Neutral Citation Number: [2013] IEHC 512

**THE HIGH COURT**

**[2013 No. 607 JR]**

**BETWEEN**

**CP**

**APPLICANT**

**AND**

**CHIEF APPEALS OFFICER, SOCIAL WELFARE APPEALS OFFICE**

**AND THE MINISTER FOR SOCIAL PROTECTION**

**RESPONDENT**

**JUDGMENT of Mr. Justice Hogan delivered on the 14th day of November, 2013**

1. At issue in these judicial review proceedings are the circumstances in which an adverse decision of an appeals officer refusing a domiciliary care allowance can be re-opened pursuant to s. 317 of the Social Welfare Consolidation Act 2005 ("the 2005 Act"). The issue arises in the following manner: the applicant, Ms. P., is the mother of a young girl, K., who has special educational needs. K. is 10 years of age and she has been diagnosed with autism spectrum disorder (Asperger's Syndrome) and attention deficit hyperactivity disorder.

2. In April, 2011 Ms. P. applied to the Minister for Social Protection for domiciliary care allowance, a statutory payment made in respect of children with a disability who require care and attention substantially in excess of what would normally be required for a child of the same age who did not have this illness. This application was refused by decision dated 20th June, 2011, on the basis that the relevant statutory test was not met.

3. Ms. P. duly appealed this decision, but the appeal was rejected by an Appeals Officer by decision dated 28th August, 2012. While the Appeals Officer accepted that K. had a diagnosis of Asberger's Syndrome, it was nonetheless concluded that "it has not been established she needs substantial additional care on a continuous basis, as provided by the legislation". Ms. P. was dissatisfied with this decision as she believed that it did not adequately take into account the particular care needs of her daughter. I pause at this point to stress that the merits of that particular decision of the Appeals Officer are not under consideration in these judicial review proceedings. The issue which arises is rather a separate one, namely, the extent of the Appeals Officer's jurisdiction to re-open a decision of this nature in the light of new evidence.

4. Ms. P. was, at all events, determined to secure new evidence to demonstrate the extent of her daughter's educational and other needs. To this end she obtained further reports from K.'s general practitioner, a specialist nurse and the school principal and special needs teacher. Ms. P. also wrote a detailed letter to the Department of Social Protection on 5th May, 2013, explaining the extent of home supervision of K. that was required in practice and seeking to "appeal" the decision to refuse to grant the allowance. The Department replied on 13th May, 2013, saying that as Ms. P's case had been "through the appeals process this application is now considered closed". Ms. P. was, however, informed that she could "at any time submit a new application for Domiciliary Care Allowance…including any additional information you have obtained".

5. On 12th July, 2013, Ms. P's solicitor, Mr. Noble, wrote to the Chief Appeals Officer drawing attention to the provisions of s. 317 of the 2005 Act which permitted the "furnishing of new evidence or of new facts "at any time" following a decision on appeal so that a statutory revision of [the] decision can be considered". Section 317 provides:

> "An appeals officer may, at any time, revise any decision of an appeals officer, where it appears to the appeals officer that the decision was erroneous in the light of new evidence or of new facts brought to his or her notice since the date on which it was given, or where it appears to the appeals officer that there has been any relevant change of circumstances since the decision was given."

6. Mr. Noble had also enclosed the up-dated reports concerning K. which had not been previously considered by the Appeals Officer. He requested confirmation that Ms. P.'s application "will be reconsidered in the light of the new evidence presented".

7. The Social Welfare Appeals Office replied on 22nd July, 2013. The Office referred first to the correspondence and the outcome of the earlier appeal. The letter then continued thus:

> "As has been indicated to you previously, the most appropriate course of action is for [Ms. P.] to make a fresh application to the Department of Social Protection based on this additional new evidence. Nonetheless you continue to request that an Appeals Officer reviews a claim which has been disallowed and closed by the Department of Social Protection, without any first instance of a Deciding Officer on the issues.
>
> Even if such an interpretation were possible (which is not admitted) it is difficult to see how you consider that such an approach could benefit your client. Proceeding via section 317 would not necessarily expedite the determination of your client's claim as against making a fresh application to the Domiciliary Care Allowance Section of the Department of Social Protection. Furthermore, there would be no avenue of appeal available for your client if her claim was processed as the Appeal Officers would, in effect, be a first instance decision. Proceeding in that way would, therefore, appear to materially disadvantage your client.
>
> The Appeals Officer intends to treat you application for a revision as a new application for Domiciliary Care Allowance and to this end, has for your client's convenience, forwarded the information received with your

> convenience to the Domiciliary Care Allowance Section of the Department of Social Protection. A Deciding Officer will consider and determine the claim which, if disallowed, can be appealed to this Office in the ordinary way."

8. Although carefully and tactfully put, the letter cannot be regarded as anything other than a steadfast refusal to entertain an application for revision of the earlier decision of the Appeals Officer. In substance, therefore, the letter effectively denies the existence of such a jurisdiction under s. 317, at least in the context of the application for revision in the case at hand.

9. While the problem thrown up by this case (and some four other similar judicial review applications which are awaiting the outcome of this case) is apparently a new one with which the Department has only recently had to grapple, it is clear that a distinction is drawn by the authorities between cases which are "closed" and those which are regarded as "live". It thus became clear during the course of the oral argument that cases which are in payment are regarded as live for this purpose and, indeed, the revising powers – whether those vested in s. 301 (deciding officer), s. 317 (Appeals Officer) and s. 318 (Chief Appeals Officer) – are commonly used to terminate such payments by reason of a subsequent change of circumstances on the part of the erstwhile claimant, even if those change of circumstances occur many months – even years – after the date on which the payment was first sanctioned.

10. Where, however, the application results in a refusal, then the case is apparently regarded as "closed" for this purpose and not readily susceptible of being re-opened for s. 317 purposes. Counsel for the Minister, Mr. Dillon Malone S.C., (correctly) stressed the necessity for flexibility in cases of this kind and submitted that this very need for flexibility justified implied limitations of this kind justifying a refusal to revise the earlier adverse decision. This was especially so given that s. 319 of the 2005 Act permitted Appeals Officers to backdate any award of payment to successful claimants, since without such a cut-off date the State would be exposed to a potentially significant contingent liability if adverse decisions could be re-opened in this fashion after the lapse of months or even years.

11. The concerns of those called upon to apply a complex system of social protection can, of course, also be readily understood. In an affidavit sworn in these proceedings, Ms. Geraldine Gleeson, the Chief Appeals Officer, voiced her anxiety were it to transpire that the interpretation of s. 317 contended for by Ms. P. was shown to be correct:

> "If sections 301 and 317 are interpreted to apply to closed claims then there is no limit on the backdating of the claim in that circumstances as the claim could not be regarded as late. This would have serious administrative and financial implications for a Department that processes 2 million claims a year."

12. Yet everything turns on the proper construction of s. 317 because it is plain that if there exists such a revising jurisdiction in the case of an application of this kind then the decision cannot possibly stand. It is to this issue of construction to which we may now turn.

**The proper construction of s. 317**

13. It may be first observed that in the absence of a provision such as s. 317 that the Appeal Officer would be *functus officio* once a decision had been made on appeal. In those circumstances, the decision on appeal would be administratively final and the Appeals Officer would have no jurisdiction to re-open the matter, even in the light of new evidence or a significant change of circumstances. The Oireachtas clearly recognised, however, that given the special nature of social security claims and the ever-changing circumstances of claimants, it would be desirable that the Appeals Officer should have the power to re-open appeals in certain circumstances. It is accordingly for this reason that s. 317 vests the Appeals Officer with a discretionary power of revision in circumstances which suggest that the decision may have been erroneous in the light of the emergence of new evidence or new facts or where it appears that there has been a change of circumstances since the first decision was given. It may also be observed that further revising powers of a similar nature have been giving to deciding officers (s. 301) and to the Chief Appeals Officer (s. 318).

14. Section 318 accordingly provides that the Chief Appeals Officer:

> "may, at any time, revise any decision of an appeals officer, where it appeals to the Chief Appeals Officer that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts."

15. So much is not in controversy. The real question, therefore, is whether the Appeals Officer has a jurisdiction to exercise this revising power under s. 317 in order to re-open an appeal which is adverse to a claimant after an interval of several months. At first blush it is difficult to see why the Appeals Officer should not have such a jurisdiction in view of the express language of s. 317 which provides that this revision may be done "at any time". This is very straightforward language which clearly provides that the power to re-open otherwise concluded appeals decision is not directly limited by temporal constraints.

16. In cases of this kind the role of the court is clear, since its task to simply to give effect to the language used by the Oireachtas. As Denham J. put it in *Board of Management of St. Maloga's School v. Minister for Education* [2010] IESC 57, [2011] 1 I.R. 362, a case concerning the interpretation of the provisions of the Education Act 1998:

> "As the words of s.29 [of the Education Act 1998] are clear, with a plain meaning, they should be so construed. The literal meaning is clear, unambiguous and not absurd. There is no necessity, indeed it would be wrong, to use other canons of construction to interpret sections of a statute which are clear. The Oireachtas has legislated in a clear fashion and that is the statutory law."

17. The same can be said here. The language is unambiguous and there is nothing absurd in giving an Appeals Officer an open-ended power to re-open cases in the light of the emergence of new facts or new evidence or changed circumstances. This conclusion is, moreover, re-inforced by the language of the remainder of the section.

18. Thus, for example, the Appeals Officer is expressly empowered to re-open matters where new evidence comes to light since the decision was first given or where in the meantime there had been a relevant change of circumstances. The wording of the section naturally presupposes that there will have been an interval of time between the original decision and the subsequent application for revision. One might ask: how else is the potentially fresh evidence to emerge or the changed circumstances envisaged by the section otherwise to come about if no interval between the date of the adverse decision and the emergence of new evidence is to be administratively permitted?

19. In any event, while it appears that s. 317 has heretofore escaped judicial consideration, the statutory predecessor to the corresponding (yet very similar) section in relation to the powers of the Chief Appeals Officer under s. 318 was considered by the Supreme Court in *Maher v. Minister for Social Welfare* [2008] IESC 15. In this case the applicant had sought judicial review of an adverse decision of an Appeals Officer which had been given as far back as August, 2000. The applicant had been given official

documentation which had not disclosed the existence of the revising power of the Chief Appeals Officer under s. 263 of the Social Welfare (Consolidation) Act 1993. This section is worded in identical terms to the present s. 318 of the 2005 Act.

20. In these circumstances the Supreme Court held that this omission to furnish the information had rendered the procedures unfair. For our purposes it is of interest that Denham J. clearly envisaged that the court could direct that the Chief Appeals Officer could exercise the revising power under s. 263 of the 1993 Act in respect of a decision which had been given some eight years earlier:

> "For years the applicant has sought that the decisions as to his disability benefit be reviewed. Doing the best I can, I am satisfied that the most appropriate remedy in all the circumstances, is that there should be a review by the Chief Appeals Officer. Owing to the many years which have elapsed, which are not the fault of the applicant, new medical assessments may be required to be obtained, indeed medical evidence from both parties. Any such assessment by medical practitioners should be limited to medical issues. Broader issues are for the Chief Appeals Officer. Thus I would remit this matter to the Chief Appeals Officer who should enable a full review of the situation.
>
> Quite apart from this decision, it is clear under s.263 of the Act of 1993 that the Chief Appeals Officer may "at any time" review any decision. In all the circumstances of this case, justice would be best met by a review of the applicant's situation by the respondent in a fair manner. Any such application should have the benefit of all relevant material, including any which the applicant may wish to put before the Chief Appeals Officer."

21. Given that the structure, language and general purpose of s. 317 and s. 318 (and, of course, its statutory predecessor, s. 263 of the 1993 Act) are in substance identical, then even if authority was needed for this purpose, these *dicta* of Denham J. in *Maher* may be regarded as effectively governing the interpretation which must be ascribed to the words "at any time" in s. 317 of the 2005 Act. It is clear from *Maher* that the Supreme Court considered that these words should mean literally what they say. It is hard to avoid the conclusion that the reasoning in *Maher* entirely negatives the arguments advanced in this context on behalf of the respondents.

22. In any event the language of s. 317 is altogether too plain to admit of any implied limitation of the kind urged by the Minister: see, *e.g.,* by analogy my own comments to similar effect in *Kinsella v. Dún Laoghaire Rathdown County Council* [2012] IEHC 344 in the context of the interpretation of the Housing (Miscellaneous Provisions) Act 2009. In *Kinsella* I noted that the 2009 Act imposed a particular limitation on the category of persons who could apply for certain types of social housing and it was accepted that the applicant did not fall into this category. In those circumstances, given the structure of the Act, there was no room to imply a further category of persons so precluded from applying. The same may be said *a fortiori* in respect of the issue of interpretation in the present case.

23. One may, of course, understand the Department's anxieties to ensure the smooth working of the appeal system and to husband scarce resources at a critical time when the State is struggling to ensure that the public finances are brought back to equilibrium. It must nevertheless be observed that the distinction sought to be drawn by the Department between cases which are in payment and those which are not has simply no basis in law. Section 317 does not make distinctions of this nature and nor does it distinguish between cases which are "live" and those which are not. Nor does it contain any implied temporal limitation of the kind which the respondents have urged, since this would be entirely at odds with the express language of the section itself.

**Conclusions**

24. In these circumstances I am accordingly coerced to conclude that the Department has failed to operate the section in the manner which was plainly intended by the Oireachtas. The criteria which were in fact applied in refusing to consider this revision application under s. 317 have no proper legal basis. It follows, therefore, that I must hold that the Appeals Office erred in law in declining to entertain this application for a review based on new evidence of the earlier decision of the Appeals Officer dated 28th August, 2012. Section 317 of the 2005 Act clearly confers such a jurisdiction to entertain revision applications of this nature in cases where new evidence has been presented.

25. I will accordingly grant an order of *certiorari* quashing the decision of the Appeals Office dated the 22nd July, 2013, as declined to entertain Ms. P.'s application for a revision of the earlier decision. I will further grant an order of *mandamus* directing the Chief Appeals Officer (or such other appropriate Appeals Officer as she may nominate for this purpose) to consider this application for a review pursuant to s. 317 of the 2005 Act in accordance with law and in a manner not inconsistent with this judgment.