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THE HIGH COURT

2009 148 MCA

IN THE MATTER OF SECTION 20 OF THE DISABILITY ACT 2005

AND IN THE MATTER OF SECTION 1(3) AND PART 2 OF THE DISABILITY ACT 2005

AND IN THE MATTER OF THE DISABILITY ACT 2005 (COMMENCEMENT) ORDER 2007 (S.I. NO. 234 OF 2007)

AND IN THE MATTER OF ORDER 84C OF THE RULES OF THE SUPERIOR COURTS 1986 AS AMENDED

BETWEEN:

HEALTH SERVICE EXECUTIVE

Appellant

-And-

TERESA DYKES

Respondent

-And-

ROGER GALLAHUE

Notice Party

Judgment of Mr. Justice Michael Hanna dated the 8th day of December, 2009

These proceedings are a statutory appeal brought by the Health Service Executive ("HSE") in respect of a determination made by the Disability Appeals Officer ("DAO") appointed pursuant to s. 15 of the Disability Act 2005 ("the Act"). The DAO is cited as respondent in the proceedings. The notice party is the father of Liam who was born on 28th August, 2002. Liam suffers from a severe manifestation of autism. Mr. Gallahue has, at all times, acted in the capacity of a lay litigant. He has filed a comprehensive affidavit outlining his and his family's plight. The problems facing Liam and his family are immense and harrowing.

Mr. Gallahue has attended court, as far as I am aware, on a number of occasions. This matter was listed before me in October last in Castlebar, Co. Mayo at the Non-Jury/Chancery sittings having been transferred from Dublin. Mr. Gallahue did not attend, very understandably, because of his caring commitment to Liam. I was informed by the parties before me that, firstly, he wished the matter to proceed rather than be put back further into the Dublin list and, secondly, that he was content to adopt the argument of the respondent. On that basis the matter proceeded.

The Issue

The determination in question involved an appeal brought by the notice party on behalf of his son, Liam Gallahue, a minor, whose date of birth is 28 August, 2002, against the HSE's decision to refuse his application for an Assessment of Need which had been brought under s. 9(1) of the Act. The determination was delivered by the DAO on 12 June, 2009 wherein the Notice Party's appeal against the HSE's finding that Liam was not eligible for an Assessment of Need was allowed. In addition to allowing the appeal, the DAO also found that Liam remained eligible for an Assessment of Need under s. 9(1) of the Act and recommended that an Assessment be provided to him and completed within a 3 month period of the date of the determination.

The HSE brought an appeal pursuant to s. 20 of the Act against the findings of the DAO and it is with that appeal which this decision is now concerned.

In the appeal, the HSE challenges the correctness of the finding of eligibility for Assessment of Need made by the DAO. Pursuant to the Disability Act 2005 (Commencement Order) 2007 ("the Commencement Order"), 1 June 2007 was fixed as the date upon which Part 2 of the Act came into force but only "in relation to persons under 5 years of age". The issue to be resolved on this appeal, therefore, is whether a person, on the date of their application for an Assessment of Need pursuant to Part 2 of the Act, must be under five years of age or whether, on the other hand, it is sufficient if the applicant was under five years of age at the date of the coming into force of the Act, that being 1 June 2007, in which case Liam Gallahue is eligible and the determination reached by the DAO in this regard is valid.

The issue arises from section 9 of the Act which entitles a person to apply for assessment. It is the HSE's case that only persons under the age of 5 are eligible. It is the DAO's case that the Act applies to persons under the age of 5 as of the 1 June 2007.

The DAO contends that the interpretation placed on the words "under 5 years of age" by the HSE is contrary to the purpose of the Act as it limits the rights intended to be conferred by the Act to a significantly greater extent than the

terms of the Act require. The HSE claims that the assessment of need service was intended by the Minister to be put in place for under 5's with the consequence that resources could be targeted at that early age group. The HSE objects to the interpretation favoured by the DAO in that they say if that is the position, then children born within 5 years of the commencement of the Act would remain indefinitely eligible for an assessment and that that cannot have been the intention of the legislature.

Essentially the situation is that if the HSE are correct in their contention that only children under 5 can be the subject of a valid application for an assessment, then the reality would be that any child who on 1 June 2007 qualified for eligibility (i.e. who was under 5 on that date) but who the next day turned 5 would lose that eligibility through no fault of their own. The DAO asserts that this is an absurd and fundamentally flawed proposition which is altogether at odds with the intention of the legislation and with our obligations in light of the European Convention on Human Rights. It has been pointed out in the course of the proceedings, both in submissions and at hearing, that had a suitable transitional regime been put in place by or under the Act, this scenario might never have arisen. However, the fact of the matter is that no such transitional arrangements were put into place for the coming into force of Part 2 of the Act and what we are therefore left with is the task of correctly interpreting the meaning of the Commencement Order and the meaning of the phrase "children under 5 years of age" in the context of that Order.

The Act
Section 1(3) is of crucial importance. It provides as follows:

> *"Part 2 shall come into operation on such day or days as, by order or orders made by the Minister for Health and Children, where appropriate, after consultation with the Minister for Education and Science, may be fixed therefor either generally or with reference to persons of different ages or with reference to any other particular purpose or provision and different days may be so fixed for persons of different ages, for other different purposes or for different provisions."*

Part 2 of the Act concerns Assessment of Need. Section 7(1) of Part 2 of the Act deals with interpretation and defines "child" as a person under the age of 18 years.

Section 9(1) of Part 2 of the Act deals with assessment of need and provides as follows:

> *"Where*
>
> *(a) a person… is of the opinion that he or she may have a disability, or*
> *(b) a specified person… is of that opinion in relation to another person and the person considers that by reason of the nature of the other person's disability or age he or she is or is likely to be unable to form such an opinion,*
>
> *the person may apply to the Executive for an assessment or for an assessment in relation to a specific need or particular service identified by him or her."*

Nowhere in the Act does it say that Part 2 of the Act shall only apply to children under 5 years of age. Under s. 1(3) the Minister is entitled to bring Part 2 of the Act into operation by reference to age. As noted above, "children" are defined in the Act, as one would expect, as persons under 18 years of age. No where in the Act or in the Commencement Order was there any statement to the effect that the right to an assessment was a right which could be lost.

The Commencement Order
In relation to the commencement of Part 2 of the Act, s. 2 of the Commencement Order provides as follows:

> "The 1st June 2007 is hereby fixed as the day on which the provisions of Part 2 of the Disability Act 2005 comes [*sic*] into operation **in relation to persons under 5 years of age**." [Emphasis added]

Had the s. 2 of the Order continued to say "on the date of the commencement of the Act" or "on the date of the making of an application on their behalf" or with words to that effect, the confusion that led to these proceedings could have been avoided.

Is this "in relation to persons under 5" at the date of the coming into operation of the Act? Or is it in relation to persons under 5 at the date of the making of the application for an assessment? Or, to go further with the inquiry, does the phrase mean that in order to be eligible for an assessment, a child must have been either under 5 at the date of the commencement of the Act **or**, under 5 on the date of the making of the application?

The phrase "in relation to persons under 5 years of age" appears to limit the group of people who are eligible for assessment. It is how it is limited and to whom that concerns us. The question is whether eligibility is limited to persons who are under 5 years of age at the time of the making of an application for an assessment or, whether it is limited to persons who were under 5 years of age on the date of the commencement of Part 2 of the Act.

S.I. No. 263 of 2007 Disability (Assessment of needs, Service Statements and Redress) Regulations 2007
This was made on 1 June 2007 and notice of it was published on 12 June.

The text of S.I. 263 of 2007 does not mention s. 9(4) of the Act which provides:

> *"Where it appears to an employee of the Executive that a person may have a disability or where a person is in receipt of a health service provided by the Executive or both, he or she may arrange for an application under subsection (1) to be made by or on behalf of the person or may request the Executive to carry out or cause to be carried out an assessment of the person."*

Regulation 6(2) of S.I. 263 of 2007 is important in that it provides that applications for an assessment of need may be statutorily recognised as possibly being incomplete. This is an important acknowledgement by the statutory code and is indicative of the legislative intention in forming this Act for the benefit or greater good of persons suffering from a disability. Regulation 6(2) provides:

> *"If any application form received by the Executive is incomplete the Executive shall, without undue delay, notify the applicant in writing of the omissions and shall advise the applicant of the steps which require to be taken in order to ensure the application form is complete."*

"Persons under 5 years of age"
Two possible interpretations are urged upon and open to the court in relation to the meaning of the phrase "persons under 5 years of age" in the context of the Commencement Order. First, it is possible, from a simple reading of the sentence, it appears that Part 2 of the Act will apply to persons under 5 years of age. On this interpretation, no one over 5 would ever be eligible for an assessment of need as Part 2 would be deemed only to apply to children under that age. In an email sent by a representative of the appellant on 27 May 2009 to the relevant Complaints Officer under the Act, the thinking of the HSE on the meaning of this all important phrase was made clear:

> "A Guidance Note was issued to Assessment Officers on 27th June concerning the interpretation of the term 'persons under 5 years of age' in respect of whom the Disability Act 2005 was implemented on 1st June, 2007. The effect of this Guidance… was to make the Act applicable to those under 5 years of age on an ongoing basis rather than only to those who were under 5 on 1st June, 2007. **The rationale for this interpretation is that it allows the HSE to implement the Act in respect of a particular age cohort from whom services are provided.** The HSE did not seek legal advice on this issue." [Emphasis added].

The second possible interpretation of the phrase is that the Act would come into force on 1 June 2007 and would be applicable to all children who were under the age of 5 years of age at that date of commencement, in other words children born on or after 1 June 2002. This second interpretation leads to an entirely different outcome for would be applicants under the Act. In other words, if a child was born after 1 June 2007 and an application was to be made on his or her behalf, that application would have to be made at a time when the child was under 5 years of age. However, if a child was born at any stage between 1 June 2002 and 1 June 2007, that group of children remain indefinitely eligible to apply.

The Purpose of the Disability Act
As far as the purpose of the Statute is concerned, the primary purpose is to provide proper assessment of the needs of people who may have a disability but another essential purpose of the Act is to deal with the volume of applications and in this regard the application of the Act was limited by the inclusion of the words "to persons under 5 years of age" in the Commencement Order. The question is whether this limits the Act to persons, who at the date of the commencement of the Act, were no older than 5 years old, in other words whether the Act only applies to persons born on or after 1 June 2002, or, as contended for by the HSE, whether the Act only applies to persons under 5 at the date of the making of an application for assessment.

The Act creates a right to assessment of need on behalf of certain persons, it does not create a timescale. The DAO contends that the application of the Act was limited to persons who were under 5 years of age at the date of the commencement of the Act, i.e. anyone born on or after 1 June 2002. This is the construction of the Commencement Order urged upon the Court by the respondent and the Notice Party. However, the HSE claims that once the Act came into force, applications for an assessment of need could only validly be made in respect of children under 5 years of age at the date of the making of the application. Thus, under the HSE's construction of the instrument, applications can only be made in respect of children under 5 years old.

The Function of the HSE under the Disability Act
The overall function of the HSE under the Act is to give effect to the Act and to provide the services as described therein, including the important service of an assessment of need. Upon receipt of an application for an assessment, one of the initial functions of the HSE will be to make a decision as to whether the applicant or the person on whose behalf the application is made is eligible for an assessment under the Act. In discharging that function, it is necessary for the HSE to know exactly to whom the Act applies and in considering that issue the HSE clearly arrived at the conclusion, without the benefit of legal advice on the matter, that Part 2 of the Act only applied to children under 5 years of age at the date of the making of the relevant application. This conclusion was reached by the HSE, as is clear from the email of 27 May 2009, in order to allow the HSE to confine the services it was obliged to provide under the Act to a particular age cohort, notwithstanding the fact that no where in the Act is any such limitation imposed.

The Duty of the DAO to Give Reasons and the Level of Detail Required
In *The State (Creedon) v. Criminal Injuries Compensation Tribunal* [1988] I.R. 51, Finlay C.J. made the following statements regarding the statutory duty to give reasons, at p. 55:

> *"… I am satisfied that the requirement which applies to this Tribunal, as it would to a court that justice should appear to be done, necessitates that the unsuccessful applicant before it should be made aware* ***in general and broad terms*** *of the grounds on which he or she has failed. Merely, … to reject the application and when that rejection was challenged subsequently to maintain a silence as to the reason for it, does not appear to me to be consistent with the proper administrations of functions which are of a quasi judicial nature."* [Emphasis added].

In *O'Donohue v. An Bord Pleanála* [1991] I.L.R.M. 750, Murphy J. stated as follows:

> *"It is clear that the reason furnished by the Bord (or any other Tribunal) must be sufficient first to* ***enable the courts to review it*** *and secondly to satisfy the persons having recourse to the Tribunal that it has directed its mind adequately to the issue before it.* ***It has never been suggested that the administrative body is bound to provide a discursive judgment as a result of its deliberation****, but on the other hand the need for providing the grounds of the decision as outlaid by the Chief Justice could not be satisfied by recourse to an uninformative if*

technically correct formula." [Emphasis added]

In *Ní Éilí v. The Environmental Protection Agency* (Unreported, Supreme Court, 30 July, 1999), the Supreme Court surveyed the authorities on the level of detailed required to be given in the reasons for a decision of a statutory body. Having considered the case law in some detail, the Court cited with approval the decision of Evans L.J. in *MJT Securities Ltd. v. Secretary of State for the Environment* [1998] J.P.L. 138, who had the following to say in respect of the statutory obligations to give reasons, at p. 144:

> *"The Inspector's statutory obligation was to give reasons for his decision and the courts can do not more than say that the reasons must be* ***proper, intelligible and adequate...*** *What degree of particularity is required must depend on the circumstances of each case …"* [Emphasis added]

More recently, in *Byrne v. The Official Censor* (Unreported, High Court, O'Higgins J., 21 December 2007), the applicant claimed that the impugned decision was invalid and ought to be quashed on the grounds that there were no or no adequate reasons given by the respondent to justify the decision. The respondents claimed that adequate reasons were furnished to the applicant for the refusal of the certificate and that it was not obliged to elaborate further upon the reasons given. O'Higgins J. held, in refusing the relief sought, that while fair procedures required a decision maker exercising statutory powers to give reasons for their decision, such reasons were given in the instant case. The respondent did not provide an analysis of the film or discuss in detail the parts of the video which led him to form his opinion that a certificate should be refused. However, he was not under any legal obligation to do so nor was he obliged to give any analysis of the parts or the contents of the video recordings that influenced his decision. All the respondent was required to do was give reasons for his decision and that requirement was satisfied when the applicant was informed that the video work would not be certified on the basis that it contained obscene or indecent matter which tended to corrupt persons who might view it. Having analysed the statutory duty to give reasons and the duty to adhere to fair procedures, O'Higgins J. rejected the grounds advanced by the appellant as to the adequacy of reasons and concluded as follows:

> *"In the case of administrative decisions, it has never been held that the decision maker is bound to provide a discursive judgment as a result of its deliberations."*

Statutory Interpretation

Under the normal canons of statutory interpretation, where the words of the Statute are clear it is not permitted to speculate as to what the legislator might have intended. Where the phrasing is unclear or ambiguous and therefore open to interpretation, a purposive approach may be taken.

If the meaning of the words used in the Commencement Order are not clear or plain upon a literal reading of those words, a purposive approach to the interpretation of the Commencement Order may be necessary.

In *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101, Blayney J., at page 151, quoted from the judgment of Lord Blackburn in the case of *Direct United States Cable Co. v. Anglo-American Telegraph Co.* (1877) 2 App. Cas. 394 to the following effect:

> *"The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver. The tribunal that has to construe an Act of a legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to enquire what is the subject matter with respect to which they are used and the object in view."*

Evershed *M.R. in Tinkham v. Perry* [1951] 1 T.L.R. 91, who, at p. 92 of that judgment, stated as follows:

> *"Words plainly should not be added by implication into the language of a statute unless it is necessary to do so* ***to give the paragraph sense and meaning in its context.****"* [Emphasis added]

It is therefore clearly established law that the first condition that has to be satisfied before recourse can be had to construction by implication or a purposive interpretation of a legislative provision is that the meaning of the statute should not be clear. In *In re MacManaway* [1951] A.C. 161, Lord Radcliffe, when asked to adjudicate on the meaning of certain words in an Act, cautioned against speculation in statutory interpretation, and said, at p. 169:

> *"The meaning which these words ought to be understood to bear is not to be ascertained by any process akin to speculation. The primary duty of a court of law is to find the natural meaning of the words used in the context in which they occur, that context including any other phrases in the Act which may throw light on the sense in which the makers of the Act used the words in dispute."*

In a similarly cautionary vein, in *R. v. Wimbledon Justices, ex parte Derwent* [1953] 1 Q.B. 380, Lord Goddard C.J. stated, at p. 384:

> *"… although in construing an Act of Parliament the Court must always try to give effect to the intention of the Act and must look not only at the remedy provided but also at the mischief aimed at,* ***it cannot add words to a statute or read words into it which are not there."*** [Emphasis added]

The following extract on the prohibition on reading words into a statute appears in *Halsbury's Laws of England* (4th ed.) (Vol. 44), at paras. 863 and 864:

> *"If there is nothing to modify, alter or qualify the language which a statute contains, the words and sentences*

must be construed in their ordinary and natural meaning. Speculation as to Parliament's intention is not permissible. If the result of the interpretation of a statute according to its primary meaning is not what the legislature intended, it is for the legislature to amend the statute construed rather than for the courts to attempt the necessary amendment by investing plain language with some other than its natural meaning to produce a result which it is thought the legislature must have intended."

Having reviewed the relevant authorities, Denham J., in her judgment in *Howard*, said, at p. 163:

"The correct conclusion to be drawn is that the plain language of the Act must not be extended beyond its natural meaning so as to supply omissions or remedy defects. The court should neither misconstrue words so as to amend defects in the legislation nor legislate to fill gaps left by the legislature. If there is a plain intention expressed by the words of a statute then the court should not speculate but rather construe the Act as enacted."

That being said, while it is certainly necessary for the courts to refrain from adding words to a statute or reading words into it which are not there, there may be cases in which such an approach may be necessary. For example, in *Tinkham v. Perry* [1951] 1 T.L.R. 91, who, at p. 92 of that judgment, Evershed M.R. stated as follows:

"Words plainly should not be added by implication into the language of a statute ***unless it is necessary to do so to give the paragraph sense and meaning in its context."*** [Emphasis added].

In *D.B. v. The Minister for Health and Children*, (Unreported, Supreme Court, 26th March, 2003), McGuinness J. again summed up the plethora of judicial dicta on statutory interpretation in the following way:

"In the interpretation of statutes the starting point should be the literal approach – the plain ordinary meaning of the words used. The purposive approach may also be of considerable assistance, frequently, but not invariably, where the literal approach leads to ambiguity, lack of clarity, self-contradiction, or even absurdity. In the interpretation of a section it is also necessary to consider the Act as a whole."

McGuinness J. quoted with approval the dicta of Keane J. in *Mulcahy v. Minister for the Marine* (Unreported, High Court, Keane J., 4 November, 1994):

"While the Court is not, in the absence of a constitutional challenge, entitled to do violence to the plain language of an enactment in order to avoid an unjust or anomalous consequence, that does not preclude the Court from departing from the literal construction of an enactment and adopting in its place a teleological or purposive approach, if that would more faithfully reflect the true legislative intention gathered from the Act as a whole."

On a literal interpretation of the Commencement Order, it is clear that the Act was to apply to children who on 1 June 2007 were under 5 years of age. Therefore, a purposive approach to the meaning of the provision is unnecessary but would in any event, in my view, lead to the same interpretation. This is so given the legislative intent behind the Disability Act and the fact that the legislation creates rights which the whole language of the Act and the supporting Statutory Instruments is designed to support and facilitate rather than stifle.

Dodd in (2008) *Statutory Interpretation in Ireland* (Dublin), at para. 8.06, discusses what is known as the informed interpretation rule which he described as being applicable in Ireland in the following way:-

"In Ireland, it is usually safe to presume that it is intended by the legislature that the courts be fully informed as to legal matters relevant to an enactment (as opposed to any and all matters that potentially aid interpretation), and that interpretation is to proceed from such an informed standpoint."

It would therefore seem, in light of the authorities discussed above, that in embarking on statutory interpretation, the Court is entitled to look at the enactment as a whole and to look at what was envisaged or hoped to be achieved by the Act, in this case the Disability Act 2005.

The Principle of Effectiveness

The DAO referred to the principle of effectiveness in her determination. This principle of European law provides that time limits cannot be imposed upon the exercise of a legal right in a manner which would render the exercise of that right impossible or exceptionally difficult. The DAO accepts that this principle only arises in the context of EU law and does not apply here. In any event, the Court is asked to have regard to the principle in so far as it indicates that it is unlikely that the Oireachtas would have intended to confer ineffective rights upon significant numbers of otherwise eligible children such as Liam Gallahue.

The Guidance Notes issued by the HSE

Guidance notes do not change the law. Counsel on behalf of the DAO, Mr. John Rogers SC, referred the Court to a number of authorities concerning interference with the independence of assessment officers by the issuing of mandatory guidelines. Having reviewed that case law, it appears to me that the power to issue and make any such directions or guidelines is not *ultra vires* the HSE per se, provided any such directions do not go beyond the giving of mere guidance which would not infringe upon the independent exercise by the relevant officers of their statutory duty. The approach of the UK courts in *Girling v. Secretary of State for Home Department* [2007] 2 W.L.R. 782 is instructive in this regard. In any event, the Memorandum forwarded to all Assessment Officers was merely a guidance document which lacked the force of law and regardless of what it contained, the HSE is obliged to give effect to the Act as is and not as modified by any guidelines or other such directions.

Conclusion

The right to an assessment of needs under s. 9 applies to all children under 5 as of 1 June 2007 and, thereafter, to all children under 5. In any event, the statutory instrument by which the Act was commenced does not entrench upon s. 9 rights. Nor could it. It is outside the competence of the Minister to introduce a time limit where no such limit was provided for in the Act. Again, it is regrettable that the Commencement Order was not worded more clearly and had there been transitional provisions put in place to deal with the rights of children under 5 at the date of the commencement of the

Act, a considerable amount of controversy, perhaps heartache, might have been avoided.

However, no such provisions were put in place and the HSE instead read into the commencement order a time scale provision which simply is not there.

It is regrettable that the Commencement Order was not worded more clearly so as to leave no doubt as to the children who would be entitled to an assessment under the Act. However, upon both a literal and a purposive interpretation of the Commencement Order, I am persuaded that the interpretation embraced by the DAO must be the meaning intended by the legislature to be ascribed to the phrase "children under 5 years of age".

For all of the reasons stated above, I would dismiss the appeal.

J.