

# LEGALEYE

## Prospect members win employment rights at tribunal

Five Prospect members, working as teachers in the prison service, have succeeded in their legal bid to be recognised as employees with full statutory rights.

The members were taken on as 'sessional' staff. The prison said they were not employees and therefore had no right to holiday or sick pay, access to the pension scheme, and no protection against unfair dismissal or redundancy.

They had all been working continually for more than two years and the prison's education service depended on them to teach classes. Despite this, they were treated as if they were on zero hours contracts with very few rights.

Tracey Betts, Nathan Proctor, Kellyann O'Brien, Cheryl Penn and Matthew Jones sought advice from Andy Bye, their Prospect negotiator. Andy and Prospect's legal team presented claims to the employment tribunal seeking declarations that the members were employees.

The Secretary of State for Justice argued that the claimants were not employees as there was no obligation for them to attend work. They further contended that if the members were held to be employees, the contracts would be illegal as they had not been appointed under the civil service recruitment principles of fair and open competition. This makes the contracts unenforceable under the Constitutional Reform and Governance Act 2010 (CRAGA).

The case was heard over two days in December at the Cardiff tribunal. The members were represented by Counsel, Declan O'Dempsey.

The Judge found in favour of the claimants. She recognised the bargaining position between the individuals and the employer was wholly unequal. While they may have been told the offer of work was on a sessional basis, the Judge found the reality was that they were employees.



The five members with Declan O'Dempsey, Counsel (2nd left) outside the tribunal

The Judge also found that there was a distinction between being a Crown employee, which is governed by employment law, and being appointed as a civil servant which relied on the provisions in CRAGA. Therefore she ruled that the contracts were legal and could be relied on by the claimants.

Tracey Betts said: "I am really pleased with the judgement; it validates our position that we should have been treated no differently to other staff. The union was invaluable in ensuring this positive outcome."

Marion Scovell, head of Prospect Legal said "The case is a good example of a tribunal analysing the reality of the working arrangements and looking beyond the 'label' attached to the contract".

"It demonstrates that many atypical workers, including those on zero hours, have more legal rights than they think and should always seek advice from their union."

A further hearing will be held to determine the financial remedy later in the year.

## Prospect appeals to the Supreme Court

Prospect is appealing to the Supreme Court for our member Mohammad Naeem, who works as a chaplain for the Prison Service.

Mohammed is challenging the potentially discriminatory effect of the pay system on the grounds of race and religion. The tribunal accepted that Muslim chaplains are more likely to be paid at the lower end of the pay scale compared to longer serving chaplains, as they tend to have shorter service. The Court of Appeal disappointingly held that this was not indirect discrimination.

The Court of Appeal's judgment was the latest in a number of judicial decisions that have restricted the scope of the law on indirect discrimination. The decision is seen as a backwards step for equality law,

as it requires the claimant to show a discriminatory cause for the difference in treatment, which creates a significant hurdle for claimants. This potentially has adverse implications for a wide range of discrimination claims.

Prospect is appealing not just to obtain a result in Mohammad's case, but to seek an improvement in the law for all workers.



Mohammad Naeem with Sean Jones QC outside the Court of Appeal in November

## Equality at work – brought to you by your union

Over 40 years since the Equal Pay Act came into force, pay inequality is still an enormous problem.

### Gender pay gap reporting

The Equality Act 2010 provided that regulations could be introduced to require employers to publish information on the gender pay gap. The Government has recently produced draft regulations to implement these provisions.

Sadly the Government's proposals fall far short. They will require annual reporting and publication of the:

- ✓ overall gender pay gap, calculated using both the mean and median figures
- ✓ number of women and men working across salary quartiles
- ✓ pay gap in relation to bonuses.

But the regulations would not require an analysis of:

- ✗ Overtime
- ✗ Part-time worker's pay
- ✗ Differences by job or grade
- ✗ Reasons for any pay gaps.

Jane Copley, Legal Officer, in Prospect's response to the consultation ([bit.ly/21W8dCm](http://bit.ly/21W8dCm)) said: "We believe the duty on reporting should apply to all employers, who should be required to report by job role, grade and pay band. While overall figures are helpful for general social policy purposes, they do not

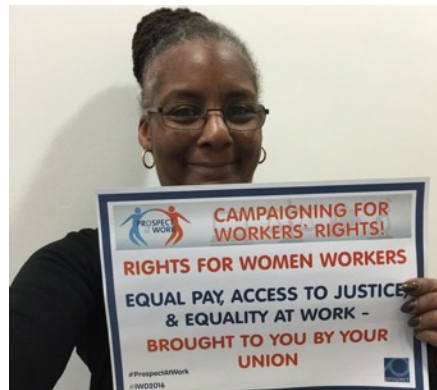
help to identify the real inequality and are not helpful in addressing claims under the Equality Act."

The new regulations are expected to come into force from October 2016. The provisions will apply to employers with at least 250 employees in England, Scotland and Wales.

### Equal pay claims

In February Prospect presented a multiple claim for equal pay on behalf of 77 members at the Met Office.

Prospect rep and NEC member Ele Wade has done a number of fantastic interviews on national TV and radio talking about the need for pay equality. Helen Stevens, Prospect Negotiator, also featured on BBC2 talking about her work on both the IPO and Met Office claims.



Paula Mitchell, Prospect Legal Assistant, joining the campaign for equality on International Women's Day

## Prospect challenges age discrimination in selection process

Nine Prospect members have successfully challenged a discriminatory selection procedure. As a result of a reorganisation members were asked to reapply for roles. Appointment to the job depended on passing a formal assessment procedure. Looking at the emergent patterns and trends it appeared that a greater proportion of older workers were failing the test.

Prospect submitted a claim of age discrimination to the employment tribunal. There were three preliminary hearings, Counsel was instructed and nearly all the preparations for a two week hearing were completed. But the case settled shortly before the final hearing.

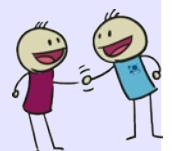
## 'Frankness' leads to dismissal

Philip Coulthard worked at the MOD for over 30 years and had a good work record. However, he developed a prolonged period of work-related stress, partly owing to staffing issues and problems with his manager. The stress led to Philip sharing his frustrations and criticisms in a frank letter to his manager. This led to him being dismissed for misconduct. Prospect supported Philip at the employment tribunal and his case was finally settled before the hearing.

Philip said: "Prospect provided excellent support. I am relieved it is now all over. And I am very grateful for the support provided by Prospect. Without this support it would have been very difficult and costly to achieve the satisfactory outcome. The importance of TU membership should not be underestimated during these challenging times."

## Member-Recruit- Member Stronger Together

Members who recruit a colleague can choose a £10 shopping voucher or make a donation to charity. To find out more visit: [www.prospect.org.uk/mrm](http://www.prospect.org.uk/mrm)



## TUC DYING TO WORK

The TUC is currently campaigning for greater protection for terminally ill workers against being dismissed by their employers. The campaign seeks to provide every person battling terminal conditions the choice of how to spend their final months.

You can support the campaign by:

- ✓ Signing the petition for a change in the law
- ✓ Encouraging your employer to adopt the campaign's voluntary charter

For more information please visit: [www.dyingtowork.co.uk](http://www.dyingtowork.co.uk)

## Your membership could be at risk!

As part of the Trade Union Bill the government is withdrawing checkoff, the ability for members to pay subs via their salary in the public sector. To find out more see the Prospect video at:

[bit.ly/1SraA ds](http://bit.ly/1SraA ds)

You can protect your membership by switching to direct debit [online](#) or call our membership team on 01932 577007



## LegalLine: supporting Prospect members

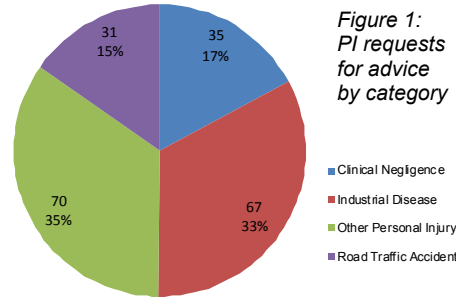
In October 2015 Prospect started working with Pattinson and Brewer solicitors (P&B), who now provide our external legal advice services.

After six months we have reviewed the number of cases and queries they have dealt with.

The cases fall under two categories. Firstly there are the personal injury and clinical negligence claims that are run by P&B and secondly there are calls for initial legal advice and discounted legal services.

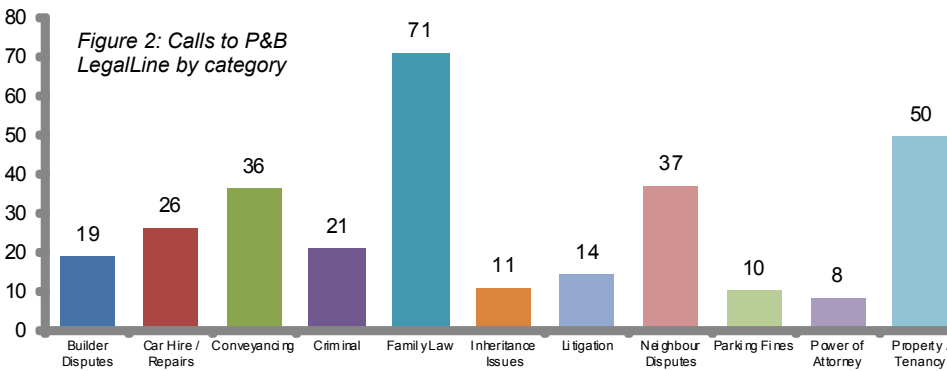
There have been 203 requests for advice on personal injury (PI) and clinical negligence, as shown in Figure 1. Our solicitors have opened 110 new cases for members. Some will have been rejected after an initial review of the case.

There have been 580 calls to the



LegalLine advice service on other non-employment law matters. These include family law, property/tenancy matters, and neighbour disputes. Figure 2 shows the breakdown of the main queries although there are an additional 277 miscellaneous queries

These figures do not include the cases for members on the Isle of Man or the Channel Islands, where we have local solicitors providing the services.



**To make a PI claim or for legal advice (non-work related) call 0808 28 193 28**

## Terms and conditions for legal assistance

### The member must:

- ✓ Be in membership at the time the problem arises
- ✓ Continue to be in membership for the duration of their case
- ✓ Not take independent legal advice before approaching Prospect
- ✓ Not commence litigation before approaching Prospect



Read our guide to legal advice for more details ([bit.ly/1VilB5P](http://bit.ly/1VilB5P))

## Europe Matters



Prospect has a new website ([eumatters.prospect.org.uk](http://eumatters.prospect.org.uk)) to provide a platform for members to discuss issues relating to the UK's membership of the EU. The legal team have written two articles. Jane Copley explains the legal implications for employment law should the UK leave the EU. And Marion Scovell asks what has Europe ever done for the workers?

## Prospect at Work Word Search

H I F F O K C E H C T Q D F P  
 Z V E T O H M D Y Z U N P C N  
 C R U B W G S R T N B T J M D  
 E D P Q G R P O I K I A Z F S  
 V M L B E V S W L U L D C D S  
 L U P K W A L E I S L V R G U  
 Y R R L W X Q H C R H O D H A  
 W O I B O U E T A V L C J W A  
 W O J G A Y S D F F M A M P M  
 S K E L H U M A O V R T V K X  
 L R I P R T N E F W X E C F W  
 C T E V J G S R N O F S Z M W  
 Y O E P F U C P Q T G R U S Y  
 E Y Z K O H C S W R E L F I E  
 P V O H C A M P A I G N I N G

### Words To Find:

- |              |               |
|--------------|---------------|
| Advocates    | Law           |
| Campaigning  | Rights        |
| CheckOff     | SpreadTheWord |
| Employment   | Survey        |
| Equality     | TUBill        |
| Facility     | Workers       |
| HouseOfLords | WRelfie       |

## Workers' Rights Quiz

All the answers can be found in this edition of LegalEye

**1) The maximum compensation for a failure to consult on a redundancy claim is:**

- a) 6 months' pay
- b) 90 days' pay
- c) 3 months' pay

**2) The Constitutional Reform and Governance Act 2010 requires:**

- a) Fair and open competition to posts in the civil service
- b) Employers to report on the gender pay gap
- c) Sessional workers to be paid holiday pay

**3) An appeal from the Court of Appeal goes to?**

- a) Court of Justice EU
- b) Court of Session
- c) Supreme Court

**4) The largest category of query to Prospect's LegalLine in the last six months was:**

- a) Parking fines
- b) Criminal law
- c) Family law

**5) Regulations due to come into force in October on the gender pay gap will apply to:**

- a) Employers with 250 or more employees
- b) All public sector employers
- c) All employers

**6) Check off is:**

- a) A checklist for employment status
- b) A process of auditing pay
- c) Where members pay their union subs direct from salary

### Answers

- 1) b, 2) a, 3) c, 4) c, 5) a, 6) c



## Tribunal uphold complaint of failure to consult on redundancy

A Newcastle employment tribunal awarded the full 90 days compensation to the employees of the Hatfield Colliery Partnership who were made redundant, without any consultation, on 29 June 2015.

In January 2015, Hatfield Colliery Partnership obtained state aid to complete its current coal plan. Work on the last coalface would have secured employment up to July this year with potential to mine a further 40 million tonnes of coal if market conditions improved.

The unions worked on a plan to produce this coal and protect jobs, but with minimal warning the decision was made to withdraw all financial support for the coalmine on 29 June 2015, resulting in the pit's closure.

The three unions, Prospect, NACODS, and NUM brought a case to the employment tribunal for compensation for failure to consult on redundancy.

Prospect negotiator Mike Macdonald, who represented the members at the tribunal, said: "The first we knew of the decision was a call on the night of 29 June.



Mike Macdonald

Although a handful of employees remained in post until August, when the partnership went into official receivership, the Judge recognised 29 June as the actual date of the dismissal. The Judge described the consultation by the employer as a "complete failure" and the decision not to consult as deliberate.

Prospect legal officer Linda Sohawon explained: "The award can be up to 90 days' pay, although the tribunal has the discretion to lower that amount and must consider the seriousness of the employers' default. In this case, the Judge held that the members deserved the maximum award."



## CAMPAIGNING FOR WORKERS' RIGHTS!

Prospect branches up and down the country are getting involved in the Prospect at Work campaign. Several branches have met to discuss the sorry state of employment rights, the attack on unions in the Trade Union Bill, and most importantly the work of unions in promoting and defending rights at work in the current hostile climate.

The campaign pages have news, resources, blogs, and a collection of photos from the WRelfies series (workers' rights selfies). [bit.ly/PAW2016](http://bit.ly/PAW2016)

In March we started a survey of reps to find out more about their role, the impact cuts in employment law have had and what they would like to see changed in the future. The survey has now closed and results will be out soon.

### Championing rights in the workplace

A key part of the campaign is celebrating the work of our fabulous representatives through our series of Workers' Rights Advocates.

Our latest profile is the team from Babcock International at Rosyth Dockyard. Gary Best, Catherine Brown, David Linton and Patrick McKee work together to support and represent members. Over the last year they have dealt with 31 grievance and disciplinary cases.

Patrick told us one of his most memorable personal cases was representing members who he thought were being underpaid. After months of negotiations they were awarded a significant raise in salary.

Gary highlighted that the team had successfully negotiated improvements in the travel and subsistence policy for graduate employees.

We asked the team what they would say to a colleague thinking of becoming a union rep. David said: "If you get pleasure helping others and making a difference to working lives, it's definitely for you." Catherine added: "Not only do the union fight for your rights but they are always there to help if you need advice".



Left to right: David Linton, Catherine Brown & Gary Best

To see the Rosyth team's full profile and those of our other featured advocates see [bit.ly/ProspectWRA](http://bit.ly/ProspectWRA)

If you would like to suggest a rep to be featured in the series contact [Marion.Scovell@prospect.org.uk](mailto:Marion.Scovell@prospect.org.uk)

## Breaking News – Success in the Court of Appeal

The Court of Appeal's judgment in Prospect, PCS, and FDA's challenge to changes in the sickness absence procedures in the Department for Transport (DfT) was handed down as LegalEye was about to be published.

In 2015 the High Court ruled that the DfT broke employees' contracts by seeking to impose new sickness management procedures without agreement.

DfT appealed to the Court of Appeal. The case was heard in February and the appeal was dismissed.

For details of the High Court ruling see [bit.ly/1B3Mk5U](http://bit.ly/1B3Mk5U).

Further news on the Court of Appeal's judgment and a fuller briefing by Prospect legal officer, Linda Sohawon, will be available shortly.

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## Information from Prospect Legal

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