Casebase Number: G0117

Title of Payment: Domiciliary Care Allowance

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

Date of Final Decision**: 21st May 2021**

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Keywords: Domiciliary Care Allowance; Refusal to revise a decision, Revised decision, Right to appeal to the Chief of Appeals Officer.

Organisation who represented the Claimant: KOD Lyons

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Case Summary:
This case is that of *Brigid Wilton McDonagh v. The Chief Appeals Officer and Minister for Social Protection* [2021] IESC 33. The case concerned whether the refusal of a deciding officer to revise an earlier decision of a deciding officer constituted a new "decision" or "revised decision" so that the refusal would give rise to the right of the applicant to appeal to the Chief of Appeals Officer.

Ms McDonagh (The Applicant) is the primary carer of her child who has a diagnosis of learning/developmental difficulties. On the 10 June 2011, the applicant applied, pursuant to s.186(D) of the Social Welfare Consolidation Act 2005 as amended (2005 Act), to become a recipient of Domiciliary Care Allowance. On the 21st September 2011, a deciding officer refused the applicant's application pursuant to s.300(2)(b) of the 2005 Act.

The applicant was informed of her right to seek a review/revision of the decision under s.301(1) of the 2005 Act and her right to seek an appeal of the decision pursuant to s.311(1) of the 2005 Act. The applicant did not seek an appeal of the decision but after an interval of four and half years sought a revision of the decision by the deciding officer under s.301(1) of the 2005 Act on three separate occasions. On each occasion the application for a review was refused, the last of these refusals being issued on the 23rd May 2017.

On the 12th July 2017, the applicant's solicitor wrote to The Chief Appeals Officer (he first-named respondent) seeking an appeal of the decision to refuse a revision of the decision. The first named respondent wrote to the applicant informing her there was no possibility to appeal to The Chief Appeals Officer as the 21-day appeal time limit for the decision made on the 21st September 2011 had expired and there was no avenue to appeal to the Chief Appeals Officer where a deciding officer reviewed a decision but refused to revise the decision.

The applicant was subsequently granted leave to seek judicial review of the decision of the first named respondent and sought an order of *certiorari* quashing the decision of the first-named respondent and an order of *mandamus* compelling the first-named respondent to determine the appellant's appeal. In doing so, she argued that a decision of a deciding officer refusing to revise an original decision constituted either a fresh "decision" or a "revised decision" under the legislation so that it gave rise to the right to appeal to the Chief of Appeals Officer.

The applicant's arguments were rejected in the High Court and the reliefs sought were refused. The Court of Appeal affirmed the decision of the High Court, again rejecting the applicant's arguments. The Supreme Court subsequently allowed the applicant's appeal

holding a decision of a deciding officer not to revise an original decision is a decision, just as a decision to revise is a decision and that as a result the applicant was entitled to appeal the decision not to revise her application for Domiciliary Care Allowance.

Key Conclusions: The refusal of a deciding officer to revise an earlier decision of a deciding officer is a decision that may be subject to appeal.

Relevant Legislation:
An applicant claiming a social welfare payment pursuant to the 2005 Act and who is dissatisfied with the outcome of a decision made by a deciding officer has two distinct processes they can seek.

The first comes under s301 of the 2005 Act:

S301(1) A deciding officer may, at any time-
(a) revise any decision of a deciding officer, where it appears to him or her that the decision was erroneous in the light of new evidence or of new facts which have been brought to the notice of the deciding officer since the date on which it was given or by reason of some mistake having been made in relation to the law or the facts, or where it appears to the deciding officer that there has been any relevant change of circumstances since the decision was given, or
(b) revise any decision of an appeals officer where it appears to him or her that there has been any relevant change of circumstances which has come to notice since the decision was given.

The second process comes under s311 of the 2005 Act:

S311(1) Where any person is dissatisfied with the decision given by a deciding officer, the question shall, on notice of appeal being given to the Chief Appeals Officer within the prescribed time, be referred to an appeals officer.

Other relevant provisions

S300(1) Subject to this Act, every question to which this section applies shall, save where the context otherwise requires, be decided by a deciding officer.

S300(2) Subject to subsection (3), this section applies to every question arising under-
(b) Part 3 (social assistance) other than chapter 9(supplementary welfare allowance).

S329 – A reference in this Part to a revised decision given by a deciding officer or an appeals officer or a revised determination given by an employee of the Executive includes a reference to a revised decision or determination which reverses the original decision or determination.

The core issue of the case was whether in circumstances wherein a decision is not appealed and where a deciding officer pursuant to s301 of the 2005 Act, subsequently refuses to revise a decision of a deciding officer, does the refusal to revise constitute a new "decision" or a "revised decision" thus giving rise to the right of the applicant to appeal to the Chief Appeals Officer under s311(1) of the 2005 Act.

Key Arguments:

The applicant argued:

1. The decision of the deciding officer on 23rd May 2017 was not a refusal to revise but rather a new decision pursuant to s.300(2)(b) of the 2005 Act, thereby refreshing the applicant's right to appeal subject to s311(1).
2. Alternatively, the applicant argued that the 23rd May 2017 decision was a "revised decision" within the meaning of s.301 of the 2005 Act. In support of this the applicant placed emphasis on s.329 of the 2005 Act contending that the section contains a non-exhaustive definition of a "revised decision" as indicated by the word includes.
3. The applicant argued the legislation should be read purposively submitting that to exclude a refusal to revise from the definition of either "a decision" or "a revised decision" would defy the legislative purpose of the statutory scheme, which the applicant contended is designed to ensure all decisions regarding entitlement of social welfare benefit are subject to unlimited review and revision. This argument relied on s.301. Furthermore, in arguing for a purposive approach before the Supreme Court the applicant relied on the judgment of Peart J in *LD v Chief Appeals Officer* [2014] IEHC 641 and submitted that the 2005 Act was a remedial statute meaning it had to be interpreted purposively.
4. Even if the refusal to revise a decision was not a "revised decision", the 2005 Act seems to envisage circumstances where a so-called unrevised decision is appealable under s.302(2A) of the Act which allows for the revision of "a decision" in respect of Supplementary Welfare Allowance, rather than "a revised decision".

The respondent argued:

1. "The decision" referred to in s.311 can only be the original decision of a deciding officer.
2. A refusal to revise a decision could not constitute "a revised decision" within the meaning of s.301 of the 2005 Act as it does not alter the original decision.
3. In arguing for a literal interpretation, it was submitted that the wording of the 2005 Act is clear and unambiguous, and that no special statutory interpretation ought to be used when construing the meaning of the provisions in question.
4. It was not absurd to exclude a refusal to revise a decision from the meaning of either a "decision" or a "revised decision", and not absurd for the legislature to put in place an open-ended statutory review procedure without recourse to an appeal where the outcome of that review remains unchanged.
5. Even if the applicant's interpretation of s.302(2A) was correct it does not follow that this approach impacts the position of a decision under s.301.

Decision of the Supreme Court:

In determining how the legislation should be interpreted, the Supreme Court examined s.5 of the Interpretation Act 2005, the observations of Dodd in *Statutory Interpretation in Ireland* (1st edn, Bloomsbury Professional 2008), the judgment of Peart J in *LD v. Chief Appeals Officer* [2014] IEHC 641 and the judgment of Clark J *in J.G.H v Residential Institutions*

Review Committee [2017] IESC 69. This examination led to the conclusion that as the legislation at issue was designed to provide assistance to those who have particular need for assistance over and above that of the average parent, by reason of having a child with a severe disability, the provisions are remedial and accordingly should be interpretated 'as widely as the words reasonably permit in order to reflect the permissive nature of the legislation'. This was in accordance with the judgments of Peart J and Clarke J in the cases mentioned above. In other words, the Supreme Court accepted the applicant's arguments for the application of a purposive approach.

Having determined this, the Supreme Court questioned why a decision not to revise the original decision should be regarded as non-appealable (particularly as in the majority of cases, the revision is sought on the basis of new evidence not before the original decision maker) given the legislative provisions at issue were drafted in such a way as to ensure that a claimant for an allowance has every possible opportunity to make their case to be entitled to the allowance.

It was held that the view the decision not to revise a decision is one that cannot be appealed is at odds with the scheme as a whole provided for under the 2005 Act which provides for both appeal and revision. In discussing this, the Court took the example of means tested allowance and stated that it was difficult to understand why, if the decision not to revise a decision is one that cannot be appealed, a claimant who obtains part of an allowance but not the full amount following a revision can appeal but a person who seeks revision and is refused the full amount cannot.

The Court also held that if the respondent's interpretation was correct there would be an inbuilt inequality in the Act, without explanation or justification, between those who seek Supplementary Welfare Allowance under s.301(2A) as opposed to any other allowance provided for under the Act such as Domiciliary Care Allowance. If the respondent's interpretation was correct there could be a concern as to the constitutionality of the legislation.

Thus, given the points discussed the Court held the legislature did not confine appeals to the "original" decision and the applicant was entitled to appeal the decisions not to revise her application for Domiciliary Care Allowance.

Observations:

From the judgment it is evident that a decision not to revise a decision is a decision which can be appealed. Of note in the judgment is the finding that the 2005 Act is a remedial statute and that interpretation should be 'generous and flexible'.

The judgment is significant for the applicant, and others in a similar position to her, as she is entitled to appeal the decision not to revise her application for Domiciliary Care Allowance. However, the case may create the risk that an applicant becomes lost in the social welfare appeal process after many revisions and experiences greater difficulty in being granted leave for a judicial review case if it is determined they have not exhausted all available remedies within the social welfare appeals process.

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

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