Casebase Number: G0077

Title of Payment: Family Income Supplement (FIS)

Community Law and Mediation Northside
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Date of Final Decision: 20th November 2015

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Organisation who represented the Claimant: Charleville & District MABS

Casebase no: G0077 (please also refer to Case No: G0064 & G0073)

Case Summary:

This case concerns a father of one child who applied for Family Income Supplement (FIS) in April 2015. The Appellant does not live with the other parent, nor does he reside with his child. He maintains his child by way of two monthly maintenance payments of €150 (€69.23 weekly).

A Deciding Officer refused the Appellant's claim on 27th April 2015 for the reason that he did not have a child normally residing with him, nor was he "wholly or mainly" maintaining the other parent.

In May 2015, Charleville & District MABS appealed this decision on behalf of the Appellant. On 25th August 2015 an Appeals Officer disallowed the appeal by way of a summary decision; that is, without an oral hearing. The Appeals Officer rejected the Appeal on the grounds that the Appellant could not be regarded as "wholly or mainly" maintaining his family as required by the statutory provisions governing the award of FIS.

On receipt of this decision, MABS made a Freedom of Information request seeking all records relating to the reasoning and decision of the Appeals Officer. On receipt of these records, MABS made a submission to the Chief Appeals Officer requesting a review of the Appeals Officer's decision pursuant to s. 318 of the Social Welfare Consolidation Act 2005 (as amended) – "the Act", on the grounds that the Appeals Officer had erred in law. MABS asserted that as the Appellant did not have a "spouse" within the meaning of Social Welfare Law, his claim fell to be decided in accordance with s. 3 and s. 227 of the Act, and Article 13(6) of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (as amended) – "the Regulations", S.I. 142 of 2007. MABS asserted the Appeals Officer had erred in her interpretation of the primary legislation, and that she had failed to apply the relevant regulatory provisions; namely, the Appellant is required to demonstrate that he is substantially maintaining his child. MABS asserted that the Appellant had met this condition and was therefore eligible for FIS.

On 20th November 2015, the Chief Appeals Officer revised the decision of the Appeals Officer and allowed the appeal.

Reference should be made to Case No: G0064 and G0073 on casebase. These cases concern the same question of statutory interpretation. Both appeals were allowed.

Summary of Benefit(s) Received:

Family Income Supplement (FIS) is a weekly payment for working families with dependent children, including one-parent families. To be eligible for FIS a person must be employed at least 38 hours every fortnight, and must have at least one qualified child under the age of 22 in full time education. That child must be regarded as normally residing with the applicant.

The main rules governing the payment of FIS are set out in Part 6 of the Social Welfare Consolidation Act 2005 (as amended), and the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (as amended), S.I. 142 of 2007.

Section 227 of the Social Welfare Consolidation Act 2005 (as amended) defines a child for FIS purposes as follows:

> *Child, in relation to a family, means a qualified child as defined in section 2(3) who normally resides with that family;…*

s. 3(5) of the Social Welfare Consolidation Act 2005 (as amended) provides:

> *Any question relating to the normal residence of a qualified child shall, subject to section 220(2), be decided in accordance with regulations made under that subsection*.

s. 227 of the Social Welfare Consolidation Act 2005 (as amended) defines a family for FIS purposes as follows:

> *"Family" means -*
> *(a) a person who is engaged in remunerative full-time employment as an employee,*
> *(b) where that person is living with or wholly or mainly maintaining—*
> *(i) his or her spouse,*
> *(ii) his or her civil partner, or*
> *(iii) his or her cohabitant, that spouse, civil partner or cohabitant, and*
>
> *(c) a child or children;*

S. 9 Social Welfare and Pension Act 2014, provides an amendment to s. 227 of the Social Welfare Consolidation Act 2005. The amendment requires a commencement order in order to take effect. At the time of writing (12th April 2016), no commencement order had been made. If commenced, a person in the Appellant's circumstances will not be eligible for FIS.

Key Arguments:

- The Respondent (the Department of Social Protection) asserted that in order for the Appellant to be eligible for FIS, his child must be normally resident with him; or, he must be wholly or mainly maintaining his family, including the parent with whom the child resides.

- The Respondent further asserted, when making a submission on appeal[1], that while it was accepted that the Appellant was maintaining his child, he could not receive FIS in circumstances where the other parent was in receipt of a "benefit or assistance".

- The Appeals Officer upheld the Respondent's position, disallowing the Appellant's appeal for the following reason:

> *Social welfare legislation states that in order to qualify for Family Income Supplement the claimant must be living with, or wholly or mainly maintaining the family.*
> *In this instance, appellant is not living with his child or the child's mother.*
> *Appellant is paying €69.23 per week by way of maintenance. This amount could not being accepted as satisfying the wholly or mainly maintaining condition for the purposes of the Family Income Supplement claim.*

- The Appellant contended that the Respondent and the Appeals Officer erred in law, that a person was entitled to receive FIS in certain circumstances where their child was living with the other parent, and the claimant was not maintaining that parent. It was asserted that the Appellant should be regarded as a "family" within the statutory definition as provided by s. 227 of the Act, and that the matter to be determined was whether or not the Appellant's child could be regarded as "qualified" child.

- The Appellant asserted that his circumstances were consistent with a finding that his child was a qualified child, and that his child should be regarded as normally residing

[1] Article 10 of the Social Welfare (Appeals) Regulation 1998 provides:

10. (1) In the case of an appeal against the decision of a deciding officer under section 257, the Chief Appeals Officer shall cause notice of the appeal to be sent to the Minister who shall, as soon as may be, furnish to the Chief Appeals Officer—

(*a*) a statement from the deciding officer or on his or her behalf showing the extent to which the facts and contentions advanced by the appellant are admitted or disputed, and

(*b*) any information, document or item in the power or control of the deciding officer that is relevant to the appeal.

with him for the purpose of qualifying for FIS. It was submitted that the matter of the child's normal residence falls to be determined in accordance with Article 13 (6) of the Social Welfare (Consolidated Claims, Payments, and Control) Regulations 2007. S.I. 142 of 2007.

- The Appellant submitted that the definition of "benefit or assistance" in Article 13 of the Regulations, expressly excluded the One Parent Family Payment. Accordingly, the Appellant could claim FIS if the other parent was in receipt of the One Parent Family Payment.

- The Appellant submitted that his case should be regarded as concerning a matter of settled statutory interpretation in that MABS had successfully appealed 13 cases concerning the same question, two of which had been referred to in the Social Welfare Appeals Office Annual Report 2011. Furthermore, in accordance with the provisions of s. 318 of the Act, the Chief Appeals Officer, in a published case taken by a CIS, overturned the decision of an Appeals Officer on the same question of statutory interpretation. The Chief Appeals Officer allowed the appeal, finding that Deciding Officer and the relevant Appeals Officer had erred in law when disallowing the Appellant's FIS claim. Casebase reference: G0073.

Background:

This case concerns a father of one child who applied for Family Income Supplement (FIS) in April 2015. The Appellant does not live with the other parent, nor does he reside with his child. He maintains his child by way of two monthly maintenance payments of €150 (€69.23 weekly).

A Deciding Officer refused the Appellant's claim on 27th April 2015 for the following reason:

> *To qualify for a Family Income Supplement, you must have at least 1 qualified child who normally resides with you (section 227 of the Social Welfare (Consolidation) Act 2005 applies).*
>
> *If you have a qualified child who normally resides with the other parent, you can claim for that child on FIS as long as you are wholly or mainly maintaining the other parent.*
>
> *Under Social Welfare Legislation, a qualified child is defined as a child under the 18 years of age or aged between 18 and 22 and in full time day education.*
>
> *As you do not have a child who normally resides with you and as you are not wholly or mainly maintaining the other parent with whom your child/ren reside, a Family Income Supplement is not payable and your application has accordingly been refused.*

In May 2015, Charleville & District MABS submitted notice of appeal on behalf of the Appellant. By way of written submission, MABS set out the Appellant's circumstances and the statutory construction and interpretation which allowed for the award of FIS in the Appellant's case; including, in particular, the application of Article 13 (6) of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142 of 2007), which provides:

> *Not withstanding the provisions of sub-article (4), a qualified child resident with one parent who is living apart from the other parent and who is not claiming or in receipt of benefit of assistance shall be regarded as residing with the other parent if that other parent is contributing substantially to the child's maintenance.*

By way of letter, dated 15th May 2015, the Appeals Office wrote to MABS, advising:

> *In view of the points raised in the letter, I have passed it to the Family Income Supplement Section in Longford for their attention and for reply to you with a clarification of their decision.*
>
> *If, on hearing from them, Mr … is still not satisfied with their explanation, you should write to this office stating clearly the grounds of his appeal.*

MABS responded to this letter on 26th May 2015, requesting that the matter be referred to an Appeals Officer for adjudication. MABS asserted that the Appellant had properly submitted his grounds of Appeal by way of written submission, and therefore it was not clear as to the purpose or authority of the Appeals Office's referral of the matter back to the Department of Social Protection; the Appellant being required to effectively submit his appeal twice, and the adjudication of his case being subjected to undue delay. MABS also referred to the content of the submission made on behalf of the Appellant; in particular, that his case be determined with reference to previous decisions by Appeals Officers on this question of statutory interpretation.

The Appeals Office responded by letter on 28th May 2015, stating:

> *Please note that it is standard procedure with all Family Income Supplement appeals submitted to this Office that they are referred to the Family Income Supplement Section of the Department of Social Protection for clarification before an appeal is opened. Many cases sent for clarification to the Department get new decisions from the Department that are favourable to the claimant and thereby not necessitating an appeal to be opened.*
>
> *However, in view of the fact that you feel that Mr…'s case is best served an appeal being opened now we will register one for him.*

Decision of the Appeals Officer: **25th August 2015**
Disallowed

Appeal Officer's reasoning and findings:

The Appeals Officer's decision was made on a summary basis; that is, without an oral hearing. The Appellant's appeal was rejected for the following reason:

> *Social welfare legislation states that in order to qualify for Family Income Supplement the claimant must be living with, or wholly or mainly maintaining the family.*
> *In this instance, appellant is not living with his child or the child's mother.*
> *Appellant is paying €69.23 per week by way of maintenance. This amount could not being accepted as satisfying the wholly or mainly maintaining condition for the purposes of the Family Income Supplement claim.*

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Request for a review pursuant to s. 318 of the Social Welfare Consolidation Act 2005 (as amended)

On receipt of the Appeals Officer's decision, MABS made a Freedom of Information request seeking all records relating to the reasoning and decision of the Appeals Officer. On receipt of these records, on 14th October 2015, MABS made a submission to the Chief Appeals Officer requesting a review of the Appeals Officer's decision pursuant to s. 318 of the Social Welfare Consolidation Act 2005 (as amended), on the grounds that the Appeals Officer had erred in law.

MABS submitted that as the Appellant did not have a "spouse" within the meaning of Social Welfare Law, his claim fell to decided in accordance with s. 3 and s. 227 of the Social Welfare Consolidation Act 2005 (as amended), and Article 13(6) of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007. MABS asserted that the Appeals Officer had erred in her interpretation of the primary legislation, and that she had failed to apply the relevant regulatory provisions; that is, the Appellant is required to demonstrate that he is substantially maintaining his child, he is not required to show that he is maintaining his "family".

It was submitted that s. 227 provides that a "family" shall include the claimant, their spouse (where relevant), and a qualified child/ren, a "spouse" being a person who is wholly or mainly maintained by the claimant. If that spouse is not living with the claimant, or being so maintained, then they are by definition not part of the "family" for FIS purposes, this does not however preclude an applicant from receiving FIS; rather, the family in these circumstances must be regarded as comprising of the claimant and his or her "qualified" child. Accordingly, the matter to be determined in this case was whether or not the Appellant's child is a

"qualified" child who may be regarded as normally residing with the Appellant for FIS purposes. As neither the Deciding Officer nor the Appeals Officer disputed that the child was a qualified child, the matter at issue concerned the child's normal residence.

Section 3(5) of the Social Welfare Consolidation Act 2005 provides:

> *Any question relating to the normal residence of a qualified child shall, subject to section 220(2), be decided in accordance with regulations made under that subsection*."

MABS submitted that in view of the above provision, the question of the child's normal residence falls to be determined in accordance with Article 13 (6) of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007, which provides:

> *Notwithstanding the provisions of sub-article (4), a qualified child resident with one parent who is living apart from the other parent and who is not claiming or in receipt of benefit or assistance shall be regarded as residing with the other parent if that other parent is contributing substantially to the child's maintenance*.

MABS submitted that in accordance with the above provision, and departmental guidelines, the Appellant must be regarded as substantially maintaining his child. The meaning of "contributing substantially" to a child's maintenance not specified in the statute; however, departmental policy considers an amount equal to, or in excess of, the qualified child rate as meeting this condition. In this matter, MABS also noted that the Deciding Officer, when making a submission to the Appeals Office pursuant to Article 10 of the Social Welfare (Appeals) Regulations 1998, had accepted that the Appellant was in fact substantially maintaining his child. In this submission, the Deciding Officer, while accepting that the Appellant was substantially maintaining his child, cited further grounds to reject the claim, asserting that the Appellant could not claim FIS if the other parent was in receipt of a "benefit or assistance".

The Appeals Officer did not address the points raised by the Deciding Officer when issuing her summary decision. In order to avoid doubt, MABS submitted that the Deciding Officer had made an error in the further reason cited for rejecting the Appellant's claim. Specifically, the meaning of "benefit for assistance" as set out in Article 13 of the Regulations expressly excludes the One Parent Family Payment.[2] Therefore, the Appellant can claim FIS if the other parent is in receipt of the One Parent Family Payment.

[2] 13. (1) In this article –
"benefit" or "assistance" means any such payments under Parts 2 or 3 (other than guardian's payment (contributory), death benefit by way of orphan's pension, guardian's payment (non-contributory), one-parent family payment or supplementary welfare allowance);

In summary, it was submitted that the Appellant was entitled to FIS as his circumstances were consistent with the statutory meaning of "family" and the regulatory provisions governing the question of a child's normal residence.

Finally, it was submitted that the Appeals Officer had not provided a reasoned basis to warrant a contrary position to that of previous Appeals Officers in 13 cases concerning the same question of statutory interpretation, and the most recent published decision by the Chief Appeals Officer, dated 29th June 2015[3]. As the Appellant's case was consistent in fact and law with previous appeals allowed, the Appeals Officer's decision should be revised in the Appellant's favour.

The decision of the Chief Appeals Officer: 20th November 2015
Appeal Allowed

The reasoning and findings of the Chief Appeals Officer:

The Chief Appeals Officer set out the relevant facts, the background to the case, and a summary of the contentions submitted by MABS on the Appellant's behalf.

The findings of the Chief Appeals Officer are set out in full:

> " I have reviewed the legislation governing Mr. X's family situation, which is Section 227 of the Social Welfare Consolidation Act, 2005 regarding the definition of 'family' for the purposes of FIS and Article 13 (6) of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142 of 2007) with regard to the normal residence of a qualified child.
>
> The definition of "family" set out in Section 227 of the Social Welfare Consolidation Act, 2005 provides that *"family"* means –
>
> *(a) a person who is engaged in remunerative full-time employment as an employee,*
> *(b) where that person is living with or wholly or mainly maintaining—*
> *(i) his or her spouse,*
> *(ii) his or her civil partner, or*
> *(iii) his or her cohabitant, that spouse, civil partner or cohabitant, and*
> *(c) a child or children; …."*

[3] Casebase, G0073:
http://www.communitylawandmediation.ie/_fileupload/Casebase/Family%20Income%20Supplement/G0073%2029_06_15.pdf

My interpretation of this provision is that it sets out who shall be regarded as being part of the "family" for the purposes of FIS and includes the 'spouse' where that spouse is living with the claimant or is being wholly or mainly [maintained] by the claimant. If the 'spouse' is not living with the claimant or being wholly or mainly maintained by the claimant then that 'spouse' is not part of the claimant's family. In this regard I conclude that for the purposes of FIS, Section 227 of the Act places no obligation on Mr. …to be wholly or mainly maintaining the other parent of his child where both parents live apart.

Section 3 of the Social Welfare Consolidation Act, 2005 provides that:

"(5) Any question relating to the normal residence of a qualified child shall, subject to section 220(2), be decided in accordance with regulations made under that subsection."

The rules for determining the normal residence of a qualified child are contained in Article 13 of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. 142 of 2007). I note that the Appeals Officer did not consider the application of Article 13(6) to Mr …'s family situation which provides that:

"(6) Notwithstanding the provisions of sub-article (4), a qualified child resident with one parent who is living apart from the other parent and who is not claiming or in receipt of benefit or assistance shall be regarded as residing with the other parent if that other parent is contributing substantially to the child's maintenance."

"benefit" or "*assistance"* is defined in Article 13(1) as meaning *any such payments under Parts 2 or 3 (other than guardian's payment (contributory), death benefit by way of orphan's pension, guardian's payment (non-contributory), one-parent family payment or supplementary welfare allowance);*

For the purposes of Article 13(6) I note, and this is not disputed, that Mr….is contributing substantially to the maintenance of his child who resides with her mother. I note also that it is contended that the other parent is in receipt of One – Parent Family Payment and as this payment is excluded the other parent cannot be said to be receiving a "benefit or "assistance".

Therefore, subject to verification by the Department that the other parent is in receipt of the One-Parent Family Payment and is not claiming or in receipt of "benefit" or "assistance" as defined in Article 13(1), Mr…. child should be regarded as residing with him for the purposes of FIS.

In the circumstances I revise the decision and allow the appeal."

The Appellant was subsequently awarded FIS at the rate of €79per week, and received arrears from the date of his claim in April 2015.

Observations:

This case concerned a question of statutory interpretation only. In this case, and others, the interpretation of the statute advanced on behalf of the Appellants was consistent with that of the Department of Social Protection prior to 2009. In 2009 the Department changed their interpretation of the statute, asserting that persons in the Appellant's circumstances must be maintaining their child, and the other parent, in order to be regarded as a family for FIS purposes.

We are advised that this is the 14th successful case taken by MABS concerning this question of statutory interpretation. This case is made more significant by the fact that it is the second decision made by the Chief Appeals Officer in which she has made a finding on a point of law using her powers under s. 318 of the Act. The first case being that taken by Dublin City Centre CIS (Casebase reference: G0073). The Chief Appeals Officer has now, in two cases concerning the same question of statutory interpretation, found against the Department's position. Section 318 of the Act is the final review mechanism provided under the Act and therefore considered to be legally binding.

It is submitted that in matters that concern statutory interpretation there must be legal certainty in order that the public know the rules applicable to a particular scheme. Accordingly, in circumstances where the Chief Appeals Officer has issued a decision under section 318 of the Act which makes a legal finding that conflicts with that of the Department, it seems only reasonable and rational that the Department review and account for their position. It should be noted that it is open to the Minister for Social Protection to refer any matter to the High Court on a point of law. To date, no such action has been taken. On the contrary, it is submitted that the Department do not appear to regard their interpretation of the statute as safe given the fact that s. 9 of the Social Welfare and Pensions Act 2014 amends the definition of "family" for FIS purposes to the extent that the Appellant in this case would not be eligible for FIS if this provision had been commenced at the time of his claim.[4]

Unfortunately, at the time of writing (April 2016), despite the findings of the Social Welfare Appeals Office, all the publically available information on the Department's website and that of the Citizens Information Service, differs with the reasoning and findings of the Appeals Office.

[4] As of 12th April 2016, s. 9 of the Social Welfare and Pensions Act 2014 had not been commenced. Accordingly, no amendment to the definition of "family" for FIS purposes, provided for in s. 227 of the Act, had taken effect whereby a person in the Appellant's circumstances from receiving FIS.

On a separate matter, this case raises concerns with respect to the Appeals Office's stated practice of delaying the registration of an appeal pending the issuing of "clarification" by the Department of Social Protection.

For ***more information***, contact us at:

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