Casebase Number: G0006

Title of Payment: Pre-Retirement Allowance

Northside Community Law and Mediation Centre
Northside Civic Centre
Bunratty Road
Coolock
Dublin 17

Date of Final Decision: 15th December 2006

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Keywords: Means - whether they should be assessed independently of wife's - family unit - whether Appellant and wife could be considered a family unit.

Organisation who assisted claimant: Northside Community Law and Mediation Centre (NCL&MC)

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Case Summary:

The Appellant had been legally separated from his spouse since 1998. The Appellant and his spouse continued to reside in the same house but in separate areas. The Appellant's Pre-Retirement Allowance was means tested on the basis that the Appellant was living with his former spouse as a family unit. As such, her earnings were considered in assessing the Appellant's means. The deciding officer's decision was appealed. The Appellant established to the satisfaction of the Appeals Officer that the marriage tie was broken. The Appellant's means were assessed on their own and were calculated as being nil. The appeal was allowed.

Summary of Benefit(s) Received:
In 2005 the Appellant was in receipt of Pre-Retirement Allowance (PRETA), assessed on the basis of his ex-spouse's weekly means. Prior to that, he was in receipt of Unemployment Assistance (UA). The grounds of entitlement for PRETA were provided by Part III, Chapter 3 of the Social Welfare Consolidation Act 2005 (as amended). PRETA has been abolished since 2007 and no new applications have been accepted. The legislation governing the means assessment for PRETA provided that the income of the claimant and the spouse was to be assessed jointly. "Spouse" was defined with reference to a man and a women living together as husband and wife. Cohabitation and marriage were treated equally under this provision.

Background:
The Appellant and his wife obtained a judicial separation on 16 June 1998. They continued to live in the same house because they could not afford to buy each other out. However, the Appellant's ex-wife moved into a "granny flat" that had previously been occupied by her mother. The flat had a separate entrance and was self-contained. They continued to share some living spaces, household chores, and expenses. They shared a kitchen but had two refrigerators. The bills, except for NTL and television license, were in his ex-wife's name. Their adult son also lived in the house. In January 2003, the Appellant had applied for Unemployment Assistance. In determining his application, a deciding officer had interviewed the Appellant. The deciding officer considered that the Appellant and his wife were continuing to live as a family unit in spite of the judicial separation. On that basis, the Appellant's means were calculated taking into account his ex-wife's income. He was assessed as having means of €31.00. The Appellant appealed this decision. However, the Appeals Officer upheld the decision of the deciding officer. The Appeals Officer stated that the legal separation appeared to have been entered into for practical reasons on the ex-wife's part. The Appeals Officer said that it appeared that the Appellant and his ex-wife lived

in the main as a family unit. In November 2005, the Appellant applied for Pre-Retirement Allowance. The Appellant's means were again calculated by including the ex-wife's income. His means were determined to be €131.00. There had been no significant changes in the Appellant's living situation since his application for Unemployment Assistance in 2003. The Appellant appealed the decision.

Date Appeal Taken:

10th February 2006

Date Appeal Heard:

4th October 2006

At Hearing:

The Appellant attended the hearing with his solicitor from Northside Community Law and Mediation Centre. The social welfare inspector also attended. The issue in this case was whether or not the Appellant and his wife were living as a family unit. If so, the income of the Appellant's ex-wife would be correctly assessable as means. The social welfare inspector submitted her findings in respect of the Appellant's circumstances since 2003. She asserted that the Appellant continued to live with his former spouse as a family unit. The Appellant's spouse had been called to attend the hearing but informed the Appeals Office that she would be unavailable on that date as she was abroad. The Appellant's solicitor outlined how the relationship between the parties had continued to deteriorate since their judicial separation in 1998. The Appellant's solicitor submitted documentation from a TD confirming that the TD was representing the Appellant in seeking information about the Senior Surrender Scheme. Under the Scheme, the house would be sold and the Appellant and his ex-wife would be given, upon their making a financial contribution towards them, two one-bedroom City Council apartments. The Appellant stated that his ex-wife had agreed to this course of action.

Decision:

Appeal ALLOWED

Relevant Evidence put forth by Social Welfare Services:

Interview reports, dated 2003 and 2006, describing the Appellant's living situation.

Relevant Evidence put forth by Appellant:

- Order of judicial separation, dated 16 June 1998
- Notification from local TD showing the Appellant's interest in the Senior Surrender Scheme.

Appeal Officer's Reasoning and Conclusion:

The "latest developments" in the case led the Appeals Officer to conclude that the marriage tie was now broken. The most important of these developments included evidence that the Appellant was looking for housing separate from his wife, a statement from the Appellant's solicitor that the relationship had deteriorated further since the judicial separation in 1998, and testimony that the Appellant's ex-wife travelled abroad frequently without the Appellant and that they had separate fridges. The Appeals Officer found that the marriage tie had been broken and assessed that the Appellant had "nil means" with effect from the date of the letter from the local TD.

Our Observations:

There had in fact been no significant change in the Appellant's living situation since 2003 and the Appeals Officer did not seem to find fault with the previous decision. In the case of a couple, the social welfare code assesses means with reference to the benefit a claimant derives from living with another person as husband and wife. This benefit involves an

assessment of the other person's earnings. While a judicial separation constitutes evidence of a legal breakdown in a relationship it is not necessarily evidence of a factual separation of two parties who continue to reside in the same residence. Each case must be determined with reference to the particular facts and circumstances of the parties concerned. It must follow that in a case where there is no judicial separation, but the facts support the contention that the parties are estranged, the marriage tie could factually, but not legally, be established as severed, and means subsequently assessed individually. In this case it was the action on the part of the Appellant to seek alternative accommodation that was a major factor in persuading the Appeals Officer that the relationship had in fact ended.

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