

Re: Departmental Circular No. 35/20 and entitlement to certain Social Welfare Payments while abroad

Summary

The Department of Employment Affairs and Social Protection has adopted a policy, by way of a Departmental Circular, which purports to allow for the suspension of certain social welfare payments in circumstances where a claimant leaves the State.

While the legislation in relation to Jobseeker's Benefit has been amended in order to allow for the implementation of the said policy, these amendments do not apply to the other payments purportedly effected by the Circular. The primary legislation in relation to Jobseeker's Allowance ('JA') and Supplementary Welfare Allowance ('SWA'), allow claimants to remain in payment provided that they remain normally resident in the State. That primary legislation does not empower the Minister to make further regulations in relation to eligibility for the payment in circumstances where claimants are absent from the State. As a result, it appears that, in relation to Jobseeker's Allowance and Supplementary Welfare Allowance, the Department's policy is contrary to the Social Welfare (Consolidation) Act 2005. Any decision on behalf of the Minister to suspend those payments where claimants, who are residents of Ireland, take holidays abroad would be open to challenge.

Similarly, the eligibility criteria for the Covid Pandemic Unemployment Payment (an administrative scheme which is not grounded in primary legislation) makes no references to entitlement to the payment being suspended during absences from the State. As with JA and SWA, the relevant criteria for access to that payment does not exclude the possibility of the claimant taking a holiday.

The Department's policy also implies that those who are advised to self-isolate following their return from travel abroad are not entitled to payments where there is an obligation to be available for work during the advisory self-isolation period. Firstly, no such obligation exists in the context of SWA and it is questionable whether such an obligation exists in relation to the Covid PUP. Secondly, it is doubtful that all social welfare claimants who do comply with the advice to self-isolate for a period can be automatically deemed to be unavailable for work or to be not genuinely seeking employment.

Introduction - Circular 35/20

1. On 30 June 2020, the Department of Employment Affairs and Social Protection issued Circular 35/20 to its Divisional Staff and Branch Managers. The circular, entitled "Updated Holiday Procedures for JA/JB/JBSE, SWA and related Payments including Pandemic Unemployment Payment", took immediate effect and the "description", included below its title, reads as follows:

"This circular updates RDO Circular 71/10 and specifically suspends the provision of Article 217 of SI 142 of 2007 which allows customers to take two weeks holidays outside the State each year."

2. The first section of the circular, entitled "Purpose", provides a more detailed description of its intended effects:

“This circular is being issued to update current holiday application processes as set out in Circular 71/10 and 13/16 for JA/JB/JBSE, SWA and related payments including the Pandemic Unemployment Payment.

Current Covid-19 public health advice and foreign travel regulations require that anyone coming into Ireland, apart from Northern Ireland, are required to self-isolate for 14 days. This means that any jobseeker who travels abroad will be unable to fulfil the GSW and availability requirements for a jobseekers payment for the period abroad and the self-isolation period on their return i.e. for up to four weeks.

On a temporary basis and as a consequence of the continuing COVID-19 pandemic the terms of the Circulars 71/10 and 13/16 have been suspended for all travel abroad and consequently at present will not apply to those wishing to take holidays outside the island of Ireland. Please note that Article 217 of SI 142 of 2007 is being amended.

In time, if the self-isolation requirements are lifted for people arriving into Ireland from specific countries, then the suspension of the Holiday application procedures will be reviewed and further notification will issue. Notification of such locations should be checked against the most up to date lists available on www.dfa.ie or www.hse.ie.”

3. Section 4 of the Circular provides that there is no change to the administrative rules regarding the taking of holidays within the State by those in receipt of payments relevant to the circular. Accordingly, a claimant of one of the relevant payments may continue to receive their payment while holidaying in Ireland for a period of up to two weeks in accordance with previous Circulars. Sections 2 and 3 of the Circular, however, impose additional restrictions in relation to the circumstances where a claimant of Jobseeker’s Benefit, Jobseeker’s Allowance, a payment under the SWA scheme or the Covid PUP may continue in payment while holidaying abroad.
4. Section 2 of the Circular pertains to “Jobseeker Holiday procedure” while section 3 deals with payments under the SWA scheme. Section 2 provides that those in receipt of a payment in respect of their status as a jobseeker should, when informing the Department of their intention to take a holiday, provide information as to where they will be holidaying. The Circular provides that such applicants should fill out a revised version of the Form UP30 (used to inform the Department of a claimant’s intention to take a holiday) which requires them to provide information in relation to their holiday destination. It seems that this revised form is yet to be published. Where a claimant has already informed the Department of their intention to take a holiday, section 2 states that such claimants should be contacted by Department staff to ascertain their holiday destination.
5. Where a claimant, on foot of Departmental enquiries or having filled out the revised UP30, has stated an intention to holiday abroad, section 2 of the circular states that the following procedure applies:

“If an application is received for holidays outside the State and to a location where self-isolation restrictions apply for people arriving in the State from, the customer should be advised that they are not entitled to a payment for that period and that if they continue to leave the country they will not be entitled to a payment for the duration of the absence from the State, nor will they be entitled to payment for the 14 day quarantine period upon their return.

All such applications should be refused and the customer advised that if it comes to the Department's attention that a person has continued to travel abroad, their claim should be suspended from payment for the duration of the period abroad and an additional 14 days. An overpayment can be considered if necessary."

6. Section 3 of the Circular provides as follows in relation to the holiday procedures for payments under the SWA scheme:

"For SWA schemes there is an administrative arrangement that payment may be allowed for up to two weeks per year while a claimant is on holidays, in line with the provisions for Jobseeker's Allowance.

The amendments to holiday procedures also apply to Basic SWA claims where there is a GSW requirement."

7. It would seem that, in light of the above, the revised rules in relation to holidays abroad set out in section 3 of the Circular apply to payments under the SWA scheme, while the latter paragraph purports to extend these requirements to the Covid Pandemic Unemployment Payment (Covid PUP).

Issues Arising in relation to Circular 35/20

8. First, it should be noted that, despite the "description" contained in the Circular as to its purported effect, a Departmental Circular cannot "suspend" the provisions of a Statutory Instrument. Such circulars do not constitute legislation and, accordingly, they may only operate within the parameters of the existing legislative regime. The fact that Article 217 of Statutory Instrument 142 of 2007 has since been amended (as will be discussed later below) is indicative of the fact that it is still in effect and takes primacy over the provisions of the Circular.
9. Secondly, a number of issues also arise as to whether Circular 35/20 is compliant with the legislation relevant to social welfare payments for jobseekers, the SWA scheme and the Covid PUP. In particular, questions arise as to whether the circular accords with the provisions of the Social Welfare (Consolidation) Act 2005 in relation to eligibility for jobseekers and SWA payments during absences from the State. Further, the "purpose" section of the Circular 35/20 provides that, where the relevant travel guidelines indicate a period of self-isolation on return to Ireland, a person subject to those guidelines after returning to the country will not be entitled to receive a payment which requires them to be "genuinely seeking employment" and "available for employment" during any such period of self-isolation.
10. The relevant legislative provisions for each of the payments referenced in the Circular in relation to absences from the State and availability for work will be set out in turn below, together with an analysis of whether the Circular is in accordance with the primary legislation in relation to eligibility for the payments.

Jobseeker's Benefit

11. The Jobseeker's Benefit Scheme is set out under Part 2 of the Social Welfare Consolidation Act 2005. Section 249(1) of that Act provides:

“Except where regulations otherwise provide, a person shall be disqualified for receiving any benefit under Part 2 (including any increase of benefit) for any period during which that person—
(a) is absent from the State”

Accordingly, the primary legislation provides that a claimant cannot continue to claim Jobseeker’s Benefit for any period during which they are absent from the State, unless such a period is provided for by way of regulation. The only regulation that allows for any such absence is the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (Statutory Instrument 142 of 2007). Article 217(d) of that Regulation was recently amended by Statutory Instrument 242 of 2020 to read as follows:

“Notwithstanding section 249, a person who is absent from the State shall not be disqualified for receiving –

(d) jobseeker’s benefit or jobseeker’s benefit (self-employed), (including any increase thereof) for any period during which that person, or his or her qualified adult, is absent from the State –

(i) on holiday, in accordance with the Covid-19 General Travel Advisory in operation by the Department of Foreign Affairs, in respect of the first two weeks of any such absence in a calendar year.”

12. The “General Travel Advisory in operation by the Department of Foreign Affairs” currently advises against non-essential travel to all countries overseas with the exception of fifteen countries on the so-called “green list”. It also states as follows in relation to the requirement to self-isolate on entering the State:

“The Irish Authorities require anyone coming into Ireland, apart from Northern Ireland and individuals arriving in Ireland from locations with a security rating of ‘normal precautions’ (“green”), to restrict their movements for 14 days, and this includes citizens and residents returning to Ireland. Restricting your movements means staying indoors in one location and avoiding contact with other people and social situations as much as possible.”

13. Article 217(d) of the 2007 Regulations must be read in light of EU law which allows workers to move within the EU to seek work. Such workers are entitled to retain entitlements to benefits for three months after moving to another member State.
14. The legislation would therefore appear to allow for absences from the State for purposes of a holiday to a country on the so-called “green list” and, perhaps, for the purpose of essential travel to any other location.
15. Section 2 of Circular 35/20 appears to accord with this legislation. The circular calls for the suspension of payments in circumstances where a claimant for Jobseeker’s Benefit travels outside the State “and to a location where self-isolation restrictions apply for people arriving in the State”.
16. However, in light of the legislation, the circular should not be interpreted by the officers of the Department in a manner that would suspend payments in circumstances where claimants travel abroad in a manner consistent with the DFA Advice.

17. Section 62(5)(a) of the 2005 Act provides that a claimant for Jobseeker's Benefit must be "available for employment" and "genuinely seeking" same. The question of whether a claimant meets these criteria is decided in accordance with the 2007 Regulations.

18. Regulation 15 of the 2007 Regulations deals with the question of availability for work and provides in full as follows:

"(1) Subject to sub-article (2), a person shall, for the purposes of Chapters 12 and 12A of Part 2 and Chapter 2 of Part 3, be regarded as being available for employment, if he or she can show to the satisfaction of the Minister, that he or she is willing and able, at once, to take up an offer of suitable full-time employment.

(2) Subject to sub-article (4), a person shall not be regarded as being available for employment if he or she imposes unreasonable restrictions on –

- (a) the nature of the employment,
- (b) the hours of work,
- (c) the rate of remuneration,
- (d) the duration of the employment,
- (e) the location of the employment, or
- (f) other conditions of employment

he or she is prepared to accept.

(3) In determining what constitutes suitable full-time employment for the purposes of sub-article (1), regard shall be had to the following –

- (a) the skills, qualifications and experience of the person concerned,
- (b) the period for which the person has been unemployed, and
- (c) the availability of employment vacancies within travelling distance of his or her residence.

(4) For the purposes of sub-article (2)(e), employment as a retained fire fighter shall not be regarded as an unreasonable restriction where that person is available for –

- (a) employment which is additional to his or her employment as a retained fire fighter and which would not necessitate cessation of the employment as a retained fire fighter, and/or
- (b) alternative employment which would necessitate cessation of the employment as a retained fire fighter."

19. Regulation 16 of the 2007 Regulations deals with the question of whether a person is generally seeking employment and provides in full as follows:

"(1) For the purposes of Chapter 12 and 12A of Part 2 and Chapter 2 of Part 3, a person shall be regarded as genuinely seeking employment if he or she can show, to the satisfaction of the Minister, that he or she has, in the relevant period, taken reasonable steps which offer him or her the best prospects of obtaining employment.

(2) For the purpose of sub-article (1) "steps" shall include –

- (a) applications for employment made to persons –
 - (i) who have advertised the availability of employment, or

(ii) who appear to be in a position to offer employment,

(b) seeking information on the availability of employment from –

(i) employers,

(ii) advertisements,

(iii) persons who have placed advertisements which indicate that employment is available, or

(iv) employment agencies,

(c) availing of reasonable opportunities for training which is suitable in his or her circumstances,

(d) acting on advice given by an officer of the Minister or other placement service concerning the availability of employment, and

(e) taking steps towards establishing or re-establishing himself or herself in self-employment.

(3) For the purpose of this article, the taking of one step on a single occasion during the relevant period shall not be sufficient unless taking that step on that occasion, in that period, is all that is reasonable for the person concerned to do.

(4) In determining for the purposes of this article whether, in a relevant period, a person has taken the steps which are reasonable in his or her case, regard shall be had to his or her circumstances, including in particular –

(a) his or her skills, qualifications and experience,

(b) the steps which he or she has taken previously to seek employment,

(c) the availability and location of vacancies for employment,

(d) the duration of his or her period of unemployment, and

(e) his or her family circumstances.

(5) For the purposes of this article, “relevant period” means the period in respect of which the person concerned has made a declaration in accordance with articles 52, 52G and 118.”

20. It would appear to be on the basis of the above requirements that the Circular implies that those in self-isolation after a period of travel abroad are not entitled to claim Jobseeker’s Benefit. Given the proliferation of online working and recruitment, this is a questionable conclusion. Further, many citizens may need to self-isolate for any number of reasons aside from having recently engaged in international travel; however, the Department has not published anything to suggest that claimants of Jobseeker’s Benefit should withdraw their claim for the payment while self-isolating for other reasons. It is thus worth questioning whether the proposition that those who are self-isolating after travelling abroad are unavailable for work or not seeking work is sustainable.

21. In addition, the intention behind the travel abroad might be to seek work in another EU State; per EU law, those travelling for that reason should be considered as “genuinely seeking work” for the period of the travel, provided such period does not exceed three months.

Jobseeker's Benefit (Self-Employed)

22. The provisions of section 249(1) of the 2005 Act and article 217(d) of the 2007 Regulations apply in an identical manner to the Jobseeker's Benefit (Self-Employed) payment.
23. Section 68C(2) of the 2005 Act provides that, for the purposes of the eligibility criteria for that payment, "the Minister shall make regulations specifying the circumstances in which a person is or is not to be regarded as being available for and genuinely seeking employment".
24. Article 52A(1) of the 2007 Regulations provides that a claimant shall not be entitled to the Jobseeker's Benefit (Self-Employed) payment during a week where he or she "fails to prove to the satisfaction of the Minister that he or she is not engaged in self-employment, is capable of work and is available for employment". Regulations 15 and 16 of the 2007 Regulations also apply to the Jobseeker's Benefit (Self-Employed) payment for the purposes of assessing whether a claimant is available for and genuinely seeking employment.
25. Given that the same primary legislation applies, the above analysis in relation to the circular and Jobseeker's Benefit applies to the application of the circular to claims for the Jobseeker's Benefit (Self-Employed) payment.

Jobseeker's Allowance

26. Section 249(6) of the 2005 Act provides as follows:

(6) A person shall be disqualified for receipt of jobseeker's allowance, pre-retirement allowance, supplementary welfare allowance, disability allowance or farm assist (including any increase in such allowance or assistance) while he or she is—

(a) resident, whether temporarily or permanently, outside the State"

It should be noted that the 2005 Act does not empower the Minister to make regulations further to the provisions of section 249(6).

27. By contrast to Jobseeker's Benefit, there is no legislative prohibition on claiming Jobseeker's Allowance while absent from the State, provided that the extent of the absence isn't such to render the claimant "temporarily resident" abroad. Accordingly, the circular creates a far-reaching prohibition on international travel for claimants of Jobseeker's Allowance, which is contrary to the primary legislation in relation to eligibility for the payment. It is arguable that the Departmental Circulars in relation to holidays abroad which pre-dated Circular 35/30 were also contrary to the provisions of the 2005 Act, in limiting claimants to two weeks holidays abroad per annum while in receipt of the payment and imposing a stricter regime than that allowed for under the primary legislation.
28. The relevant primary legislation does not prohibit claims for Jobseeker's Allowance during absences from the State, provided the claimant remains resident therein. It would appear, then, that suspensions during such absences, in light of the Circular, would be without a legislative basis.

29. Section 141(4) of the 2005 Act provides that a claimant for Jobseeker's Allowance must be "available for employment" and "genuinely seeking" same. Regulations 15 and 16 of the 2007 Regulations also apply to Jobseeker's Allowance for the purposes of assessing whether a claimant is available for and genuinely seeking employment. The analysis set out above at paragraphs 20 and 21 is therefore also applicable in the context of Jobseeker's Allowance.

Supplementary Welfare Allowance

30. The provisions of section 249(6) of the 2005 Act (set out above at paragraph 24) also apply in relation to Supplementary Allowance claims. Accordingly, the Circular also imposes a travel restriction which is far more prohibitive than that envisioned by the primary legislation on claimants of Supplementary Welfare Allowance. As with Jobseeker's Allowance, the legislation does not prohibit claims for SWA during absences from the State, provided that the claimant cannot be deemed "temporarily resident" abroad. It would appear, then, that suspensions during such absences, in light of the Circular, would be without legislative basis.

31. Neither the 2005 Act nor the 2007 Regulations impose a requirement for claimants of SWA to be available for work or genuinely seeking work. Accordingly, there is no legislative basis for suspending claims for SWA during periods when the claimant is self-isolating following travel abroad in accordance with DFA advice.

Covid Pandemic Unemployment Payment

32. There is no primary or secondary legislation in relation to Covid PUP. It appears to be operating as a purely administrative scheme.

33. The criteria for accessing the payment, as set out in the claim form, makes no reference to a requirement to remain in the State, rather it requires claimants to be "resident" in Ireland. It would be absurd to suggest that a person ceases to be resident in Ireland during an absence from the State for as little as two weeks. It therefore appears to be contrary to the terms of the scheme to apply the terms of the Circular which disentitles claimants to the payment during brief holidays abroad.

34. The Department's website in relation to the payment states that "Holiday entitlements rules are the same as those for Jobseeker's Payments". The meaning of this statement is wholly unclear in that there is no one set of rules governing entitlements to take holidays when in receipt of a jobseeker's payment. As noted above, the only such legislative rules relate to Jobseeker's Benefit and the legislation specifically provides that those rules apply only to that scheme. In addition, this criterion is additional to the criteria which applied when the scheme was initially introduced. It is not permissible for the Department to now attempt to apply this criterion retrospectively.

35. Circular 35/20, then, appears to imply the existence of additional criteria to the scheme which have not been published and which claimants may not be aware of. Further, it does not appear that claimants for the Covid PUP have been requested to inform the Department of their intention to travel abroad. It appears unreasonable and irrational, then, to suspend claims where the Department learns a claimant has travelled abroad in circumstances where claimants have not been formally told that such travel may affect their entitlement to the payment.

36. The Department's website in relation to the payment has been recently amended to indicate that claimants must be "genuinely seeking work". However, the regulations in relation to assessing whether claimants are available for or seeking work have not been amended to reflect this. As noted above, regulations 15 and 16 of the 2007 Regulations explicitly only apply to jobseekers payments and so there is no question of a claimant for Covid PUP or SWA being assessed by reference to those regulations. Further, the other criteria for accessing the Covid PUP suggest that it is available to those experiencing a temporary layoff due to the pandemic. It is therefore unclear whether such claimants are expected to seek alternative work while waiting for their regular employment to resume. It is also notable that the application form for the payment has not been updated to include this additional eligibility criterion.

Enforcement of the Circular

37. Finally, issues arise as to how the Department intends to enforce the provisions of Circular 35/20. The powers of the Department in this regard are governed by the Social Welfare (Consolidation) Act 2005. The 2005 Act provides for how and when the Department may take certain actions at airports and ports.

38. Section 250(16B) of 2005 Act provides as follows in relation to the powers of Social Welfare Inspectors at such locations:

"Where, while attending at any port for the purposes of ensuring compliance with this Act, a social welfare inspector—

(a) has reasonable grounds to believe that there has been a contravention of this Act, and

(b) is accompanied by—

- (i) a member of the Garda Síochána,
- (ii) an officer of Customs and Excise, or
- (iii) an immigration officer,

the social welfare inspector concerned may, on production of his or her certificate of appointment—

(i) question and make enquiries of a person who is a passenger at the port and is preparing to embark, or is embarking, from, or has landed in, the State in relation to any matter that concerns compliance with this Act, and

(ii) request such person to produce to that inspector any documents or other information as that inspector may reasonably require for the purposes of establishing the identity, and, where appropriate, the habitual residence, of that person."

39. While the above section gives Social Welfare Inspectors broad powers in respect of questioning persons at airports, it should be noted that Social Welfare Inspectors must have some "reasonable grounds" of suspicion before using these powers. Further, it is arguable that this power is further limited by section 250(2) of the 2005 Act which states that such Inspectors shall investigate questions "referred to him or her by the Minister". The question thus arises as to whether an Inspector can

engage their powers under section 250(16B) in respect of a claimant whose entitlement has not been questioned and referred to the Inspector.

40. It is notable that while the 2005 Act provides for specific procedures in relation to the provision of information to Social Welfare Inspectors from Financial Institutions, Employers and Landlords, there is no provision in the Act in respect of the provision of information by ports or airports.

Conclusion

41. The above analysis focuses on whether the Circular accords which the legislative schemes for each of the payments to which it applies. It appears that, with the exception Jobseeker's Benefit, the circular does not have a sound legislative basis. In the context of each of the other payments, it appears the circular creates an eligibility criteria in relation to presence in the State which is not provided for in the primary legislation and, as a result, cannot be considered enforceable. There are further questions as to whether the eligibility criteria provided for in the primary legislation in relation to availability for work can be considered as providing a legislative basis for suspending payments during periods of advisory self-isolation.
42. Further issues do arise, however, in relation to whether the Circular unlawfully interferes with claimants constitutional right to travel and their rights as EU workers to freedom of movement within the European Union and/or in relation to whether the Circular is in breach of equality legislation in that it may have a greater impact on non-Irish nationals than Irish nationals.

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28th June 2020