THE AIRE CENTRE
Advice on Individual Rights in Europe

INFORMATION NOTE ON FULL-TIME CARERS AS WORKERS

This information note is designed primarily for EEA nationals who are full-time carers in receipt of Carer's Allowance in the UK. It sets out the AIRE Centre's general position on full-time care of this nature as constituting work under EU law.

It must be noted from the outset that the UK Courts and Tribunals have been unwilling to recognise persons providing full-time care as 'workers' under the broad European Union definition. As a result, EEA nationals who are providing such care and are therefore unable to perform other work, are generally unable to assert a right to reside under the domestic provisions for the purpose of claiming benefits. However, at the AIRE Centre we are currently involved in litigation which seeks to reverse this position.

The Right to Reside

Under Article 6 of the EU Directive 2004/38 all EEA nationals have a right to enter the UK for an initial period of three months. EEA nationals have an extended right to reside for longer than three months under Article 7 of that Directive if they are a worker, a self-employed person, a student with adequate sickness insurance or a self-sufficient person with adequate sickness insurance. If they belong to one of these categories, they will be considered to be exercising a Treaty right which confers a right to reside. A further right to reside is extended to jobseekers under Regulation 6 of the Immigration (EEA) Regulations 2006, which were the UK implementing regulations of the EU Directive.

EEA nationals must demonstrate that they have a right to reside in order to gain access to certain social assistance and social security benefits. As a carer is not considered a worker, they are not entitled to assert a right to reside in this way and as a result may struggle to support themselves.

EU Workers

When determining whether or not a person is exercising Treaty rights as a worker or self-employed person, these terms should be interpreted in accordance with EU law. The case of *GENC* has established that the term "worker" should be interpreted broadly, accepting a wide definition of the term. The Court of Justice of the European Union has stated that '*the essential feature of an employment relationship…is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'*.

In order to be considered a worker, a person must be pursuing activities that are "real and genuine" rather than merely "marginal and ancillary." *GENC* further established that any person pursuing

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such activities in return for remuneration is necessarily a worker or self-employed.[1] Which of the two the individual in question will fall under, depends on whether or not they are performing these services under the direction and control of another.

It was also held in the case of *Lawrie-Blum* that all that is required to constitute work under EU law is that "*the activity should be in the nature of work performed for remuneration, irrespective of the sphere in which it is carried out."*[2] What this means for carers is that it is irrelevant that the care provided is traditionally provided within a home setting rather than under a private contract of employment.

Thus, in order to be considered a worker, a person must be:

1) pursuing activities that are real and genuine, not marginal and ancillary; and
2) performing those activities in return for remuneration.

In order to relate the above definition of work to the activities carried out by carers, this information note will examine what each requirement entails and how it is met by full-time carers.

'Real and Genuine work'

There is no definitive test for what constitutes real and genuine work. However, the work carried out by carers is generally of a demanding and intensive nature, requiring much physical and emotional input. The care that is given may include preparing meals, help with bodily functions, or frequent help and supervision throughout day and night.

The case of *Trojani*[3] set out factors to be taken into consideration when deciding if work is real and genuine. It considered the central question to be whether the activities are capable of forming part of the normal labour market. Other cases, such as *Levin*[4] and *Lawrie Blum*[5] suggest that the services performed must be of economic value. The services provided by carers are indeed capable of forming part of the normal labour market – if carers were not performing the work, the State would have to employ another person to do so. Similarly, they have economic value – the cost of the Secretary of State employing another person to do the work.

Often, the person receiving the care will be in receipt of Disability Living Allowance (DLA), which is gradually being replaced by the Personal Independence Payment. This benefit is available at different rates depending on the nature and impact of the disability. The mere fact they are recognised as being eligible for this benefit, and the different levels at which it is available, indicates a recognition of the requirement for care and the standard of work involved in such care. Receipt of any level of DLA can only then be considered an indication of the real and genuine nature of care provided by another.

Furthermore, the case of *GENC* referred to above also established that, in order for work to be real and genuine, it does not need to be on a large scale. Work for as little as five and a half hours per week was still found to be sufficient for the purposes of constituting "real and genuine" work rather than merely "marginal and ancillary" work. As highlighted below, carers are generally required to

[1] *Hava Genc v Land Berlin* Case C-14/09, paragraph 19
[2] *Lawrie-Blum v Land Baden-Wuerttemberg* [1986] EUECJ R-66/85 (3 July 1986), paragraph 20
[3] *Michel-Trojani v Centre Public D'aide Sociale de Bruxelles* Case C-456/02
[4] *Levin v Staatsecretaris van Justitie*, Case 53/81
[5] *Lawrie Blum v Land Baden-Wurttemberg*, Case 66/85 [1986] ECR 2121

work for 35 hours per week. As this far outweighs the minimum limit established in *GENC*, it is the AIRE Centre's position that carrying out a range of caring duties for the required 35 hours per week cannot be considered anything other than "real and genuine" work.

'Work Performed for Remuneration'

To be considered a worker, a person must be performing the services for remuneration. Most carers will be in receipt of Carer's Allowance, awarded under section 70 of the Social Security Contributions and Benefits Act 1992. It is the AIRE Centre's position that this should be considered remuneration for the purposes of being a worker.

In order to receive Carer's Allowance a person must provide care for at least 35 hours per week and must do so to the exclusion of all other gainful employment. This means the carer cannot earn more than £100 from any other employment. To require a person to work 35 hours per week and receive no outside remuneration totalling over £100 is akin to full time work that would be performed in regular paid employment. Furthermore, there is a parallel to be drawn between the requirement that a person in receipt of Carer's Allowance is not permitted to undertake any other "gainful employment" and the clause present in many employment contracts precluding the employee from engaging in other work.

Carer's Allowance can be considered remuneration under European Union case law. In the case of *Kurz* it was held that a person can be a worker based on "*activity… financed by public funds and restricted to a limited group of people.*"[6] As a result, the fact that carers in receipt of Carer's Allowance do not have a private contract of employment cannot, of itself, prevent Carer's Allowance from constituting remuneration.

The basic idea behind Carer's Allowance is that it provides financial support to people who have foregone the opportunity of taking up full-time work in order to provide care to someone else. Carer's Allowance is an income replacement benefit, which is taxable to ensure equality of treatment between persons whose income is all from benefits and whose income is a mixture of benefits and earnings. In addition, by taking up the role and responsibilities of a full-time carer, such a person ensures that the State is not required to pay a full salary to a suitably qualified individual who would otherwise have to care for the person in need of assistance.

Furthermore, case law of the Court of Justice of the European Union has previously found a man to be a worker even though the activities he performed were a requirement of membership in his community and the remuneration he received was essentially pocket money that was paid to everyone in the community.[7] In another case, the worker was involved in a scheme designed to reintegrate participants into the labour market which was only open to a certain number of people and his remuneration came from public funds.[8] Similarly, in *Birden v Sttadtgemeinde Bremen* Case C-1/97 [1998] ECR 1-07747 a person who was paid under a programme financed by a public authority and designed to integrate persons dependent on social assistance into the labour market, was found to be a worker. What these cases highlight is a willingness of the CJEU to accept worker status where the European requirements are met, regardless of whether or not it adheres to the national notion of "employer" and "employee."[9] Further, as the remuneration in these cases were

[6] *Kurz (ne Yuece) (External relations)* [2002] EUECJ C-188/00 (19 November 2002), paragraph 46
[7] *Steymann v Staatssecretaris van Justitie (EEC Treaty)* [1988] EUECJ R-196/87 (5 October 1988)
[8] *Trojani* Case C-456/02
[9] However, note that in case –C-344/87 *Bettray v Staatssecretaris van Justitie* the CJEU found that someone paid from public funds to perform services as part of a drug rehab programme was not a worker.

not administered by a private employer, it is clear that funds offered by the State can still constitute remuneration for the purpose of being a worker.

'For and Under the Direction of Another'

An additional factor to be taken into consideration when a determining whether a person is a worker is whether the work is completed "for and under the direction of another."[10] To fulfil this, the work should be part of a "relationship of subordination."[11] It is the AIRE Centre's position that the imposition of rules requiring the carer to work for 35 hours per week and not to undertake any other gainful employment to the sum of £100 demonstrates that the work being performed is under the direction of the State.

Thus, the State imposes restrictions and conditions on the carer just as a contract of employment, in either the public sector or the private sector would. A carer should therefore be considered to be operating under the direction of the State.

Conclusion

It is the AIRE Centre's position that, as long as they meet the above criteria, a carer should be recognised as a worker for the purposes of EU law as they are performing work of a real and genuine nature in return for remuneration under the direction of the State.

What is the AIRE Centre?

The AIRE Centre is a London-based charity whose mission is to promote awareness of European law rights and assist marginalised individuals and those in vulnerable circumstances to assert those rights. The AIRE Centre's lawyers litigate key cases before the domestic and European courts. The AIRE Centre also offers free legal advice on European law and has particular expertise regarding the rights of EEA nationals and their family members. If you are faced with the issue outlined in this note, or if you are representing someone in this position, please do not hesitate to get in touch with us via info@airecentre.org.

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[10] *Jany v Staatssecretaris van Justitie* Case C-268/99
[11] Ibid, paragraph 34.