

Casebase Number: G0073

Title of Payment: Family Income Supplement (FIS)



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Bunratty Road
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Dublin 17

Date of Final Decision: 29th June 2015

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Keywords: Family Income Supplement – definition of family – appeal – section 318

Organisation who represented the Claimant: Dublin City Centre Citizens Information Service

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

Case Summary:

This case concerns a father of two children who applied for Family Income Supplement (FIS) on 5th August 2013. The Appellant does not live with the other parent, nor does he reside with his children. He maintains his children by way of monthly maintenance payments of €450.

A Deciding Officer refused the Appellant's claim on 20th August 2013 for the reason that he was not maintaining his former spouse/partner, and therefore could not be regarded as falling within the statutory definition of a 'family' for FIS purposes.

The Appellant appealed this decision. On 21st July 2014 an Appeals Officer disallowed his appeal by way of a summary decision; that is, without an oral hearing. The Appeals Officer rejected the Appeal on the same grounds that the Deciding Officer had disallowed the claim in the first instance.

On 29th May 2015 Dublin City Centre Citizens Information Service (CIS), on behalf of the Appellant, requested a review of the Appeals Officer's decision pursuant to s. 318 of the Social Welfare Consolidation Act 2005 (as amended). The CIS asserted that the Appeals Officer had erred in his interpretation of the primary legislation, and had not applied the relevant regulatory provisions in this case.

On 29th June 2015, the Chief Appeals Officer revised the decision of the Appeals Officer and allowed the appeal.

Reference should be made to Case No: G0064 on casebase. That case concerns the same question of statutory interpretation and the Appeal was 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 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 230(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 his or her spouse, that spouse, and
(c) a child or children;

Key Arguments:

- The Respondent (the Department of Social Protection) asserted that the Appellant’s circumstances did not fall within the statutory meaning of “family” as provided by s. 227 of the Social Welfare Consolidation Act 2005. The Respondent’s contention was that s. 227 provides that in the case of parents who are not living together, FIS can only be awarded to the parent with whom the child lives the majority of the time or, to the “other parent” if that parent is “wholly or mainly” maintaining their former spouse and children.
- The Appellant contended that the Respondent’s interpretation of the statute was incorrect, that a person was not precluded from being regarded as a “family” for FIS purposes in circumstances where they were not maintaining the other parent, that the matter to be determined was whether or not the Appellant’s children could be regarded as “qualified” children. If the children are qualified children within the meaning of the statute, it was asserted that the Appellant should be regarded as meeting the conditions for the award of FIS.

- The Appellant asserted that his circumstances were consistent with a finding that his children were qualified children, and his children could be regarded as normally residing with him for the purpose of qualifying for FIS. It was the Appellant's contention the matter of the children'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 asserted that in previous cases concerning precisely the same question of statutory interpretation the Appeals had been allowed. Two of those cases were referred to in the Social Welfare Appeals Office Annual report 2011 and therefore the Appellant's case should be determined in a manner consistent with that of previous Appeals Officers.

Background:

The case concerns a father of two children who applied for Family Income Supplement [FIS] on 5th August 2013. The Appellant does not live with the other parent nor does he reside with his children. He lives in close proximity to his children and is involved in their life on a daily basis. The Appellant maintains his children by way of monthly maintenance payment of €450.

A Deciding Officer refused the Appellant's claim on 20th August 2013 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 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.

On 18th February 2014, Dublin City Centre Citizens Information Service (CIS), submitted notice of appeal on behalf of the Appellant. The CIS set out the Appellant's circumstances, submitting evidence to the fact that the Appellant maintains his children in the amount of €450 per month, and is involved in their care on a daily basis. The CIS also referred to the

relevant statutory provisions; in particular, reference was made to Article 13(6) of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142 of 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 of assistance shall be regarded as residing with the other parent if that other parent is contributing substantially to the child's maintenance.

Decision of the Appeals Officer: 21st July 2014

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:

Having carefully examined the evidence. I have concluded that the appellant does not meet the qualifying conditions under the Family Income Supplement (FIS) scheme. These conditions are specified in social welfare legislation and there is no discretion provided for in the said legislation. Section 227 of the Social Welfare Consolidation Act 2005 provides for the definition of a 'family' ...where that person is living with or wholly or mainly maintaining his or her spouse and a child or children. Though I am satisfied that the appellant is substantially maintaining his children, there is no evidence demonstrate that he is supporting his 'family', as legislatively defined.

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

On 29th May 2015 the CIS, on behalf of the Appellant, requested that the Chief Appeals Officer review the decision of the Appeals Officer pursuant to s. 318 of the Social Welfare Consolidation Act 2005.

The CIS submitted that the Appeals Officer had erred in law and that the relevant statutory provisions allowed for the award of FIS in this case.

The CIS submitted that s.227 of the Social Welfare Consolidation Act 2005, and Article 13 (6) of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 allowed for the award of Family Income Supplement in circumstances where a claimant is living apart from the other parent, and where the children do not reside with the claimant but are substantially maintained by the claimant.

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 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” children. Therefore, the matter to be determined in this case was whether or not the Appellant’s children are “qualified” children.

s.227 of the Social Welfare Consolidation Act 2005 Act defines child as follows:

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

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 230(2), be decided in accordance with regulations made under that subsection.”

The CIS submitted that in view of the above provisions, the question of the children’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.

The CIS submitted that as it was not in dispute that the Appellant is substantially maintaining his children, the children may be regarded as residing with the Appellant for FIS purposes, providing the other parent is not in receipt of a “benefit or assistance” within the meaning of Article 13 of the regulations, or claiming FIS in respect of the same children.¹

It was further submitted that this matter of statutory interpretation should be regarded as settled in view of previous decisions by Appeals Officers in respect of cases taken by MABS, cases which concerned precisely the same question of statutory interpretation. In view of these decisions it was asserted that the Appeals Officer in this case relied on an

¹ Article 13 of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 provides that *benefit or assistance* does not include the One Parent Family Payment, Supplementary Welfare Allowance or Guardian’s payment.

interpretation of the statute that conflicted in its entirety with that of other Appeals Officers without providing a reasoned basis for so doing.

Finally, the CIS noted that s. 9 of the Social Welfare and Pensions Act 2014, provides an amendment to s. 227 of the Social Welfare Consolidation Act 2005. This amendment, once commenced, will preclude a claimant in the Appellant's circumstances from receiving FIS. However, as this provision has not been commenced into law, the Appeals Officer's decision must be found to be incompatible with the law as it stands.

The decision of the Chief Appeals Officer: 29th June 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 of the CIS on the Appellant's behalf.

The findings of the Chief Appeals Officer are set out in below 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. In this regard I conclude that for the purposes of FIS, Section 227 of the Act places no obligations on Mr. X to be wholly or mainly maintaining the other parent of his children where both parents live apart.

I note that the Appeals Officer did not consider the application of Article 13(6) of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142 of 2007) to Mr X's family situation. In this respect the Appeals Officer erred in law.

For the purpose of Article 13 (6) I note, and this is not disputed, that Mr. X is contributing substantially to the maintenance of his children who reside with their mother. Therefore, subject to the other conditions set of in Article 13 (6) being met, i.e. that the other parent is not claiming or in receipt of benefit or assistance, Mr. X's children should be regarded as residing with him for the purposes of FIS.

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

Observations:

This case concerned a question of statutory interpretation only. In this case, and others, an interpretation of the statute was advanced on behalf of Appellants that was consistent with

the Department's position 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 former spouse/partner in order to be regarded as a family for FIS purposes.

At the time of publication of this case (September 2015) MABS advised that they have successfully challenged the Department's interpretation of the statute in 13 cases on Appeal, cases which concerned precisely the same question of statutory interpretation as applied in this case. Please note, one of those cases is published on casebase (Case No: G0064). MABS have further advised that 3 of the 13 Appellants have submitted complaints to the Office of the Ombudsman, asserting that the Department's actions in rejecting their FIS claims in the first instance are consistent with a finding of maladministration. We understand that these investigations are ongoing.

While there is no system of precedent in the case of Social Welfare Appeals, in matters concerning statutory interpretation there must be legal certainty where possible in order that the public know the rules applicable to a particular scheme. Accordingly, in circumstances where legally binding decisions have been made by Appeals Officers, decisions which are contrary to the statutory interpretation advanced by the Department, it seems only rational that the Department review their position.

The fact that in this case the Chief Appeals Officer has made a finding on a point of law is significant, as the authority of the Chief Appeals Officer in this matter arguably should not be subject to a contrary interpretation by the Department of Social Protection. If the Department insist on maintaining their position, despite the decision of the Chief Appeals Officer's, the matter should in our opinion be referred to the High Court by the Minister for Social Protection on a point of law.

At the time of writing (September 2015) the Department have not amended the information available to the public, despite the number of cases that have been successful on appeal and the decision of the Chief Appeals Officer in this case. The Department's website refers:

A separated parent can apply for FIS once he or she meets the qualifying conditions and

- *Is living with the children or*
- *Is wholly maintaining the ex-spouse, ex-civil partner or ex-cohabitant with whom the children are living*

Wholly maintaining means that maintenance paid by you, the FIS applicant, must be the main income of your ex-spouse, ex-civil partner or ex-cohabitant. Your former spouse or partner cannot have more than €100 a week income in their own right and cannot be married, in a civil partnership or cohabiting.

We further note that as of September 2015 s. 9 of the Social Welfare and Pensions Act 2014, had not been commenced. In these circumstances, the position of the Chief Appeals Officer in this case must in our opinion be regarded as the correct interpretation of the statute.

For *more information*, contact us at:

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