

Casebase Number: G0085

Title of Payment: Jobseeker's Allowance



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Date of Final Decision: 20 December 2016

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Keywords: Jobseeker's Allowance –Means Assessment – cohabitation –oral hearing - appeal

Organisation who represented the Claimant:

Community Law & Mediation Northside (CLM)

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Case Summary

This case relates to the decision by a Deciding Officer (DO) to assess the Appellant as though one of a couple for the purpose of his Jobseekers Allowance (JA) claim, despite his declaration that he is a separated single man.

The Appellant asserted that he separated from his wife, Ms.X, in or around 2000, but did not leave the family home for financial reasons. The Appellant and Ms.X, though separated, continue to reside in the same house, which they jointly own. They did not obtain a legal separation. During previous periods of unemployment following his separation the Appellant had been assessed as a single person for JA purposes.

At the end of May 2016, the Appellant ceased employment and made a claim for JA. When making his application he declared that he was separated, and he provided information with respect to other members of the household, including his wife, Ms. X. On 1st June 2016 JA was awarded to the Appellant at the rate of €188 per week, the amount payable in respect of a single person . After awarding the payment, the Appellant's claim was referred to a Social Welfare Inspector (SWI) for investigation, and the Appellant was interviewed on 16th June 2016. The SWI requested that the Appellant submit evidence of his wife's earnings despite his assertion that he was a separated man. On receipt of this evidence, means of €305 from Ms. X's employment were assessed against the Appellant's claim, and a decision was made to reduce his JA to €7.80 per week. This decision took effect from 22nd June 2016. In making this decision, the DO made a finding that the Appellant was one of a couple, that the Appellant had not established that he was separated from his wife.

Shortly after receiving the decision of the DO, the Appellant submitted Notice of Appeal to the Social Welfare Appeals Office, together with a letter from the Legal Aid Board confirming that he had made an appointment with respect to commencing separation proceedings. The Appellant then sought the assistance of CLM. CLM sought the release of documents held by the Department of Social Protection under the Freedom of Information Act 2014.

The Department of Social Protection (DSP) referred the matter to another SWI for further review following the Appellant's submission of his Notice of Appeal. On 28 July 2016 a SWI

made an un-notified call to the Appellant's home. According to the "Means Reporting Form" completed by the SWI on that date, the Appellant's status was recorded as "married – but separated the last 15 years". The report also confirmed that the Appellant and his wife jointly own the property in which they live.

The SWI in her report, of 29 July 2016, noted:

" [w]hile there did appear to be bedding on the kitchen table , there was no evidence of any disarray that would result in 2 people sleeping downstairs and 2 adults and 2 children sleeping upstairs in a 2 bedroomed house...Though Mr... does appear to be now proceeding legally with separation, they are both living under the one roof and I cannot rule out cohabitation. I recommend that the means applied to the client's claim continues and that he be advised of his right to appeal that decision."

The SWI did not interview the Appellant's wife, Ms. X.

CLM made a written submission setting out legal arguments, and on 7 December 2016, CLM represented the Appellant at an oral hearing. In addition to the written submission, affidavits attesting to the relevant facts were submitted from the Appellant, his wife, and his sister.

On 20 December 2016, the Appeals Officer allowed the appeal.

Key Conclusion:

Appeal Allowed

"Having carefully examined the evidence in this case including that presented at oral hearing, I am satisfied that there is sufficient evidence to establish that the appellant is not in a cohabitating relationship with his wife. I conclude therefore that the appellant should not be assessed with means in respect of his wife's insurable employment since 22/6/16 and that he should be assessed with nil means from that date. "

Summary of Benefit(s) Received:

Jobseekers Allowance (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 JA a person receives is

reduced by the amount of means assessed in accordance with the relevant statutory provisions.

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”

A Cohabitant is defined by s.2 of the Social Welfare (Consolidation) Act 2005 (as amended), which provides:

“ ‘cohabitant’ means cohabitant within the meaning of section 172(1) of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010”

Section 172(1) of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 provides:

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

Section 172(2) of the Act provides:

“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”*

The Department of Social Protection’s Guidelines on Co-habitation state:

- “No single criterion can necessarily support a decision that a couple are living together as husband and wife or civil partners. It is essential to have as much information as possible on all the criteria before arriving at a decision.
- Evidence or the lack of it, in any criterion may not necessarily be conclusive.
- A voluntary admission of living together as husband and wife or civil partners is accepted as sufficient evidence where the person makes the admission in the knowledge that his/her own entitlement will be adversely affected by it. Such admission should be obtained in writing, as far as possible in his/her own words, and the statement should be read over to him/her before being signed.
- Where co-habitation is admitted the period where the couple were cohabiting and claiming a social welfare payment should be included in the admission.”

The Guidelines further state:

“The second party should be interviewed where his or her claim to benefit or assistance may be affected, and/or where his or her means are being taken into consideration.”

The Department Guidelines further state:

*“The fact that the couple reside in a common residence is insufficient by itself to determine that they are living together as husband and wife or civil partners. There also needs to be consideration as to whether they constitute a single household.”
emphasis added*

The Guidelines continue:

- The first question to examine is whether they reside in a single residential unit.
- Is the accommodation a single flat, apartment, house, caravan or other dwelling place?
- If it is a house, is it officially a single household unit? Do the local housing rules permit it to be subdivided into more than one unit?
- What type of accommodation is available and how is it shared?
- Who pays the household expenses such as rent, gas, electricity, mobile telephone(s), home telephone, television stations including satellite and cable television services, television license fee, wi-fi/broadband? In whose name(s) are these accounts?
- Do either maintain (or live in) another home, or use another address? If so, which place is the effective residence? At which address do they keep their personal belongings?
- Are they listed on the electoral register as resident together?
- What address do they both use for employment or social welfare purposes?”

“Where household duties such as those listed below are done by one partner for the other, or by both for each other, in the same way in which husbands and wives/civil partners ordinarily perform such tasks then that is further evidence that the couple are living together as husband and wife/civil partners.”

“Do the couple share any of the following:

- Providing meals and shopping.
- Cleaning and laundry.
- Caring for each other and members of the household during illness. Decorating, gardening, washing up.”

Key Arguments on behalf of the Appellant:

- CLM contended that the DSP had failed to correctly apply their own Guidelines in relation to cohabitation, and highlighted the factors which should have been considered when determining whether or not two adults are in a cohabiting relationship.
- It was submitted that in accordance with the DSP’s guidelines the Appellant’s wife should have been interviewed to establish her account of the household circumstances.
- Affidavits were submitted from the Appellant, his wife and his sister. All three affidavits attested to the fact of the separation and facts pertaining to the extent to which Appellant and Ms X lived separate lives.
- It was submitted that the Appellant’s finances and daily domestic needs (food, laundry etc) were managed independently of his wife. It was also submitted that neither party could leave the family home for financial reasons.
- CLM submitted that the DSP failed to properly meet their evidential burden when deciding that the Appellant was one of a couple. Specifically, in circumstances where a person is in receipt of a payment, as in this case, the burden falls to the DSP to provide an evidence based case that it is highly probable that the Appellant was in a cohabiting relationship with Ms. X.
- It was submitted that the investigation and decision by the DO were at odds with the Appellant’s right to fair procedures and natural justice. The investigation itself was demonstrably flawed in that it was unreasonably limited in its scope of enquiry, and the findings consequent on this investigation were not put to the Appellant prior to an adverse finding being made.

Key Arguments on behalf of the Department of Social Protection

- The Deciding Officer in her submission to the Social Welfare Appeals Office in August 2016 noted the facts and observations contained in the SWIs reports,

and stated that the Appellant was “inadvertently” put into payment at full single rate prior to an investigation taking place.

- The DO referred to the SWI establishing that the Appellant shared a two bedroom house with his ex wife, his son and daughter and his two grandchildren, but that there was no evidence of “disarray that would result in 2 people sleeping downstairs”
- The DO submitted : “ Though Appellant does appear to now be proceeding with a legal separation we were not in a position to rule out co-habitation”
- The DO submitted “His comments have been noted, however under Social Welfare legislation a couple who reside in the same household are regarded as a couple for JA purposes as it is a means tested payment, regardless of the domestic arrangements they may or may not have in place and as such Ms.X’s income has to be assessed as means against the appellant until such time as they are no longer living together.... ”
- The DO submitted that as the Appellant had no income since June 2016 this calls into question how the Appellant has managed to survive. The DO asserted “...Again this would question how he has survived on no income and therefore he must have undeclared income/money in order to survive”

Date of oral hearing: 7 December 2016

In attendance: Appeals Officer, Social Welfare Inspector, Appellant, Counsel for the Appellant, Solicitor for the Appellant.

Counsel for the Appellant made oral arguments, summarising the matters as set out in the written submission on behalf of the Appellant.

In response to submissions on behalf of the Appellant, the SWI on behalf of the DSP responded:

- The SWI stated that she had based her report on information available to her at the time. The SWI submitted that had CLM’s submission and affidavits been provided on an earlier date, the decision could have been reviewed therefore possibly avoiding an oral hearing.
- The SWI confirmed that the JA payment was put into payment before a full review was carried out in order not to cause delay.
- The SWI acknowledged that the Appellant’s wife Ms.X was not interviewed.
- The SWI apologised to the Appellant for the expression used in her report as regards the “lack of disarray” at the Appellant’s home.

The Appeals Officer noted that many of his questions were addressed by the contents of the submission from CLM and the Affidavits presented.

The Appeals Officer sought clarification with respect to a period when the Appellant left his home. The Appellant stated that he left his home for a week due to difficulties because of his financial situation. The Appellant advised that he lived in homeless accommodation during this period and made a claim for SWA, which was refused. The Appellant also submitted that he and his wife had been in relationships with other people since the separation.

Date of final Decision: 20 December 2016

Appeal Officer's reasoning and conclusions:

The Appeals Officer in his written comments and conclusions referred to the relevant statute as applies to the question of cohabitation and noted the contents of CLM's submission. The Appeals officer noted the Appellant's claim history, that he had previously been assessed as a single person and that his circumstances had not changed during the intervening years. The Appeals Officer further noted the facts as attested to in the Affidavits, including the declaration of the Appellant's sister that she had been "helping out" the Appellant since his JA had been reduced.

The Appeals Officer concluded:

"...Having carefully examined the evidence in the case including that presented at oral hearing, I am satisfied that there is sufficient evidence to establish that the appellant is not in a cohabitating relationship with his wife. I conclude therefore that the appellant should not be assessed with means in respect of his wife's insurable employment since 22/6/16 and that he should be assessed with nil means from that date."

Observations:

In a case where a person claims that they are separated, but continues to live in the same residence as their spouse, it is undoubtedly difficult to establish the bone fides of their claim, that they should be treated as a single person for social welfare purposes. Unfortunately, establishing the legitimacy of a claim in these circumstances will be made more difficult, if an investigation does not proceed openly, and with due regard to all relevant lines of enquiry and the whole of the evidence. We suggest that to proceed openly, there must be recognition of the fact that financial necessity often dictates less than ideal living arrangements; accordingly, it cannot be presumed that two people are living together as a married couple simply because they live in the same house and remain legally married.

While the investigation in this case was flawed, it is the reasoning of the Deciding Officer that should be highlighted in this regard, as the legal responsibility for making a finding rests with the DO, not the SWI. For this reason, it must be stated that the DO in this case appears to have failed in her statutory duty when grounding her decision in an investigation that was to all intents and purposes incomplete. It is suggested that before making a finding the DO

should have referred the matter back to the SWI in order that the Appellant's wife be interviewed and more information be provided regarding the household domestic arrangements and finances in accordance with the DSP's Guidelines on Cohabitation. It appears that neither the Deciding Officer nor the Social Welfare Inspector considered or applied the various criteria to be taken into account when determining cohabitation.

Contrary to this approach, on the basis of limited information, the DO proceeded to make a finding of fact. The DO went further when making her submission to the Social Welfare Appeals Office by asserting that the Appellant could not meet the required evidential burden so long as he continued to reside in the same house as his wife. In summary, by the DO's reasoning it was not possible for the Appellant to be regarded as a single person for social welfare purposes in his current circumstances.

Critically, the DO did not demonstrate that she had any regard to the Appellant's claim history, that he had previously been assessed as a single person and therefore had a reasonable expectation that he would be assessed as a single person when making his most recent claim. This fact alone should have given the Deciding Officer pause, insofar as given the Appellant's claim history, and the fact that his JA was initially awarded at the full rate, the evidential burden arguably fell to the DSP to establish that the Appellant was in fact living with Ms X as man and wife.

For further information:

Decision Making and Natural Justice (Guidelines, Department of Social Protection)
<http://www.welfare.ie/en/Pages/Decision-Making-and-Natural-Justice.aspx#q1>

Cohabitation (Guidelines, Department of Social Protection)
<http://www.welfare.ie/en/Pages/Cohabitation.aspx>

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

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