



FINAL REPORT OF INVESTIGATION
under section 4(2) of the Ombudsman Act 1980
of a complaint made
about the suspension of a Disability Allowance payment
while the recipient was resident in Northern Ireland
against
The Department of Social & Family Affairs

Office of the Ombudsman
September 2010

Contents

Chapter 1 Statement of Complaint

Chapter 2 Background and History

Chapter 3 Department's Response to Statement of Complaint

Chapter 4 Analysis

Chapter 5 Findings

Chapter 1 Statement of Complaint

A complaint was made to this Office by a public representative on behalf of a young man concerning his right to have his Disability Allowance (DA) payment from the Department of Social & Family Affairs (the Department) continued while he was resident in a care facility in Northern Ireland during the period October 2004 to May 2006. The man's DA payment was suspended during the period of his stay in Northern Ireland but was restored on his return in May 2006. An application for arrears of DA, to cover the period of his stay in Northern Ireland, was made on his behalf on his return but this application was rejected by the Department.

The young man has Sotos Syndrome and autism and, while in Northern Ireland, he was under the care of a voluntary organisation providing residential care to people with disabilities. His care while in Northern Ireland was funded by the Health Service Executive (HSE). He returned from Northern Ireland in May 2006 when a suitable residential care placement, also provided by the voluntary organisation, became available.

In the normal course, DA is not payable for any period during which a claimant is resident outside of the State [Section 249 (6)(a) of the Social Welfare Consolidation Act 2005]. However the Department has a practice, on what appears to be an extra-statutory basis, of continuing the payment of DA to persons who are resident outside the State for the purpose of receiving medical treatment.

The key issue in this complaint is the refusal of the Department to give the claimant the benefit of the extra-statutory arrangement under which it continues payment of DA to persons resident outside of the State for the purposes of receiving medical treatment.

Chapter 2 Background and History

- 2.1 Disability Allowance is a weekly allowance for people aged between 16 and 66 years who have a disability. The disability must be expected to last for at least one year and applicants must pass a medical examination and a means test to get the allowance. The relevant primary legislation specifies that applicants have to be resident in the State to receive the allowance.
- 2.2 In June 2008 a T.D. complained to the Ombudsman on behalf of the man (now age 24) about the decision of the Department of Social & Family Affairs (the Department) to refuse arrears of DA for the period of his stay in Northern Ireland. He suffers from Autism and Sotos Syndrome (a rare genetic disorder). His mother, a widow, had cared for him at home until October 2004 (when he was 19 years of age) at which time she was no longer able to cope with his challenging behaviour resultant on his medical condition.
- 2.3 The Health Service Executive (HSE), the body responsible for providing services appropriate to the man's condition, decided that it was imperative at that stage (October 2004) that he receive specialist residential treatment to manage his very challenging behaviour. However, the HSE had no appropriate placement available at that time within its area or within the Republic of Ireland. As a result, the HSE placed him in the care of a voluntary organisation with a care facility in Enniskillen, Northern Ireland. The HSE was then in discussion with that organisation regarding the provision of such specialist services within its area; however, that service was not in place when this patient's care needs were identified. Owing to the fact that there was no such service available in the State at that time, it was arranged between the HSE and the voluntary organisation's branch office in the Republic to place him in Northern Ireland. This placement was funded by the Executive. It was intended to be an interim measure until a suitable placement would become available in the Republic.
- 2.4 The man remained in the care facility in Northern Ireland from 6 October 2004 until 23 May 2006 at which time an appropriate residential placement was provided by the HSE/voluntary organisation in the Republic. The service has since been provided in one locality and it is the HSE's intention to have it in place in other centres in the Republic over time. During the period of his placement in the care of the services in Northern Ireland, the man's mother incurred significant costs in travelling to and from the facility to visit him every week; this involved a round trip of 298 km. She also had the added expense of providing her son with clothes, shoes, treats etc. which caused additional financial hardship on her. These items had previously been funded out of the man's DA payment.
- 2.5 On his return from the care facility in Northern Ireland in May 2006, the man's DA payment was restored by the Department. His mother applied to the Department for arrears of the allowance to be paid to cover the period of his stay in Northern Ireland. This was rejected by the Department and a subsequent appeal to the independent Social Welfare Appeals Office was not upheld on the basis that he was considered to be ineligible for the allowance as he was resident outside the State for the period in question.

- 2.6 Prior to the complaint being made to the Ombudsman, the Department received a series of representations and letters in support of the claim for arrears of DA to be paid. The voluntary organisation wrote three separate letters of support (dated 16 November 2006, 18 January 2007 and 18 May 2007). In these letters the organisation emphasised that the man's placement in Northern Ireland was because of the absence of any suitable placement in the Republic; that he was without income of any kind during his placement in Northern Ireland; that his destructive behaviour meant that he was incurring extra costs for clothing and bedding "and other equipment necessary for his condition"; that his mother had been "responsible for providing any monies needed for his upkeep"; and that his mother "travelled weekly to visit her son 180 miles return and never received any travel allowance for this". In its letter of 18 May 2007, the organisation attached a letter from the HSE (dated 16 May 2007) in which the HSE stated very clearly that the man's placement "out of the jurisdiction" had come about "as a result of a deficit in service provision and at our (HSE) behest". In September 2007, one of the family's Dáil representatives (a Minister of State) wrote to the Minister for Social and Family Affairs in support of the claim for DA arrears; that Minister included in her representation a separate letter from another local Dáil representative (who happened to be a senior Government Minister) also supporting the arrears claim. And in late October 2007, a TD (who complained subsequently to the Ombudsman on behalf of the family) put down a Parliamentary Question (PQ) on the matter. All of these political representations, and the PQ, received the same answer: that DA could not be paid for the period of the placement in Northern Ireland because of the legal provision that a person is disqualified for receipt of DA during any period when that person is "resident, whether temporarily or permanently, outside the State".
- 2.7 However, during the course of the examination of the complaint the Department informed this Office that there is an administrative exception/extra-statutory provision which applies in certain circumstances. This originated when the Department took over responsibility for the former scheme known as Disabled Person's Maintenance Allowance (DPMA) which had been operated by the health boards up to 1995. To qualify for payment of DPMA an applicant had, amongst other things, to be ordinarily resident in the functional area of the health board. In practice, health boards allowed payment of DPMA to persons who went abroad on approved educational courses on the basis that, while temporarily resident outside the State, they were nevertheless ordinarily resident within the State. The same practice was followed by the health boards in the case of DPMA recipients who went abroad on a temporary basis for specialist medical treatment; they were regarded as being ordinarily resident within the State and payment of DPMA would be continued in such cases.

Under the transitional provisions set out in the Social Welfare Act 1996 (when the Department assumed responsibility for the new DA scheme), existing DPMA recipients could not be made worse off as a result of the transfer to Disability Allowance. Consequently, the arrangements regarding temporary absence from the State were continued for them, and extended on an administrative basis, to relevant new claims for Disability Allowance. According to the Department, these administrative arrangements/extra statutory provisions enable DA recipients retain the allowance if;

- medical treatment required by the beneficiary is not available in the State
- the person is sent from the State for the medical treatment at the behest of the HSE, and
- written confirmation is provided that the person is in an institution outside the State receiving medical treatment.

In the course of the Ombudsman's preliminary examination of this complaint, this Office asked the Department to consider the possibility that the decision to refuse arrears of DA for the period of the man's placement in Northern Ireland might, in the light of the existing administrative arrangements, be regarded as improperly discriminatory and inequitable. The Ombudsman's Office suggested that to have administrative arrangements in place to continue payment of DA to a person receiving medical treatment outside the State, but not to include in this arrangement a disabled person placed abroad for specialist care, was a distinction that could not be justified. The Department's response was to maintain its position that the care provided to the man in Northern Ireland was not medical treatment and that it did not come within the scope of the administrative arrangements. Furthermore, the Department did not agree with this Office's suggestion that confining the administrative arrangements to medical treatment discriminates against a disabled person sent abroad for specialist care. The Department concluded: "...it is not proposed to give further consideration to the question of entitlement to Disability Allowance for the period in question".

In light of the Department's decision, the Ombudsman decided to initiate an investigation of the case and the Department was notified by letter dated 12 March 2009 which enclosed a copy of the Statement of Complaint. For the purposes of the investigation the Department was asked to provide:

- (a) a copy of all records (including records of contacts on the matter with the Department of Finance, if any) held by the Department which deal with the administrative arrangements catering for situations where recipients of DA retain their payment while they are resident outside the State and,
- (b) a comprehensive written submission in response to the Statement of Complaint.

Chapter 3 Department's Response to the Statement of Complaint

- 3.1 The Department's initial response to our request as, specified in Chapter 2, was received on 27 March 2009. It stated that, while it did operate an administrative exception to the disqualification from DA where claimants have been absent from the State to receive medical treatment, this is subject to the three conditions outlined in Chapter 2. Furthermore, it said each case is examined on its own merits. The Department said that a record of such cases had not been maintained and it had not consulted the Department of Finance on these administrative arrangements. (A copy of the full text of the Department's reply is at Appendix 1).
- 3.2 A further detailed reply, dated 3 April 2009, in response to the Statement of Complaint, was received from the Department (a copy of the full text and enclosures provided by the Department is at Appendix 2). The Department's reply:
- provided details of the history of the man's DA claim up to the time it was suspended following his placement in the care facility in Northern Ireland;
 - outlined the origin of the administrative practice to pay DA in the case of people receiving medical treatment outside the State;
 - explained that DA arrears for the period in Northern Ireland were refused because *"It was considered at the time that the care provided for [...] in Northern Ireland would not come under the heading of medical treatment"*.

The Department said that, arising from the investigation by the Ombudsman's Office, it had reviewed the circumstances of the case to take account of (a) EU legislation which allows for free movement and for medical treatment to be provided in other member states, if not available in the home country, and (b) the HSE's letter dated 16 May 2007 which stated *"that the type of care required was not available here and recommended that it be provided in Northern Ireland"*.

- 3.3 In the circumstances the Department said it had decided to award DA to the man for the period 6 October 2004 to 23 May 2006 resulting in a payment of arrears of €13,089.60. A further payment of €1,276.84 was issued to him to compensate him for the loss of purchasing power due to the delay caused in paying him for the period during which his claim had been suspended.
- 3.4 The Department also stated that *"Provision is now being made to provide a statutory basis for the payment of DA outside the State for clients getting medical treatment"*.

Chapter 4 Analysis

4.1 This investigation is not concerned with the decision to terminate the man's DA payment in October 2004. The termination of payment came about because his mother returned her son's DA book to the Department on the understanding that her son ceased to be entitled to DA by virtue of his placement in Northern Ireland. It is clear on the basis of the legislation governing DA that he was not entitled to payment of DA for the period of his placement with the voluntary organisation in Northern Ireland.

In the course of this investigation it became clear that, in practice, the Department does in certain circumstances pay DA (or its equivalent) to some applicants notwithstanding that they are not resident within the State. The family in this case, it would appear, were not aware that the Department operated such extra-statutory arrangements. The central issue in this investigation is the failure of the Department, prior to the Ombudsman's investigation, to rely on the existing extra-statutory arrangements as a basis for paying DA arrears.

4.2 It is unclear as to whether the Deciding Officer who rejected the application for DA arrears considered the option of paying them on an extra-statutory basis. The recipient's mother was not told by the Department that an extra-statutory arrangement existed; nor was she invited to argue the case that her son should have the benefit of an extra-statutory arrangement. Indeed, prior to the involvement of the Ombudsman's Office, it appears that the existence of extra-statutory arrangements was not mentioned to her nor to any of those supporting her. In his written response of October 2007 to the representations made by the Minister of State, the Minister for Social and Family Affairs explained that DA "is not payable for any period in respect of which the claimant is resident away from the State *excepting where the person is pursuing second or third level courses of education outside the State under the Back to Education Allowance Scheme or while receiving medical treatment*(our emphasis)". However, this letter did not make clear that the exceptions mentioned operate on the basis of an extra-statutory arrangement rather than on the basis of legislation. This is not an academic distinction: while the Department would be required to construe and apply a legislative provision strictly, it would have greater discretion in the application of an extra-statutory provision. Furthermore, in as much as the extra-statutory arrangements are Department-made, it is reasonable to expect that in their terms and in their application they will be fair and equitable.

4.3 In considering the relevance of the extra-statutory arrangements, two questions arise. The first is whether the Department acted reasonably in the manner in which it chose to interpret the term "medical treatment". The second question is whether, in any event, confining the advantage of the extra-statutory arrangements to "medical treatment" represents a fair and equitable approach.

4.4 As regards the first of these questions, it is necessary to decide what constitutes a reasonable and fair interpretation of the term "medical treatment". In the course of this investigation the Department gave its understanding of the term on three separate occasions. In a letter of 9 December 2008 the Department relied on the following definition: "professional treatment for an illness or injury or professional services administered by a physician or another

professional provider for the treatment of an illness or accidental injury". The Department emphasised that the medical treatment in question must be treatment "not normally available within the State" and expressed the view that what the man received in Northern Ireland was "supported residential care" rather than medical treatment. In a subsequent letter, dated 6 February 2009, the Department commented that "the in-service care as provided in [-] case would not be deemed to be medical treatment for the purpose of the administrative provision". Finally, in a letter of 27 March 2009 (see Appendix 1), the Department elaborated further by expressing the view that, in the present context, the "phrase 'absent from the state for medical treatment' would have a meaning for the ordinary citizen that the treatment would be carried out by a medical doctor or similarly qualified person and that the provision of such treatment is not incidental but is the primary reason for absence from the State".

- 4.5 In fairness to the Department, the Ombudsman accepts that such a construction is one possible construction of the term 'absent from the state for medical treatment'. But it is not the only possible construction nor is it necessarily the fairest construction of the term. In its letter of 9 December 2008, the Department said it was relying on a definition (quoted above) of "medical care" provided by the Deputy Chief Medical Officer in the Department of Health and Children. Unfortunately, the Department did not quote the entirety of what the Deputy Chief Medical Officer actually said; omitted from the quotation was the following qualification: "The issue is probably: does it refer to care delivered by a doctor or care provided in a medical setting by a nurse, doctor, physio etc. In truth the definition will depend on the context and on who is using the term". Clearly, the term is an inexact one and, as the Deputy Chief Medical Officer in the Department of Health and Children observed, the context is all important.
- 4.6 It is striking that the Department appears not to have made any specific enquiries to establish the precise details of the service regime in the centre in Northern Ireland. While it is not necessary to deal with this here in any great detail, it is clear that the regime involved a mix of elements including supervision, medication, activation, psychological, nursing, and medical support as well as various therapeutic elements (physiotherapy and occupational therapy). This mix of elements constitutes "in-patient services" in the sense in which that term is used in the Health Act 1970. The relevance of this is that the service provided to hospital in-patients in Ireland, ranging from acute care to long-stay care and all of the stages in between, is "in-patient services"; while it is a term that includes acute, high-tech medical treatment, it also includes nursing home-type care. It appears the Department has singled out one element of the package which constitutes "in-patient services" and taken the view that this is the element - and only that element - which will have the benefit of the extra-statutory arrangement.
- 4.7 It may be inherent in administrative or extra-statutory arrangements that the terminology used will lack the precision of definition which usually is a feature of arrangements provided for in statute. This may have the advantage that administrators will have some flexibility in the application of the extra-statutory arrangements. One would then expect this flexibility to be used to the advantage of applicants rather than to their disadvantage. In this case, it appears that the Department relied on a term (medical treatment) which is capable of a wide range of meanings and then used discretion to apply the term in a restrictive way to the

disadvantage of applicants. In short, therefore, the answer to the first question posed at Para. 4.3 above is that the Department did not act reasonably in the manner in which it chose to interpret the term "medical treatment" for the purposes of the extra-statutory arrangements which apply in the case of Disability Allowance. While this conclusion applies generally it has even greater force in the very particular, and difficult, circumstances of this case.

4.8 The second question posed at Para. 4.3 is whether confining the advantage of the extra-statutory arrangements to "medical treatment" represents a fair and equitable approach. The Department has expressed the view (letter to Ombudsman of 6 February 2009) that it is "not considered that confining the (extra-statutory) arrangements to medical treatment discriminates against someone who goes abroad for the purpose of care facilities". This is a remarkable position to have adopted given the fact that a person going abroad for medical treatment could benefit from the arrangements whereas a person going abroad "for the purposes of care facilities" could not.

4.9 The logic of the "medical treatment" extra-statutory arrangements would seem to be that a person who needs to go abroad for medical treatment, because that treatment cannot be provided within the State, should not be further disadvantaged by the loss of Disability Allowance. In principle, this is a fair and reasonable approach. However, people with illnesses or disabilities will occasionally need to go abroad for necessary services which for whatever reason are not being provided by the statutory service provider in this State. There is no rational basis for distinguishing between the needs and rights of a person sent abroad for acute hospital treatment (where that treatment cannot be provided within the State) and a person with an intellectual or psychiatric disability who is sent abroad because an appropriate residential place cannot be provided within the State. Leaving to one side the fact that the residential placement is likely to constitute "in-patient services", within the meaning of the Health Act 1970, it is a matter of fact that both cases involve the provision of services which are necessary and which, in the normal course, should be provided within the State by the relevant statutory authority.

4.10 The general point which must be made here is that when the Department devises administrative arrangements, with a view to mitigating the negative consequences of a strict application of the law, it must do so in a manner which avoids the creation of some further unfairness. The Ombudsman appreciates that the Department's action in establishing the extra-statutory arrangements was undoubtedly well intentioned. Nevertheless, as regards the second question posed at Para. 4.3, the answer must be that the Department's approach cannot be regarded as being fair and equitable. It may well be that, in its belated decision to give the claimant in this case the advantage of the extra-statutory arrangements, the Department now recognises that its original approach was neither reasonable nor equitable.

Chapter 5 Findings

The Ombudsman finds as follows :

- 5.1 that [-] was adversely affected by the actions of the Department, (a) in its decision to refuse DA arrears for the period of his care in Northern Ireland and (b) by allowing the decision to stand for more than three years;
- 5.2 that insofar as it considered the extra-statutory option in this case, the Department took an unreasonably narrow view of the scope of that option and that this was contrary to fair or sound administration ;
- 5.3 that insofar as the Department, in considering the option of the extra-statutory payment, sought to distinguish between those receiving hospital treatment and those receiving residential care services, it acted in a manner which was improperly discriminatory ;
- 5.4 that, in any event, the service provided to [-] in Northern Ireland would, had it been provided in the Republic, fall into the category of "in-patient services" within the meaning of Section 51 of the Health Act 1970 and that this is commonly understood as meaning hospital treatment.

Emily O'Reilly
Ombudsman
September 2010