THE SUPREME COURT

[Supreme Court Appeal No. 38/2019]

McKechnie J.

MacMenamin J.

Dunne J.

Charleton J.

O'Malley J.

BETWEEN

CATALIN PETECEL
(SUING THROUGH HIS MOTHER AND LEGAL GUARDIAN MARIA PETECEL)

Appellants

AND

THE MINISTER FOR SOCIAL PROTECTION IRELAND AND THE ATTORNEY GENERAL

Respondents

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 15th day of July 2020.

Introduction

1. This is the second judgment delivered in this Court in these proceedings. In the first, delivered by me on the 14th May 2020 and agreed with by all other members of the Court, it was held that the High Court and Court of Appeal had erred in ruling that the appellant herein was not entitled to institute judicial review proceedings rather than proceeding with a statutory appeal (see [2020] IESC 25). The judgment also summarised the arguments in the substantive issue raised by the appellant – that he was entitled to claim disability allowance notwithstanding the fact that he is not habitually resident in the State, and that the classification to the contrary effect of the allowance as a special non-contributory cash benefit included in Annex X of Regulation 883/2004 is invalid under European Union law.

2. The judgment did not come to a conclusion on the substantive issue, as it was determined that it was necessary for the parties to address certain aspects of the statutory provisions that might have a bearing on the legal classification of the payment. They were therefore afforded an opportunity to lodge written submissions on the implications, if any, for that classification of the earnings disregard and the disqualification criteria. These two aspects were described in paragraphs 10 and 11 of the judgment as follows:-

> *"10. As with many welfare payments, the means test includes an "earnings disregard". This means that if the recipient has some income from employment or self-employment, that income will be disregarded up to a prescribed amount for the purpose of calculating their means. Until recently, the rules relating to disability allowance specified that the employment or self-employment had to be "of a rehabilitative nature" (Rule 1(2)(b)(viii) of Part 2 of Schedule 3 of the Act of 2005, and rule 147 of the Social Welfare (Consolidated Claims, Payment and Control) Regulations 2007 S.I. 142/2007). However, s.20 of the Social Welfare, Pensions and Civil Registration Act 2018 removed those words from the Act and Regulations. A person in receipt of disability allowance may, therefore, earn up to the prescribed amount from any form of work.*
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> *11. Regulations made under s.212 as amended provide for disqualification from receiving disability allowance. The main reason for disqualification is a failure to comply, without good cause, with such requirements as are specified in the regulations including attending for any medical or other examination or treatment; complying with instructions relating to his or her incapacity issued by a doctor; refraining from behaviour likely to hinder his or her recovery; and being available to meet with an officer of the Department regarding the claim (s.212 as amended).*

However, a person shall not be disqualified from receipt of the allowance while engaging in such class or classes of employment or training and subject to such circumstances and conditions as may be prescribed (s.212(2) as substituted by s.26 of the Social Welfare and Pensions Act 2007).”

3. The need to give further consideration to these provisions was explained in paragraphs 115 to 117:-

> *“115. While the definition of the allowance in s.210 certainly seems to be within the concept of social assistance, for the reasons argued by the respondent, there are two aspects that are of concern. The first is that, at the time when the appellant made his application, it was possible to work and to earn up to a prescribed amount without losing entitlement, but only if the work was considered to be rehabilitative in nature. That restriction was removed in 2018, but while it was in force it might have been seen as strengthening the argument that there was a medical or rehabilitative purpose to the allowance, as opposed to a sole purpose of maintaining a subsistence level of income.*
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> *116. The second issue is the disqualification criteria. These could, in my view, be regarded as on-going conditions of entitlement, and they are clearly geared towards improving the health and quality of life of the claimant.*
>
> *117. It seems to me that there may be some possibility, having regard to those two aspects and to the caselaw discussed above, that the CJEU would find that at the relevant time there was a medical purpose to the overall conditions of eligibility.”*

The request for supplemental submissions

4. This Court does not often ask for further submissions following a hearing. It may, therefore, be necessary to point out that it is essential that the parties focus on the points in relation to which the submissions are requested. In this case it was not intended to be an opportunity to rehash submissions already made before the Court, and it was certainly not intended to be an opportunity to adduce evidence not previously in the case. In this regard, the Court notes that the appellant in his submissions referred to guidelines published by the respondent (in February 2020) and to a newspaper article. In turn, the respondent sought liberty to file an affidavit explaining the earnings disregard and the disqualification criteria, stating that these matters had not been previously addressed because they had not been raised in the appellant’s pleadings. The respondent also offered to exhibit the guidelines referred to by the appellant.

5. The Court declined to accept a supplemental affidavit and made it clear that no reliance would be placed on either the newspaper article or the guidelines (which, in any event, long postdate the appellant's claim).

6. I would emphasise that the issue before the Court is the legal classification of the payment, having regard to the statute, the regulations and the relevant EU rules and case law. The appellant has argued that the Court should refer the matter to the Court of Justice of the European Union, while the respondent maintains that the classification is *acte claire*. It is not open to the Court to disregard an aspect of the legislation that may be relevant to this dispute, simply on the basis that it was not previously debated by the parties. What the parties were asked for, in that context, were their submissions on how, if at all, the classification issue might be affected by consideration of the provisions in question.

7. In the circumstances I would make it clear that I do not intend to embark upon fresh arguments raised by either party that are not concerned with the "rehabilitative work" aspect of the earnings disregard or with the disqualification criteria.

Submissions on the issue

8. The appellant submits that the link between disability allowance and rehabilitation is demonstrated by the fact that, as with its predecessor payment (the disabled person's maintenance allowance), it was (until 2019) possible for a recipient of the allowance to be paid an additional special allowance if engaged in a training scheme geared towards the employment of disabled persons. The appellant also refers to the stipulation, in s.212(2) of the Social Welfare Consolidation Act 2005 (as amended by s.26 of the Social Welfare and Pensions Act 2007) and in Article 147 of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. 142/2007), that a recipient of disability allowance shall not be disqualified from the payment while engaging in such class or classes of employment or training and subject to such circumstances and conditions as may be prescribed.

9. It is submitted, in reliance on the opinion of the Advocate General in *Commission v. Parliament and Council (Case C-299/05)* [2007] E.C.R. I-8695, that a payment should be seen as covering the risk or contingency of "reliance on care" if it has the purpose of facilitating rehabilitation measures and the improvement of the claimant's living circumstances. The appellant also relies upon the ruling of the CJEU in that case and in *Jauch* v. *Pensionsversicherungsanstalt der Arbeiter (Case C- 215/99)* [2001] E.C.R. I-1901 to the effect that benefits which are intended to improve the state of health and quality of life of

persons reliant on care have as their essential purpose supplementing sickness insurance benefits and must be regarded as "sickness benefits". It is submitted that on the facts of this case, payment of disability allowance would be for the care of the appellant and would have the purpose of improving his living circumstances.

10. It is pointed out that eligibility for disability allowance does not require incapacity for work (unlike the invalidity pension) and that employment is in fact expressly permitted and encouraged. In those circumstances it is contended that the allowance cannot correctly be described as being intended guarantee only a minimum subsistence income.

11. In relation to the disqualification criteria, the appellant refers to *Heinze v. Landesvericherungsanstalt Rheinprovinz (Case-14/72)* [1972] E.C.R.1105 and *Jordens-Vosters v. Bedijsvereiniging voor de Leder en Lederwerkende Industrie (Case-69/79)* [1980] E.C.R.75. He argues that s.212 of the Act of 2005 and Article 137 of the regulations of 2007 clearly have "medical functions" that are geared towards improving a claimant's state of health and quality of life.

12. In *Heinze* the Court of Justice was concerned with a German law that obliged pension insurance institutions to cover necessary medical treatment and pay a temporary allowance to an insured person if he or she, or a member of his or her family, contracted contagious tuberculosis. It was stated by the legislature that the purpose was to encourage and ensure the recovery of invalids. This was part of a range of measures taken in respect of the fight against tuberculosis. Eligibility did not depend upon the individual being at risk of losing employment, or on whether or not there was a chance of maintaining or re-establishing employment lost because of the illness.

13. The defendant argued that the nature of the benefit was such that insurance contributions paid while working abroad did not have to be taken into account. The national court observed that the object of the legal protection afforded by the pension insurance scheme was earning capacity, while the aim of the fight against tuberculosis was to cure invalids and protect those in close contact with them.

14. The Court of Justice noted that the fundamental objective of the Community Regulation was the free movement of workers. The pursuit of that objective meant that the concept of social security could be regarded as including the aim of preventing the spread of disease, which could not be regarded as "a mere measure of social assistance". From that point of view, a provision that established a direct link between the affiliation of an individual to a pension insurance scheme and the acquisition of a right to benefits, payable to insured persons and

their dependants “as a result of the fact that they have contracted tuberculosis and chiefly in order to bring about their recovery” must be regarded as social security. The Regulation covered benefits of a prophylactic or remedial nature. Further, the Court stated that where benefits were also awarded to the members of the family of the insured person and “where their essential aim is to cure the invalid and protect those who are in contact with him” they must be regarded as sickness benefits.

15. In *Jordens-Vosters*, the claimant was an insured person, in receipt of an incapacity pension, who had been refused reimbursement of medical expenses. The referring court asked whether the “sickness benefits” covered by the Regulation included benefits in the nature of medical or surgical benefits. The Court of Justice held that it did, and included health care, whatever the type of social legislation or whatever benefits were provided, as long as the legislation in question related to a branch of social security that covered them.

16. The respondent submits that there has always been a distinction between rehabilitation payments and services administered by the health authorities, and maintenance allowances. The training allowance referred to by the appellant was paid by the Health Service Executive, not by the respondent, and was not linked to disability allowance.

17. It is argued that the disability allowance scheme has no rehabilitative element. Further, it is not a care allowance. It is payable whether or not the disability giving rise to eligibility also gives rise to care needs, without reference to any assessment of such needs and without reference to any costs associated with them. While there is an earnings disregard, there is no disregard in respect of any additional costs associated with the person’s condition. It is pointed out that the means test may involve taking into account the income from the employment of a spouse or partner of a claimant, but that a disregard also applies to part of that income. The respondent describes the allowance as an income support scheme that provides a minimum level of subsistence while not preventing recipients from accessing the labour market if they can.

18. The respondent notes that the Act of 2005 does not define the concept of “work of a rehabilitative nature”. There has never been a requirement that a claimant who is able to work should engage in work with a *medical* rehabilitative purpose. It is said that the respondent has always taken the view that all work has positive social benefits, and has, generally speaking, a rehabilitative nature.

19. On the disqualification provisions, it is pointed out that the regulations do not provide for disqualification for failure to attend for medical treatment, as opposed to medical

examination. In these circumstances it is argued that the rules are not geared towards improvement of health and quality of life, but are control provisions to ensure compliance with the eligibility criteria.

Discussion

20. To recap, the relevant features of disability may be summarised as follows.

21. The allowance is payable to a person of working age who, by reason of a specified disability, is substantially restricted in undertaking employment of a kind that would be suited to his or her age, experience and qualifications in the absence of the disability. The disability specified is an injury, disease, congenital deformity or physical or mental illness which has continued or may reasonably be expected to continue for a period of at least one year.

22. Eligibility does not depend either directly or indirectly upon insurance contributions, and is subject to a means test.

23. For the purposes of the means test, earnings from employment may be disregarded up to a prescribed amount. Until recently, the legislation specified that such employment had to be of a rehabilitative nature. This concept was never statutorily defined, and there has never been a requirement that the work should be conducive to medical rehabilitation. The Minister for Social Protection has interpreted the legislation in the light of a view that all work brings positive social benefits. A disregard may also apply to the earnings of a spouse or partner.

24. Eligibility is not affected if the recipient avails of a service providing training to disabled persons. The allowance may continue to be payable where the person is resident in a hospital, nursing home or psychiatric facility where the cost of care and maintenance is met by the State.

25. The Act empowers the Minister to make regulations providing for disqualification from receipt of the allowance in the event of a failure to comply with a requirement to attend for a medical examination or treatment, or with instructions given by a medical practitioner (whether from his or her treating doctor or from the practitioner conducting the examination or treatment under the terms of the Act) in relation to the disability. The regulations as made do require availability for medical examination and compliance with instructions, but there is no provision for disqualification for failing to comply with treatment. In principle, a person may not be disqualified while engaging in employment or training.

26. A claimant must be habitually resident in the State.

Conclusion

27. In paragraph 115 of the first judgment I said that the definition of disability allowance in the Act appeared to support the reasoning put forward by the respondent. Having received the further submissions, I am satisfied that this is the correct position.

28. Disability allowance is a non-contributory, means-tested payment that covers persons whose capacity for work is restricted to the extent described in the Act but who do not have sufficient contributions to qualify for invalidity benefit. The question is whether it is appropriately classified as a special non-contributory cash payment within the meaning of Article 70(2) of Regulation 883/2004.

29. In answering this question, one starts with the purpose of the payment. The purpose of disability allowance could be described as improving quality of life only in the sense that it is intended to protect against poverty. It does not have the purpose of improving health, save insofar as health may be endangered by poverty. It is payable without distinction between persons whose disability is considered to be permanent and those who might be expected to recover in the medium to long term (in the sense of a period greater than one year). There is no element of assistance with recovery from the disability, or assistance with any particular need created by the disability, or assistance with any healthcare costs associated with it, whether in relation to a need for personal care or otherwise. Under the various regulations, the amount payable is calculated by statutory formulae in the same manner as other social assistance payments.

30. The medical examinations provided for are, I accept, designed primarily as a control mechanism to ensure initial and ongoing eligibility. While s.212 of the Act (as amended) envisages the possibility of disqualification for refusal to comply with treatment or other instructions from a medical practitioner as to behaviour in respect of the disability in question, such provisions cannot be construed as conferring a right to medical care or treatment along with the allowance. I would reserve any view on the propriety of a medical assessor giving instructions to a person in circumstances where there is no doctor/patient relationship, but even in the event that a medical assessor gives instructions which are not complied with, the recipient cannot be disqualified if engaged in employment or training. There is no requirement that the employment or training in question should be assessed in terms of medical benefit.

31. Similarly, it would appear that the now-repealed requirement, for the purposes of the earnings disregard, that employment be of a rehabilitative nature, was not construed as relating to medical rehabilitation. Rather, the disregard simply mirrors the position in relation to other social assistance payments. A disregard removes any financial disincentive for recipients who, while qualifying for the allowance, are in a position to take up some form of paid employment and may improve both their material position and their overall wellbeing, but it is not a measure that, in itself, improves the earning capacity of a disabled person.

32. Having regard to the foregoing, and to the discussion of the CJEU case law in the first judgment, I am therefore satisfied that disability allowance has been correctly classified as a special non-contributory allowance. I do not consider that there is any purpose to be served by referring any question to the CJEU as to the validity of its inclusion in Annex X of the Regulation.

33. In those circumstances, the allowance is not governed by the rules relating to the exportability of benefits and the respondent is entitled to impose a habitual residence condition.

34. I would therefore dismiss the appeal.