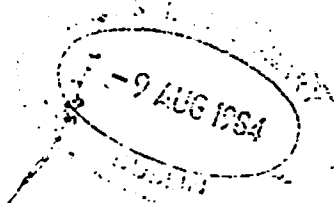


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THE HIGH COURT

1982 No. 287 SS

STATE SIDE



BETWEEN:-

ROLAND McCONNELL

Prosecutor

-and-

THE EASTERN HEALTH BOARD

Respondent

Judgment of Mr. Justice Hamilton delivered the 1st day of June 1983.

This is an application brought by the Prosecutor herein to have made absolute, notwithstanding cause shown the Conditional Order of Certiorari made herein on the 24th day of May 1983, by Mr. Justice McMahon.

The application for the Conditional Order was grounded on the Affidavit of the Prosecutor sworn herein on the 20th day of May 1982 and the Affidavit of David Ellis sworn herein on the same date and the exhibits referred to therein.

The Respondent purported to show cause by the Affidavit of Nicholas Doyle, a Section Officer of the Respondent Board, sworn

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on the 26th day of July 1982.

The facts relevant to the determination of the issues herein are that:-

1. The Prosecutor is and was at all times material hereto a disabled person and entitled to the maintenance allowance for the disabled persons pursuant to the provisions of Section 69 of the Health Act 1970 and the regulations made thereunder.
2. Since in or about the month of December 1978, the Prosecutor had been in receipt of such allowance.
3. In or about the 16th day of May 1980, the Prosecutor married one Jean Sherrard, who at the time of the said marriage was in receipt of unemployment benefit in the sum of £32.70 per week.
4. At that time the Disabled Persons Maintenance Allowance being paid to the Prosecutor was £20.45.
5. By virtue of the terms of Article 6(c) of the Disabled Persons (Maintenance Allowances) Regulations Statutory Instrument Number 160 of 1973 and Article 6(c) of the Disabled Persons (Maintenance Allowances) (Amendment)

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(Number 2) Regulations of 1981 Statutory Instrument Number 34 of 1981, the Prosecutor was obliged to notify the Respondent of any change in his circumstances material to his entitlement to the said allowance.

6. The Prosecutor's marriage and the fact that his spouse was in receipt of an income undoubtedly amounted to a change of circumstances within the meaning of the aforesaid regulations but the Prosecutor, who was unaware of the said regulation did not notify the Respondent of his marriage for the purposes of complying with the said regulation though he did so for other purposes.

7. It appears from the Affidavit of the said Nicholas Doyle that he first became aware of the Prosecutor's marriage on the 8th day of September 1981 and of the fact that his wife had an income; that it was not until the week ending the 10th day of October 1981 that the Prosecutor's allowance was reduced from £20.45 to £13.83, which reduction was made after receiving particulars from the Prosecutor of their date of marriage and of the spouse's income which, at that time, consisted of Social Welfare Payments of £27.02 per

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week. The purpose of this reduction was to ensure that the combined income of the Prosecutor and his wife did not exceed £40.85.

8. The Respondent considered that an over-payment of the Disabled Persons Maintenance Allowance had been made to the Prosecutor during the period from the 10th day of May 1980 to the 10th day of October 1981 and a decision was made to recoup the over-payment by a deduction of £2.00 per week from the amount payable to the Prosecutor.

While the amount of the over-payment had not been determined at that stage, the Prosecutor was informed that the amount had to be repaid by a weekly deduction.

The Prosecutor then consulted Mr. Ellis of the Coolock Community Law Centre and the following correspondence then ensued:-

1. By letter dated the 16th day of October 1981 Mr. Ellis wrote to the Respondent as follows:-

"Dear Sir,

We act on behalf of the above in connection with a claim made by your Board for repayment from our clients for an alleged over-payment of the Disabled Persons Maintenance



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Allowance.

Mr. McConnell was in receipt of DPA prior to his marriage in May 1980 and continued to receive the allowance, at the full rate, after his marriage up to this week. This week our clients were informed that as Mrs. McConnell is in receipt of Unemployment Benefit her husband's DPA will have to be reduced. They were also informed that this reduction should have operated from the date of their marriage (Mrs. McConnell was in receipt of Unemployment Benefit throughout this period), and that therefore a refund will be claimed by the Board, which would be payable at the rate of "a couple of pounds" a week, deducted from the allowance.

We wish to point out that our clients did not attempt in any way to deliberately withhold information from the Board, and were not informed that the DPA was liable to be reduced on account of Mrs. McConnell's income. More importantly our clients called to Emmet House three or four weeks after their marriage, to seek information about any possible additions to the DPA following the marriage.

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At this visit full disclosure was made by our clients as to their means and they were at no time informed that, given their joint means, the DFMA was liable to be reduced.

In view of the above facts we consider that it would be unjust of the Board to seek a refund for the extra allowance which was received in good faith and through no fault of our clients. We also consider that given our clients' circumstances, Mrs. McConnell is still unemployed, it would place a considerable additional burden on them if a refund was sought.

We look forward to having your comments in this matter in the near future and trust that in the interim period no attempt will be made to seek a refund by reducing our clients' DFMA.

Yours faithfully

David Ellis."

By letter dated the 29th day of October 1961 the Respondent replied as follows:-

"Dear Sir

I am directed by the programme manager, Mr. F. J. Donoghue

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to acknowledge receipt of your letter of 16th October 1981 regarding Disabled Persons Maintenance Allowance for the above-named.

The case is being investigated and you will be informed further in the matter in due course.

Yours faithfully

M. O'Donnell
ASO
Community Care Services"

On the 30th of October 1981 Mr. Ellis again wrote as follows:-

"Dear Sir

We refer to our letter of the 16th October, in the above matter and we would appreciate an early reply.

Yours faithfully"

On the 19th of November 1981 the Respondent wrote as follows:-

"Dear Mr. Ellis

I wish to acknowledge receipt of your letter dated the 30th of October 1981 regarding previous correspondence in the above matter.

The Board is awaiting a report from the Department of Social Welfare before a further decision can be made in

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the case.

Yours sincerely

M. O'Donnell
Community Care Services."

On the 16th of December 1981 Mr. Ellis wrote:-

"Dear Mr. O'Donnell

I refer to your letter of the 19th November 1981 and

I would be obliged to know if you have yet received

the report from the Department of Social Welfare that

you are awaiting in this case.

I look forward to hearing from you.

Yours sincerely"

On the 31st of December 1981 the Respondent replied as follows:-

"Dear Mr. Ellis

I wish to acknowledge your letter of 16th December 1981

regarding the above-named.

I understand from Mr. Doyle in our area office in Cromcastle

Road that a report has been received from the Department

of Social Welfare. The case is being examined and Mr. Doyle

will contact you early in January.

Yours sincerely

M. O'Donnell
Community Care Services"

By letter dated the 6th day of January 1982 Mr. Ellis wrote to the Respondent as follows:-

"Dear Mr. O'Donnell

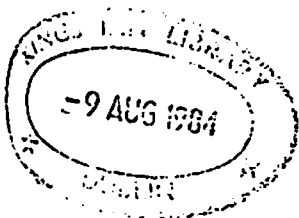
I refer to my earlier correspondence in this matter and my last letter of the 16th of December 1981. In view of the fact that I understood that this matter is still under investigation I was surprised to learn from my clients that they had been informed by the local Community Care Office that from the 10th January an amount of £2.00 per week will be deducted from their DPMA. I will repeat my request for your comments on our letter of the 16th of October 1981 and I would request that any deduction from our clients DPMA should not take place before we have received these comments and had an opportunity to discuss them with our clients.

I look forward to hearing from you in the near future.

Your sincerely"

By letter dated the 29th day of January 1982 the Respondent wrote as follows:-

"Dear Mr. Ellis



I refer to your letter of the 16th of October 1981 regarding an over-payment of Disabled Persons Maintenance Allowance to the above person.

Under the DFMA regulations 1981 the recipient of an allowance is required to notify the health board of any change in his medical condition or any circumstances of his spouse or other dependants material to his entitlement to the allowance.

Mr. McConnell was notified by letter of the conditions attached to payment of the allowance before payment commenced.

Mr. McConnell's marriage in May 1980 clearly affected his entitlement to an allowance. His failure to notify this office of the change in his circumstances resulted in an over-payment of £814.00 arising before the matter came to the Board's notice.

It is proposed to recoup this over-payment by deducting £2.00 per week from Mr. McConnell's DFMA.

I regret the delay in replying to your letter which resulted in a delay in obtaining information from the Department of Social Welfare.

Yours sincerely

Nicholas Doyle
Section Officer."

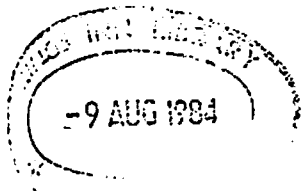
As appears from the Affidavit of the Prosecutor, the decisions of the Respondent which were challenged by him are:-

1. The decision made by the Respondent in or about the month of October 1981 to reduce his allowance from the sum of £20.75 to £13.83, which decision remained in effect until the 9th day of January 1982 and
2. The decision that there had been an over-payment to the Prosecutor of the sum of £814.00 and that this amount had to be refunded by him to the Respondent at the rate of £2.00 per week.

The grounds upon which the Conditional Order was granted were as set out in paragraph 9 of his said Affidavit and are that;

- (a) the Respondent purported to rely on the Disabled Persons Maintenance Allowances (Amendment No. 2) Regulations 1981 which did not come into operation until the 6th day of October 1981 and any over-payments made before that date cannot be recouped under these regulations.
- (b) the Prosecutor complied with the provisions of Regulation 6(c)

of the aforesaid regulations by informing the Respondent of his marriage and of the fact that his wife was in receipt of unemployment benefit, and



(c) The Prosecutor was given no or no adequate opportunity to make representations on his behalf.

If the Prosecutor's case depended solely on (a) and (b) I would allow the cause shown and refuse the application to make absolute the Conditional Order granted herein.

The provisions of Article 6(c) of the 1981 regulations are similar in terms to the provisions of Article 6(c) of the 1973 regulations, and indeed I am satisfied that the deduction was made by the Respondent not because of the failure to comply with the regulations as such but by reason of the changed circumstances which came to their notice.

I am however satisfied that the Prosecutor was not given adequate opportunity to have representations made on his behalf with regard to the decision made by the Respondent that there had been an over-payment of £814.00 and that this amount should be refunded at the weekly rate of £2.00 per week.

It is clear from the correspondence and in particular the

letter dated the 16th day of October 1981 written by Mr. Ellis that he was desirous of making further representations on the Respondent's behalf.

In his said letter he sought the Respondent's comments on the matters raised in his letter and reiterated this request in his letter dated the 6th day of January 1982.

In his letter dated the 16th day of October 1981 he stated:-

"We look forward to having your comments on this matter in the near future and trust that in the interim period no attempt will be made to seek a refund by reducing our clients' DPMA."

It is clear from the same that depending on the comments of the Respondent in reply to his letter, he intended making further representations on behalf of the Prosecutor before any final decision was made.

In my view, he should have been afforded such opportunity and in addition he should have been afforded an opportunity to consider and make representations upon the report which the Respondents obtained from the Department of Social Welfare and to which they had regard in reaching their decision.

At no stage was Mr. Ellis informed of the contents of the said report or afforded an opportunity to make representations with regard thereto, if he so wished, to the Respondent.

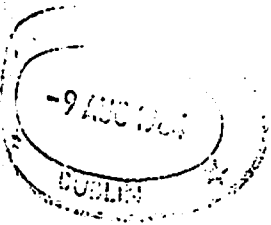
As stated by Mr. Justice Henchy in the course of his Judgment in Kiely .v. Minister for Social Welfare 1977 Irish Reports at 281:-

"This Court (that is The Supreme Court) has held, in cases such as in Re: Haughey that Article 40 Section 3 of the Constitution implies a guarantee to the citizen of basic fairness of procedures. The rules of natural justice must be construed accordingly. Tribunals exercising quasi-judicial functions are frequently allowed to act informally - to receive unsworn evidence, to act on hearsay, to depart from the rules of evidence, to ignore courtroom procedures and the like - but they may not act in such a way as to imperil a fair hearing or a fair result. I do not attempt an exposition of what they may not do for, to quote the frequently cited dictum of Tucker, L. J. in Russell .v. The Duke of Norfolk, "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural

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justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth."

Of one thing I feel certain, that natural justice is not observed if the scales of justice are tilted against one side all through the proceedings. Audi alteram partem means that both sides must be fairly heard."



I am satisfied that the rules of natural justice were not complied with in this case because Mr. Ellis, acting on behalf of the Prosecutor was not afforded an adequate opportunity of making representations on behalf of the Prosecutor before the decision of the Respondent was made and that he was not afforded an opportunity of considering the report from the Department of Social Welfare and making representations thereon, if he so desired.

Consequently I will disallow the cause shown and make absolute the Order in so far as it relates to the finding that there had been an over-payment of £814.00 and that this sum should be repaid at the rate of £2.00 per week.

I am limiting the Order to these decisions of the Respondent

because they are the ones referred to in Mr. Ellis's letter of the
16th of October 1961.

Leon Hamilton

