

Casebase Number: G0058

Title of Payment: One Parent Family Payment & Family Income Supplement



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Date of Final Decision: 2nd September 2014

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Organisation who represented the Claimant: CLM Limerick

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Case Summary:

The Appellant is a mother of four. She had been in receipt of the OPFP [or equivalent] since August 1994, shortly after the birth of her eldest child. The Appellant had twins in 1996 and the relevant increases were awarded on her claim. The Appellant's fourth child was born in 2010.

Following an investigation by the Department of Social Protection [DSP], a decision was issued by a Deciding Officer on 12th February 2013, advising the Appellant that her payment was withdrawn for the reason that she was regarded as cohabiting with the father of her three eldest children. The Deciding Officer made the decision pursuant to section 302[b] of the Social Welfare Consolidation Act 2005. The Appellant sought an appeal of the determination to an Appeals Officer. An oral hearing was held on the 14th January 2014. The Appeals Officer disallowed the appeal on 10th February 2014.

The Appellant's Family Income Supplement claim was also the subject of an appeal. This payment had been disallowed as a consequence of the decision in respect of the OPFP; that is, the Department asserted that the Appellant should be treated as one of a couple rather than a one parent family.

[See Casebase Report G0057 for full background and oral hearing]

Summary of Benefit(s) Received:

The OPFP is a payment for men and women under 66 who are parenting alone. In order to receive this payment a person must satisfy a means test, be parenting alone [not cohabiting] and be habitually resident in the state. In the case of claimants who were previously in a relationship based on marriage, or a civil partnership, the

claimant must be separated for at least 3 months and demonstrate that they have made efforts to seek maintenance. In the case of a relationship that is not based on marriage/civil partnership, a claimant will be required to demonstrate that they have made reasonable efforts to seek maintenance as a condition of ongoing entitlement. A prisoner's partner may receive the OPFP providing their partner is in custody, or has received a sentence of at least six months, at the time of making a claim.

Family Income Supplement [FIS] is a weekly tax-free payment available to employees with children. It gives extra financial support to people on low pay. A person cannot qualify for FIS if they are self-employed – a person must be an employee, employed at least 38 hours every fortnight, and the employment must be likely to last at least three months. A person must have at least one child who normally lives with them or is financially supported by them. Their child must be under 18 years of age or between 18 and up to 22 years of age and in full-time education. To qualify for FIS, the average weekly family income must be below a certain amount for the family size. A person may qualify for FIS in addition to the OPFP providing the combined income from social welfare and other assessable sources is below the relevant thresholds set by the Department.

Background:

On the 30th May 2014 CLM Limerick applied for a revision of the Appeals Officer's decision to disallow the Appellant's appeal [Appeals Officer's report dated 10th February 2014]. This application was made pursuant to Section 318 of the Social Welfare Consolidation Act 2005. CLM Limerick on behalf of the Appellant asserted that the Appeals Officer in his reasoning and findings had made mistakes in the law and the facts. The errors cited were grouped into four main categories:

1. The Appeals Officer failed to adhere to relevant principles of law in making credibility findings.
2. The Appeals Officer violated the Appellant's right to natural and constitutional justice by relying on material received from the SWI after the oral hearing had concluded.
3. The Appeals Officer's decision was unreasonable and/or irrational in that the Appeals Officer had regard to irrelevant considerations.
4. The Appeals Officer failed to apply the correct legal test for cohabitants.

- 1. The Appeals Officer failed to adhere to relevant principles of law in making credibility findings.**

The Appeals Officer made a negative credibility finding against the Appellant upon which his decision to refuse her appeal was based in substantial part.

In objecting to the Appeals Officer's reasoning, CLM Limerick relied in particular on the case of *IR v Minister for Justice Equality and Law Reform* [2009]. In this judgement Mr Justice Cooke considered the principles to be applied to credibility findings by decision makers. Cooke J set out ten principles; principles 4, 5, 6 and 9 were cited as being of particular relevance to the decision of the Appeals Officer in this case. Cooke J refers:

4) The assessment of credibility must be made by reference to the full picture that emerges from the available evidence and information taken as a whole, when rationally analysed and fairly weighted, it must not be based on a perceived correct instinct or gut feeling as to whether the truth is or is not being told.

5) A finding of lack of credibility must be based on correct facts, untainted by conjecture or speculation and the reasons drawn from such facts must be cogent and bear a legitimate connection to the adverse finding.

6) The reasons must relate to the substantive basis of the claim and not to minor matters or to facts which are merely incidental in the account given.

9) Where an adverse finding involves discounting or rejecting documentary evidence or information relied upon in support of a claim and which is prima facie relevant to a fact or event pertinent to a material aspect of the credibility issue, the reason for that rejection should be stated.

CLM Limerick asserted that in his findings the Appeals Officer failed to adhere to these principles. Those failures primarily related to three issues (i) the current address of the Appellant's ex partner, (ii) the level of contact between the Appellant and her ex partner, and (iii) the presence of the ex partner's van at the Appellant's home.

(i) Evidence of Address

The Appeals Officer found that there was "*considerable documentary evidence giving [the ex partner]'s address as that of the Appellant*". CLM Limerick asserted that this finding was demonstrably inaccurate. There were in fact only two documents before the Appeals Officer which stated the ex partner's address as that of the Appellant;

these documents comprised of two handwritten school application forms, both completed by the Appellant and the reasons for so doing accounted for. In addition to these documents, the SWI asserted to the Appeals Officer that the ex partner's car was registered to the Appellant's address in 2007. However, the SWI did not provide documentation to substantiate this assertion.

The Appeals Officer therefore had two documents, which were both documents of the same type, giving evidence of the ex partner's address as that of the Appellant. CLM Limerick asserted that by any reasonable measure this could not be regarded as "*considerable documentary evidence*".

In contrast, the Appellant provided substantial documentation establishing that her ex partner was, and is not, resident in her home, including:

1. Bank statements and credit union statements in the Appellant's name only
2. A utility bill in the Appellant's name only
3. Written confirmation from the Local Authority that the Appellant and her children were the only residents registered at her address
4. A prescription from a GP showing the ex partner's current address as that of his mother's
5. A letter from the ex partner confirming his current address
6. A letter sent to the SWI from the ex partner's employer confirming his current address
7. Three letters from the Road Safety Authority to the ex partner spanning the period 8 March 2010-7 January 2011
8. A fixed penalty notice from An Garda Síochána bearing the ex partner's current address.

It is of note that items 7 and 8 confirmed the place of registration of the ex partner's vehicle as not being that of the Appellant.

CLM Limerick asserted that the Appeals Officer in considering the matter of *proof of address* had presented his findings without proper regard to the whole of the evidence in order to establish a full picture of the Appellant's circumstances. In this, it was asserted that the Appeals Officer had not demonstrated proper regard to the evidential weight of much of the documentary evidence submitted by the Appellant. More particularly, by accepting the DSP's evidence as providing the necessary proofs, the evidence submitted by the Appellant was in effect rejected by the Appeals Officer without a reasoned basis for so doing.

(ii) Ex partner's level of contact with the Appellant since 1995

At the oral hearing the SWI produced a report, dated 26th November 2012, referring to an interview that took place with the Appellant on 23rd September 2011 (14 months previously). This report was read out at the appeal and relied on by the Appeals Officer.

In her report, and at the oral hearing, the SWI asserted that the Appellant claimed that she had no contact with her ex partner since 1995. The Appellant denied ever making such a statement.

CLM Limerick contended that the record did not support the SWI claims, the Appellant had in fact never denied having contact with the father of her children, and furthermore in correspondence with the DSP the Appellant had referred to contact of the type one would expect where two people have parenting responsibilities. CLM Limerick further asserted that given the significance attributed to this alleged statement, it was not credible that there would be no contemporaneous record made by the SWI. The SWI's report referred only to the question of contact being "put to her"[the Appellant]. The Appellant's response was not noted.

CLM Limerick asserted that the Appeals Officer in his findings did not demonstrate that he questioned the credibility of the SWI evidence; on the contrary, it was the Appellant who was found to be lacking in credibility, despite the SWI testimony being undermined by the record. Again, the Appeals Officer's reasoning did not present as being consistent with an objective consideration of the evidence as a whole.

(iii) Presence of the ex partner's van at the Appellant's home

The SWI asserted that the ex partner's van was observed in the Appellant's driveway on fourteen dates over a nine-month period. It transpired at the hearing that the SWI herself had not made all these sightings, and there was no contemporaneous record provided to substantiate these claims when the relevant file was sought under the Freedom of Information Acts.

The Appellant had stated in her various dealings with the SWI that her ex partner continued and continues to have a relationship with his three children, and he visits her home for this purpose. The Appellant also stated that her ex partner sometimes drives his son to college and his two other children to school. The Appellant further

asserted that her eldest son was experiencing some difficulty with other young people in the area and so the ex partner would on occasion park his van in the driveway to give an overall impression of security.

The Appeals Officer in considering this testimony made a finding that - *the Appellant gave a number of differing statements regarding this.*

CLM Limerick asserted that the Appeals Officer had again rejected the Appellant's account as not credible without the benefit of cogently reasoned grounds. More particularly, the testimony of the Appellant was not in respect of mutually exclusive events; rather, it was an account that was in fact consistent with the type of interaction that could be expected between two parents who are no longer in a relationship with one another, but who both have input into their children's lives. The Appellant's testimony could not if considered in context be regarded as contradictory, or "differing", as asserted by the Appeals Officer.

2. The Appeals Officer violated the Appellant's right to natural and constitutional justice by relying on material received from the SWI after the oral hearing had concluded.

The Appeals Officer's report with respect to his decision refers to additional information forwarded to him by the SWI, after the oral hearing. The Appeals Officer relied on this information, but the Appellant was not notified of the material, nor was she given an opportunity to respond.

CLM Limerick asserted that the failure to notify the Appellant of this information, and to provide her with opportunity to respond represented a breach of the Appellant's right to natural and constitutional justice. Moreover, it was asserted that in circumstances where the Appeals Officer's decision was made primarily on the question of the Appellant's credibility, such a breach of natural justice presented as all the more egregious.

In making this assertion CLM Limerick cited relevant case law. In *Galvin v Chief Appeals Officer* [1997] Costello P set out the principles to be applied when deciding whether an oral hearing would be required as a matter of natural justice, namely if - *without an oral hearing it would be extremely difficult if not impossible to arrive at a true judgement of the issues which arise in the case.* More recently, in *ROY v Refugee Appeals Tribunal* [2014] Barr J was satisfied that consideration of and reliance on additional information obtained by the Tribunal after the oral hearing breached fair procedures.

3. The Appeals Officer's decision was unreasonable and/or irrational in that the Appeals Officer had regard to irrelevant considerations.

In his concluding comments, the Appeals Officer referred: *the Appellant states that her ex partner is not the father of her fourth child, but she cannot provide evidence of who is.* In making this comment the Appeals Officer was placing an onus on the Appellant to provide evidence of paternity. In the absence of such evidence, the Appeals Officer was in effect speculating that the Appellant's ex partner was probably the father of her youngest child.

CLM Limerick asserted that the Appeals Officer's role was to adjudicate on the matter of the Appellant's disqualification from receiving the OPFP on the basis of alleged cohabitation; the paternity of the Appellant's youngest child was not a relevant consideration. Moreover, the Appeals Officer's reliance on the alleged failure of the Appellant to provide proof of the paternity of her fourth child was wholly irrelevant to the matters before him.

4. The Appeals Officer failed to apply the correct legal test for cohabitants.

The Appeals Officer had before him written submissions on behalf of the Appellant setting out the factual basis upon which she could not be regarded as a cohabitant within the meaning of the relevant statutory provisions. In this, the preliminary definitions contained in the Social Welfare Consolidation Act 2005 [as amended] refer:

"cohabitant" means a cohabitant within the meaning of section 172(1) of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010;

It follows that on any question relating to co habitation reference must be made to s.172 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, which provides:

172.— (1) For the purposes of this Part, a cohabitant is one of 2 adults (whether of the same or the opposite sex) who live together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other.

(2) In determining whether or not 2 adults are cohabitants, the court shall take into account all the circumstances of the relationship and in particular shall have regard to the following:

- (a) the duration of the relationship;*
- (b) the basis on which the couple live together;*
- (c) the degree of financial dependence of either adult on the other and any agreements in respect of their finances;*
- (d) the degree and nature of any financial arrangements between the adults including any joint purchase of an estate or interest in land or joint acquisition of personal property;*
- (e) whether there are one or more dependent children;*
- (f) whether one of the adults cares for and supports the children of the other; and*
- (g) the degree to which the adults present themselves to others as a couple.*

(3) For the avoidance of doubt a relationship does not cease to be an intimate relationship for the purpose of this section merely because it is no longer sexual in nature.

While the Appeals Officer referred to the existence of the submission from CLM Limerick, he did not demonstrate in his reasoning and findings that he had applied the appropriate statutory test in this case.

Date of final Decision: 2nd September 2014.

Decision of the Appeals Officer revised. Appeal Allowed.

Chief Appeals Officer's Reasoning:

In a situation where an existing payment is being reviewed, the onus is on the Department to make a satisfactory case for disallowance. In this particular case the onus was on the Department to satisfy the Appeals Officer that the Appellant was co-habiting and this is reflected in the Department's own guidelines on investigating cohabitation. Those guidelines list the criteria by which cohabitation can be established and state that no single criteria can necessarily support a decision and that evidence, or lack of it, in any criterion may not necessarily be conclusive. Those criteria are;

- *The duration of the relationship;*

The Appellant admitted she and her [ex partner] cohabited for a period in 1995 and 1996 but was clear in her contention that they have not cohabited since. The only evidence to the contrary submitted by the Department is circumstantial. It related to (a) the fact that the ex partner's car was seen outside the Appellant's home on many occasions (b) the fact that his vehicle was licensed at the Appellant's address (c) the fact that the children's school listed the ex partner as a contact at the Appellants address. The evidence as to the vehicle being parked at the address can and was explained by co-parenting. The evidence as to address is more than balanced by evidence that the ex partner resides at his mother's address.

- *The basis on which the couple live together;*
No Evidence
- *The degree of financial dependence of either adult on the other and any agreements in respect of finances;*
No Evidence
- *The degree and nature of any financial arrangements between the adults including any joint purchase of an estate or interest in land or joint acquisition of personal property;*
No Evidence
- *Whether there are one or more dependant children;*
3 Dependant children
- *Whether one of the adults cares for and supports the children of the other;*
No Evidence
- *The degree to which the adults present themselves to others as a couple;*
No Evidence

Having regard to all of the foregoing, I consider the Appeals Officer erred in law in treating the appeal as if it were an application for One Parent Family Payment where the onus of proof rests with the applicant. This was in fact a review of a payment which had been made over many years and in the circumstances the onus of proof was on the Department. I have set out above the Department's own guidelines in relation to determining whether a person is cohabiting with another and commented on the evidence available under each heading. It is clear from the above that there is little or no factual evidence in relation to 5 of the criterion and to the extent that

there was evidence in relation to 1 criterion it was circumstantial and was rebutted by the Appellant.

The request for review was quite forensic in terms of analysis of evidence and the Appeals Officer's report. However, having read the file and all submissions, I consider that the decision ought to be revised having regard to a lack of evidence and I have no further need to address the other issues raised.

In the circumstances I revise the decision and allow the Appeal.

FIS Appeal:

On the 5th September 2014, CLM Limerick forwarded a copy of the Chief Appeal Officer's decision to the Social Welfare Appeals Office in support of the Appellant's FIS appeal, which was lodged on 10th February 2014. This payment had been disallowed as a consequence of the decision in respect of the OPFP; that is, the Department asserted that the Appellant should be treated as one of a couple rather than a one parent family. As the Chief Appeals Officer had found that there was a lack of evidence to substantiate the allegation of cohabitation, it should therefore be a straightforward matter to deal with the FIS appeal.

At the time of writing [March 2015] the Appellant is still awaiting a decision in respect of her FIS appeal and is awaiting payment and arrears in respect of her OPFP claim.

Observations:

This Chief Appeals Officer's decision is significant as it firmly places the onus of proof on the Department when reviewing entitlement to an existing payment. This is in contrast to the process of making a new application, where the burden shifts to the Applicant to provide evidence that they meet the relevant statutory criteria.

The Chief Appeals Officer adopted a strict evidential approach to her review, assessing the evidence in a manner that was consistent with the statutory framework as set out in the preliminary definitions of the Social Welfare Consolidation Act 2005 [as amended] and s.172 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. In this, her decision is plain and unambiguous:

I consider that the decision ought to be revised having regard to a lack of evidence

The Chief Appeals Officer was silent on a number of the issues CLM Limerick raised in respect of the Appeals Officer's reasoning and failure to properly adhere to the principles of natural justice.

This case was significant on many levels, not least because of the devastating power of the SWI in this instance. Allegations and findings were made that were based to a considerable degree on circumstantial evidence, allegations that were apparently accepted without question by the Deciding Officer in the first instance.

CLM Limerick asserted that the Appeals Officer in considering the evidence had rejected the Appellant as not credible without providing a properly reasoned basis for so doing. In contrast, when considering the evidence submitted by the SWI, the witness for the Department of Social Protection, the Appeals Officer in his findings did not question the validity or substance of these proofs. This invites serious questions with respect to the objectivity of the Appeals Officer when adjudicating on this matter. In view of the findings of the Chief Appeals Officer, it is therefore not unreasonable to state that the Appeals Officer did not demonstrate a cogent and dispassionate analysis of the evidence and the law for the purpose of making a finding of fact.

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