Too Old to be Equal?

An Ombudsman investigation into the illegal refusal of Mobility Allowance to people over 66 years of age

Executive Summary

This was an investigation by the Ombudsman, Emily O'Reilly, of a complaint against the Department of Health. The Department failed to amend the terms of the Mobility Allowance Scheme even though it was not compliant with Equal Status legislation enacted in 2000.

The Ombudsman has found that the Mobility Allowance Scheme, as currently constituted under a Departmental circular, is in breach of the Equal Status Act 2000 because it includes an upper age limit. The upper age limit in the Scheme has been illegal since the commencement of the Equal Status Act in 2000. The Ombudsman found that the actions of the Department do not suggest any sense of urgency in seeking to bring the Scheme into compliance with the Equal Status Act, even eleven years after its commencement. This was despite having had the defects in the Scheme brought to its attention by a number of bodies including the Equality Authority.

The Department has accepted the Ombudsman's findings and recommendation.

The Complaint

In September 2008 Mr. Browne, who lives in Roscommon, complained to the Ombudsman, on behalf of his sister about the refusal of the Health Service Executive (HSE) to award her a Mobility Allowance. Ms. Browne had applied for the Allowance in June 2008, when she was over eighty years of age. The HSE refused her application on the basis that she was over 66 years of age and, as a first-time applicant, was outside the scope of the Scheme. This decision was upheld following an appeal in August 2008. Sadly, Ms. Browne died in October 2010 before the completion of the Ombudsman's investigation. Despite this, her brother asked that the investigation be completed in recognition of the needs of people like his sister.

Mobility Allowance

Mobility Allowance is paid, subject to a means test, to people who have a disability and are unable to walk or use public transport and who would "benefit from a change in surroundings"[1]. It is intended to allow people who are not car-owners to make private transport arrangements, for example to travel by taxi from time to time. Although first-time applicants must be under 66 years of age, people already receiving the Allowance continue to be paid after their 66th birthday provided they are otherwise entitled. The Scheme operates under the general authority of section 61 of the Health Act 1970 which provides that a health board (HSE) "may make arrangements to assist in the maintenance at home" of a "sick or infirm person, or a dependent of such a person". At present, the maximum rate of the Allowance is €208.50 per month.

[1] HSE , Mobility Allowance http://www.hse.ie/eng/services/Find_a_Service/entitlements/Disability_Services/Mobility_Allowance.html Accessed on 21 March 2011.

Other Related Scheme

The Ombudsman's initial view that the terms of the Mobility Allowance are unfairly discriminatory is supported by a case published by the Equality Authority in 2008[2]. In the ***McNabola Case,*** dealt with in detail in Chapter 3 of the Ombudsman's report, a woman complained to the Equality Authority when the HSE refused her application for a Motorised Transport Grant on the grounds that she was over 66 years of age. She claimed that she was discriminated against, on the grounds of age, contrary to the provisions of the Equal Status Act 2000. That case was settled when the then Department of Health and Children, having accepted that Mrs. McNabola's contention was valid, removed the maximum age limit of 66 years in the case of the Motorised Transport Grant. It seemed to the Ombudsman that the Department had to be aware that the inclusion of an upper age limit in the case of the Mobility Allowance was also untenable and required to be deleted from the Scheme.

Dealing with Complaint - Investigation

The Ombudsman wrote to the Department's Office for Disability and Mental Health in February 2009 suggesting that the age limit for Mobility Allowance was discriminatory and contrary to the Equal Status Act 2000. The Department replied that responsibility for the Scheme was due to transfer to the Department of Social and Family Affairs, that the Department intended to review it prior to transfer, and that in the meantime the HSE would continue to operate it in accordance with the 1979 Circular. The Department stated "*it is not feasible to amend the scheme to remove the upper age limit in the current economic circumstances*". No view was given on whether the age restriction was, or was not, contrary to the provisions of the Equal Status Act 2000.

Further correspondence with the Department followed in the course of 2009. In November 2009, the Secretary General said that the views of the Ombudsman would be taken into account in a review of Mobility Allowance in the context of "*overall Government policy regarding supports for people with disability*". The Ombudsman did not consider this an appropriate response and decided to investigate the matter. In the course of the investigation, the Ombudsman looked in particular at the relevance of international human rights instruments as well as at Irish equality legislation.

The Ombudsman found that, while the HSE's refusal of the Allowance was in line with the Department's Circular of 1979, the continued inclusion in the Circular of an upper age limit has had the effect of rendering the Scheme non-compliant with the Equal Status Act 2000. In effect, the Scheme has been operating since 2000 on the basis of an illegality. The Ombudsman found that Ms. Browne had been adversely affected by the failure of the Department to amend the Scheme so as to render it compliant with the Equal Status Act 2000.

In making these findings, the Ombudsman expressed the view that the Department has not displayed any sense of urgency in acting to bring the Scheme into compliance with the Equal Status Act, even eleven years after the commencement of that Act. She commented also that, in the case of the related Motorised Transport Grant, it was only through the determination of Mrs. McNabola, acting with the assistance of the Equality Authority and having commenced proceedings through the Equality Tribunal, that the Department had dropped the upper age limit.

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[2] Equality Authority, Casework Activity 2008, 2008

Department's Response

It was not until the Draft Investigation Report went to the Department that its Secretary General accepted that it "*should have reviewed and updated the mobility allowance scheme following the enactment of the Equal Status Act [2000].*" He stated that following a recent review of the terms of the Scheme, "*particularly the upper age limit and the definition of disability*", the Department concluded that it could not continue to operate on the current basis. However, he said that it had been decided not to look at the upper age limit in isolation, and instead to look at the Scheme in its entirety. He told the Ombudsman that certain options in relation to the future of Mobility Allowance had been considered by the Minister and the Government but that final policy decisions had not yet been taken.

The Secretary General reported that, in the particular case of the late Ms. Browne, the Minister had authorised retrospective payment of the Mobility Allowance on an exceptional basis, with effect from June 2008. The Department apologised, through the Ombudsman's Office, to the complainant and to his late sister.

The Role of the HSE

In strict legal terms the HSE is not responsible for the Mobility Allowance Scheme. Nonetheless, one might reasonably have expected that it would have made representations to the Department seeking to have the scheme made compliant with the Equal Status Act. The Ombudsman has no reason to believe that the HSE made any such representations.

Recommendation

In her report the Ombudsman recommends that the Department of Health completes its review of the Mobility Allowance and, arising from that review, revises the Scheme so as to render it compliant with the Equal Status Act 2000. The Ombudsman further recommends that this process of review and revision should be completed within six months of the date of this report.[3] The Department has accepted this recommendation.

[3] The Ombudsman expresses no view as to the terms of any revision of the Mobility Allowance Scheme other than that the revised scheme should be compliant with the Equal Status Act 2000.