

Casebase Number: G0024

Title of Payment: Mobility Allowance



Northside Community Law and Mediation Centre
Northside Civic Centre
Bunratty Road
Coolock
Dublin 17

Date of Final Decision: 24th April 2010

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Keywords: Mobility Allowance- Equality Tribunal-appeal-mental disability- failure to identify correct defendant at circuit court

Organisation who assisted claimant: Northside Community Law and Mediation Centre (NCL&MC)

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Case Summary:

Note: This case concerns the Mobility Allowance. This is not a Social Welfare Scheme. It is an Allowance administered and paid by the Health Service Executive. We have included this case as the Allowance is only available to those who pass a means test, and its terms are compatible with the description and category 'social welfare'. *Following the failure of the Claimant's appeal to the HSE Medical Review mechanism, he/she initiated proceedings, under the Equal Status Acts 2000 - 2008, concerning the basis of the refusal of MA. The origin of these proceedings is considered in a separate case file entitled G0024 which is also available on our website for your review.*

Case Summary:

This case concerns an appeal taken by the Appellant to the Equality Tribunal concerning the medical criteria an individual must satisfy in order to qualify for Mobility Allowance (MA). The Appellant argued that the criteria are discriminatory as they do not apply to individuals with a mental disability and this was accepted by the Equality Officer. This decision however was successfully appealed to the Circuit Court by the HSE who argued that they were not the correct respondent (defendant) in the case. This argument was accepted by the Court.

Summary of Benefit under Dispute:

The Mobility Allowance (MA) is a means tested monthly payment payable by the Health Service Executive (HSE) to individuals who are disabled and are, as a result, unable to walk or avail of public transportation. It is not provided for in specific legislation but was introduced in 1979 by the Department of Health and Children and is payable under Section 61 of the Health Act, 1970.

The HSE has provided the criteria for eligibility for MA in a circular dated 1st July 2002: *"A Mobility Allowance is payable by Health Boards, subject to a means test, to persons with a severe disability. Applicants must be 16 years or older and under 66 years. The allowance provides financial support to eligible people who are unable to walk or use public transport and is intended to enable them to benefit from a change in surroundings, e.g. by financing the occasional taxi journey.*

Eligible persons must reside at home or in any long-stay facility. Such eligible persons can continue to receive payment after they reach the age of 66 provided they were receiving the allowance prior to their 66th birthday. Persons aged 66 or over who apply are not eligible..."

In addition to these requirements additional medical criteria must also be satisfied. The applicant must be:

- Unable to walk, even with the use of artificial limbs or other suitable aids, or his/her health is such that the exertion required to walk would be dangerous.
- The inability to walk must be likely to last for at least a year.
- He/she must not be medically forbidden to move.

Relevant Legislation:

Under the Equal Status Acts 2000 – 2008, various sections were considered. Discrimination is defined under Section 3(1) which states:

“For the purpose of this Act, discrimination shall be taken to occur -

(a) where a person is treated less favourably than another person is, has been or would be treated in a comparable situation...”

Disability is also expressly referred to under Section 3(2)(g) which states:

“that one is a person with a disability and the other either is not or is a person with a different disability (the “disability ground”),

The provision of services to a particular section of the public was also considered. Section 5(1) provides:

“A person shall not discriminate in disposing of goods to the public generally or a section of the public or in providing a service, whether the disposal or provision is for consideration or otherwise and whether the service provided can be availed of only by a section of the public.”

Background: Following a failure of an appeal through the HSE Medical Review process regarding a claim for Mobility Allowance (MA) the applicant, represented by a relative due to his mental condition, issued proceedings under the Equal Status Acts 2000 – 2008 concerning the medical criteria an individual must satisfy in order to qualify for MA. The medical criteria for this benefit limit the availability of the benefit to individuals with a physical disability, who must be “unable to walk, even with the use of artificial limbs or other suitable aids, or his health is such that the exertion required to walk would be dangerous.” The Appellant argued that this criterion made no reference to individuals with a mental disability who as a result of their psychological disability experienced difficulty with public transport and that this amounted to discrimination on the ground of disability.

The Equality Officer accepted this argument and held that the qualifying criteria as set out did not allow for an assessment of all potential comparables under the definition for disability, which includes those with mental disability, which resulted in the applicant being treated less favourably. This decision was appealed by the HSE to the Circuit Court on the grounds that it [the HSE] was not the correct party in the proceedings, and also that no case was made to argue that it had incorrectly applied the scheme, or that they had erred in refusing the applicant MA in accordance with the established criteria set out for the scheme. The HSE did not dispute the actual findings of the Equality Officer. On commencement of proceedings to the Circuit Court, the Minister for Health and Children was joined as a ‘Notice Party’ in the proceedings.

The Court found in favour of the HSE. The Judge in the case found that the Minister for Health and Children was the correct respondent/defendant to the complaint before the Equality Officer, not the HSE. The court further held that no order could be made against the

Minister in this case, as the Minister should have been named as a notice party when the complaint was first brought before an Equality Officer.

Date of Application to the Equality Tribunal: 3rd October 2006.

Date of Equality Tribunal Hearing: 15th January 2009.

Date of Circuit Court decision: 24th April 2010

The hearing (Equality Tribunal): At the hearing the Advocate acting on behalf of the Appellant argued that the applicant was unlawfully discriminated against on the ground of disability, subject to Sections 3(1) 5(1) of the Equal Status Acts, 2000 – 2008, in relation to his access to a MA payment from the HSE. The Appellant’s Advocate argued that an individual with a mental health disability, so severe as to prevent him from using public transport, should have an equal right in law to a service which is provided in order to aid individuals with difficulty regarding mobility and inclusion. She further argued that the current criteria for assessment are outdated and result in increased disparity being experienced by individuals with one kind of disability as opposed to another. Finally, she argued that the MA should be amended in line with equality legislation as the current service is discriminatory. The HSE contended that all of the proper procedures in relation to the Appellant’s application had been followed and that the allowance had been refused on the basis that the applicant had failed to satisfy the relevant medical criteria. It further argued that it was obliged, as an agent of the Department for Health and Children, to adopt these criteria and had no discretion with regard to the assessment. It did however acknowledge that the language of the Circular, which outlines the criteria for assessment, was outdated. The Equality Officer first noted that the defences in Section 14 of the Acts did not apply here as the allowance concerned is governed by a Circular. Secondly, she held that the HSE had acted entirely in accordance with the rules set out in the Circular and finally, she considered the criteria for assessment. She held that pursuant to Section 3(1) discrimination occurs when an individual is “treated less favourably than another person is, has been or would have been treated in a comparative situation” and that in a case concerning a different disability that any such comparator falls within the broad definition given to disability, as provided for under the Acts. She found that the current format for assessment for MA was not compatible with the Equal Status Acts and that in order to for an individual with a mental disability to not be treated less favourably than an individual with a physical disability, that he should have his psychological ability in relation to mobility assessed.

Date of Equality Officer’s Decision: 9th February 2009.

Decision/Recommendations:

The Equality Officer found in favour of the Appellant and held that the applicant had been treated less favourably in his assessment for MA. She held that the assessment process was discriminatory subject to Sections 3(1) and 5(1) subject to his disability and that he should be reassessed in accordance with the broad definition given to disability in the Equal Status Acts. Full case report available on the Equality Tribunal Decisions Database. See: <http://www.equalitytribunal.ie/Database-of-Decisions/2009/Equal-Status-Decisions/DEC-S2009-012-Full-Case-Report.html>

Date of Appeal (Circuit Court): 20th March 2009.

The hearing (Circuit Court):

Following the decision of the Equality Officer, the HSE appealed to the Circuit Court. It argued that it [the HSE] was not the correct respondent (defendant) for the previous application as the Circular does not operate to make the HSE an agent of the Minister for

Health and Children and that Section 42(2) of the Equal Status Acts does not make the HSE the appropriate party. The Appellant attended at the Law Centre after the Equality Tribunal's decision had been issued. The NCL&MC was instructed in respect of the appeal before the Circuit Court and represented the Appellant before the Circuit Court. As the Minister had not been identified as a respondent in the previous claim and was, as a result, prevented from part-taking in the Equality Tribunal's investigation, the Appellant made an application to join the Minister as a co-respondent to the proceedings. However this was opposed by the Minister and the HSE and the Minister was instead joined as a notice party. The HSE, and the Minister, also referred to Section 28(2) which provides that *"In its determination [of an appeal from a decision of the Equality Tribunal under section 25 of the Acts] the Circuit Court may provide for any redress for which provision could have been made in the decision appealed against [substituting the discretion of the Circuit Court for the discretion of the (Equality Tribunal).]"* The HSE submitted that pursuant to Section 27(2) of the Acts which provide that an order can be made that a person specified in such order take a specific course of action, that the Minister should be ordered to amend the disability eligibility criteria. However, as the Minister was merely a Notice Party to the proceedings no such order could be made against him. The court therefore accepting that the HSE was the incorrect respondent for the previous proceedings and that no order could be made against the Minister, granted the appeal.

Decision: Appeal (by the HSE) ALLOWED.

Courts Reasoning's and Conclusions:

While the Equality Officer had held that, pursuant to Section 42(2) that the HSE was the appropriate respondent, the Circuit Court adopted an opposite position. It held that as the Department of Health and Children set out the Circular that they were the correct respondents and that the HSE were merely carrying out its functions and had no discretion with regard to the criteria for the scheme. Therefore the previous recommendations of the Equality Officer, including compensation and reassessment, were set aside and the Appellant was without means of redress or compensation.

Observations: Given the success of the client's claim in the Equality Tribunal it is clear that the criteria for MA do need to be reviewed. However, as no such order was made requiring the Minister for Health and Children to carry out such a review the medical criteria remain the same. NCL&MC did not represent the appellant until the case went to the Circuit Court. It was unfortunately the failure to identify the correct defendant that led to this decision being overturned thus denying the Appellant any relief and a fair assessment for MA.

For more information on Mobility Allowance useful links are;

- **Citizens Information:**
http://www.citizensinformation.ie/en/travel_and_recreation/transport_and_disability/mobility_allowance.html
- **HSE:**
http://www.hse.ie/eng/services/Find_a_Service/entitlements/Disability_Services/mobility_allowance.html
- **Health Act 1970**
<http://www.irishstatutebook.ie/1970/en/act/pub/0001/index.html>

- **Equal Status Act 2000:**
<http://www.irishstatutebook.ie/2000/en/act/pub/0008/index.html>

For ***more information***, contact us at:

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