

Casebase Number: G0090

Title of Payment: Job Seekers Allowance



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

Date of Final Decision: 10 May 2017

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Keywords: Job Seekers Allowance (**JA**)-Overpayment- Debt owed to the Department of Social Protection (**Department**) - Retrospective assessment – Appeal

Organisation who represented the Claimant: Community Law and Mediation Northside (**CLM**)

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Case Summary:

This case concerns a revised decision by a Deciding Officer (**DO**), whereby it was asserted that the Appellant was overpaid Jobseekers Allowance (**JA**) from 2012 to the date of discovery in 2015. The Appellant was assessed as having retrospectively derived means from her husband's earnings, earnings that were not disclosed to the Department of Social Protection (the **Department**) throughout the period at issue. As a consequence of this revised decision, it was asserted that the Appellant was liable to repay to the Department the sum of €36,584.

On appeal, the Appellant asserted that though married, she was estranged from her husband. With respect to her husband's earnings, it was the Appellant's position that she was unaware of his changed circumstances as she and her spouse live separate and independent lives.

The Appellant was in receipt of JA from 2009. The Appellant was paid the rate payable to a couple less means from her husband's employment at the time. On the basis of this assessment the Appellant received in or around €108 JA per week. In 2011 the Appellant's spouse damaged his back and claimed Occupational Injuries Benefit (**OIB**). The Appellant asserted that on an unknown date in 2012 she was advised by an officer of the Department that as a married couple she was obliged to amalgamate her claim with that of her spouse. According to the Appellant, she objected to being paid for her spouse at the time, asserting that she was in fact separated but that she couldn't move out for financial reasons. From January 2012 the Appellant received €312 JA per week, the amount payable to a couple with nil means. In March 2012 the Appellant's husband returned to work. This change in circumstances was not disclosed to the Department.

In August 2015 the Department conducted a review of the Appellant's claim. The Appellant attended an interview with a Social Welfare Inspector (**SWI**) on the 17th August 2015, and it was put to her that her husband had resumed work in 2012. The Appellant contended that this was the first time that she was made aware that her husband had gone back to work. Further to this interview the Appellant was asked to provide bank statements for herself and her spouse for six months and her spouse's payslip. On the 28th of August the Appellant had a further interview with a SWI where she furnished various bank statements and a written statement setting out her marital difficulties and the fact that she and her husband had been separated for some time and lead separate lives. She also stated that she had confronted her husband after the meeting of the 17th August regarding his work situation and the fact that he had not told her he had resumed work. She further stated that

he maintained that he had told her; however, she submitted that he had not, and the first time she had found out he was working was at the meeting with a SWI.

On concluding the investigation a decision was issued on 03/09/2015 whereby it was found that the Appellant's spouse had resumed employment in 2012, and that as a consequence of this change in circumstances the Appellant had means of €204 per week with effect from 26th March 2012. In issuing this decision the DO did not refer to the specific revising powers afforded to DO's under s. 302 of the Social Welfare Consolidation Act 2005 (2005 Act); revising powers that include a provision for a DO to assert that a claimant acted so as to defraud the Department.

The matter was then referred to the Special Investigation Unit for further consideration, and the Appellant was required to attend an interview under caution on 14th September 2015. This interview was conducted pursuant to Section 302 (a) of the 2005 Act, for the purpose of potentially bringing a prosecution in the event that there were sufficient grounds to assert that the Appellant wilfully concealed information in order to qualify for a higher rate of payment. Despite being flagged for possible prosecution in this respect, no decision under Section 302(a) was made. A report dated 22nd September 2015 was sent by the SWI from the Special Investigation Unit to the DO for decision regarding an overpayment.

Based on the Department's assessment of the facts, the Appellant was found to have been overpaid the sum of €36,584 during the period 26 March 2012 to September 2015. A letter was subsequently issued with respect to the overpayment and the Appellant's obligation to repay the debt.

The Appellant lodged a notice of appeal in October 2015. The Appellant sought assistance from CLM who came on record at this time, and sought release of documents held by the Department under the Freedom of Information Act. CLM contended on behalf of the Appellant that she and her husband had been estranged for a number of years but due to financial constraints the Appellant could not move out of the family home. Despite residing in the same dwelling both individuals lived totally separate lives.

On 5 April 2016 CLM made a written submission on behalf of the Appellant to the Chief Appeals Officer. In addition to the written submission, affidavits attesting to the relevant facts were submitted from the Appellant and her daughter. It was submitted on behalf of the Appellant that the retrospective effect of the decision should be set aside for various reasons set out in the submission. It was asserted on the Appellant's behalf that she acted in good faith, did not knowingly mislead the Department, and did not conceal any material facts that were known to her.

In her sworn affidavit, the Appellant set out the living arrangement between herself and her estranged husband, and asserted that their only interaction was in respect of utilities and bills for the home in which they both resided. In her Affidavit the Appellant asserted that due to addiction issues on the part of her spouse, coupled with his aggressive behaviour was the impetus for the separation. The Appellant also outlined in her Affidavit that she had advised an officer of the Department at the time [2012] that she was separated, and therefore wanted to be considered as single person but that the officer insisted that she was required to have her husband as an adult dependent on her payment as she was considered a married couple for social welfare purposes.

As a consequence of being paid in this way, the Appellant left the amount payable in respect of her husband on the home mantelpiece each week and did not benefit from this amount. It was further set out in the Appellant's affidavit that upon resuming employment, the Appellant's estranged spouse continued to take the money left by the Appellant without informing her of his change in circumstances. As they lived totally separate lives, the Appellant had no knowledge until she was made aware by a SWI of the Department at a meeting in August 2015. On being so notified by the SWI, the Appellant willingly and immediately disclosed the facts of her husband's employment by letter to the Department.

The Department did not interview the Appellant's estranged spouse, nor was there evidence of a visit to the Appellant's house to assess the living arrangements in order to clarify the facts pertaining to the family circumstances.

It was submitted that given the fact that the Appellant was not aware that her estranged husband had returned to work, and that he had never advised her of same, it is unfair and unreasonable for the Department to issue a retrospective decision from March 2012 with the effect that the Appellant was being held liable for a significant overpayment in the sum of €36,584.

An oral hearing was held on the 24th May 2016, which was attended by the SWI and DO from the Department in addition to the Appellant, her daughter and solicitor from CLM. The hearing was adjourned to allow the SWI who had interviewed the Appellant under caution to attend. The hearing was reconvened on the 15th September 2016.

On 10 May 2017, the Appeals Officer issued a decision allowing the appeal to the extent that it was found that the decision of the DO should not have retrospective effect, thus negating the overpayment.

Key Conclusions:

Overpayment cancelled.

The Appeal's Officer issued her decision by way of letter dated 10 May 2017 from the Social Welfare Appeals Office.

"The Appeal is allowed. Appellant's application for Jobseeker's Allowance should be assessed as a single/separated person, effective from 17th August 2015.

I am satisfied that as the facts of the case are not in dispute, the appellant was paid the full married rate of Jobseekers Allowance to which she was not entitled from Jan 2012 onwards. However, the Department have not proven conclusively that appellant was aware of the additional income from her husband's return to work. On this basis I decide to uphold the Deciding Officer's decision but I decide in accordance with the provisions of Section 319 (b) of the Social Welfare (Consolidation) Act that the decision should apply on from the date of decision, thus negating the overpayment."

Summary of Benefit(s) Received:

JA is a means-tested payment available to people who are unemployed and who are available for, capable of and genuinely seeking employment. To qualify for JA, an applicant must satisfy a means test. The rules governing the assessment of means are set out in Part 2 of the 3rd Schedule 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. The amount of JSA a person receives is reduced by the amount of means assessed in accordance with the relevant statutory provisions.

The relevant statute provides for the assessment of means from maintenance and specified “non-cash” benefits.

In the case of income from maintenance, the statute provides for a maximum amount to be disregarded in the case of a claimant who has housing costs. The excess of that amount is assessed at half. The maximum statutory disregard is €4,952 per annum, €95.23 per week.

The assessment of means is based on the income and assets of the claimant and, where relevant, their spouse, civil partner or cohabitant. The definition of a “spouse” in the 3rd Schedule to the Act refers:

“spouse” means each person of a married couple who are living together”

The relevant statute governing the recovery of overpayments is set down in Part 11 of the 2005 Act and Part 9 of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (as amended), S.I. 142 of 2007.

Section 301 of the 2005 Act provides that a DO may revise the decision of another DO in circumstances where there has been an error in the facts or the law and/or where there has been a relevant change in circumstances.

Section 302 of the 2005 Act provides a DO with the authority to determine from what date a decision should take effect in view of the facts and circumstances of a particular case. Section 302 (a) states that:-

where any benefit, assistance, child benefit, family income supplement or continued payment for qualified children will, by virtue of the revised decision be disallowed or reduced and the revised decision is given owing to the original decision or determination having been given, or having continued in effect, by reason of any statement or representation (whether written or verbal) which was to the knowledge of the person making it false or misleading in a material respect or by reason of the wilful concealment of any material fact, it shall take effect from the date on which the original decision or determination took effect, but the original decision or determination may, in the discretion of the deciding officer, continue to apply to any period covered by the original decision or

determination to which the false or misleading statement or representation or the wilful concealment of any material fact does not relate

Section 302 (b) states that:-

where any benefit, assistance, child benefit, family income supplement or continued payment for qualified children will, by virtue of the revised decision be disallowed or reduced and the revised decision is given in the light of new evidence or new facts (relating to periods before and after the commencement of this Act) which have been brought to the notice of the deciding officer since the original decision or determination was given, it shall take effect from the date that the deciding officer shall determine having regard to the new facts or new evidence and the circumstances of the case;

Arguments made on behalf of the Appellant:

Key Arguments on behalf of the Appellant:

- Affidavits were submitted on behalf of the Appellant and her daughter that attested to the fact of the separation and the facts pertaining to the extent to which Appellant and her estranged husband live separate lives. Details were provided with regard to how the parties paid separate bills such as rent etc, and that the amount equivalent to that payable for an adult dependent was left on the mantle piece for the Appellant's estranged husband each week.
- It was submitted that in view of the history of the marital relationship and the particular personal circumstances of the case that the Appellant had at all times acted in good faith and did not wilfully conceal any material facts or knowingly mislead the Department.
- It was submitted that there was a history of an abusive and controlling marriage with addiction issues on the part of the Appellant's husband, thus providing a context in respect to the lack of communication between the Appellant and her estranged spouse and to the credibility of the Appellant's assertion that she was unaware that her husband had resumed work.
- CLM referred to the Social Welfare Appeals Office Annual Report 2013, and in particular the section referring to overpayments where the importance of DO's using their discretion in particular cases to determine the effective date of the revised decision. In this regard the importance of taking into account the personal circumstances of each case was emphasised. It was contended that the DO had neglected to take into account the particular circumstances of the Appellant's case regarding her marital relationship and breakdown.
- CLM submitted that the Department failed to properly meet the evidential burden required when deciding to reduce or withdraw a payment.
- CLM submitted that as the Appellant was unaware of the fact that her estranged husband returned to work, it was unfair and unreasonable for a retrospective assessment from March 2012 to be issued by the Department with the effect that the Appellant is being held liable for a significant overpayment in the sum of €36,584.

Arguments on behalf of the Department of Social Protection

- In August 2015 the Appellant's JA was reviewed by SWIs having noted earnings on her spouse's record. Per the SWI report the Appellant stated her spouse was not employed but his record noted open employment and income.
- The conditions to be satisfied for JA are outlined in social welfare legislation and include an assessment of means, including those of a person's spouse or partner.
- The case was sent to the Special Investigations Unit (SIU) for follow up. During the course of their investigation it was determined that the Appellant's spouse had returned to work despite her signing a form to the contrary, and on foot of this took a cautioned statement from the Appellant where she reiterated she had no knowledge of her spouse's employment.
- The SWI recommended overpayment and a revised decision.
- The DO wrote to the Appellant in September 2015 outlining the reasons for the alleged overpayment. The Appellant's spouse returned to work in March 2012 and from that date until September 2015 the Appellant was overpaid a sum of €36,584 due to the undeclared income which was assessable as means from the date the Appellant's spouse had returned to work.
- The DO set out that the Appellant was in receipt of a means assessed payment that as a result of her spouse returning to work, she was not entitled to.
- The Appellant failed to notify the DSP that her husband had resumed employment. The DO set out that a local social welfare office should be contacted immediately should there be any change in income and or circumstance of the recipient of social welfare and or their spouse.

Date of Oral Hearing: 24th May 2016 and reconvened on the 15th September 2016

Date of Final Decision: 10 May 2017

Appeal Officer's (AO) reasoning and conclusions:

It was stated that as the Appellant was in receipt of JA for several years, the onus is therefore on the Department to conclusively establish the facts when withdrawing or reducing a payment.

The AO noted that the SWI held various meetings with the Appellant during the course of the investigation. However, the AO considered there to be important omissions in the Department's investigation; specifically, there was no evidence of a visit made to the Appellant's home to ascertain the facts with respect to the marital circumstances between the Appellant and her estranged spouse, nor was the Appellant's husband interviewed.

The AO further noted that it was not clear from the SWI's report whether the Appellant was notified that she would have an overpayment prior to either interview with the SWI. It was further noted that the Appellant immediately disclosed the facts of her husband's employment by letter upon discovering same.

The key determining factor in the AO's decision turned on the Appellant's credibility and the extent to which she was forthcoming in her evidence. The AO accepted that the Appellant was in fact 'separated' for a lot of her life. Taking account of the Appellant's evidence, as well as the fact that there was no departmental investigation into the home living circumstances of the Appellant and her estranged spouse, the AO found that the Department had not provided adequate proof that the Appellant is not a separated person, or that she was aware of her husband's employment income.

Further, the AO noted that the Department did not contest the Appellant's assertion that she attempted to make a claim in her own right, and that she was reluctant to claim for her spouse as an adult dependant.

The AO also noted that the Department had access to the Final Cert details of the Appellant's husband from February 2012, and should have been notified of same in a timely manner in 2012 by the automatic Warning Report.

The AO further determined that based on the circumstances of the case that it was her opinion that a revised decision under Section 302(a) was not warranted.

It was held that the facts of the case were not in dispute in that the Appellant was paid at the incorrect higher rate from the date her husband returned to work in 2012. However, given the Appellant's credibility and the Department's failure to reach an appropriate standard of proof to establish that the Appellant was aware of the additional income from her husband's return to work, a revising decision should not issue with retrospective effect.

In conclusion, the AO upheld the DO's decision but decided the date should apply from the date of her decision, in accordance with 319 (b) of the 2005 Act which states that: -

where any benefit, assistance, child benefit, family income supplement or continued payment for qualified children will, by virtue of the revised decision, be disallowed or reduced and the revised decision is given in the light of new evidence or new facts (relating to periods before and after the commencement of this Act) which have been brought to the notice of the appeals officer since the original decision was given, it shall take effect from the date the appeals officer shall determine having regard to the new facts or new evidence and the circumstances of the case.

As a result, the AO determined that the overpayment was negated.

For further information:

<http://www.welfare.ie/en/Pages/Decision-Making-and-Natural-Justice.aspx>

<http://www.welfare.ie/en/Pages/Means-Assessment.aspx>

<http://www.welfare.ie/en/Pages/Cohabitation.aspx>

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

Community Law and Mediation Centre, Northside

Northside Civic Centre, Bunratty Road, Coolock, Dublin 17

E: info@communitylawandmediation.ie | W: www.communitylawandmediation.ie

T: 01 847 7804