

CASEWORK BULLETIN

2011 Number 2



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. The impact of financial restrictions on accessing health and social care services is reflected in a number of our cases.

We are working closely with Mencap on a legal and policy strategy to enable resettlement of long stay patients from Muckamore Learning Disability Hospital. Almost 200 patients remain in Muckamore and at June 2011, 91 had been in the hospital for more than 20 years. The legal challenge is highlighted in this bulletin. The social security section highlights important Commissioner cases concerning ESA and tribunal powers to reduce DLA awards and an unusual case concerning internment in the late 1950s. The immigration section showcases the fast moving developments in European law and the impact of the McCarthy judgment in the ECJ. Finally, the employment section spotlights some particularly poor practice by employers that came back to haunt them.

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

This is my last Casework Bulletin as I am moving to the Office of the Attorney General this month. I wish all our members the best of luck with their work.

Maura McCallion, Assistant Director (Casework & Training), September 2011

Community Care



Help with cleaning at home

The High Court ruled earlier this year that a health and social care trust had acted unlawfully in how it had approached the needs of our client who is a wheelchair user. The trust had withdrawn and refused to reinstate a cleaning service.

The legal argument focused on the process followed by the trust in reaching its decision to remove the cleaning service and its

application of the Regional Access Criteria for domiciliary care. The judge found that the trust, in reaching its decision, had not acted in accordance with the criteria as it failed to take into account 'relevant information' which would have required it to reassess our client's need.

The judge also held that while the criteria allow trusts to take into account a service user's resources, an earlier Departmental directive (1999) excludes from the scope of permissible consideration any disability related benefits. This was a directive introduced following lobbying by the Law Centre. He found that the trust had acted in

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contravention of the directive by failing to make a distinction between our client's disability related benefits and her other sources of income.

Services for adults with autism

The Law Centre was contacted by a woman whose nineteen year old son has severe autism spectrum disorder with related complex disabilities. Since 2005, her son had been in receipt of a social care service for two hours each Friday evening which entailed two workers from Autism Initiative taking him out to activities such as swimming. When her son moved from the children's social care team to the adult team, the local health and social care trust withdrew the service, on the basis of unavailability of funding. The withdrawal of the service caused our client's son distress which had a significant effect on the whole family.

The Law Centre identified potential legal breaches by the trust, including the withdrawal of a service without a proper reassessment of need or the putting in place of an alternative service. The trust also indicated that the service was one provided only when a service user was under nineteen and this raised a potential age discrimination concern as well as suggesting care provision was service rather than needs led.

Following correspondence between the Law Centre and the trust, it was agreed that the service should be reinstated and judicial review proceedings were avoided.

Funding delays leading to prolonged stays in hospital

A 91 year old woman who had been hospitalised following a stroke was ready for discharge into a care home. A bed was identi-

fied in an appropriate nursing home. Her local health and social care trust informed the family that funding for the bed was not available and that their mother would have to remain in hospital and be placed on a waiting list for discharge.

Following legal correspondence, our client was discharged. The same result was achieved in two other similar cases of delayed discharge.

Sufficient care services to allow an older person to remain in her own home

We acted for a 93 year old woman with complex physical needs who is cared for at home by her daughter who works part time. Since our client had been extremely distressed by a short spell in hospital, her daughter wished her to remain living at home for as long as possible. To enable the daughter to continue working, she sought assistance from her local health and social care trust. In response, the trust arranged a care package but it was insufficient to meet the needs of the family.

We were able to liaise with the trust on its legal obligations and an appropriate care package for both mother and daughter was arranged.

Mental health



Legal authority for detention

This High Court case focused on the statutory test 'substantial likelihood of serious physical harm' which is at the core of the legal grounds required to justify involuntary detention in a psychiatric hospital.

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Our client had sent unwanted messages via Facebook to a woman. She had reported the matter to the local police. Our client was then detained in hospital for treatment for his mental illness. A mental health review tribunal reviewed his detention and found it to be lawful. The High Court quashed the tribunal's decision, noting that 'psychological harm or a state of mental anxiety or foreboding or a feeling of harassment on the part of a third party - as regards both the past and the future, as predicted - will not suffice' for the statutory test to be met.

Use of guardianship

We took a case to the High Court on behalf of a disabled client to clarify the proper procedures for ensuring that welfare decisions, for example about contact with family, are lawful and protect the Article 8 ECHR rights of the person concerned. The High Court noted that it was not appropriate for the local trust to use the structure of guardianship under the Mental Health (NI) Order to give it authority to restrict family access.

We are looking into other cases which might allow for further guidance to be given in this area.

Resettlement of long stay patients

We were disappointed in the High Court's decision in our client's challenge to the Department of Health and Social Services on the lengthy delay in resettlement of long stay patients from Muckamore Abbey learning disability hospital.

The case involved three main arguments. One was on the statutory duty to meet assessed need and the duty of the Department to monitor activities of trusts in this regard. The second was on the right to independent

living as an aspect of Article 8 ECHR. The final argument was whether or not the departmental policies and targets for resettlement have created a legitimate expectation that our client could rely on. The judge was not persuaded that the Department had acted in way which rendered its position unlawful.

Our client has now left hospital but is seeking to appeal the case to the Court of Appeal due to the points of general public importance which the case raises.

Social security



Interim benefit payments for European nationals who are destitute

Our previous bulletin highlighted a judicial review application on the right of a Polish client to receive interim payments of Income-based Jobseeker's Allowance (JSA) while he exercises appeal rights about entitlement to benefits. As we obtained benefit for our client before the High Court case was finally decided, the challenge was withdrawn. The Law Centre is anxious to test this point in other cases, where people with strongly arguable cases are being left to face destitution pending the outcome of lengthy appeals procedures.

This particular client had worked in the UK for more than four years before being made redundant due to the recession. He was refused benefits and became street homeless for a year which led to him becoming extremely unwell. A hostel agreed to accommodate him on a charitable basis while the dispute about his entitlement to benefits was pursued.

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Our client claimed Contribution-based JSA as it was clear that he should have necessary contributions for contribution based benefits. When this was refused we appealed. It came to light that an employer had made deductions for national insurance contributions but had not sent these to HMRC. We made an application for correction of his national insurance record to reflect the fact that his employer had failed to forward these deductions. HMRC agreed and this has led to Contribution-based JSA being backdated for June to December 2010 and a current award of Contribution-based Employment and Support Allowance (ESA).

We are also appealing a tribunal decision that our client did not have a right to reside for the purposes of Income-based JSA last year. We are arguing that he can rely on EU Directive 2004/38 to show a right to reside and that provisions of the Workers Registration Scheme are unlawful in these circumstances.

We are also advising him to make a claim for Income-related ESA as we wish to challenge the operation of the right to reside rule for EU citizens with ESA. Since 1 May 2011, the Workers Registration Scheme has been abolished and nationals of the A8 states are entitled to claim JSA and Housing Benefit, but right to reside issues can still arise where a claim for ESA is made if they are not accepted to have had EU worker status.

Right to reside

We have also had another European law case before the Social Security Commissioner. Our Latvian client worked in Northern Ireland for more than a year before he was made redundant. Unfortunately there was a break of more than 30 days in his registered employment and he was refused access to JSA. His daughter, who was at school at the time, was taken

into the care of social services. The Social Security Commissioner has recently decided that he had a right to reside at the time he claimed benefit due to the fact that he had a daughter at school whose education had started while he was in registered work. We are bringing a second appeal which concerns his right to reside as the parent of a child in care in Northern Ireland.

Employment and Support Allowance

We successfully represented in one of the first ESA appeals to reach Social Security Commissioner level in Northern Ireland (C7/10-11(ESA)). Commissioner Mullan allowed the appeal, deciding the appellant did pass the stringent ESA test for Limited Capability for Work.

Our client had a serious injury to his right hand which left him unable to grip and to form a fist with that hand. The Department did not dispute the very real problem that he had with his right hand. It is possible to score points under the Limited Capability for Work test for the activity of '*Picking up and moving or transferring by the use of the upper body and arms..*' A person will score 6 points if s/he '*cannot pick up and move a light but bulky object, such as a cardboard box, requiring use of both hands together*'.

The tribunal which heard the appeal gave the appellant 0 points for this descriptor as it decided that it could not consider his manual dexterity when considering his ability to pick up. Commissioner Mullan concluded that the tribunal was wrong and that manual dexterity would be relevant to a decision on a person's ability to pick up an object.

Disability Living Allowance and the power of the tribunal to reduce the award

We had another successful case before the Commissioner recently (C85/10-11 (DLA)).

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Our client had had an indefinite award of the high rates of care and mobility of DLA. The Department had changed this after a review to low care and high mobility. The client felt that his condition had not changed and he appealed to a tribunal. Unfortunately, the tribunal removed the low rate care entitlement and just awarded the high rate of the mobility.

Commissioner Mullan decided that the tribunal had not followed the guidance set down in C15/08-09(DLA). Although the tribunal had stated that it had the power to change his award, it had not offered either an adjournment or the option of withdrawing the appeal.

The Commissioner also criticised how the tribunal dealt with the difficult issues of grounds for supersession and the effective date of supersession.

Another ground of appeal had been that the panel hearing the appeal was only made up of women and the man felt very inhibited about discussing intimate personal details in front of the all female panel. The Commissioner did not accept that this had led to an error of law, but he did usefully state that in such situations a person would be entitled to ask for an adjournment and a mixed gender panel.

State Pension Credit and the valuation of capital

Our client had separated from his wife 30 years ago. She had continued to live in the former matrimonial home with the children who are now adults. Our client owned the property in his sole name. The mortgage was paid off and he did not charge his estranged wife rent. She was in poor health and the house had fallen into disrepair.

When our client claimed State Pension Credit the Department valued the property at £120,000 and reduced his State Pension Credit

to a minimal level due to the notional income attributed to this. A tribunal refused his appeal.

The Law Centre then convinced that tribunal to set aside its decision and represented the client at the remitted tribunal. The Department agreed to get a further valuation of his interest in the property with his wife residing there. The valuation came back at just over £9,000. As a result our client has received more than £7,000 in arrears and his State Pension Credit has been increased to £110 per week.

National insurance credits during internment

We acted recently for a man who had been interned without trial in Northern Ireland between 1957 and 1960. He was never charged with or convicted of any offence. He had a full employment record both before and after internment. The client was receiving State Retirement Pension at a reduced rate because he did not receive national insurance credits while interned.

We made an application for an award of credits for the period and we appealed the refusal on human rights grounds. The tribunal agreed that there had been a breach of human rights but refused the appeal on the grounds that it did not have the power to grant a remedy.

We then appealed to the Social Security Commissioner. In the interim we corresponded with the office of the Secretary of State for Northern Ireland and the Department of Justice regarding a scheme in 1999 under which contributions were made for those interned in the 1950s.

The Department of Justice has now confirmed that it had made late payment of contributions for the period to HMRC. The Pensions Department is currently reviewing our client's pension entitlement.

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Immigration



Irish/British dual nationals

We have now had three European law appeals since the Court of Justice of the European Union judgement in *McCarthy v UK* (C-434/09) earlier this year. This decision restricts the ability of a dual national who has not moved between member states to rely on Directive 2004/38/EC as a basis for residence of his or her non-EEA spouse. One of our arguments has been that the UK regulations can be interpreted differently.

The first appeal involved a dual British/Irish national who is now permanently incapacitated and we argued that the appellant is the family member of a worker who has ceased activity. We relied in part on *MAH [2010] UKUT 445 (IAC)* to argue that the UK Regulations were more favourable than the Directive and did not require the EU citizen to have exercised her/his right of free movement. The judge accepted our submission that this case was very similar on the facts to *MAH* and allowed the appeal.

The second immigration judge accepted a very similar argument in respect of a worker who is temporarily unable to work.

Unfortunately in our third case, the judge did not address this argument at all, despite similar submissions, and merely declared that following *McCarthy* dual British/Irish nationals cannot rely on European law. We have appealed against this decision.

Refugee status

The Law Centre represented a West African mother and daughter in fear of female genital mutilation, in their recent successful tribunal appeal against a refusal of refugee status.

The adult and child claimed that there was

no part of their home country where they would be free from risk of persecution and harm. The immigration judge determined that their right to life and right to be free from torture would be unlawfully at risk if they were removed to their home country by the UK Border Agency (UKBA). The judge deemed them to be in need of humanitarian protection and refugee status. In making his decision, he made reference to an expert report given to the Law Centre by an African lawyer and women's rights activist, which set out in detail the situation in the home country.

We were also successful in securing full refugee status for two unaccompanied asylum seeking children in the last few months. We have made a complaint, however, that one of these children was interviewed by UKBA at the airport before social services arrived. We have also raised concerns that only one break was offered to the other child during an interview of over four hours, contrary to UKBA policy guidance on interviewing children.

In another asylum case which reached Upper Tribunal stage, the UKBA eventually agreed to withdraw its decision refusing refugee status to our client who was believed by the Iranian authorities to have acted against the regime. The First-Tier Tribunal had initially dismissed the woman's appeal but a senior immigration judge agreed that there had been errors of law in the First-Tier Tribunal's decision-making.

Detention of a mother of a young child

A client of the Law Centre is bringing civil proceedings against the UK Border Agency for its actions in detaining her during her pregnancy and separating her from her young child. The proceedings are before the High Court and we are arguing that the immigration authority's actions amounted to false imprisonment of the mother. We are seeking to demonstrate that UKBA failed to follow its

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own policy as contained in its Children and Family Cases Process Instruction and also acted in breach of Article 8 ECHR.

Employment



Redundancy

We recently represented two employees made redundant by the same employer, bringing claims for unfair dismissal.

The first employee had been off sick for some weeks, and on the day he returned to work the employer told him that he was making him redundant because of the economic downturn. He was the only person let go at this stage. The lack of any procedure made the dismissal automatically unfair, and our client felt that the employer had simply decided to dismiss him because he had been absent.

In cases where the statutory dismissal procedures have not been followed, employers will often try to limit their liability by suggesting that the employee would have been dismissed in any case if proper procedures had been followed. The onus is on the employer to produce evidence to show that dismissal might have happened anyway, and in a redundancy dismissal this is likely to take the form of details of the redundancy selection process carried out, including selection pool, criteria and scoring. In this case, the employer produced a redundancy selection grid that showed our client having achieved the lowest score - but the selection process had occurred some months after his dismissal, with his name and scores added at the bottom in a different font. Our client having obtained further employment, the case settled for £4,000.

Our second client was also dismissed on the spot and without any statutory procedures being followed, so he too would be held to have been automatically unfairly dismissed.

The employer again maintained that the dismissal would have happened anyway in an attempt to limit liability, but examination of the records of the redundancy process showed a number of flaws. First, the employee's contract set out what factors would be used to select in a redundancy situation, including attendance and timekeeping, but the employer failed to use this as part of the criteria, and we were able to point to objective records that could have been used (an attendance and timekeeping bonus).

Secondly, the employer based his scores for skills on answers given by each individual worker as to what they could do, rather than any objective evidence or assessment. Our client had answered honestly, but other employees had received marks for areas that they did not work in. Thirdly, mistakes had been made in awarding marks, with our client not given credit in some areas. In addition, we could show the Tribunal the scoring matrix with our previous client added in subsequent to his dismissal, which could have an impact on credibility. The case settled just before the Tribunal hearing for £5,000.

Employees on work permits

We recently acted for one client who found herself subjected to bullying and harassment by her employer over a period of years. The employer brought up her work permit status as an implied threat when she complained. Our client put up with this situation for much longer than she would otherwise have done, because she thought that leaving the job and the abusive situation would lead to her losing her right to remain in the country.

We wrote to the employer setting out the legal issues and suggested a discussion to try to resolve the situation. Our client had numerous prospective claims arising from breach of her employment rights, including constructive dismissal due to breakdown in

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trust and confidence between employer and employee, discrimination on racial grounds (notably concerning the use of her work permit status as a threat), and discriminatory victimisation due to being subject to disciplinary proceedings for having made a complaint about being discriminated against.

As the employment relationship had irretrievably broken down, our client would not be able to return to work, but her status as a work permit holder would be very significant in calculating any compensation she might receive from a Tribunal. We advised her that she could have a right to remain in the country as the partner of an EU national, but such an application might take a year or more to process, and she would be unable to work in the meantime and would have no access to benefits. If she had to return to her country of origin, her prospects of securing work at a similar pay level would be extremely low.

As a result, the employer could be facing a very large claim for loss of earnings. Work permit holders may be vulnerable, but if they do successfully bring a case, the stakes for the employer may be much higher than they would be in the case of another worker who can look for another job at a similar rate.

Following protracted negotiation, the employer agreed to pay £25,000 in compensation, with an agreed reference and very detailed confidentiality clauses to prevent any negative repercussions for our client.

In advising migrant workers on employment law in similar situations, it is very important that they are advised of the consequences that various courses of action can have on their immigration position. The Law Centre is very happy to give advice in individual cases.

Transfer of undertakings

We recently represented nine cleaners who were subject to transfer when a new company won the tender to clean the large supermarket in which they worked (a service provision change). Redundancies followed the transfer, but no staff consultation about such proposed

measures had taken place beforehand, contrary to the TUPE regulations. Both employers can be liable in this situation, but the employee must proceed against the employer who employed her/him before the transfer. In this case the employer agreed to pay each employee six weeks wages in compensation.

Constructive dismissal

In a recent case, we represented an employee who had been injured at work. His personal injury claim was subsequently not contested and he was compensated in full. During the time he was off work he submitted a sick line, but the employer rang up his GP and persuaded him to change the sick line to 'fit for light duties', implying that this is what our client wanted. The employer then refused to pay Statutory Sick Pay as a result of the changed sick line. Our client contacted the doctor, who was justifiably apologetic and reinstated the correct sick-line. Nevertheless, the employer maintained his refusal to pay sick pay and then brought disciplinary charges against our client for his failure to turn up to work when 'fit' to do so. There was also a concern that the employer was following him.

Our client resigned and brought a claim of constructive dismissal and the case settled for £5,000 just before tribunal. As the employer had financial difficulties, our client agreed to staged payment of the settlement sum over a number of months, with final withdrawal of the tribunal proceedings only coming when we had received all monies due. In the current economic climate, this sort of agreement may be necessary and can ultimately be in the best interests of the client.

For copies of decisions referred to in this bulletin please contact Mary Blair, Law Centre (NI) librarian.

McClellan's (Kathleen) Application [2011] NIQB 19

JR 45 Application [2011] NIQB 17

JR 47 Application [2011] NIQB 42

JR 50 Application (2011) NIQB 43

Law Centre (NI) court judgments are available online on the Northern Ireland Court Service website at: www.courtsni.gov.uk/en-GB/Judicial+Decisions