. They were unaware that they had acted unlawfully. They returned to China and, a year later, re-applied for visitors' visas. They did not mention their trip to Dublin as it was an honest mistake which they had no reason to recall or raise on a visa application. However, this visa was refused on the basis that they had used deception by failing to disclose their previous 'unlawful entry' into the Irish jurisdiction.

The refusal decision specified that they were subject to a ten year ban on re-entry. The alleged deception was based on a written statement from a Garda officer who alleged that they were stopped en route and were

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returned back to Northern Ireland. Our clients were adamant that this was not the case and that the officer had permitted their onward travel to Dublin. They provided dated photographs at various landmarks in Dublin as evidence to that effect. The UKBA failed to produce this Garda officer at the tribunal hearing and in fact failed to appear at all at the appeal. By the date of the hearing, the clients had been unable to see their daughter for almost two years. The judge, unusually, allowed the appeal outright on the day and stated that the UKBA's action and subsequent inaction amounted to an abuse of process.

Deportation

We were successful in a bail case in September. Our client is a Portuguese national who has resided in the UK for more than eight years. He has a long term partner who is an Irish national and they have a five year old child together. Our client had been convicted of possession of cannabis with intent to supply. He served his full criminal sentence but was then served with a deportation order and detained under immigration provisions. As there are no detention facilities in Northern Ireland, he was removed to England where he was being held pending his removal from the UK. We lodged an urgent bail application on his behalf.

We argued that his detention in England, or at all, was unlawful on the basis that the decision to deport was, in itself, an unlawful decision. He had resided in the UK for five years and arguably had a permanent right to reside. Under European legislation, a decision to remove must only be taken on 'serious grounds of public policy or public security'. Our client had been given a nine month custodial sentence which he had discharged. He had been assessed as low/medium risk of re-offending and was an enhanced prisoner at HMP Magilligan. We further submitted that he had a strong family life in the UK and had no incentive to abscond. We argued that he had admitted to his drug problems, had been clean for nine months and was committed to drug counselling and therapy. He was granted bail and returned back to Northern Ireland to reside with his family. We appealed the decision to deport and are awaiting a tribunal hearing.

Discretionary leave to remain

We were finally able to obtain leave to remain for a Pakistani family. Members of the family have had files open with us for the past five years. Much of their application to remain centred on ill health and caring.

Social security

Court of Appeal ruling

Hamilton v Department for Social Development [2010] NICA 46

In this decision, the Law Centre had appealed to the Court of Appeal against a decision of the Social Security Commissioner. The decision concerned the right to recover an overpayment where the decision to supersede the original award was notified after the decision to recover the overpayment.

Where the Department is seeking to recover an overpayment of benefit, Section 69 of the *Social Security Administration (Northern Ireland) Act 1992* requires that at least two decisions are made. There must be a supersession or revision of the original

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decision which awarded benefit (an entitlement decision) and a decision that the overpayment is recoverable from the claimant (a recoverability decision). In this case, while an entitlement decision had been made, it was not communicated to the claimant until after the recoverability decision had been made and sent to her. An appeal tribunal allowed her appeal on the basis that the entitlement decision had not been validly made as the Department could not show it had been sent to her. A Social Security Commissioner overturned the tribunal decision and found that, as the entitlement decision had been made, it was a valid legal decision. The Law Centre appealed to the Court of Appeal on her behalf.

The Court of Appeal agreed with the Commissioner, finding that the general principle stated in *R v Secretary of State for Home Department (ex parte Anufrijeva) [2003] UKHL 36* that a decision does not have full legal effect until communicated to the person affected did not apply to this case. Social security legislation specifically states that certain decisions may take effect from a date different than the date on which it was made (Regulation 7of the Decision and Appeals (NI) Regulations 1999, for example). As a result, the Court found that the entitlement decision had legal effect when the later overpayment decision was made.

The Court also found that, due to the wording of the overpayment decision letter, it was a valid notification of the entitlement decision. To those experienced in dealing with benefits, the expected course of action would be for a claimant to receive two decisions in separate letters, one an entitlement decision and the other a recoverability decision. However, as the overpayment letter gave some brief explanation of how the overpayment had arisen (the claimant was no longer entitled to Carers Allowance and therefore no longer entitled to Income Support), the Court found that the letter (which would normally be seen as the overpayment decision letter) also served to inform the claimant of the entitlement decision. The Court held that there is nothing preventing the Department giving notice of the two decisions in the same letter.

Advisers need to be aware of this if the person they are advising wishes to appeal against both entitlement and recoverability as there may be cases where only one decision letter is issued which deals with both entitlement and recoverability.

Interim payments for destitute people

We have been granted leave after a hearing in the High Court in October on our application to challenge the lawfulness of the refusal of the Social Security Agency to refuse interim payments of Jobseeker's allowance to a destitute Polish client. The judicial review application will now proceed to a full hearing of the legal arguments.

Attendance Allowance

Another judicial review application was avoided when we successfully argued for the payment of arrears of Attendance Allowance of £6,690 to a client. The payments were being paid into another person's bank account.

Temporary or permanent incapacity?

The Law Centre has recently represented in a case involving a Lithuanian woman who was in receipt of Incapacity Benefit with a top-up of Income Support. In order for her to be entitled to Income Support, she had to have a right to reside. She had been in employment prior to being in a car accident. As a result of the accident she had metal pins inserted into

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her legs and had claimed Incapacity Benefit. European legislation states that where a person was working but is now temporarily incapable of work, s/he will retain a right to reside.

Our client had been on Incapacity Benefit for around three years and was asked by the Income Support office when she would be able to return to work. She replied that her doctor was not able to tell but he had said it would likely not be in the near future. The Income Support office decided that she was no longer temporarily incapable of work and stopped her Income Support. There was no issue over her incapacity for work.

The Law Centre appealed on the basis that European law only allows for a person to be either temporarily incapable of work or permanently incapable of work. Those who are temporarily incapable of work will, in certain circumstances, retain a right to reside. Those who are permanently incapable of work can obtain a permanent right of residence. European law does not allow for a third category of persons who are neither temporarily nor permanently incapable of work and the Department was therefore wrong to find that the claimant had lost her right of residence.

Our appeal was allowed, and the claimant was found to have been entitled to Income Support throughout. The tribunal found that her statement that she would not return to work in the near future was insufficient evidence to supersede her entitlement to Income Support on the ground that she was no longer temporarily incapable of work. As she was still in receipt of Incapacity Benefit, she was still incapable of work.

The Department had indicated an intention to appeal this decision to the Social Security Commissioner, but no application was made.

The Law Centre would be very interested in hearing about any similar cases.

Community Care and Mental health

Withdrawal of home help services

We have been granted leave to apply for judicial review of a decision of the Western Health and Social Care Trust not to provide a cleaning service to an elderly client who is a wheelchair user. Our original application had been wider, to include concerns about rigid policies and night time care, but the judge has narrowed the focus of the challenge to the cleaning service only. The legal issues concern the manner in which the trust has removed the cleaning service from our client and the way it has applied the regional access criteria for domiciliary care. We expect the full hearing to conclude in early February.

In a separate case, we successfully challenged a trust on its failure to provide services to meet the assessed needs of a client with a terminal illness. Our client was assessed as needing one hour shopping and one hour laundry service per week. The trust concerned initially refused to provide these services, citing lack of resources as the reason for the refusal. Following negotiations, the trust accepted our legal representations and the services were included in our client's domiciliary care package.

Care home fees

We recently acted on behalf of an adult who was charged a third party top-up fee by the trust in connection with a relative's placement in a nursing home. The adult concerned had been paying the top-up fee for a number of years prior to seeking our advice on the issue. We challenged the legal-

ity of this charge and the case was successfully settled in our client's favour without the need for judicial review action. Our client was refunded over £2,000 in back payment of fees improperly charged.

Delayed discharge from hospital

We have lodged judicial review applications for two clients about the delay they are experiencing in being discharged from Muckamore Abbey hospital to accommodation in the community. We are arguing that both the Belfast Trust and the Department of Health, Social Services and Public Safety are not meeting their legal responsibilities to our clients under community care and human rights law.

Independent medical reports

We were disappointed not to be given leave in a judicial review about a decision of the mental health review tribunal not to allow our client to instruct a medical expert because he, in other cases, sits as a tribunal panel member. There are not many doctors willing to give reports for tribunal so this affects our client group significantly. The High Court judge decided that our client did not have sufficient interest to be allowed to challenge the tribunal, indicating that the doctor could have taken a challenge to the direction. We have asked the Court of Appeal to look at the decision as we feel that, in addition to the doctor, our client does have standing to bring a case. The hearing on this is on 24 March.

Personality disorder services

We have another judicial review listed for a leave hearing in March. We are arguing that there was an unlawful withdrawal of psychiatric services to our client, who has a personality disorder.

Unlawful detention

We were successful at mental health review tribunals in three cases in the autumn. We were able to make the case that the hospital authorities no longer had the lawful authority to detain our clients as there was not a high enough risk of our clients causing serious physical harm to themselves or others. Our clients had been detained in hospital for between two and five years.

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:
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