

**Casebase Number: G0098**

**Title of Payment: State Pension (Contributory)**



Community Law and Mediation Northside

Northside Civic Centre

Bunratty Road

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Dublin 17

**Date of Final Decision: April 2018**

**Title of Payment:** State Pension (Contributory)

**Date of Final Decision:** 3 April 2018

**Keywords:** State Pension (Contributory)- Homemakers' Scheme- Age Discrimination-Gender Discrimination

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

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**Case Summary:**

This case relates to a review of a decision by the Department of Employment Affairs and Social Protection (the **Department**) made in July 2017 as to the weekly payments to which the Appellant is entitled under the State Pension (Contributory) (**SPC**).

In April 2017, the Appellant was referred to CLM by Age Action Ireland. She had been employed between 1967 and 1971, at which time she became pregnant and left the workforce to become a homemaker. She had four children, the last of whom was born in 1986. She returned to the workforce in 2002 and continued working until 2016 when she reached the age of 65 and retired.

The Appellant made social insurance contributions between 1967 and 1971. During this time she worked in the private sector and was never subject to any legal marriage bar. When she returned to the workforce in 2002, she resumed making payments until her retirement.

Initially, the Department decided that the Appellant was entitled to a weekly pension payment of €155. By letter dated 12 July 2017, the Department stated that this was calculated by reference to a total of 974 social insurance contributions over the 50 year period from 1967 to 2017. This gave the Appellant a yearly average of 19 contributions for pensions purposes.

CLM requested a review of the decision querying the total contribution calculation and submitting that the Appellant should benefit from the Homemakers' Scheme (the **Scheme**) as provided by Sections 108 and 109 of the Social Welfare Consolidation Act 2005 (the 2005 Act). The Scheme provides that time spent out of the workforce rearing children under 12 years of age may be disregarded when calculating the yearly average number of contributions for pension purposes.

By letter dated 11 August 2017 the Department noted an error in the calculation of the total number of contributions. Further, the Department determined that the Appellant should be entitled to the benefit of the Homemakers Scheme. However, this benefit was limited to four years as the Scheme did not have statutory effect prior to 6 April 1994. The revised decision had the effect of increasing the Appellant's total contributions to 1003, and yearly average to 22, thereby increasing her rate of payment from €155 to €202 weekly.

Notwithstanding the above, CLM pursued an appeal asserting that the Homemakers Scheme does not present as compatible with Articles 6, 14 and Article 1 Protocol 1 of the European Convention of Human Rights (**ECHR**), and the obligation upon the Minister for Employment Affairs and Social Protection pursuant to Section 3 of the ECHR Act 2003. In view of these legal questions CLM

requested that the Chief Appeals Officer refer the matter to the High Court pursuant to s 306 of the 2005 Act.<sup>1</sup>

By letter dated 14 March 2018, the Chief Appeals Officer notified the Appellant and CLM of her refusal to refer the question of the Scheme's compatibility with the ECHR and the ECHR Act 2003 to the High Court. The Chief Appeals Officer held that as questions relating to compliance with the Constitution and/or the European Convention of Human Rights could not be referred to an appeals officer in the first instance, the Chief Appeals Officer does not have jurisdiction in the matter.

**Key Conclusions:**

State Pension (Contributory) payment increased.

Appellant notified by way of letter dated 11 August 2017 from an officer of the Department:

“I refer to the notification of award of your State Pension (Contributory) that issued to you on 12/07/2017. Following updating of Homemakers' credits to your social insurance record, it has been decided that you are entitled to your pension at a higher rate. A revised award notification is attached.”

Further to the appeal regarding referral of the question of compatibility of Sections 108 and 109 of the 2005 Act with the European Convention on Human Rights to the High Court, the Chief Appeals Officer held:

“I consider that the question relating to compliance of any provision of the Social Welfare Consolidation Act 2005 with the Constitution and/or the European Convention on Human Rights was not, and could not be, referred to an appeals officer and in those circumstances I have no jurisdiction to make a reference to the High Court pursuant to Section 306 of the 2005 Act.”

By way of decision dated 3<sup>rd</sup> April 2018 an Appeals Officer disallowed the Appellant's appeal. The Appeals Officer held that the correct rate of payment had been awarded given the level of contributions made by the Appellant and the relevant statutory provisions as set out in the 2005 Act.

**Summary of Benefit Received:**

SPC is a social insurance payment made when you reach age 66. It is based on your social insurance (PRSI) record. The pension is not means-tested. Your personal rate is not affected by other income you may have such as an occupational pension.

The rules governing the assessment of SPC are set out in Chapter 15 of the Social Welfare Consolidation Act 2005 (as amended). To qualify for SPC a person needs to:

1. Have paid social insurance contributions before a certain age
2. Have a certain number of social insurance contributions paid and
3. Have a certain average number of contributions (paid and/or credited) over the date you first entered insurable employment to the date you reach aged 66.

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<sup>1</sup> Earlier in proceedings CLM asserted that the Homemakers Scheme breached the Constitutional equality guarantee. However, CLM did not advance this argument when requesting that the Chief Appeals Officer refer the matter to the High Court under s 306 of the Act. The reason being that the constitutional validity of an enactment cannot be impugned by way of case stated: see *People (DPP) v. Dougan* [1996] 1 IR 544.

At present, to qualify for the full pension a claimant needs a yearly average of 48 contributions or more. If a person has a lesser average the pension is awarded on a pro rata basis.

The Homemakers' Scheme was introduced by s 24 of the Social Welfare Act 1996, with effect from 6 April 1994. The Scheme provides that a person who leaves the workforce in order to provide full-time care for a child under age 12 or an ill or disabled person age 12 or over will not have those years included when determining the yearly average number of contributions for pensions purposes. The maximum number of years that can be disregarded under this scheme is 20. It applies equally to women and men.

Sections 108 and 109 of the 2005 Act provide:

“108.—(1) Subject to this Act, a person shall be entitled to State pension (contributory) where he or she has attained pensionable age and satisfies the contribution conditions in section 109.

(2) In this Chapter—

“homemaker” means a person who—

(a) is resident in the State, or is a person referred to in paragraph (a), (b) or (c) of section 219(2) and is under pensionable age,

(b) is not engaged in remunerative employment, other than employment specified in paragraph 5 of Part 2 of Schedule 1,

(c) either—

(i) resides with and cares for a child under 12 years of age on a full-time basis, or

(ii) resides with and provides full-time care and attention to a person who is so incapacitated as to require full-time care and attention within the meaning of section 179(4), or

(iii) subject to the conditions and in the circumstances that may be prescribed, does not reside with but provides full-time care and attention to a person who is so incapacitated as to require full-time care and attention within the meaning of section 179(4),

and

(d) other than in the case of the class or classes of person that may be prescribed, makes application to be regarded as a homemaker in the prescribed manner and within the prescribed time;

(2A) The question whether a person satisfies the criteria set out in the definition of “homemaker” in section (2) is a question that may be decided by a deciding officer.

(3) In the case of a claimant who was a homemaker for the duration of any complete contribution year, beginning on or after 6 April 1994, in which the claimant does not have any credited contributions or voluntary contributions, that contribution year shall be disregarded for the purposes of determining the yearly average of that claimant subject to the total number of contribution years so disregarded not exceeding 20.

109.—(1) The contribution conditions for State pension (contributory) are—

(a) subject to subsection (3), that the claimant has entered into insurance before attaining the age of 56 years,

(b) that the claimant—

(i) has qualifying contributions in respect of at least 520 contribution weeks, or

(ii) in the case of a person who on or before 6 April 1997, is a voluntary contributor paying contributions under Chapter 4 of Part 2, has an aggregate of qualifying contributions and voluntary contributions in respect of 520 contribution weeks, of which not less than 156 are qualifying contributions, or

(iii) in any other case, has an aggregate of qualifying contributions and voluntary contributions in respect of 520 contribution weeks of which not less than 260 are qualifying contributions, since his or her entry into insurance,

(c) that the claimant has a yearly average or, in the case of a person who attains pensionable age on or after 6 April 1992, an alternative yearly average of not less than 48.”

The referral power of the Chief Appeals Officer under Section 306 of the 2005 Act provides that:

“306.—The Chief Appeals Officer may, where he or she considers it appropriate, refer any question which has been referred to an appeals officer, other than a question to which section 320 applies, for the decision of the High Court.”

**Arguments made on behalf of the Appellant:**

- CLM argued that while the provisions of Sections 108 and 109 of the Act are phrased in gender neutral terms, in reality the sections indirectly discriminate against women. This is due to the fact that the averaging rules have their primary impact on women. The Scheme attempts to balance the scales in this regard. However, as the Scheme is only backdated to April 1994, it only operates in favour of younger women. Thus, the Scheme directly discriminates against the claimant on the basis of age as younger women are treated more favourably than older women. CLM argued that there does not appear to be any objective justification for the unequal treatment beyond the fact that further backdating the Scheme would be more expensive. Accordingly in the absence of any objective and reasonable justification for the discriminatory effect of sections 108 and 109 based on age it was contended that the sections are incompatible with Article 14 in conjunction with Article 1 of Protocol 1 of the ECHR.

It was also contended by CLM that on its face the Scheme is gender neutral. However, the scheme has a disproportionate adverse affect on women due to the fact that it does not apply to any period prior to 6 April 1994. On this point it was submitted by CLM that again in the absence of any objective and reasonable justification for the discriminatory effects of sections 108 and 109 based on gender the sections present as incompatible with Article 14 taken in conjunction with Article 1 of Protocol 1 of the ECHR.

- CLM submitted that the constitutional validity of an enactment cannot be impugned by way of case stated re *People (DPP) v Dougan* [1996] 1 IR 544. It was further submitted that there can however be no comparable rule in relation to the compatibility with the ECHR because a declaration of incompatibility does not affect the validity of the enactment, as per

Section 5 of the 2003 Act. Accordingly the question to be referred to the CAO concerned the compatibility of Sections 108 and 109 with the ECHR.

- CLM submitted that Article 1 of Protocol 1 of the ECHR provides for the protection of private property/ possessions. The right to a pension has been held by the European Court of Human Rights to be a “possession” for the purposes of Article 1 of Protocol 1 of the ECHR.
- CLM further submitted that as Article 14 which prohibits discrimination is not a free standing right it must be pleaded in conjunction with another right in this case with Article 1 of Protocol 1. It was also submitted that the non-discrimination right as set out under Article 14 is violated when States treat differently persons in similar situations without providing an objective and reasonable justification.
- CLM submitted that Sections 108 and 109 directly discriminate against the Appellant in relation to her right to private property in her SPC in that the Scheme treats her less favourably than a younger person. It was further contended that the decision of successive governments not to backdate the Scheme beyond 6 April 1994 means that persons who left the workforce before that date are treated less favourably than those who did so after that date. In regard to the objective justification in respect of the cut-off date as provided for in the Scheme as put forward by the Department CLM referred to a review carried out by the Department in 2000 which states,

“That there is no fundamental reason in principle, why the Homemaker provisions should only apply from 1994”.

- On the basis of the above submissions CLM argued that the Chief Appeals Officer should refer the following question regarding the compatibility of Sections 108 and 109 of the Act with the European Convention on Human Rights to the High Court, pursuant to her powers under Section 306 of the Act

“Whether sections 108 and 109 of the Social Welfare Consolidation Act 2005 are compatible with the European Convention on Human Rights, and in particular, Article 1 of Protocol 1 and Article 14 thereof”.

#### **Arguments on behalf of the Department of Employment Affairs and Social Protection:**

- By way of letter dated 12/7/2017 it was stated by the Department that having examined the Appellant’s entitlement to SPC it was decided that she was entitled to €155.20 based on her total number of contributions of 974 from 1967 to 2017 resulting in a yearly average of 19.
- Further to CLM’s request for a review the Department reassessed the Appellant’s entitlement. By way of letter dated 11/8/2017 it was determined that the Appellant had a total of 1003 reckonable contributions, and a yearly average of 22 contributions following the application of the Homemakers Scheme to a four year period. This had the effect of increasing the Appellant’s entitlement to €202.80.

**Date of Oral Hearing: N/A - Summary decision.**

**Date of Final Decision: 14<sup>th</sup> March 2018 & 3<sup>rd</sup> April 2018**

#### **Appeal Officer’s (AO) reasoning and conclusions:**

The Appeals Officer determined on 3<sup>rd</sup> April 2018 that the appeal was disallowed on the basis that the correct rate of payment of SPC was applied.

The Appeals Officer determined that the Appellant's rate of pension at €202.80 per week is the weekly rate of payment prescribed in the social welfare legislation for a person with a weekly average of 20 to 29 contributions.

By way of decision dated 14<sup>th</sup> March 2018 the Chief Appeals Officer decided not to refer the question of the compatibility of Sections 108 and 109 of the Act with the ECHR to the High Court and she declined to exercise her powers under Section 306 of the Act. The Chief Appeals Officer held that:

- The role of the Chief Appeals Officer is to determine appeals against decisions of Deciding Officers;
- The Deciding Officer makes a decision under the powers granted by Section 300 of the Act; and
- As Section 300 does not provide any basis whereby the Deciding Officer can consider the issue of compliance of the Act with the European Convention on Human Rights, it follows that such a question cannot be considered by the Chief Appeals Officer.

The Chief Appeals Officer concluded that:

“I consider that the question relating to compliance of any provision of the Social Welfare Consolidation Act 2005 with the Constitution and/or the European Convention on Human Rights was not, and could not be, referred to an appeals officer and in those circumstances I have no jurisdiction to make a reference to the High Court pursuant to Section 306 of the 2005 Act.”

**For further information:**

[http://www.citizensinformation.ie/en/social\\_welfare/social\\_welfare\\_payments/older\\_and\\_retired\\_people/state\\_pension\\_contributory.html](http://www.citizensinformation.ie/en/social_welfare/social_welfare_payments/older_and_retired_people/state_pension_contributory.html)

<https://www.welfare.ie/en/Pages/Qualifying-for-State-Pension-Contributory.aspx>

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