

Casebase Number: G0071

Title of Payment: One Parent Family Payment



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

Date of Final Decision: 1/05/2015

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Organisation who represented the Claimant: Waterford MABS

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Case Summary:

The Appellant is a mother of two children. In 1996 she had one child, a son, and she was living in her parents home. She applied for and was awarded the One Parent Family Payment [OPFP]. The Appellant's second child, a daughter, was born in December 2010. The Appellant did not apply for an increase on her claim in respect of her daughter, and advised the Department of Social Protection ["the Department"], in writing, that she did not wish to claim an increase because the father, John [not his real name], was supporting her daughter by providing weekly maintenance payments.

When completing and signing claim review forms in 2009 and 2011, the Appellant maintained that she continued to reside in her parents' house.

In 2012 the Department reviewed her claim, and in the course of their investigations established that the Appellant and John had jointly purchased a property in 2008.

In December 2012 a Deciding Officer issued a letter to the Appellant setting out the facts and evidence that in the Department's opinion were consistent with a finding that the Appellant had been cohabiting with John from February 2008 – to the present. The Appellant was afforded the opportunity to respond before a decision was made. The Appellant replied by way of letter asserting that she had resided for a short period with John in 2008, but John's relationship with her son was so poor she had to move out in May 2008. The Appellant asserted that from May 2008 to October 2012 she resided with her sister. She claimed that in October 2012 she moved back in with John but did not know if the relationship would last which is why she delayed notifying the Department.

The Department rejected the Appellant's assertions, and on 15th January 2013 a Deciding Officer issued a decision whereby it was contended that from February 2008 to 9th January 2013 the Appellant was cohabiting with John and was therefore not entitled to the OPFP. The decision was made in accordance with s. 302(a) of the Social Welfare Consolidation Act

2005 [as amended].¹ As a consequence of this revised decision, the Appellant was found liable for an overpayment amounting to €48,766.80.

The Appellant appealed the decision, and an oral hearing was held on 2nd December 2013. The Appellant was unrepresented at the time. On 17th December 2013 the Appeals Officer disallowed the appeal in respect of the periods 21st February 2008 to 14th May 2012, and 20th October 2012 to 9th January 2013. The Appeals Officer held that on the basis of a letter issued by the mortgage provider in November 2013, which referred to a Standard Financial Statement [SFS] completed by John in May 2012, the Appellant should have the benefit of “the very slight doubt” that she was not living with John at that time. Accordingly, the Appeals Officer did not make a finding that the Appellant was cohabiting from the date of the SFS [May 2012] to October 2012.

On 23 September 2014 Waterford MABS, on behalf of the Appellant, requested a review of the Appeals Officer’s decision. The request for a review was made in accordance with s.317 and s.318 of the Social Welfare Consolidation Act 2005.² MABS asserted that the Appeals Officer’s reasoning was flawed to the extent that there had been errors in fact and law in this case. MABS also submitted new evidence in the form of an Affidavit from the Appellant’s son who was then aged 18.

The Appeals Officer reviewed his decision, and in February 2015 he rejected MABS assertions. The Appeals Officer restated his findings and did not accept that were grounds to revise his decision.

On 10 March 2015 MABS responded, requesting that the Chief Appeals Officer review the Appeals Officer’s decision in accordance with s. 318 of the Social Welfare Consolidation Act 2005 [as amended].

On 1st May 2015 the Chief Appeals Officer revised the decision of the Appeals Officer and allowed the appeal.

Summary of Benefit(s) Received:

¹ This section of the Act refers to a revised decision by a Deciding Officer whereby it is asserted that a claimant gave false information and/or willfully concealed information and misled the Department for the purpose of receiving a benefit or assistance to which they were not entitled.

² Section 317 of the Social Welfare (Consolidation) Act 2005, as amended, provides an Appeals Officer with the authority to revise the decision of another Appeals Officer where the decision is found to be erroneous in light of new evidence or new facts.

Section 318 of the Social Welfare (Consolidation) Act 2005 provides the Chief Appeals Officer with the authority to change the decision of an Appeals Officer if the Appeals Officer is found to have made a mistake in the law or the facts of the case.

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 may 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, for at least six months at the time of making a claim.

s. 2[1] of the Social Welfare Consolidation Act, 2005 provides:

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

s. 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 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.

s. 175 of the Social Welfare Consolidation Act 2005 provides:

A person referred to in section 173(1) shall not, if and so long as that person is a cohabitant, be entitled to and shall be disqualified for receiving payment of one-parent family payment

Background:

The Appellant is a mother of two children. In 1996 she had one child, a son, and she was living in her parents home. She applied for and was awarded the One Parent Family Payment. The Appellant's second child, a daughter, was born in December 2010. The Appellant did not apply for an increase on her claim in respect of her daughter, and advised the Department, in writing, that she did not wish to claim an increase because the father, John (not his real name), was supporting her daughter by providing weekly maintenance payments of €45. When completing and signing claim review forms in 2009 and 2011, the Appellant maintained that she continued to reside in her parents' house.

In 2012, the Appellant's claim was reviewed and the fact that a property was held in her name and John's came to the Department's notice following a search of the Land Registry. The birth registration details of the Appellant's daughter, born in 2010, named John as the father of her daughter with an address at the property that he and the Appellant had jointly purchased in 2008. The address provided for the Appellant was her parents' home.

In December 2012 a letter was issued by the Deciding Officer setting out the facts and evidence that in her opinion were consistent with a finding that the Appellant had been cohabiting with John from February 2008 – to the present. The Deciding Officer referred specifically to the following facts:

- The Appellant and John were registered as the joint owners of a property since 2008, and John, the father of the Appellant's daughter, resides in this property.
- The Appellant did not claim an increase on her claim for her daughter despite being invited to do so by the Department.
- The Appellant and John were both employed by the same employer until March 2012 when the Appellant finished work.

The Deciding Officer stated:

It is clear to the Department that you have been cohabiting with John X since at least ...February 2008 and have been overpaid One Parent Family Payment since that date.

The Appellant was afforded the opportunity to respond to the Deciding Officer's allegation before a decision was made, and the Deciding Officer requested further information. Specifically, the Deciding Officer sought information relating to the Appellant's finances [Bank account statements for 6 months and mortgage statements], information from the school showing emergency contacts and any addresses on file in respect of her son, the long version of the baptismal certificates for the Appellant's children, and car tax and insurance details. The Deciding Officer requested that this information be submitted within 10 days.

The Appellant replied to the Deciding Officer's letter, rebutting the allegation that she had been cohabiting with John from 2008. She contended that she had been living with her sister from May 2008 until October 2012. Some of the documentation requested by the Deciding Officer was submitted, including financial information. There was also a baptismal certificate on file for her daughter but there was no address information on this certificate.

Details of email correspondence on file revealed that the Deciding Officer made enquiries to determine if there were any cars registered in the Appellant's name either at her parents or John's address. A car was registered in the Appellant's name at the address of her parents. No cars were registered at the address of the property owned jointly by the Appellant and John.

On the 15th January 2013, the Deciding Officer issued a revised decision in accordance with s. 302(a) of the Social Welfare Consolidation Act 2005 (as amended). The Deciding Officer determined that the Appellant had been cohabiting with John from 2008 to January 2013

with the effect that the client was liable to repay to the Department of Social Protection the sum of €48,766.80.

According to the information on file, the Deciding Officer in this case acted as investigator and decision maker; there being no record of any investigation being carried out by a Social Welfare Inspector, and no evidence that either the Appellant or John had been interviewed in order to ascertain the nature of their relationship during the period in question.

The Appellant appealed the decision and an oral hearing was held on 2 December 2013.

The appeal and the oral hearing:

1. Key arguments and evidence relied on by the Appellant.

- On appeal, the Appellant asserted that she had been living with John since October 2012, and that she did live with him for a three-month period in 2008. She submitted that she lived with her sister from May 2008 to October 2012, spending most of her time in her Mother's house and staying with her sister at night.
- The Appellant claimed that the relationship between John and her son was very difficult and as a consequence her relationship with John deteriorated to such a degree that she had to move in with her sister in May 2008.
- At the oral hearing the Appellant submitted in evidence a number of documents addressed to her parents home, including: a letter from the mortgage provider, P60, bank statements, health insurance documentation, a record of her attendance at hospital, documents relating to the registration of her daughter's birth, car registration information and payslips from her previous employer.
- The Appellant also submitted Affidavits from her sister and John, which supported her claim that she did not reside with John during the relevant period. The Appellant's sister confirmed that the Appellant lived with her from May 2008 to October 2012, and contributed to the cost of food and utilities while living there. John's statement confirmed that he and the Appellant did not live together during the relevant period and that he alone paid the mortgage and bills in respect of the property held in joint names.
- The Appellant referred to the absence of any joint financial arrangements such as bank accounts and utilities, and the Appellant also referred to the significance of the letter issued by the mortgage provider in November 2013 which confirmed that in May 2012 John sought forbearance with respect to the mortgage payments and submitted a Standard Financial Statement for this purpose. The Appellant asserted

that she was not a party to these negotiations and this was evidence that she did not live with John.

- The Appellant submitted that she sought advice in November 2012 with regard to surrendering her OPFP. These assertions were made variously at oral hearing, in her statement of her grounds of appeal and in a declaration signed by the Appellant.

2. Key arguments and evidence relied on by the Department of Social Protection

The Department of Social Protection submitted the following facts and evidence as consistent with a finding that the Appellant was cohabiting from 2008.

- The Appellant and John are the joint owners of a property purchased in 2008, and this fact was “concealed” from the Department.
- In February 2008 the Appellant moved into the property which is held in joint names with John.
- John is the father of the Appellant’s daughter
- The Appellant did not apply for an increase on her claim in respect of her daughter despite being invited to do so on two occasions. The reason given by the Appellant was that her daughter was being financially supported by her father in the amount of €45 per week. According to the record of the oral hearing, the Department asserted that the Appellant’s failure to make this claim was to “avoid attracting attention” to her relationship with John.
- The Appellant on three review forms issued in 2009 and 2011 maintained that her address was her mother’s house while stating on appeal that she in fact moved in with her sister in May 2008.
- At the time of the purchase of the property, the Appellant was in receipt of OPFP in respect of her son, who was a child from a previous relationship.
- During the period 1996 to December 2012 the address for the Appellant on the Department’s records is the address of her parents home, where she resided with her mother.

The Deciding Officer found that the above facts were evidence of cohabitation, and in her submission to the Appeals Office, it was asserted by the Deciding Officer that the Appellant had “concealed” the purchase of the property in 2008. The Deciding Officer also found it significant that the Appellant was “in the process” of surrendering the OPFP at the time when the Department wrote to her in 2012, but could not prove this to be the case.

Decision of the Appeals Officer:

On 17 December 2013 the Appeals Officer disallowed the appeal in respect of the periods 21st February 2008 to 14th May 2012 and 20th October 2012 to 9th January 2013, thereby revising the decision of the Deciding Officer in part:

Based on the evidence, including that adduced at the oral hearing, I am satisfied that appellant was cohabiting with Mr... for the period 21 February 2008 to 14 May 2012 and from 20 October 2012 to 9 January 2013 and was not entitled to One Parent Family Payment for those periods. My decision is made under Section 302(a) of the Social Welfare Consolidation Act 2005, as amended.

The Appeals Officer's reasoning and findings:

The Appeals Officer's reasoning for deciding that the Appellant was not cohabiting between 14 May 2012 and 20 October 2012 was based on the letter issued by the mortgage provider in November 2013. This letter confirmed that John had signed and submitted a Standard Financial Statement to the lender in May 2012, and this "indicated" that the Appellant was not residing in the property at that time.

According to the record of the oral hearing, the Appeals Officer was not satisfied that the client was credible. The record of his deliberations refers:

The main issue that runs through this case is credibility or lack of same. It is clear that appellant and Mr. X bought a house in 2008 and moved in together. There was an onus on her to inform the Department of this change in circumstances but she did not do so either at the time or in the next 12 weeks approx. that she lived there.

...

Looking at the evidence of the case the only possibly tangible 'hard' evidence of appellant living other than... [THE PROPERTY HELD IN JOINT NAMES] is the [MORTGAGE PROVIDER] letter which states that in filling out a SFS on ...2012 Mr. X indicated she was no longer living in the house.

Overall, I did not find the appellant's evidence to be credible and I am quite satisfied that appellant was cohabiting with Mr. ... at ...up to at least 14 May 2012 and quite probably up to the date appellant said she resumed cohabitation with him.

However, having regard to the... letter I am going to give what would appear to me to be the benefit of the very slight doubt and decide that the...

Request for a review in accordance with the provisions of s. 317 and s. 318 of the Social Welfare Consolidation Act 2005 (as amended)

On 23 September 2014 Waterford MABS made a submission to the Chief Appeals Officer pursuant to s. 317 and s. 318 of the Social Welfare Consolidation Act 2005. MABS asserted on behalf of the Appellant that the Appeals Officer in his reasoning and findings had made mistakes in the law and the facts in this case. MABS also submitted new evidence in the form of an affidavit from the Appellant's son who had reached majority after the decision of the Appeals Officer had been made in December 2013. In view of the nature of the matter at issue, and her son's age at the time, the Appellant had not considered it necessary to submit evidence from her son at an earlier date.

MABS submitted the following grounds for their contention that the Appeals Officer had made a mistake as to the facts and the law in this case:

- The Appeals Officer did not demonstrate that he questioned the evidence and the speculative nature of the decision made by the Department of Social Protection. In particular, the Appeals Officer did not consider it significant that the Deciding Officer in this case acted contrary to the principles of natural justice. That is, the record revealed that the Deciding Officer acted as investigator and decision maker, which in turn led to a selective investigation and presentation of the evidence.
- The Appeals Officer did not demonstrate that he considered it relevant that there was a lack of direct evidence to support the Department's position.
- The Appeals Officer inaccurately referred to an absence of "hard" evidence provided by the Appellant, and in so doing was prescriptive in his deliberations and did not demonstrate that he considered the evidential value of the affidavits of John and the Appellant's sister.
- The Appeals Officer by his reasoning placed an unreasonable burden of proof on the Appellant, and made a finding based principally on the assertion that the Appellant lacked credibility, rather than an objective assessment of the whole of the evidence before him.

On 6 February 2015, the Appeals Officer responded to MABS submission.

Having reviewed all the relevant documentation and submissions I do not consider that my decision was erroneous in the light of new facts or the new evidence and do not consider that a revision of my original decision is warranted.

The Appeals Officer referred again to the absence of "hard" evidence, particularly the lack of evidence to prove that the Appellant resided with her sister during the periods stated. The Appeals Officer reiterated his finding that the Appellant lacked credibility, and in this regard the Appeals Officer referred specifically to the failure of the Appellant to notify the Department of her change in circumstances in 2008.

Request for a review by the Chief Appeals Officer pursuant to s. 318 of the Social Welfare Consolidation Act 2005

On 10 March 2015 MABS, on behalf of the Appellant, requested that the Chief Appeals Officer review the decision of the Appeals Officer in accordance with s.318 of the Social Welfare Consolidation Act 2005 (as amended).

MABS asserted that the Department's position was not challenged by the Appeals Officer despite the fact that the Deciding Officer's decision was based on a flawed investigative process, selective presentation of the evidence, and speculative reasoning.

MABS submitted that the Appeals Officer erred in his reasoning and findings by adopting a prescriptive approach to the proofs required, rather than making an objective assessment of the evidence available. In particular, while the Appeals Officer referred to the absence of "hard" evidence, he made no reference to what, if any, evidential weight was attributed to the direct evidence provided in the form of sworn testimony from the Appellant's sister, her son and John.

MABS also challenged the Appeals Officer's finding that the Appellant lacked credibility on the grounds that this was based on conjecture; that is, it was the Appeals Officer view that the Appellant could not be believed in view of the circumstantial evidence and her inability to provide certain proofs.

With respect to the issue of credibility MABS relied on the Judgement in the case of *IR v Minister for Justice Equality and Law Reform* [2009]. In his judgment Cooke J 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.

MABS submitted that the Appeals Officer failed to adhere to these principles by not attributing appropriate evidential weight to the Affidavits submitted. Instead, a presumptive position was adopted whereby the Appellant could not be regarded as credible because she did not have evidence that the Appeals Officer deemed necessary to support her assertions.

In summary, MABS asserted that the Appeals Officer had been selective in his reasoning and examination of the evidence before him, and had not challenged the authority of the Department's decision despite their being significant flaws in the decision making process. As a consequence, it was asserted that the Appeals Officer had made errors in fact and law in this case.

Date of final Decision: 01/05/2015

Appeal Allowed

Chief Appeals Officer's reasoning and findings:

Before referring to her findings the Chief Appeals Officer summarised the background to the case, the grounds for review submitted by Waterford MABS, and the statutory framework with respect to the question of cohabitation.

The Chief Appeals Officer's findings are set out in full below.

"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 make an evidence-based case that it is highly probable that the appellant was residing with X during the period in question in an intimate and committed relationship. In doing so, the Department must, at a minimum, have followed its own guidelines on investigating cohabitation. Those guidelines list the criteria by which cohabitation can be established and state that no single criterion 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 that she and ... cohabited for a period of 3 months from February 2008 and that she had been cohabiting with Mr ... since October 2012 but was clear in her contention that they have not cohabited for the period from May 2008 to October 2012. The only evidence to the contrary submitted by the Department is circumstantial. It relates to (a) that Ms... failed to inform the Department that she had purchased a house at ... with Mr ...;(b) Ms ... failed to inform the Department of her correct address although there was opportunity for

her to do so by way of review forms signed by Ms... in July 2009, January 2011 and February 2011;(c) that Ms... did not wish to have her daughter ...added to her claim so as to avoid attracting attention to her relationship with Mr ... and the fact that they were residing together.

- **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;**
Ms ... purchased a house at ... with Mr ... in February 2008.
- **Whether there are one or more dependant children;**
1 dependent child
- **Whether one of the adults cares for and supports the children of the other;**
No Evidence. On the contrary, Ms ... states that the reason she moved out of ... in 2008 was due to the poor relationship between Mr... and her son ...
- **The degree to which the adults present themselves to others as a couple;**
No Evidence

In this case the appellant had been in receipt of a payment for many years which was withdrawn following a review and in the circumstances the onus of proof was clearly on the Department to establish that cohabitation existed and not on the appellant to prove to the contrary.

I have set out above the Department's 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 the only factual evidence supporting the contention of cohabitation is the purchase of a house at ...On the basis of this one piece of factual evidence, and without sending the case to a social welfare inspector for investigation, the Deciding Officer came to a conclusion that the appellant was cohabiting with ... from the date of the purchase of the property and disallowed her One Parent Family Payment with effect from 21 February 2008. As a result a significant overpayment amounting to €48,766.80 was assessed against her. The fact that the Deciding Officer made the revised decision under Section 302(a) of the Social Welfare Consolidation Act 2005 means that she concluded, on the basis of one piece of factual evidence, that the appellant had made a false or misleading statement or

representation or had wilfully concealed a material fact in order to continue to qualify for her payment between February 2008 and January 2013.

The appellant rebuts the inference drawn by the Department that this and other inferences made by the Department amounts to cohabitation. The appellant states that while she has an on/off relationship with Mr ... and they lived together for certain periods, they did not live together for the entire period due to the poor relationship between ... and Ms ... son,...In support of her position, Ms ... submitted evidence in the form of correspondence (Bank statements, VHI renewal, hospital appointments, birth registration of ..., car registration etc) sent to her at her sister's address. Ms ... also submitted Affidavits from her sister,..., Mr.... and her son, ... in support of her position.

Having carefully read the file and considered all submissions, I consider that the decision ought to be revised. Having regard to all of the foregoing, I consider the Appeals Officer erred in law in placing an unreasonable burden of proof on the appellant. The Department, in its guidelines on cohabitation, accepts that "where an entitlement may be disallowed, limited or withdrawn, the onus is on the Department to establish that cohabitation exists".

I am of the view that the Department did not meet the requirements set out in its own guidelines to establish that cohabitation existed and that the Appeals Officer did not give sufficient weight to this fact and to the other evidence provided by the appellant, as outlined above, in support of her position.

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

Observations:

This Chief Appeals Officer's decision is significant in that it places the onus of proof on the Department when reviewing entitlement to an existing payment and considering a disallowance of a claim. 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.

This case is significant on many levels, not least because of the devastating effect of the Deciding Officer's decision, made without proper regard to the investigative process that the Department would ordinarily employ in circumstances where there is a question with respect to the legitimacy of a person's claim. In this case, the circumstantial evidence clearly

warranted an investigation; that is, the purchase of a property by the claimant with the father of her child is at least indicative of a close relationship at that time. Whether or not this relationship included both parties cohabiting over a number of years is a matter for an investigation, and such an investigation would ordinarily include interviewing the claimant and the person she may have been cohabiting with. There was no such investigative action in this case. Furthermore, it is the policy of the Department to ensure that the investigative process is kept separate to the role of the Deciding Officer as decision maker. This is to ensure that the Deciding Officer can examine all the evidence and make findings of fact independent of the investigative process. The Deciding Officer in this case acted as investigator and decision maker.

Such a rational and reasoned approach was clearly not adopted in this case. It appears that the Department's case was largely based on circumstantial evidence, suspicion, and speculation. The fact that this was left unchallenged by the Appeals Officer raises serious questions with respect to his objectivity in this case. The Appeals Officer in his findings did not question the validity or substance of the Department's proofs, referring instead to the Appellant's failure to produce so called "hard" evidence.

In summary, it is not unreasonable to conclude that the Appeals Officer in this instance did not demonstrate a cogent and dispassionate analysis of the evidence before him and the law for the purpose of making a finding of fact.

For ***further information*** on One Parent Family Payment:

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

http://www.welfare.ie/en/Pages/278_One-Parent-Family-Payment.aspx

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

Community Law and Mediation, Northside

Northside Civic Centre, Bunratty Road, Coolock, Dublin 17

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

T: 01 847 7804