



FLAC Submission to Oireachtas Committee on Social Protection, Community and Rural Development and the Islands' Review of the Pandemic Unemployment Payment (PUP) Scheme.

December 2020

About FLAC:

FLAC (Free Legal Advice Centres) is one of Ireland's oldest civil society organisations. It is a voluntary, independent, legal and human rights organisation which for the last fifty years has been promoting access to justice. Our vision is of a society where everyone can access fair and accountable mechanisms to assert and vindicate their rights.

FLAC works in a number of ways:

- Operates a telephone information and referral line where approximately 12,000 people per annum receive basic legal information
- Runs a nationwide network of legal advice clinics in 71 locations around the country where volunteer lawyers provide basic free legal advice to approximately 12,000 people per annum
- Is an independent law centre that takes cases in the public interest, mainly in the area of homelessness, housing, discrimination and disability
- Operates a Roma legal clinic
- Has established a dedicated legal service for Travellers.
- Operates the public interest law project PILA that operates a pro bono referral scheme that facilitates social justice organisations receiving legal assistance from private practitioners acting pro bono.
- Engages in research and advocates for policy and law reform in areas of law that most affect marginalised and disadvantaged

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Introduction

FLAC welcomes the opportunity to make a submission to the Oireachtas Committee on Social Protection, Community and Rural Development and the Islands in the context of their review and examination of the Pandemic Unemployment Payment (PUP) Scheme. We are happy to clarify any point or expand on the contents of this submission and attend at the Special Committee in person or by video conference or otherwise.

Since the onset of the Covid-19 pandemic, FLAC has advocated for the PUP Scheme to be administered in a fair manner having regard to human rights and equality standards, and has sought to highlight operational issues with the scheme which may have created barriers to certain persons or groups accessing the payment.

FLAC made a detailed submission to the Oireachtas Special Committee on Covid-19 in relation to the State's legislative response to the pandemic and appeared before that Committee on 9 September 2020. FLAC's submission to that committee highlighted a number of concerns in relation to the operation of the PUP Scheme.¹ Unfortunately, many of the issues FLAC raised at that juncture remain unresolved.

Since appearing before that Committee, FLAC has continued its research and analysis relating to the operation of the PUP Scheme. We have also provided legal representation to a number of people in relation to their entitlement to the payment.

In this submission, FLAC will highlight issues in relation to the following:

1. The actions of Social Welfare Inspectors at airports and ports and the impact of those actions on claimants of the PUP.
2. The absence of regulations in relation to entitlement to the PUP during absences from the State.
3. The requirement to "Genuinely Seek Work" while in receipt of the PUP and the absence of regulations in relation to same.
4. The lack of clarity surrounding how residents in Direct Provision may access PUP arrears.
5. The proposal in section 3 of the Finance Bill 2020 to retrospectively create a tax liability in respect of PUP payments received from March 2020.

¹ FLAC's full submission to Oireachtas Special Committee on COVID -19 Response can be accessed in full at: <https://www.flac.ie/publications/flac-submission-to-the-oireachtas-special-committe/>

The actions of Social Welfare Inspectors at airports and ports and the impact of those actions on claimants of the PUP.

Beginning in June 2020, significant concerns arose around about the actions of the Department of Social Protection at Ports and Airports. In response to this, FLAC sought to highlight the statutory limits on the powers of Social Welfare Inspectors in such settings. While section 250(16B) of 2005 gives Social Welfare Inspectors certain powers in respect of questioning persons at airports, these powers may only be exercised where that Inspector has some “reasonable grounds” of suspicion for questioning a specific person. Accordingly, the 2005 Act does not provide a legal basis for a policy of “blanket” questioning at airports whereby all individuals are questioned before boarding a specific flight or where individuals are questioned without the Inspector having a reasonable grounds for believing that they may be committing a breach of the social welfare code.

In late July 2020, the Minister for Social Protection announced that she had “directed the department to review all cases to date where people who went on holiday and had their payment stopped”. The results of this review were announced the following day with the Department stating that of the 2,500 claims for the Covid PUP which were suspended on foot of airport checks, only 85 such suspensions arose in cases where the claimant was not leaving the State permanently. In the Irish Times, the Department is reported as stating that persons subject to this review were deemed to have left the country permanently in circumstances where the Department did not have evidence of them “[returning] to the country seeking to have their payment reinstalled”. FLAC has concerns that many persons whose claims for the payment was suspended on foot of airport checks conducted contrary to the 2005 Act, may not have had their payment restored simply because they did not inform the Department of their return to the State (having never been requested to provide such information to the Department). In addition it is unclear whether, having returned to the State, their payment was restored and backdated.

The Department of Social Protection has since stated that it has not carried out any airport checks since 16 July 2020. Further, FLAC is also aware that the Data Protection Commissioner is currently investigating the issues around data protection which arise from the Department’s actions in this regard. However, FLAC has a number of outstanding questions in relation to the Department’s actions during this period:

First, subsequent to the “review” conducted by the Department of claims suspended on foot of airport checks, the Department was obliged to release information under FOI which raises significant concerns in relation to the selection of flights to certain countries for airport checks. That information shows that the Department operated checkpoints at the departure gates of 30 flights between 1 April 2020 and 13 June 2020. Of these 30 flights, 70% were destined for locations in Romania or Moldova. The fact that each passenger boarding such flights was subject to questioning by the Department raises the worrying implication that Departmental officials were operating under a policy whereby travelling to a certain location was considered by the Department to be a “reasonable ground” for suspecting that a person was breaching social welfare law. In FLAC’s view any such policy would be highly suspect and likely to be discriminatory as it would appear to target the person’s nationality, rather than any objective criterion independent of nationality.

Second, it is clear that the “review” conducted by the Department may not have restored the payments of all those whose claims were wrongly suspended. The Department’s actions at airports are reflective of the policy set out in Departmental Circular 35/20. That circular mandates the suspension of claims for Jobseeker’s Allowance, Supplementary Welfare Allowance and the Covid on foot of any absence from the State which does not comply with the Department of Foreign Affairs’ travel advice. FLAC’s previous submissions (including our submission to the Oireachtas Special

Committee on Covid-19 Response) have highlighted that there is no legislative basis for suspending claims for Jobseeker's Allowance and Supplementary Welfare Allowance during absences provided that those absence are not such as to support a finding that the claimants are no longer normally resident in Ireland. This was similarly the case in relation to the Covid PUP during the period 13 March 2020 to 5 August 2020 (before the payment was put on a specific legislative basis).

Third, it appears that in some instances such suspensions were put in place on foot of airport checks at no notice to the claimant. Such a policy represents a flagrant breach of claimants' rights to fair procedures and, specifically, their right to respond to any allegation that they were acting in a manner which disentitled them to a social welfare payment.

Finally, the Social Welfare Appeals Office frequently emphasises that while the initial burden of proving entitlement to a particular payment is placed on the claimant, in circumstances where a payment is stopped by the Department, it is the Department that bears the burden to prove disentitlement. In the case of those who had their claim disallowed after they travelled from the State, the Department does not appear to have initiated a rigorous investigation to assure itself that the person has become dis-entitled before stopping the payment and has effectively put the burden on the claimant to prove their entitlement twice.

None of these concerns have yet been acknowledged, let alone addressed, by the Department to date. FLAC's concerns in this regard are illustrated by the experience of one of our clients, whose claim for the Covid PUP was suspended after she travelled to Romania in May 2020 to attend to a family emergency. Every passenger who boarded her outward bound flight was subject to questioning by Departmental officials who did not identify themselves properly or explain why they were requesting certain information from passengers. Information released under FOI shows that the decision to suspend our client's claim for the PUP was made by a Social Welfare Inspector who had no legislative authority to make such a decision. Further, the suspension was put in place at no notice to her and without any written decision issuing to her so that she could understand the reason for the decision and appeal same if she did not agree with the decision. This woman suffered significant financial hardship as a result of the suspension which remained in place until she returned to work in August 2020. FLAC made representations to the Department on behalf of our client raising concerns at the manner in which her payment had been suspended, the absence of a legal basis for the Department's actions, the absence of fair procedures and the potentially discriminatory nature of the Department's actions. A settlement on confidential terms was reached in that instance.

FLAC is concerned that there may be many other persons (whose claims were stopped on foot of airport checks, in circumstances where there was no legal basis for suspending their claims due to an absence from the State) whose claims have not been restored or where the person is yet to receive a back-payment for the period of unlawful suspension.

Recommendations

The Government should commit to commissioning an independent review of the activities of Social Welfare Inspectors at ports and airports with a view to establishing how many persons' claims for social welfare payments were suspended on foot "airport checks" which were conducted in a manner contrary to the 2005 Act and contrary to claimants' right to fair procedures. Such a review must also examine the manner in which flights were selected for such checks and the findings of the review and any recommendations should be published

The Department should review all claims for social welfare payments which were suspended on foot of airport checks with a view to ascertaining whether the checks were carried out lawfully, whether

any suspension arising from the checks was allowed under primary legislation in relation to the relevant payment and whether the claimants subject to such checks were afforded fair procedures or given any notice before a suspension was put in place. The Department should lift any suspensions which were imposed arising from airport checks conducted contrary to the 2005 Act or which were imposed in circumstances where the relevant primary legislation did not allow for a suspension on the basis of an absence from the State alone. Further, claimants subject to suspensions under such circumstances should be notified that their claim is being reviewed to allow each claimant to respond to the review and each claimant should be awarded back payments for the period of any unlawful suspension.

The absence of regulations in relation to entitlement to the PUP during absences from the State.

Section 249(1) of the Social Welfare Consolidation Act 2005 (as amended) disentitles claimants to the Covid PUP during absences from the State except “where regulations otherwise provide”. No regulations have been made by the Minister to provide for entitlement to the payment during holidays or absences from the State for essential purposes.

By contrast, article 217(d) of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (Statutory Instrument 142 of 2007) provides that claimants for Jobseeker’s Benefit and Jobseeker’s Benefit (Self-Employed) are not disentitled to their payments while they are “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”. Further, the Department, on an administrative basis, allows claimants for Jobseeker’s Allowance and Supplementary Welfare Allowance to remain in payment while on holidays (subject to the same conditions).

In addressing the Dáil on 29 July 2020, the Minister for Social Protection stated:

“As I am currently bringing legislation through the Oireachtas to put PUP on a statutory basis, I intend to sign regulations that will bring the PUP payment in line with Jobseeker’s. That will mean persons on PUP can travel to Green List countries and their payment will not be impacted. As with Jobseeker’s, persons travelling to countries outside the Green List can only do so for essential reasons.”

The Minister has yet to sign any such regulations and as a result it does not appear that the Covid PUP is payable to claimants during any absences from the State regardless of the reason for such travel or however short its duration.

Further, FLAC is also concerned that the strict “holiday rules” being implemented by the Department (as reflected in Departmental Circular 35/20) represent an arbitrary and punitive imposition of travel restrictions on those who are in receipt of certain social welfare payments. As highlighted in the above submissions on “airport checks”, these new “holiday rules” seem to exceed the conditions allowed for under primary legislation in many instances. While “the Covid-19 General Travel Advisory in operation by the Department of Foreign Affairs” exists only as guidance for the majority of the population, the same advice is being enforced with harsh, punitive effect against persons who are in receipt of certain social welfare payments. It is arguable that such Regulations fails the “principles and policy” test, in that the primary legislation does not envisage that the Regulations that the Minister is allowed to adopt being directed to enforcing public health and travel advice and so may be *ultra vires* the power of the Minister concerned.

Recommendations

The Minister for Social Protection should urgently introduce regulations allowing claimants of the Covid PUP to take holidays/leave the State.

The Minister should review its administrative “Holiday Rules” for all payments (including the Covid PUP) and ensure that the rules applied in respect of each payment are reflective of the conditions in respect of absences from the State arising from primary legislation and not more restrictive.

The requirement to “Genuinely Seek Work” while in receipt of the PUP and the absence of regulations in relation to same.

The Social Welfare (Covid-19) (Amendment) Act 2020 introduced a requirement to “genuinely seek work” while in receipt of the Covid PUP. Section 68L(1) of the 2005 Act (as amended by the 2020 Act) provides that, in order to be eligible for the Covid PUP, a person must be “genuinely seeking, but is unable to obtain, employment suitable for him or her having regard to his or her age, physique, education, normal occupation, place of residence and family circumstances”. Further, section 68L3 of the 2005 Act provides that a person is disentitled to the payment if he or she:

“(c) has refused an offer of suitable employment,

(d) has failed or neglected to avail himself or herself of any reasonable opportunity of obtaining suitable employment”

FLAC has concerns about the imposition of a requirement for claimants to “genuinely seek work” whilst in receipt of the Covid PUP. Although, the 2020 Act does not apply the condition retrospectively, the condition may have an adverse impact on many claimants’ eligibility for the payment following its enactment.

The “eligibility notice” for the Covid PUP on the application form promulgated by the Department has always stated (and still states) that the payment is available to those who “have been temporarily laid-off from work”. Many employees and owners of businesses which are currently closed but intend to reopen are in receipt of the Covid PUP. It seems unreasonable to expect such claimants to seek alternate work in circumstances where they have every expectation of resuming employment imminently. Further, employees who have been laid off may have to forego statutory redundancy payments from their original employer if they take up other employment elsewhere which obliges them to give notice in their previous employment. The right of an employee to pro-actively claim a redundancy lump sum where they have been on lay-off for four or more continuous weeks was temporarily removed for the duration of the Covid crisis by section 29 of the Emergency Measures in the Public Interest (Covid 19) Act 2020. Thus, if such a person did find another job, they would have to forego all statutory redundancy as well as minimum notice entitlements. Further, those who have no access to child care services due to the pandemic may be unable to seek work while in receipt of the Covid PUP and their entitlement to same may therefore be prejudiced.

While the Minister and representative of the Department of Social Protection have made statements to the effect that this requirement to “seek work” is currently not being enforced by the Department, this position is not reflected in the legislation governing the scheme.

Unlike other payments where claimants are required to “genuinely seeking work”, the Minister has not introduced any regulations in relation to how claimants are to be assessed as “genuinely seeking work” whilst in receipt of the Covid PUP. The introduction of such regulation would provide welcome clarity as to the how the requirement to genuinely seek work is currently operating in the context of the Covid PUP.

Finally, FLAC is concerned that the Department has adopted a policy (by way of Departmental Circular 35/20) to the effect that, where claimants are in receipt of a payment which requires them to “genuinely seek work”, this criteria cannot be satisfied during the two-week period of self-isolation advised following a claimant’s return from certain countries. Given the proliferation of online working and recruitment, the basis for this policy is questionable. 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 and also whether it puts pressure on claimants not to self-isolate in such circumstances.

Recommendations

The Department should review the imposition of a requirement to “genuinely seek work” while in receipt of the Covid PUP. At the very least, regulations should be introduced setting out how this criteria is to be applied to claimants for the payment which take into account the fact that many claimants have limited access to childcare and, further, that many claimants for the payment are temporarily laid-off and have every expectation of resuming their previous employment or self-employment.

The Department should review Departmental Circular 35/20 including the rigid policy contained therein to the effect that persons cannot be considered to be “genuinely seeking work” during periods when they are advised to self-isolate.

PUP arrears owed to residents of Direct Provision.

In announcing that employees resident in Direct Provision Centres would be able to access the Covid PUP in August 2020, the Minister for Social Protection stated that the “payment will be paid with effect from when they were temporarily laid-off”. However, it appears that when such resident’s claims are granted by the Department, the arrears due to them are not paid immediately and no information is provided in relation to when they should be expected.

FLAC recently made representations to the Department on behalf of a resident in Direct Provision who had been laid off in March 2020 but whose claim for the PUP was only awarded in August. As a result, she had suffered acute financial hardship in the intervening period. The woman was aware of the Minister’s statement to the effect that arrears would be paid in such cases but did not know how to access them. In that instance, the arrears were paid after representations from FLAC to the Department. However, the case raises concerns that there may be other workers who are resident in Direct Provision centres who may not be aware that they are owed Covid PUP back-payments, or who may be having difficulty accessing their PUP back-payments.

FLAC understands that the Department intends is currently undertaking a review of claims for the Covid PUP with a view to establishing how many claimants may be owed arrears of the payment. It is clear that any such review should include a calculation of the arrears owed to claimants of the payment who are resident in Direct Provision.

Recommendation

The Department’s ongoing review of outstanding arrears owed to claimants of the PUP should ensure that claimants who are resident in Direct Provision have received arrears in respect of any time since they were laid-off during which they were not in receipt of the payment. The Department should also undertake to ensure that residents in Direct Provision are fully aware of their entitlement to the PUP.

The proposal in section 3 of the Finance Bill 2020 to retrospectively create a tax liability in respect of PUP payments received from March 2020.

On 24 November 2020, FLAC wrote to members of the Oireachtas to highlight its concerns in relation to the provisions of section 3 of the Finance Bill 2020.² Those concerns relate to the imposition of tax liability to the Covid PUP on a retrospective basis. Specifically, FLAC sought to highlight that:

- The retrospective provisions of the 2020 Bill may create an unexpected tax liability which disproportionately affects those who have suffered the most financial hardship as a result of the Covid-19 pandemic. An analysis of the information available to claimants for the payment since March suggests that they cannot be expected to have been aware that such a tax liability would arise.
- These retrospective provisions may not be in accordance with the constitutional protection of citizen's property rights which only allow for the introduction of retrospective legislation which interferes with those rights in very limited circumstances.

We understand that the 2020 Bill at Report Stage in the Dáil on 2 December 2020 before consideration of the Bill begins in the Seanad on 9 December 2020. We hope that FLAC's analysis of section 3 of the 2020 Bill will be considered as the legislation progresses through the Oireachtas.

² FLAC's Briefing Note to members of the Oireachtas in relation to the provisions of section 3 of the Finance Bill 2020 can be accessed at: <https://www.flac.ie/publications/note-re-s3-of-the-finance-bill-2020-final/>