

Introduction

Welcome to the casework bulletin. We hope that you find the cases we are working on interesting and useful for your own work. We need members to keep talking to us about their advice and casework and to refer on cases which are complex or where our input could help.

We are currently particularly interested in referrals of cases of restrictions on access to health care for people from abroad. Please keep us in mind if you come across this problem.

Maura McCallion

Assistant Director (Casework Services)

May 2008

Social security



Removal of existing awards

An appeal to the Social Security Commissioner has led to some useful case law on the requirements on tribunals when they are considering removing an existing award of Disability Living Allowance.

We appealed a tribunal decision to remove our client's award of middle rate care of DLA. The Commissioner allowed our appeal and emphasised that claimants must be given a sufficiently clear warning that the tribunal will consider their entitlement to an existing award when neither party has disputed it. Tribunals will need to identify what evidence has led them to consider the existing award. They will need to give a cogent evidential basis for any decision which seeks to remove an existing award. If a tribunal does not follow this guidance then its decision may be set aside.

Migrant worker cases

The Law Centre is currently representing a client before the Social Security Commissioner in a case that considers the circumstances in which migrant workers may retain a right of residence when they have children attending school in Northern Ireland. As the children of workers have a right to pursue educational studies, we are

questioning whether the children and a parent have a right to reside to ensure the child's educational rights are observed.

A case on similar issues is before the Court of Appeal in England. The Court has decided to refer this issue to the European Court of Justice for guidance. It is likely our case will be postponed awaiting the response.

On the 23 and 24 July, the House of Lords will hear our test case Income Support appeal for our Polish client who had worked in Northern Ireland for over twelve months but had failed to register her second job when she moved workplace. Our client was in need of Income Support as she had to give up work to look after her child when her relationship broke down. We are disputing the lawfulness under European law of the restrictions placed on eligibility for benefits for European Accession state nationals. This case was referred by Women's Aid.

Tax credits

North Belfast Counselling and Advice Services, Tar Isteach recently referred to us two tax credit cases where problems with the computerised payments system led to hardship. We are interested in hearing from any advisers or individuals who come across similar problems.

In both cases, the mothers received Child Tax Credit (CTC) payments after the births of their daughters but the payments then suddenly stopped. Both mothers were left for some months without CTC until HMRC agreed to make manual payments. Apparently due to a computer error, both claims were no longer recognised by the tax credit computer system. Manual payments continued for two years but this has caused problems with the payment of milk tokens. One mother has not received these for more than a year. HMRC has written to both clients alleging that they have been overpaid tax credits. Deductions are being made from their ongoing payments and court proceedings have been threatened. The clients were both told that they have not in fact been overpaid but that the computer system does not recognise the manual payments.

The Law Centre has written to HMRC's legal department and stated that we will begin judicial review proceedings in the High Court. The aim is to make HMRC reinstate full payments to our clients, cease manual payments and provide a full explanation of the history of these claims.

HMRC has suspended recovery action pending the outcome of a full review into the cases.

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Income Support

Ligoniel Improvement Association referred a case to us for an appeal to the Social Security Commissioner. The client had had problems with his mail and did not receive an incapacity for work questionnaire. Neither did he receive the reminder or subsequent decision. He states that he became aware of the problem when his Income Support stopped. His appeal to a tribunal was unsuccessful. The client's Housing Benefit also stopped when his Income Support stopped. He has found himself with arrears of rent and threatened with eviction proceedings.

The Law Centre has entered an appeal on the grounds that the tribunal erred in two ways. First, the law states that a person cannot be treated as incapable of work unless four weeks have passed between the issue of the form and the reminder and at least six weeks have passed since the form was issued. It is our case that the days on which the forms were issued should be excluded when calculating the four weeks and that the tribunal was wrong to find that the time limits were met. We also argue that the tribunal was wrong to accept that the Department's printout of the generation of the forms was proof that the forms were issued on that day. We will also appeal any refusal to backdate Housing Benefit.

Significantly, the client failed to realise that he could make a fresh claim sooner than six months after the disallowance and lived in a state of near destitution. He would have been entitled to make a fresh claim when he was disallowed but would have been referred for a personal capability assessment right away.

Employment



Fixed term employees

We were successful at tribunal for an employee who argued that there had been a breach of the Fixed Term Employees legislation as he was barred from applying for internal vacancies. The employer argued objective justification for its decision but this was not accepted. It is reducing staff numbers in line with the Review of Public Administration. We think this is the first case of its kind in Northern Ireland.

Unlawful deductions from wages

The Law Centre negotiated settlement of a case for £5,000 where our client, a migrant worker, had had a management company set up on his behalf by an agency without his knowledge. This resulted in deductions being made from his wages that he could not understand. When

he protested about these he was eventually told there was no more work for him. East Belfast Independent Advice Centre referred his case to the Law Centre.

This was an example of the way that certain agencies and employers can try to set up atypical working arrangements, often for migrant workers, with the effect of decreasing or extinguishing their employment rights. The agency and the company that set up the arrangement contended that it meant that our client was self-employed. Our argument was that the whole arrangement was a legal sham that did not reflect the reality.

We recently assisted Omagh Independent Advice Centre (OIAC) in providing the tribunal advocacy for a case they had been working on. The case, for a Polish worker who is claiming an unlawful deduction from wages, was successful at tribunal. We are now working with OIAC on enforcement of the judgment as the employer has not yet complied.

The Law Centre recently represented a group of employees in a factory claiming a breach of the working time regulations and unlawful deduction of wages for underpayment of holiday pay. We resolved the issue in the workers' favour through correspondence which secured an agreement for the future. We held a group meeting to establish whether to raise proceedings for back pay. In the end, the workers decided not to take tribunal action.

Dismissal

We settled a case referred by East Belfast Independent Advice Centre, where a part-time shop worker felt that she had been forced out of her employment. Our client received £2,000 financial compensation. Through settlement we were able to secure other terms that could not be awarded by a Tribunal, such as a very favourable reference and a joint expression of regret at the way the employment had ended.

We also negotiated settlement of a case at Tribunal for £3,500 where an employee had been dismissed without the proper statutory procedures being followed. Although he had been described as self-employed for part of the time he had been working, we argued that he was in fact an employee on all the facts of the case.

Immigration



Asylum

We have successfully resolved the immigration position of a number of long standing clients through the application of the Home Office's 'legacy' programme. This shows that continuing to pursue appeals and fresh

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applications over several years can ultimately bear fruit. One of the clients whose case we can now close has been with us since 1997.

An Iranian client was granted refugee status recently. He had been involved in the anti-government movement there. We also obtained leave to remain for an Iranian minor.

Trafficking

We obtained indefinite leave to remain in the UK for a Nigerian teenage client and her young child. We think that this client may have been trafficked into the UK. Our community care unit also persuaded social services that she should have been given 'looked after child' status while she was under eighteen. Social services agreed that they would now treat her as if she had been and provide her with care leaver support as she settles here.

We also secured discretionary leave for an Indian woman who is a victim of trafficking.

Discretionary leave

We obtained discretionary leave for a Ugandan woman and her baby daughter. The child has Down's syndrome and required heart surgery, treatment for leukemia and other medical intervention in Northern Ireland.

Identity Cards Act

We secured Temporary Admission for a man who had been charged under the Identity Cards Act 2006 and held on remand for over ten months in HMP Maghaberry before being acquitted of all charges in the Crown Court.

Mental health

Long term detention and lack of community services

We were successful at the end of February in a judicial review of a decision of the mental health review tribunal. A 24 year old man had been detained in Muckamore Abbey hospital for over five years.

Our case was that the barrier to his discharge is a lack of community facilities and that the tribunal was wrong to find that this failure on the part of the community trust was sufficient to mean that it was still 'necessary' to detain him in hospital for treatment. The High Court found the reasoning of the tribunal which upheld the detention to be inadequate. The court remitted the matter to a differently constituted tribunal. On 15 April 2008 the new tribunal, despite strong

opposition from the trust, ordered discharge deferred for six weeks to give social services time to put in place a satisfactory and robust aftercare package. We have now lodged judicial review proceedings to test the legality of the deferral of discharge from detention in these circumstances.

The role of the mental health review tribunal medical member

A judicial review leave application has been made to test the lawfulness of an apparent preconceived opinion of a medical member of a mental health review tribunal. A statement was made at the start of the hearing that our client had a psychotic illness and required to be detained for treatment. This appears contrary to the guidance set out in case law that the medical member's view should be preliminary at that stage, relate only to the mental condition and not address the requirement for compulsory detention or treatment.

Community care



Brain injury services

A judicial review about adequate care arrangements for a young woman with a brain injury is ongoing. The judicial review has increased the focus on the lack of services and has led to a more intensive care package. This includes a rotational domiciliary/residential arrangement and more input from her psychologist in training care staff.

Age appropriate respite

The Law Centre is also running two judicial review actions about the lack of age appropriate respite facilities. This has led to the trust proposing to convert a room to be used as a respite bedroom in an existing facility. We are consulting with our clients about this move and the cases are ongoing.

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/

Copies of this report in large text format are available on request. Contact Publications Department at Law Centre (NI), telephone 028 9024 4401.