Casebase Number: G0132

Thematic Note of SWAO Case Studies: Overpayment of Social Welfare – General

Community Law and Mediation Northside

Northside Civic Centre

Bunratty Road

Coolock

Dublin 17

Period of Analysis: 2009-2021

Theme: Overpayment of social welfare – General Issues

Period of Analysis: SWAO Annual Reports 2009-2021

Keywords: Overpayments; Fraud; Appeals; Oral Hearing; Burden of Proof; Cohabitation; Reviews

Casebase No. Case G0132

Summary of the relevant law:

Overpayments of social welfare occur where a person gets a payment of an allowance, pension or any other benefit from the Department of Social Protection (the "Department") that they are not entitled to. The Social Welfare (Consolidation) Act 2005 sets out the circumstances where an overpayment may arise and the liability of a person to repay an overpayment.

An overpayment can arise where a person has been granted a payment but subsequently a revised decision is made by the Department under Section 302 or 325 of the Social Welfare (Consolidation) Act 2005 (the "**Act**") to reduce a person's entitlement to a social welfare payment retrospectively. In such circumstances, the Department will issue a letter informing the person of the revised decision.

A key question with overpayments is whether the Department allege fraud on the part of the recipient. Fraud occurs where the Department is told or led to believe something that the person receiving the payment knew was false or misleading or a key piece of information is withheld from the Department.

A revised decision that there has been an overpayment based on fraud is made under Section 302(a)/325(a)) of the Act. If the overpayment arose as a result of fraud, the person may be criminally prosecuted even if the overpayment is repaid. See G0133 for further details.

Where no fraud is alleged by the Department, they have some discretion to take into account the facts and circumstances that gave rise to the overpayment and this will be relevant in an appeal against such an overpayment. It is also possible to appeal the date when the overpayment is deemed to have arisen, which may result in the amount of the overpayment being reduced. A revised decision with no allegation of fraud is made under section 302(b).

It is therefore very important to know if fraud is alleged (ie, the decision was made based on section 302(a)) or no fraud is alleged (ie the decision is based on section 302(b).)

The other circumstances where an overpayment may arise are covered by sections 336, 336(a) and 336(b) of the Social Welfare Consolidation Act 2005 (as amended).

Examples of this category of overpayment are:

- double cashing, for example a person reports that she or he did not receive a payment due, a duplicate is issued and both payments are cashed by the person;
- impersonation, for example a person makes a claim assuming the identity of another person;
- cashing after death, for example a relative continues to cash a pension or allowance after the death of the person entitled to it.

Finally, the rules relating to the how the Department can recover an overpayment of social welfare are in Statutory Instrument No. 349/2005 Social Welfare (Recovery of Overpayments) Regulations, the

Department's Operational Guidelines on Management of Customer Overpayments and Recovery of Customer Debt. and more information is available through Citizen's Information.

Observations on appeal outcomes in SWAO Case Studies:

An appeal against an overpayment can be made to the Social Welfare Appeals Office (SWAO). A person has 21 days to appeal and details on appeals are available on the SWAO website.

To assist with appeals, we have drawn together the case studies relating to overpayments in the SWAO Annual Reports below and have made some observations based on our review of the case studies in Annual Reports dating from 2009 to 2021.

Below we set out observations under the following headings –
- Initial Observations
- Error by the Department

We have separate Thematic Reports on Casebase relating to the following: -
- Fraud (Section 302(a)) (G0133)
- Cohabitation (G0134)
- Recovery of overpayment from the Estate of the Deceased (G0135)

Initial Observations -

- Alleged ignorance of the requirements or criteria of a social welfare payment is generally disregarded, in particular where a claimant was explicitly made aware of the requirements. (See Case Study **J5 2018/54 State Pension Non-Contributory Oral Hearing** below)

- The SWAO will have access to information from electoral registers, vehicle registrations, tenancies, births register and Social Welfare Inspectors in assessing the facts pertaining to the case.

- There is a strict obligation to inform the Department of changes to your circumstances where in receipt of social welfare. This includes changes to your financial circumstances, living arrangements, absence of the State, periods where a child or caree is not residing in the home etc.

- If a change in circumstances has been notified to the Department, or the Department has made a clear error, an Appeals Officer may reduce or cancel an overpayment. This discretion arises under Article 246(1) of Part 9 of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 - S.I. 142 of 2007 (as amended) which provides that the amount of an overpayment to be repaid may be reduced or cancelled where the overpayment arose because of: (i) a failure by the Department to act within a reasonable period on information which was provided by or on behalf of the person concerned; or (ii) an error by the Department.

- Other than in cases of fraud, an Appeals Officer can change the effective date when an overpayment is deemed to have arisen, having regard to all the circumstances of the case. This may result in no overpayment arising.

- Decisions involving the assessment of means are very fact-dependent and will be governed by all circumstances relating to the individual case.

The Section 318 reviews of decisions of Appeal Officers by the Chief Appeals Officer are of particular note and show the following:

- The obligation to notify the Department of a change of circumstances may be discharged if the relevant facts are disclosed in an application for a separate benefit.
- A notification of relevant information to another Government body (e.g. Tusla) does not equate to the disclosure of that information to the Department.
- Where an entitlement is disallowed, limited or withdrawn on the basis of cohabitation, the onus is on the Department to establish that cohabitation (i.e. in an intimate and committed relationship) exists and not the appellant to show they are not cohabiting with the nominated person. In putting together its case, the Department must follow its own Guidelines on Investigating Cohabitation and consider a range of evidence of cohabitation to make such a finding. See **Cohabitation** below.
- In a revised decision, a Deciding Officer much set out the relevant provision in the legislation under which the decision is made and the amount of the overpayment amounts in order to respect an appellant's right to natural justice and fair procedures.
- A lack of a review by the Department may be taken into account in circumstances where they failed to act on information (e.g. a clear instruction of a Social Welfare Inspector's report) but not generally in other circumstances.

Error by the Department

Whether an error by the Department will result of the overpayment being reduced or set aside will depend on the circumstances of the case. See Case Study **I2 2017/40 Jobseeker's Allowance Summary Decision** for an example of where the level of engagement with Department by the Appellants and circumstances surrounding the error were sufficient to reduce overpayment to nil. It states:-

> "The couple had numerous interactions with the Intreo Centre over the course of their claims and always went there together when issues or queries arose. Their ongoing engagement with various activation measures was also mentioned. The appellant also got statements of payments received on four occasions for submission to the university where she studied in the UK. The letter of appeal also states that the couple had never claimed separately before, and they were not aware of the level of payment each would receive. Given their ongoing engagement with the Intreo Centre, they assumed they were receiving their correct entitlement."

Also level of communication over the course of the relevant period with Department in **I3 2017/46 Supplementary Welfare Allowance Summary Decision** was such that error of Department and overpayment effectively reduced to nil.

In Case Study **J1 2018/35 Working Family Payment Oral Hearing**, the Appeals Officer concluded that:-

> "as there had been no change in the appellant's circumstances as set out in the governing legislation, the appellant continued to be entitled to Working Family Payment for 52 weeks from the commencement of that claim. The Appeals Officer considered the retrospective examination of the hours worked from January 2015 to June 2015 as erroneous and unfair. With regard to the continuing entitlement from June 2015 to June 2016, the Appeals Officer concluded that the same principle applied. In the absence of any evidence to the contrary on the file, the Appeals Officer had to assume that at the time of renewal of Working Family Payment in June 2015, the appellant was found to be in compliance with the conditions for award, that this was likely to continue for 3 months and was payable for 52 weeks to June 2016."

In Case Study **J3 2018/49 Supplementary Welfare Allowance Summary Decision**, the Appellant failed to tell the Department that she had taken up a training course while on SWA. It was on the recommendation

of her GP as part of medical and psychological treatment and increased her employment possibilities. The Appeals Officer noted that "under Section 190 (3) of the 2005 Act the Department has discretion to grant Supplementary Welfare Allowance to persons attending a course of study "in a case where there are exceptional circumstances." This concession did not appear to have been considered by the Department in this instance. The Appeals Officer considered that the evidence submitted by the appellant in support of her appeal could be regarded as constituting "exceptional circumstances" and the appeal was allowed."

Relevant Case Studies of the SWAO Annual Reports 2009-2021

A.	**2009**	
B.	**2010**	
1.	2010/15 Disability Allowance	Question at issue: Over payment
C.	**2011**	
D.	**2012**	
1.	2012/15 One Parent Family Payment	Question at issue: Overpayment
2.	2012/22 Survivor's (Contributory) Pension	Question at issue: Overpayment
E.	**2013**	
F.	**2014**	
G.	**2015**	
1.	2015/15 Carer's benefit & Maternity Benefit	Question at issue: Concurrent payment of benefits
2.	2015/21 State Pension (Non-Contributory)	Question at issue: means and overpayment assessed following review
3.	2015/22 & 2015/23 Unspecified payment in respect of two appellants	Question at issue: Cohabitation
4.	2015/24 State Pension Non-contributory	Question at issue: Claim against the deceased pensioner's estate
5.	2015/25 State Pension (Non-contributory)	Question at issue: Claim against the deceased pensioner's estate
H	**2016**	
1.	2016/17 Disability Allowance	Question at issue: Eligibility (medical)
2.	2016/23 Job Seeker's Allowance	Question at issue: Eligibility (retrospective assessment of needs)
3.	2016/28 State Pension (Non-contributory)	Question at issue: Eligibility (revised decision as to means)
4.	2016/318/34 Carer's allowance	Question at issue: Overpayment assessed
5.	2016/318/36 One parent family payment	Question at issue: Means and cohabitation
I	**2017**	
1	2017/10 One-Parent Family Payment Oral hearing	Question at issue: Overpayment whilst child in care

2	2017/40 Jobseeker's Allowance Summary Decision	Question at issue: Overpayment (department error)
3.	2017/46 Supplementary Welfare Allowance Summary Decision	Question at issue: Eligibility (rent supplement and overpayment)
4.	2017/49 State Pension (Non-Contributory) Oral hearing	Question at issue: Claim against the State
5.	2017/51 State Pension (Contributory) Summary Decision	Question at issue: Overpayment (qualified adult)
6.	2017/318/62 Jobseeker's Allowance	Question at issue: Whether an Appeals Officer had erred when partially allowing an appeal in relation to an overpayment
7.	2017/318/65 Disability Allowance (DA) and One Parent Family (OPF)	Question at issue: whether the appellants were cohabiting
8.	2017/318/68 State Pension (Non-Contributory)	Question at issue: overpayment assessed (means)
9.	2017/318/69 State Pension (Non-Contributory)	Question at issue: overpayment assessed (means)
J	**2018**	
1.	2018/35 Working Family Payment Oral Hearing	Question at issue: Eligibility (hours worked)
2.	2018/39 Jobseeker's Allowance Summary Decision	Question at issue: eligibility (whether the person was unemployed)
3.	2018/49 Supplementary Welfare Allowance Summary Decision	Question at issue: Eligibility and overpayment
4.	2018/53 State Pension (Non-Contributory) Summary Decision	Question at issue: Eligibility (means and overpayment)
5.	2018/54 State Pension Non-Contributory Oral Hearing	Question at issue: Eligibility (means and overpayment)
6.	2018/318/66 Carer's Allowance	Question at issue: Eligibility (care provided)
7.	2018/318/67 State Pension (Non-Contributory)	Question at issue: Absence from state
K.	**2019**	
1.	2019/03 Child Benefit Summary Decision	Question at issue: Qualified child- ordinarily resident
2.	2019/44 Jobseeker's Allowance Summary Decision	Question at issue: Eligibility (full-time education)
3.	2019/50 Farm Assist Summary Decision	Question at issue: Overpayment
4.	2019/57 Widower's (Non-Contributory) Pension Oral Hearing	Question at issue: Entitlement-co-habiting

L.	**2020**	
1.	2020/01 Child Benefit – Qualified Person	Question at issue Qualified person
2	2020/49 State Pension (Contributory)	
M.	**2021**	
1.	2021/01 Child Benefit – Qualified Child	Question at issue Qualified child

B1 2010/15 Disability Allowance

Question at issue: whether it was correct to disallow the appellant's claim in respect of a period between 2007 and 2008, on grounds that his means from employment exceeded the statutory limit – with the assessment of an overpayment of some €19,000

Background: The appellant, a 25 year old single man who resides with his mother, applied for Disability Allowance in 2003 with a certified illness of benign essential tremor and was awarded payment. Subsequently, it came to the attention of the Department of Social Protection that he had been employed with effect from a date in 2007. Having examined his earnings in the period at issue, he was deemed not to have been entitled to payment and an overpayment was assessed.

Oral hearing: The appellant maintained that he was unaware of the earnings implications in relation to Disability Allowance. The Appeals Officer drew his attention to his initial interview by the Social Welfare Inspector, which had been conducted to determine whether he had any means in the context of his. He pointed out to the appellant that in his report of that interview, the Inspector stated that he had advised him of his obligations to notify the Department if and when he commenced employment. In reply, the appellant stated that he had no recollection of that interview or the Inspector's advice.

The Appeals Officer reviewed the documentary evidence on file, including a number of letters issued to the appellant by the Inspector which specifically referred to details of his income and advised of the obligation to notify the Department in the event of taking up employment. The appellant stated he had no recollection of receiving any such letter. He said that he had been away at college and his mother had managed all his affairs; in that capacity, she would have dealt with any correspondence received. He added that as he was in receipt of a Post Leaving Cert Maintenance Grant in addition to his Disability Allowance, he was not sure of the conditions for receipt of the payments. He attributed his failure to notify the Department to this lack of knowledge.

The Appeals Officer advised the appellant that evidence on file indicated that he had been working in a restaurant in 2004 and that he had sent the Department a Form P45 in respect of that employment, with an accompanying letter. The Appeals Officer suggested that this indicated that he was aware of the conditions pertaining to receipt of the payment. In response, the appellant reiterated his earlier written contentions that he never knew the details of the Allowance and that it was always his belief that it was his entitlement. He went on to say that he had been under 18 years of age when he applied for Disability Allowance and that his mother had managed completion of the claim form and related matters. He added that she generally cashed the payment at the post office on his behalf as she was his agent. He submitted, therefore, that he should not be liable for any overpayment.

Conclusion of the Appeals Officer: The Appeals Officer noted the contents of the Social Welfare Inspector's report, conducted when the appellant's means were assessed initially in 2003. He noted also that the report of the interview indicated that the appellant's mother was present throughout. He referred to the correspondence issued to the appellant on three occasions, all of which referred

specifically to the requirement to notify any change in his circumstances, including the commencement of employment.

In relation to the appellant's contention of ignorance of the conditions attaching to receipt of Disability Allowance, due in part to his medical condition, the Appeals Officer was not satisfied that this was the case. On the contrary, he noted that the medical report completed by the appellant's family doctor indicated that, despite his medical condition, he was assessed as 'normal' across a range of abilities, with the exception of manual dexterity and balance.

This, in the view of the Appeals Officer, was supported by the fact that the appellant did not require the appointment of a 'type 2 agent' where a person is unable to manage their own financial affairs and requires a person to act on their behalf. He had appointed his mother as a 'type 1 agent'; someone who could collect his payment from the local post office.The Appeals Officer viewed the appellant's capacity to study and maintain himself while attending college and living away from home to be indicative of a person who can manage independently, a fact confirmed by his full-time employment. He referred to the appellant's claim form which indicated that he was over 18 years at the time and not 17 years, as he had stated. He noted the extensive communication from the Social Welfare Inspector to the appellant in late 2003 and early 2004 and was satisfied that the appellant was made aware of his obligations to notify the Department of any change in his circumstances or means. Based on all of these circumstances, he upheld the Deciding Officer's decision in the case. He stressed, however, that in pursuing the recovery of the overpayment, due regard must be taken of the fact that the appellant is the sole earner in the household while his mother is the recipient of a social welfare payment.

Outcome: Appeal disallowed

D1 2012/15 One Parent Family Payment

Decision under appeal: entitlement in period specified with overpayment assessed - reason(s) stated:-

As you aware, this allowance is not payable to a person who is cohabiting, that is, living with another person as husband and wife. I am satisfied that you were cohabiting with [person named] from at least [specified date] and I have decided that you were not entitled to One Parent Family Payment from this date. As you continued to cash your One Parent Family Payment up to and including [specified date], you have incurred an overpayment amounting to €125,000. This decision has been made in accordance with Section 302 (b) of the Social Welfare (Consolidation) Act, 2005.

Overpayment: €125,000, reduced subsequently to €98,000.

Background: Following a review of her One Parent Family claim, awarded initially as Deserted Wife's Benefit, the question of the appellant's continued entitlement was referred for investigation. In connection with the investigation, she was interviewed by a Social Welfare Inspector who took the view ultimately that she had been cohabiting with a person named. The Deciding Officer disallowed her claim, in line with the decision outlined above. The Deciding Officer also wrote to the appellant and advised as to the amount of the overpayment assessed, inviting her to comment on methods of repayment. In her response, the appellant asserted that the circumstances of her case were not examined fully and that her entitlements should be off-set against the overpayment. She made an appeal against the decision, stating that the person named was merely a tenant who contributed to the household bills. The person in question sought to confirm this by providing a statement to the effect that he was paying maintenance from his Jobseeker's Allowance.

The amount of the overpayment was adjusted subsequently to take account of periods for which the

person named would have been entitled to claim the appellant as an adult dependant on his Jobseeker's Allowance payment.

At oral hearing: the appellant was accompanied by a friend. The Social Welfare Inspector attended at the request of the Appeals Officer, as did the Deciding Officer.

The Deciding Officer outlined the decision under appeal and stated that she had relied upon the Social Welfare Inspector's report. In relation to the person named in the decision as cohabitant the Inspector had noted the following prior to interviewing the appellant:

- he was listed on the electoral register at the same address as the appellant
- he had a car and motorbike and both were registered at the appellant's address
- he was a registered as a tenant by the local authority at the appellant's address

The Inspector read from his report, and stated that he had interviewed the appellant on a date [specified]. He said that she had accepted that the person named in the decision had lived at her address since his own marriage had broken up. She acknowledged that he contributed to the household and she said that he was the father of her child. The Inspector stated that the appellant had not claimed an increase in her payment in respect of the child and that she had offered no explanation for this. He opined that it was likely that the couple had been cohabiting since 1999.

On behalf of the appellant, the person who had accompanied her submitted that the overpayment was excessive and not proportionate. He asserted that the appellant had allowed the person named to stay in her home out of sympathy and that there had been no stability in those early years. He also sought copies of the reports relied upon by the Deciding Officer and asked that the hearing be adjourned so that the appellant could respond in full to the case against her.

The hearing was adjourned.

The appellant sought and was given copies of all documents, as well as a copy of the Department of Social Protection's Operational Guidelines on Cohabitation (www.welfare.ie/en/Pages/Cohabitation.aspx).

At the re-convened oral hearing: the same parties attended. The appellant confirmed that she had examined all of the evidence supporting the decision under appeal. She insisted that she had been truthful in her dealings with the Department. She said she did not have means and was struggling to live. It was pointed out that an Inspector had reported in 1998 that there was no cohabitation. The appellant argued that she did not grasp the issue involved and had since regulated her position as regards social welfare entitlements. This was clarified to mean that she was now being paid as a qualified adult dependant on the social welfare payment of the person named.

The Deciding Officer advised that the appellant had notified the Department in 1997 that her cousin had moved in with her. This turned out to have been the person named. She stated, however, that the effective date which had been specified in the decision had been determined with reference to the date on which the person named had been included as a tenant by the local authority. The Inspector contended that the reference to his being the appellant's cousin represented a deliberate misleading statement as evidenced by the appellant's initial failure to disclose to him that the person concerned was

living at her address. He reported that when asked directly, she had then admitted that the person named was living there.

On behalf of the appellant, her friend submitted that the reference to her cousin was a 'Dublin saying' and was not indicative of an effort to mislead. He asserted that the appellant had had a difficult life and had not gained financially, and he went on to say that he could not understand how such a huge overpayment had arisen.

Comment/Conclusion: The Appeals Officer summarised the evidence supporting the decision that the appellant had been cohabiting with the person named, as follows:

- the appellant admitted that they had been living together since 1997
- he was included as a tenant by the local authority in 1999
- he is listed there on the electoral register and his car is registered there
- the appellant and the person named lived as a couple and they have a child
- the appellant now admits that the person named is the child's father
- the appellant did not disclose the child's birth and forewent the child increase on her One Parent Family Payment
- the appellant and the person named are registered on the child's birth certificate as resident at the same address
- the appellant admitted that she was now cohabiting with the person named and had been included as a dependant on his social welfare payment
- the appellant admitted that he had been contributing to the household, both rent and childcare
- the couple had been together since 1998, at least, and this indicated stability
- the appellant said that she reared the children on her own, he did not help but she added that he was no different from a lot of men in that regard

the appellant has sought to be treated as a couple for social welfare purposes and the overpayment assessed was reduced by allowing the deduction of the social welfare rate for a couple over the period of the overpayment when the person named was not working

The Appeals Officer considered that the only reasonable conclusion was that the appellant and the person named had been living together as a couple in an intimate and stable relationship since the date specified in the decision. He concluded that the appellant and her partner would have been entitled to Family Income Supplement in 2004 and 2005, and calculated that that notional entitlement would have been

€940 per annum for both years. He determined that this amount should be deducted from the overpayment.

Decision of the Appeals Officer: The appeal is disallowed.

Note on reason(s) for decision: Having carefully examined the evidence in this case, including that presented at oral hearing, I have concluded that it has been established that the appellant [person named] have been cohabiting since [specified date]. The evidence indicates that they share finances and

household duties, that they shared responsibility for the care of their child, and that the length of the relationship points to a degree of stability in their relationship as a couple. In the circumstances, I must conclude that the decision regarding cohabitation is correct and I regret that the appeal cannot succeed.

D2. 2012/22 Survivor's (Contributory) Pension

Decision under appeal: revised entitlement with overpayment assessed - reason(s) stated:-

My decision is based on the report received from the local Social Welfare Inspector, in which he stated that [person named], was cohabiting with you for the past 20 years, and prior to your application for a Widow's Pension. Accordingly, I have decided that you had no entitlement to Widow's Contributory and I am terminating your payment immediately from your date of award.

This decision has been made in accordance with Section 302 (a) of the Social Welfare (Consolidation) Act, 2005, on the grounds that you wilfully concealed a material fact from the Department. As a result of this decision, you have been assessed with an overpayment. In the circumstances of this case, it is the intention of the Department to recover the overpayment in full. Our Debt Management Section will be in contact with you shortly regarding repayment of this overpayment.

Overpayment assessed: €73,300.

Background: The appellant applied for a Widow's (Non-Contributory) Pension in 2001, following the death of her husband. The case was investigated by a Social Welfare Inspector and, shortly afterwards, the appellant withdrew her claim and signed a statement to this effect as recorded by the Inspector at the time. No formal reason was given for the withdrawal. The appellant was issued with a letter which advised her that no further action would be taken as a result of her wish not to continue with the claim. Later in that same month, however, a Deciding Officer concluded that she had an entitlement to a Widow's (Contributory) Pension based on her late husband's PRSI contributions and a letter was issued to the appellant advising as to the date of award .

The appellant, at the time of her initial application, was in receipt of Unemployment Assistance from a [specified] Social Welfare Local Office. In 2009, the person named in the overpayment decision applied for Jobseeker's Allowance at that office and advised that the appellant was his partner and that she was in receipt of a Widow's Pension. He stated that he had been cohabiting with her for the previous 20 years. The Department of Social Protection commenced an investigation into the appellant's circumstances. Ultimately, it was decided that she was not entitled to the Widow's Contributory Pension with effect from a date in 2000. As a consequence of this decision, an overpayment of €73,300 was assessed.

The revised decision was made under Section 302 (a) of the Social Welfare (Consolidation) Act, 2005, which refers to wilful concealment of a material fact – taken to mean cohabitation with the person named for some 20 years without advising the Department.

At oral hearing: the appellant was accompanied by a constituency worker from the office of her local T.D. The Deciding Officer attended at the request of the Appeals Officer. She read the decision and outlined details of the case history, referring to the Social Welfare Inspector's report and letters of natural justice which had been issued to the appellant inviting her to comment before a decision was made. On the issue of the overpayment, she advised that the appellant had been awarded a State (Non-Contributory) Pension with effect from her 66th birthday and that this had the effect of reducing the overpayment

amount to €50,500. She confirmed that the person named had been deemed to be an adult dependent on the appellant's pension.

The appellant outlined the background to her relationship with the person named. She accepted that they had been living together in the period at issue. She advised that when she was interviewed by the Social Welfare Inspector in 2001, in connection with her Widow's (Non- Contributory) Pension claim, she told the Inspector that she was co-habiting and that this was the reason for her withdrawing the claim subsequently. She said that at the time of her application she was in receipt of Unemployment Assistance and when she got the pension book from the Department, she stopped that claim.

She went on to say that she had accepted the payment in good faith on the basis that she had withdrawn her non-contributory claim and had not applied for a contributory pension.

On behalf of the appellant, her advocate asked if an application for a contributory pension had ever been made and if so, was there an application form. She stated that the appellant was distraught at the prospect of having to repay such a large overpayment, and went on to say that the appellant genuinely did not understand that she not was entitled to Widow's (Contributory) Pension. The appellant stated that she did not deliberately set out to defraud the State.

Following a general discussion about the application, the Deciding Officer accepted that there had been no claim for a Widow's (Contributory) Pension but she made the point that it was unclear as to why the Widow's (Non- Contributory) Pension claim had been withdrawn. She said that, in any event, when the appellant got the award letter for the contributory pension she would have received a leaflet about the conditions for receipt of the payment. She accepted that no review had taken place after the pension was awarded and acknowledged that the only contact the Department had with the appellant was when she changed her address.

Comment/Conclusion: In reviewing the documentary evidence, the Appeals Officer noted that on her Widow's Pension application form, the appellant had declared her Unemployment Assistance payment and had indicated that she had been separated from her husband for some years prior to his death. He noted also that while an exact reason was not given by the Social Welfare Inspector at the time in relation to withdrawal of the claim, there was a notation on the file which stated the name and age of the person named as cohabiting with the appellant.

The Appeals Officer noted that the appellant had claimed a Widow's (Non-Contributory) Pension and, following an interview with the Social Welfare Inspector, she withdrew that claim on the basis of cohabitation with the person named. While this was not specifically mentioned in the notice of withdrawal which had been written by the Inspector and signed by the appellant, he was satisfied nonetheless from her testimony at the oral hearing and the notation on the file as written by the Inspector that this is the case. He noted also that it was clear that the appellant had never applied for a Widow's (Contributory) Pension and that there is no option to do so on the Widow's (Non-Contributory) Pension claim form.

While he accepted that, in the circumstances, the appellant had no entitlement to a Widow's (Contributory) Pension based on cohabitation with the person named, he considered that the decision to revise the original decision by using Section 302 (a) of the Social Welfare Consolidation Act, 2005 – in effect wilful concealment of a material fact – was unsafe given that she had never applied for the

payment in the first place and that it would not stand up under scrutiny. He made a decision with reference to Section 302 (c) of the Act, determining that the decision to disallow the Widow's Contributory Pension should take effect from a different [specified] date, which was the date of the appellant's 66th birthday as after that date she had been awarded a State (Non- contributory Pension).

Decision of the Appeals Officer: The appeal is allowed.

Note on reason(s) for decision: Having considered all of the evidence on file and that adduced at the oral hearing I am satisfied that no wilful concealment of the facts has occurred in this case. In the circumstances I am allowing the appeal under Section 302 (c) of the Social Welfare Consolidation Act, 2005 and that the decision to disallow the payment of her Widow's Contributory Pension should take effect from [specified date] which is the date of her 66th birthday as after this date she has now been awarded a State Non-Contributory Pension. The appeal therefore succeeds.

G1. 2015/15 Carer's benefit & Maternity Benefit

2015/15 – Carer's Benefit & Maternity Benefit Oral hearing and subsequent Section 318 review
Question at issue: Concurrent payment of benefits

Background: The appellant had been in full-time employment prior to the birth of her first child. When her child was diagnosed as having a disability, she made a claim for Carer's Benefit and returned to work on a part-time basis. The claim was awarded with effect from a date in 2012 for the maximum period (104 weeks) for which Carer's Benefit may be paid. The appellant applied for and was awarded Maternity Benefit in 2013. In connection with that claim, she had provided details of her Carer's Benefit payment. Subsequently, however, she was advised that Carer's Benefit is not payable with other social welfare payments such as Maternity Benefit and a Deciding Officer held that she was not entitled to Carer's Benefit with effect from the date on which Maternity Benefit had been paid. The effect of the decision was to create an overpayment of some €5,000.

Oral hearing: The appellant outlined the background to her claim for Carer's Benefit and her decision to make the claim. She stated that, on the application form, there had been a list of circumstances outlined that may affect Carer's Benefit and a statement indicating that there was a requirement to notify the Department in the event of such circumstances occurring. She pointed out that payment of Maternity Benefits was not included on the list. In addition, she stated that when she completed the application form for Maternity Benefit she had declared that she was in receipt of Carer's Benefit. She said that she did not consider that she was liable for the overpayment which had been assessed.

The appellant acknowledged that she had signed a declaration on the Carer's Benefit claim form, indicating that she would notify the Department of any change in income or circumstances. She advised that she had been aware that her combined income was quite high but that she had considered that this was something to which she had an entitlement in view of her circumstances. She advised that her second child had also been diagnosed with the same disability and that she was in receipt of Carer's Allowance and Domiciliary Care Allowance in respect of both children.

Consideration: Having regard to the provisions of the legislation, the Appeals Officer concluded

that the appellant was not entitled to receive Carer's Benefit for the period that she had paid been Maternity Benefit. Accordingly, the appeal was held not to succeed.

Following further submissions, the Appeals Officer revised his decision and determined that it should take effect from a specified date only, with the effect that the amount of the overpayment was reduced.

Request for review: Solicitors acting for the appellant sought a review of the Appeals Officer's decision in accordance with Section 318 of the Social Welfare Consolidation Act, 2005. The Chief Appeals Officer carried out a review, advising that her role under the terms of the legislation was a revising one rather than another avenue of appeal.

Grounds for Review: In support of the request, two points were put forward: that when the Department notified the appellant of the award of Carer's Benefit, the receipt of Maternity Benefit was not listed as one of the circumstances that would affect her entitlement, and in her application for Maternity Benefit she had provided details of the Carer's Benefit payment. It was asserted that the Appeals Officer did not exercise his discretion properly in relation to the reduction in the overpayment assessed against the appellant.

The Chief Appeals Officer examined the background to the case and the details of the appellant's claim. She noted that the appellant's attention had been drawn to the circumstances and events which might affect her Carer's Benefit and of the necessity to notify the Department if any of these occurred. She observed that only one of the twelve events related to receipt of a payment (Domiciliary Care Allowance) and that the others related to circumstances such as change in care arrangements, change of address, bank details or marital status. Maternity Benefit was not mentioned.

Having reviewed all the material that was before the Appeals Officer, the Chief Appeals Officer was satisfied that the appellant had provided full details of her Carer's Benefit payment when she applied for Maternity Benefit. She concluded that, in doing so, she had fully discharged her obligation to notify the Department of a change of circumstances that might affect her entitlement to Carer's Benefit – albeit that the payment of Maternity Benefit was not listed as a payment that might affect her continued entitlement to Carer's Benefit. She noted that the information had been submitted to the Department in ample time to allow payment of Carer's Benefit to be discontinued and to avoid the concurrent payment of Carer's Benefit and Maternity Benefit. She concluded, therefore, that the decision of the Appeals Officer was erroneous in that appropriate consideration was not given to all the facts of the case and that discretion had not been appropriately applied by the Appeals Officer. In the circumstances, the Chief Appeals Officer determined that the revised decision should have taken effect from a current date and no overpayment raised.

Outcome: Appeal allowed.

G2 2015/21 State Pension (Non-contributory)

Summary Decision

Question at issue: Means and overpayment assessed following review

Background: Following a review of his means, it came to light that the appellant had capital which had not been disclosed. The Deciding Officer made a revised decision and determined that the appellant had means which affected the rate of pension he received between 2009 and 2014. Arising from that decision, an overpayment of some €22,000 was assessed. The Deciding Officer relied on the provisions of the Social Welfare Consolidation Act, 2005, Section 302 (a), as a basis for the decision. An appeal was made on the appellant's behalf by an Information Officer/Advocate with his local Citizens Information Service. It was submitted that the appellant had a diagnosis of Parkinson's disease and that he never opened or read any correspondence that came in the post. The appeal was determined by way of summary decision.

Consideration: The Appeals Officer referred to the submission made on the appellant's behalf, including details of the appellant's medical diagnosis, noting that his sister had assisted in acquiring the information requested by the Social Welfare Inspector during the review process. She noted that it had been submitted that he had an entitlement to Widower's Pension (Contributory) with effect from 2008, when his wife died, and that he need not have made a claim for State Pension (Non-Contributory) had he received a Widower's Pension. It was pointed out that he had been in receipt of Disability Allowance and that, in line with advice given by staff of the Department of Social Protection, he had applied for State Pension (Non-Contributory) on reaching 66 years of age. The Information Officer/Advocate advised that she had assisted in having a claim completed by the appellant and that an award of Widower's Pension (Contributory) had been made with effect from a date in 2015.

The Appeals Officer noted the Deciding Officer's conclusion that retrospective payment of Widower's Pension (Contributory), with an offset against the overpayment assessed in relation to State Pension (Non-Contributory), could not be provided for as the revised decision was made with reference to Section 302 (a) of the Act. Those legislative provisions outline the manner in which revised decisions are to take effect where the original decision was given, or had continued in effect, by reason of any statement or representation which was to the knowledge of the person making it false or misleading or by reason of the wilful concealment of any material fact. The Deciding Officer was satisfied that this was the appropriate legislative provision to apply as the appellant had failed to notify a change in his circumstances, that is, the lodgement of €40,000 to his bank account in 2009.

The Appeals Officer observed that a high standard of proof must be held to be required where Section 302 (a) is deemed to apply, not least because of the additional penalties which it entails, such as the restriction on offsetting other entitlements against overpayments assessed, as provided for under Section 342A. In this regard, she noted that the Social Welfare Inspector who interviewed the appellant and noted his circumstances, had made no reference to the possibility of fraudulent intent and that the Deciding Officer had not indicated the basis for his assertion in this regard. In addition, she noted that the appellant had a diagnosis which imposes limitations in relation to managing his affairs and that, while he had not notified the Department about the bank lodgement, neither had he advised as to his wife's death. While it might be argued that the former would have affected his pension adversely, the latter would have provided the basis for a

claim.

The Appeals Officer concluded that while it had been established that the appellant had capital that was not disclosed, there was no evidence to suggest that there had been fraudulent intent. Accordingly, she determined that the revised decision should apply for the dates specified but with reference to the provisions of the Social Welfare (Consolidation) Act, 2005, Section 302 (b), allowing for the retrospective award of Widower's Pension (Contributory) to be offset against the overpayment assessed in relation to State Pension (Contributory).

Outcome: Appeal partially allowed

G3 2015/22 & 2015/23 Unspecified payment in respect of two appellants

Question at Issue: Cohabitation

Background: The appellants were each in receipt of named payments. In the context of a review of entitlement, and an investigation by a Social Welfare Inspector, a question arose as to cohabitation. The Inspector interviewed each of the appellants and submitted reports and accompanying documents for determination. The Deciding Officer made reference to the interviews conducted by the Social Welfare Inspector and concluded that each of the appellants had concealed a material fact, that is, that they were cohabiting with one another. Ultimately, it was concluded that both persons were disqualified for receipt of the named payments as they were cohabiting. A revised decision was made in each case, with reference to the provisions of Section 302 (a) of the Social Welfare (Consolidation) Act, 2005, and overpayments were assessed. An appeal was made by both parties. In response to a request made by solicitors acting for each of the appellants, and with the approval of the Chief Appeals Officer, the appeals were heard together – with a separate report and decision completed in each case.

Oral hearing: The appellants attended, and each was represented separately by a solicitor. The Social Welfare Inspector attended at the request of the Appeals Officer. The decision at issue in each case was outlined, as was the manner in which the Appeals Officer intended to proceed.

It was acknowledged that the second appellant resided at the address of the first appellant for some years. It was contended, however, that the parties had never cohabited within the meaning of the Social Welfare Acts and, in particular, that they had not been engaged in an intimate/sexual relationship at any time. It was submitted that they had been nothing but platonic friends, had separate bedrooms, that the first appellant had her own independent means, that she was not engaged to, nor did she have any intention of marrying the other person.

In support of the appeal, reference was made to a Court Judgment, dated 5 May 2015, *In the matter of Section 194 of the Civil Partnership and Certain Rights and Obligations Cohabitants Act*

2010 [2015] IEHC 309, where Baker J found [paras. 21, 77, 78, 79] that in order to be a cohabitant for purposes of the 2010 Act, a relationship must be more than one of mere friendship and must be or have been at some point sexually intimate.

Medical evidence was submitted outlining medical issues which prevented a sexually intimate relationship. It was also submitted on behalf of both appellants that in the report of his investigation of the two claims, the Social Welfare Inspector had stated that the appellants were co-resident.

Consideration: The Appeals Officer made reference to the provisions of the governing social welfare legislation. In particular reference was made to the definition of 'Cohabitant' which is defined in section 2(1) of the Social Welfare (Consolidation) Act, 2005, to mean a cohabitant within the meaning of section 172(1) of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010, which provides:

– …a cohabitant is one of 2 adults (whether of the same or opposite sex) who live together 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.

The Appeals Officer observed that, prior to 2010, the relevant section of the Act provided for disqualification where two people were cohabiting 'as husband and wife'. In the cases at issue, the Appeals Officer noted that if cohabitation in an intimate and committed relationship was not established, it could not be contended that the appellants concealed a material fact and, accordingly, that each would retain an entitlement to the named payments and no overpayment would arise. In this regard, he considered that the

Judgment of Baker J, IEHC 309, was critical in assessing the evidence in the cases at issue. He made reference to paragraphs 21, 77, 78, 79, 86 and 95 of the Judgment as being of particular relevance, one of which states:

Para 86 – "*The Act offers no assistance as to what is meant by an intimate relationship, but having regard to s. 172(3) it is clear that the relationship must have been at some point in time a sexual relationship for intimacy to be found. The intimacy that is intended is a sexual intimacy and not merely the intimacy of a close friendship".*

The Appeals Officer noted from the evidence presented by the Department in the context of its review, which pre-dated the Court Judgment cited, that many of the interconnected elements to which Baker J had made reference were considered to be in place in this case. In Paragraph 95, for example, it is stated that:

The basis of a relationship involves a number of interconnected elements such as the degree of shared activities that persons enjoy, such as shared meals, especially evening meals and

breakfast, shared activities, shared division of household chores and shared holidays…"

However, he had regard also to the medical evidence which confirmed that throughout the period at issue, the capacity of having an intimate relationship did not exist. On the basis of this evidence, and having regard to the unequivocal findings of Baker J [2015] IEHC 309, that a relationship must have been, at some point in time, a sexual relationship for intimacy to be found, he concluded that it had not been established that the appellants were cohabiting within the meaning of the governing legislation for the period since 2010 or, in the period prior to 2010, 'as husband and wife' within the meaning of the legislation which applied at the time. Accordingly, each of the appellants was entitled to the named payment during the period at issue and no overpayment applied.

Outcome: Appeal allowed.

G4 2015/24 State Pension Non-contributory

Question at Issue: Claim against deceased pensioner's estate

Background: The deceased had been awarded pension in 1998 and had been in receipt of Disability Allowance prior to attaining pension age. At the time of the pension claim, he had declared a credit union account with a balance of some €1,900. His entitlement was reviewed in 2011 when he denied having any capital in the bank. Following his death, an investigation by a Social Welfare Inspector indicated undisclosed capital of €59,000 and his means were assessed retrospectively to take account of this. As a consequence of the revised means assessment, an overpayment of some €38,000 was calculated and a demand for payment was made against the estate. His sister, the executrix of the estate, made an appeal against the decision and solicitors acting on her behalf questioned the amount of the overpayment. It was submitted that the deceased never had capital in the [named] bank as his sister had provided this money for the upkeep of his residence.

Oral hearing: The sister of the deceased attended and was represented by her solicitor. The Deciding Officer attended at the request of the Appeals Officer, while the Social Welfare Inspector had moved to other duties and was unable to attend.

The solicitor in the case sought to provide some background, referring to the sister of the deceased, the fact that she had worked for some years in the United Kingdom before returning to the family home. He referred to the capital held at a [named] bank, and said that this had always belonged to his client and submitted that an affidavit from 1996 confirmed this. It was submitted that she had intended that the funds be used for the upkeep and renovation of the family home so that it would remain habitable until she returned to live there. It transpired that her brother had proved unable to maintain the house and evidence was produced showing that expenditure in the order of €230,000 had been incurred in the previous year for extensive renovations.

A copy of the grant of probate was submitted and it was pointed out that the net value of the estate came to just €20,000. It was submitted that the Department had misrepresented the ownership of the funds assessed and that the deceased had no interest in those funds. He had not been able to fulfil the purpose for which the capital had been set aside and he had never accessed the bank account at issue.

The Deciding Officer explained the assessment: the deceased had been assessed with capital held in his own name and a half share of the capital held in a joint account with his sister. She noted that there was evidence of transfers of funds between the accounts which suggested that they had been managed. In response, the deceased's sister pointed out that her brother had received no State payments until he was aged 49 years and she had enquired about his entitlements. At that stage, he had received a Disabled Person's Maintenance Allowance (subsequently Disability Allowance). She confirmed that she had managed the accounts and had moved the capital so that the best yield could be achieved. His sister described the deceased as having a learning disability and said that he had not been capable of managing things. They had another brother who died in 1995 and since then she had had to return home every 6 weeks. She recalled that the deceased had been duped by individuals purporting to do maintenance work and, on one occasion, had withdrawn €2,000 from his credit union account to pay them. She said that he had been vulnerable to such approaches and, after that, she had warned the bank and credit union to be aware of him seeking to withdraw funds.

The Deciding Officer conceded that the Department had not implemented its review policy over the years in question but said she believed that a reminder of the qualifying conditions had issued around the year 2000. It was accepted that there was no record of such a reminder on file. The Deciding Officer agreed there could be circumstances when a joint account was assessed in full against one of the named account holders. She went on to say, however, that she believed that the deceased could have accessed the account had he wished to. She noted that the Social Welfare Inspector had reported that there had been no evidence to indicate that the capital in the joint account was not the property of the deceased.
His sister insisted that the deceased did not have access to the [named] bank account and she said she objected to the Department seeking to recover what was, in effect, her savings. In conclusion, her solicitor reiterated the assertion that the deceased had no control over the funds at issue, the capital was the property of the deceased's sister and he had been a party of convenience only and had never sought to access the account. It was submitted that it was wrong therefore to attribute those funds to him.

Consideration: The Appeals Officer considered that there was no doubt as to the amount of capital held; the balances had been verified. What was in doubt, however, was whether one half of the money held in a joint account should have been assessed as capital held by the deceased and therefore a notifiable increase in his means which he had failed to declare.
He examined the question as to where the funds came from. The evidence indicated that the deceased had been awarded a Disabled Person's Maintenance Allowance sometime in the 1980s, consistent with his sister's account of him and her reference to his intellectual disability. The

Appeals Officer noted that the Social Welfare Inspector made reference to the actual ownership of the funds but had dismissed his sister's assertion that the funds in the joint account were not the property of the deceased. The Appeals Officer considered that, in circumstances where the deceased had no income other than a social welfare payment, evidence was required to establish that he had access to the funds at issue and that he had accessed those funds. He noted that there was no evidence of income from any source apart from his pension and whatever his sister had provided him with. He noted also that there was no evidence that he had managed the account from the nursing home where he spent the last three years of his life, yet significant transactions had taken place during those years and his sister had confirmed that she managed the funds. In the circumstances, he concluded that it was appropriate to apply the discretion which is permitted in the legislation and to make the decision effective from a current date only with no retrospective effect.

Outcome: Appeal allowed

G5 2015/25 State Pension (Non-contributory)

Question in issue: Claim against deceased pensioner's estate

Background: The late pensioner made a claim for State Pension (Non-Contributory) in 1987. Her means were investigated and the capital declared, some £17,000, was assessed.
Pension was awarded. A review conducted in 1992 indicated capital of £16,000, with a similar amount noted at a further review in 1997. Following the pensioner's death in 2011, a schedule of assets was submitted to the Department, indicating that she held assets in the amount of €80,000 at the time of her death. A revised decision was made where the Deciding Officer concluded that pension was payable at a lower rate in the period from 2002 to 2011. As a result, an overpayment of some €45,000 was assessed against the estate. The executor sought to establish if the deceased would have had an entitlement to a contributory State Pension. Details of her social insurance record were examined and she was held to have an entitlement to a reduced Pre-1953 State Pension. The effect of this decision was to reduce the overpayment to €37,000, and a demand for payment was issued to the estate. An appeal was made by the executor.
Oral hearing: The personal representative of the deceased attended and was accompanied by a solicitor. The formal decision was presented and the evidence relied upon in making the decision was outlined. The question as to entitlement to a contributory State Pension was discussed and it was pointed out that the deceased had applied in 1981 but her claim was refused. The Appeals Officer sought to clarify that a special Pre-1953 State Pension (Contributory) was introduced with effect from 5 May 2000, and applied to persons with social insurance contributions paid prior to 1953. This pension is payable at half the maximum standard rate. The Appeals Officer referred to evidence provided by the Department which indicated that, when the deceased's entitlement to a Pre-1953 State Pension (Contributory) had been established the overpayment had been recalculated and reduced from the amount originally assessed to the current level of €37,000.
In support of the appeal, it was submitted that the deceased would have been a saver and that she had lived frugally and had not spent much money down through the years. It was stated that

her house was in very poor repair, that she only ever had one car and that she had never taken a holiday.

Consideration: In arriving at a decision in the case, the Appeals Officer examined all of the available evidence, including that adduced at the oral hearing. She noted that, at the time of application, the deceased's means were investigated and she had disclosed capital of £17,000. No other means were disclosed at the time. The Appeals Officer referred to the reviews conducted in 1992 and 1997, when the deceased would have had an opportunity to disclose all her means and noted that capital of the order of £16,000 was declared. In contrast, she noted that the schedule of assets indicated capital of some €80,000 at date of death. She concluded that, under the terms of the relevant social welfare legislation, this capital was assessable as means. She determined that means had been assessed correctly in accordance with the relevant social welfare legislation and that the overpayment was recoverable from the assets of the deceased in accordance with the provisions of Section 335 (b) of the Social Welfare Consolidation Act, 2005.

Outcome: Appeal disallowed.

H1 2016/17 Disability Allowance

Question at issue: Eligibility (medical)

Background: The appellant, in his mid-30s, had been in receipt of Disability Allowance from 2002. A review of his claim was carried out in 2013, when the Department of Social Protection received information from the Revenue Commissioners under a Protocol for Consultation, Information and Data Exchange. The data provided referred to Deposit Interest Retention Tax, and outlined interest earned on accounts held by the appellant. An investigation indicated that he had been awarded compensation for injuries sustained in a road traffic accident in 2003. The amount at issue was of the order of €1.75 million and it was held that he had failed to notify the Department. His claim was disallowed with effect from a date in 2003 and an overpayment in the amount of €108,000 was assessed under Section 302(a) of the Social Welfare Consolidation Act 2005. In an appeal against the decision made on the appellant's behalf, it was submitted the Department had been fully informed about the nature of his injuries and the fact that a claim was pending and its duty of care to him was questioned.

Oral hearing: The appellant was accompanied by a relative. The Deciding Officer, who attended at the request of the Appeals Officer, outlined the decision. She made reference to the significance of applying the provisions of Section 302(a), that is, that it had been held that there had been wilful concealment of a material fact. She presented details of the appellant's claim and an account of the review process. She concluded that he had failed to advise the Department of a major change to his financial circumstances in connection with an award made by the Court in 2003.

It was submitted that the appellant was just 18 years of age when interviewed by the Social

Welfare Inspector in connection with his claim, that he was still receiving rehabilitative care after a catastrophic accident and he had little recollection of that time or what was asked of him. A request for access to his personal data had been made under the Freedom of Information (FOI) Acts. It was pointed out that the evidence indicated that the Inspector had noted that a personal injuries compensation claim was pending and was expected to be finalised within two years. In addition, reference was made to a request made by the same Inspector for the claim to be reviewed again in the following year, while an officer within the Disability Allowance area had indicated that a review should be undertaken by a date in 2002. It was noted that no review had been undertaken and it was submitted that this constituted negligence and a failure to implement a duty of care to the appellant. It was contended that there was no intent to deceive and that an overpayment should not be assessed.

The Deciding Officer acknowledged that a review should have been conducted but advised it had been overlooked due to staff shortages and pressure of work. She suggested that there may not have been fraudulent intent but she reiterated that there was an onus on the appellant to have notified the Department. She advised that the appellant had been informed both verbally and in writing of this obligation.

Consideration: The Appeals Officer observed that he had some sympathy with the points submitted on the appellant's behalf and he noted the extent of the injuries he had sustained. He noted also the Deciding Officer's evidence and her statement as to why the case had not been reviewed early in 2000 and he considered that the oral hearing had served to indicate that there had been no real intent by the appellant to defraud the Department. He considered that there were faults on both sides but that, ultimately, the primary responsibility rested with the appellant who should have notified the Department of the very significant compensation award made. He noted that the evidence confirmed that the appellant had been advised verbally of his requirement to inform the Department of any change to his circumstances at the application interview stage, and that he had been advised again in writing at the date of award and that reminders were also available on his Disability Allowance payment books. He noted that there was no medical evidence to the effect that the appellant was incapable of managing his own affairs.

He concluded that the decision to disallow the application with effect from a date in 2003 was correct, with the overpayment assessed being fully recoverable. Having regard to the circumstances of the case, however, he applied the provisions of Section 302(b) of the Social Welfare Consolidation Act 2005, which refers to a revised decision given in the light of new evidence or facts, accepting that there was no wilful intent to defraud. He noted that the amount assessed as overpaid was substantial and advised the appellant that it was open to him to contact the Department of Social Protection and to comment on any proposals for recovery or to challenge any recovery plan outlined.

Outcome: Appeal disallowed.

H2 2016/23 Job Seeker's Allowance

Question at issue: Eligibility (retrospective assessment of needs)

Background: In connection with a claim for Jobseeker's Allowance made in 2009, the appellant provided details of bank and credit union accounts which he held at the time. His means were assessed and his claim was awarded. It appears that his file was examined in connection with a claim which his partner made for Carer's Allowance in 2013. Additional information had been provided, indicating that the appellant had opened a further account in the meantime. When his claim came under review in 2015, however, it emerged that no adjustment had been made to take account of that new information. A revised decision was made and the appellant was held to have been entitled to a lower rate of payment with effect from a date in 2013. Initially, this was applied with reference to the provisions of Section 302(a) of the Social Welfare Consolidation Act 2005, which deals with fraudulent intent. When it came to light that all of the information had been disclosed at the appropriate time but that there had been a failure to revise the means assessment accordingly, the decision was applied with reference to Section 302(c). These are the provisions usually applied where a Deciding Officer has made an error or where information was provided but not acted upon. An overpayment of some €15,000 was assessed. In his appeal submission, the Deciding Officer acknowledged that the overpayment had arisen solely as a consequence of a Departmental error as the appellant had provided the relevant information but it had not been taken into account.

Consideration: The Appeals Officer noted that the appellant had provided details of his means in full and that the Department had been made aware of the additional bank account when his partner was interviewed in 2013 in connection with her claim for Carer's Allowance. In the circumstances, he determined that the means from savings were assessable from a specified date in 2015, that is the date from which the retrospective decision had been applied, with the effect that the overpayment was eliminated.

Outcome: Appeal allowed.

H3 2016/28 State Pension (Non-contributory)

Question at Issue: Eligibility (revised decision as to means)

Background: The appellant had retired from farming and had been in receipt of a Farm Retirement Scheme payment after which she had then let the land to her son for £800 (at that time) per annum on a long term lease. This letting had previously been accepted by the Department of Agriculture when she had received a pension under the Farm Retirement Scheme.

She applied for a State Pension in 2009 when the Farm Retirement Scheme had ceased and land had been transferred to her son. When her husband applied for pension some years later, it emerged that the couple had retained 42 acres of land. The holding was assessed on a capital value basis and the appellant was held to have weekly means of €170. This assessment was applied retrospectively and an overpayment was assessed in the amount of €64,000.

Oral hearing: The appellant attended with her husband and a legal representative. The Deciding Officer, who attended at the request of the Appeals Officer, read the decision and sought to clarify the manner in which the means assessment had been revised and applied retrospectively.

On behalf of the appellant, her legal representative outlined the family circumstances. He made reference to the decision to retire from farming and apply for a pension under the Farm Retirement Scheme, the letting of land to her son on a long-term lease and, ultimately, the transfer of land and retention of a holding by the appellant and her husband. It was stated that hay and grass from the holding had been sold to neighbouring farmers for €1,000 and it was submitted that this was consistent with the previous letting value of £800 per annum and reflected the couple's limited capacity due to declining health. It was submitted also that it was inappropriate to assess the capital valuation as the land was being used and, apart from the grass/hay being harvested, the couple kept some donkeys on the holding. (The keeping of animals such as donkeys is the minimum stock levels accepted for Single Farm Payment). It was contended that the assessment was incompatible with a holding that generated €1,000 per annum and that no consideration appeared to have been given to the use being made of the land.

The appellant's legal representative asserted that the capital value option was the most punitive assessment to have applied and that other options appeared not to have been explored, such as the actual income or perhaps a letting value. He submitted that there was hardship involved in the case and that the overpayment assessed had been excessive. He noted that the application of Section 302(a) of the Social Welfare Consolidation Act 2005 (which refers essentially to fraud) carries with it a high burden of proof. He submitted that while Section 302(b) had been applied in the appellant's case, the burden of proof was no less stringent when a pensioner was left to face such a substantial overpayment and that it had not been met in this case.

The Deciding Officer acknowledged that he had been aware of the income of €1,000 per annum but stated that he had not known that the land was being used. He referred to the letter issued to the appellant prior to the decision and in line with the requirements of natural justice, advising as to the information which was before him. He stated that the appellant had made no reference to the holding being in use. He referred to the auctioneer's valuation which had been supplied by the appellant's husband, and said he had accepted that valuation for purposes of assessing the capital value of the land. He made reference to repayments and it emerged that the appellant had commenced repaying the overpayment which had been assessed. The Appeals Officer reminded him that no recovery should commence until the appeal was decided.

Consideration: The Appeals Officer considered it significant that the land at issue had been let

under a scheme approved by the Department of Agriculture. The Officer was satisfied that the evidence served to establish that the retained holding could not be assessed under Part 3.1(1) of Schedule 3 of the Social Welfare Consolidation Act 2005 as the appellant and her husband were using the land. He referred to evidence submitted which indicated that the holding generates approximately €1,000 per annum. Allowing €100 for necessary expenses, he assessed the net value at €900 per annum.

The Appeals Officer accepted that overpayments, arising from a revised decision under Section 302(a) or 302(b), must be individually justified and considered that the larger the overpayment the greater the burden of proof and justification was required. It was noted that there was no indication as to why the Deciding Officer had chosen not to apply the discretion available in the legislation under Section 302(b) and that that it had not been shown why a capital value assessment was deemed appropriate in the circumstances of the case. It was considered that insufficient grounds had been provided for the decision. Having regard to the points submitted on her behalf, including the distress caused to the appellant and what the Appeals Officer regarded as the incorrect application of the legislation, it was concluded that the decision should not apply retrospectively and that the revised means should apply from a date in 2014.

Outcome: Appeal allowed.

Further comment: The Appeals Officer noted that recovery of the overpayment had commenced in advance of an appeal decision and observed that this was not in line with the policy of the Department of Social Protection.

H4 2016/318/34 Carer's allowance

Question at Issue: overpayment assessed

Grounds for Review: A review was sought on the basis that the Appeals Officer had not given sufficient weight to certain facts relating to the appeal, as follows:

1. The appellant had relied on an opinion of a social worker engaged with Tusla regarding her continued entitlement,

2. No consideration had been given to the exemption of 13 weeks provided for in the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (No. 142 of 2007),

3. In relation to the recovery of any amounts due, the appellant was prepared to make repayments as specified.

Background: The appellant was awarded Carer's Allowance in September 2009 in respect of care she was providing for her son. In 2015, a Social Welfare Inspector called to her home and it emerged at this meeting that her son was no longer residing there having been admitted to a children's residential unit at the end of 2013. As a result, a Deciding Officer, relying on Section

302(b) of the Social Welfare Consolidation Act 2005, decided that the appellant was not entitled to Carer's Allowance with effect from the relevant date. In addition, she was held not to have had an entitlement to a Respite Care Grant paid in 2014. (This was re-named Carer's Support Grant in 2016.) Following an oral hearing, an Appeals Officer disallowed the appeal.

Review: I examined each of the three grounds separately.

Information provided in error by Tusla: The contention here is essentially that the appellant's reliance on information provided by Tusla should be equated to the provisions of Article 246(1) of the of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142 of 2007) which provides that:

The amount of an overpayment to be repaid may be reduced or cancelled where the overpayment arose because of –

1. *a failure by the Department to act within a reasonable period on information which was provided by or on behalf of the person concerned, or*
2. *an error by the Department,*

and the person concerned could not reasonably have been expected to be aware that a failure or error had occurred.

It cannot be said that the Department acted in error in this case and I can find no grounds on which I can equate the provisions of Article 246(1) to the provision of information provided by Tusla. There is an onus on all recipients of social welfare payments to notify the Department of any change in their circumstances that may impact on their entitlement or continued entitlement. It was open to the appellant to contact the Department if she had any enquiries relating to her payment or her continued entitlement to Carer's Allowance.
The onus was not on Tusla to contact the Department.

From my review of the evidence, I note that some weeks before the appellant's son was admitted to the residential unit, a Deciding Officer of the Carer's Allowance section had written to her and advised that a review of her entitlement had been undertaken. This letter outlined in some detail the events which may affect entitlement to Carer's Allowance, including circumstances where full-time care and attention is no longer being provided or where the carer or the person being cared for is admitted to hospital or to residential care. For the reasons outlined I found no grounds to revise the decision of the Appeals Officer on the basis of this contention.

Consideration of exemption for 13 weeks: It was submitted that the report of the oral hearing indicated that the Appeals Office did not consider if the exemption provided for by Article 136(a) of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142 of 2007) applied in the appellant's case. Article 136(a) provides that a carer may continue to be

regarded as providing full-time care and attention to a relevant person where –

(a) he or she would qualify for payment of an allowance but for the fact that either the carer or the relevant person is undergoing medical or other treatment of a temporary nature in an institution for a period of not longer than 13 weeks, or …

I noted that the Appeals Officer's report of the oral hearing made reference to the appellant's account of the arrangements put in place for her son, stating that it had been intended initially that he would return home on 3 to 4 days per week. However, his behaviour had become increasingly violent and it was agreed that he would remain in the residential unit from late in 2013. From my review of the evidence, it was clear that the care arrangement was voluntary and that both the appellant and her husband were actively involved in a shared parenting plan and visited their son on a daily basis. However, I am satisfied that the care arrangement, while voluntary, was not temporary in the sense provided for by Article 136(a). I therefore found no grounds to revise the decision of the Appeals Officer on the basis of this contention.

Recovery of Overpayment: As outlined by the Appeals Officer, the recovery of the overpayment does not come within the remit of the Social Welfare Appeals Office and is a matter between the Department of Social Protection and the appellant.

For the reasons outlined above, I was satisfied that the Appeals Officer did not err in fact or law and consequently I declined to revise the decision in this case.

Outcome: Request for revision denied.

H5 2016/318/36 One parent family payment

Question at Issue: Means and Cohabitation

Grounds for review: The appellant denied being in a relationship with the nominated person while receiving One-Parent Family Payment and she alleged errors of fact, as follows:

1. The information provided by the Social Welfare Inspector was incorrect,

2. The Appeals Officer did not conduct the appeal hearing in a fair manner.

Background: The appellant had been awarded One-Parent Family Payment in 2002 when she had one qualified child. In the context of a review, it emerged that she had another child for whom she had not sought payment. An investigation indicated that she was registered as the joint owner of a property since 2001. Ultimately, it was held that she had failed to show that her means did not exceed the statutory qualifying limit and that she had been in a cohabiting relationship with a nominated person who was the joint owner of the property at issue. Accordingly, payment was terminated. A revised decision was applied with effect from the date

of claim and an overpayment of some €135,000 was assessed.

The Appeal: The Appeals Officer indicated that she considered the evidence advanced by the Department to be more convincing and concluded that the appellant had not been eligible for receipt of One-Parent Family Payment from the date of claim on grounds that she had failed to show that her weekly means were below the appropriate limit as she had failed to declare her joint ownership of a property with a nominated person. In addition, the

Appeals Officer held that the appellant had failed to show that she was not cohabiting with that person. Accordingly, the appeal was disallowed.

Review: I examined the means and cohabitation aspects of the decision separately.

Means: I noted the appellant's assertion that she had not been asked to show that her means were below the specified limit and could see no evidence to suggest that such a request had been made but not complied with. It was not clear to me what the import of her interest in the property was in relation to her claim for One-Parent Family Payment and this was not detailed at all by the decision-makers. There was no exploration as to what legal and practical control the appellant could exercise such that she could sell or derive a profit from the property. It is clear that if she lived at the property and was cohabiting with the nominated person, as upheld by the Appeals Officer, then the question as to means did not arise as she would have been disqualified for One-Parent Family Payment in such circumstances.

Cohabitation: In a situation where an existing payment is being reviewed, the onus is on the Department to make a satisfactory case for a disallowance. In this particular case, given the lengthy period at issue and the significant financial consequences of a revised decision for the appellant, an evidence-based case was required, indicating that it was highly probable that the appellant was residing with the nominated person during the entire period in question in '*an intimate and committed relationship*', as provided for in the governing legislation. In putting together such a case, the Department must, at a minimum, have followed its own *Guidelines on Investigating Cohabitation*. Those Guidelines list the criteria by which cohabitation may be assessed and I examined the evidence in this case with reference to each of those criteria, as follows:

Duration of the relationship: The appellant was clear in her contention that she had not cohabited with the nominated person in the period at issue. The only evidence to the contrary was circumstantial.
Basis on which the couple live together: The appellant jointly owned a property since 2001 and her car, registered at her parents' address, had been observed outside that property on five occasions in 2014. The Appeals Officer noted that there was no other evidence and that the appellant had stated that she allowed the nominated person to take her car as it had a baby seat.

Degree of financial interdependence: The nominated person paid some maintenance in respect of the children. Apart from this, there was no evidence pointing to any degree of financial interdependence.
Degree and nature of any financial arrangements between the adults: The appellant and the nominated person were joint owners of a house. There was no evidence of any other financial arrangements between them.
Dependent children: There were two dependent children.
Care and support for children of the other adult: This did not arise.
Degree to which the adults present themselves as a couple: There was no evidence.

In this case, the appellant had been in receipt of a payment for many years and this was withdrawn following a review. In the circumstances, the burden of proof was clearly on the Department to establish that cohabitation existed and not on the appellant to prove the contrary. I note that the Appeals Officer considered that the evidence advanced by the Department was more credible and convincing than that put forward by the appellant and that the Officer concluded the appellant had failed to show that she was not cohabiting with the nominated person. This was clearly an error of law. In misdirecting themselves on this point, I could only conclude that the Appeals Officer had placed an unreasonable burden of proof on the appellant such as to render the appeal hearing unfair. 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.

Revised decisions and overpayments: I addressed the legislative provisions relating to revised decisions outlined in Chapter 1 of Part 10 of the Social Welfare Consolidation Act 2005. The '*effect of revised decisions by Deciding Officers'* is clearly laid out in Section 302 and prescribes in mandatory terms when and in what circumstances a revised decision is to take effect. There are potentially significant consequences flowing from these provisions, such as in the appellant's case where an overpayment of some €135,000 had been raised. The Department's *Guidelines on Revised Decisions and Their Date of Effect* state that a *decision should include reference to:*

1. *The relevant provision in the legislation under which payment is being allowed, disallowed, or reduced;*
2. *The sub-section of Section 302 of the Social Welfare Consolidation Act 2005 being applied in determining the effective date of the revised decision.*

The Department's *Guidelines on Overpayment Recovery* state that:

An overpayment is created where a Deciding Officer or a Designated Person makes a revised decision under Section 302 or Section 325 of the Social Welfare Consolidation Act 2005 and the effect of the decision is to reduce a person's entitlement retrospectively.

I could find no evidence to indicate that the revised decision was made with reference to any of the provisions in Section 302, nor could I see where the appellant had been advised of the amount of the overpayment. This combination of failures is an error in law and in my view a serious denial of the appellant's right to natural justice and fair procedures. The Appeals Officer did not direct her attention to the provisions and the obligations arising from this section in their consideration of the appeal. In light of all of the above considerations I concluded that the Appeals Officer had erred in law and, in the circumstances, revised the decision.

Outcome: Decision revised and appeal allowed.

I1 2017/10 One-Parent Family Payment Oral hearing
Question at issue: Overpayment whilst child in care

Background: The Department made a revised decision that the appellant was not entitled to One Parent Family Payment (OFP) for an approximately 15 month period from September 2015 to December 2016 when her son was in foster care. As a result of this decision, an overpayment of almost €15,000 was assessed against the appellant. In appealing the decision, the appellant stated that her son was only ever under interim care orders of 28 days duration and that every month she expected the order to be lifted. During the care period the appellant received help for significant health issues. She states she had daily access to her son and continued to buy all his clothes and food and paid for any extracurricular activities at his crèche whilst he was in care.

Oral hearing: The appellant attended the hearing with a representative from her local Citizens Information Centre (CIC). The appellant, who is in her mid-twenties and has an almost three year old son, developed mental health and alcohol/drug problems soon after the birth of her child. She took part in a one-month treatment programme in January 2015 during which time her son was cared for by her mother. However, she relapsed and her son was taken into care in September 2015. He was placed into the care of the appellant's brother and his wife. In November/December 2015 the appellant once again had to go into a treatment centre and remained there for a few months.

Every month the appellant went to court to try to get her son returned as he was only on 28 day interim orders. She stated that both the HSE and Tusla were aware that she was in receipt of OFP. She maintained that during all that time she continued paying for essentials for her son and also had to continue paying rent on their house as every month she expected him home. She remained her son's legal guardian and saw him every day except when she was away for treatment. From summer 2016 he began staying for overnights in her house and was officially returned to her in January 2017. She is claiming OFP since his return to the family home.

The CIC representative did not consider that it was appropriate for the Department to raise an overpayment considering that the appellant would have been on an alternative social welfare payment if she had not been receiving OFP, as she had no other income. The CIC representative also pointed out that the appellant had received the notice of overpayment just after her son had resumed living with the appellant and this had a very negative effect on her well-being.

Consideration: The Appeals Officer was satisfied from the evidence that the Department was correct and that the appellant had no right to continued payment of OFP once her son was taken into care. Based on

the oral hearing it was equally clear that the appellant never set out to defraud the Department or to claim anything to which she was not entitled. As she was keeping a home for her son to return to and generally had daily contact with him, she incorrectly, believed that she was still entitled to payment of OFP. The Appeals Officer also noted that the appellant had continued paying for much of her son's upkeep and, as the representative of the CIC pointed out, the appellant would clearly have had an entitlement to a different payment such as Disability Allowance if the OFP had been stopped.

The Appeals Officer noted the very difficult circumstances for both the appellant and her young son. The Appeals Officer considered that a decision with retrospective effect with the consequence of raising an overpayment would be grossly unfair on the appellant. While the Appeals Officer upheld the Department's decision that the appellant had no entitlement to OFP he decided that the application of Section 302(b) of the Social Welfare Consolidation Act 2005 was appropriate and determined that the decision should take effect from 7 December 2016. In those circumstances no overpayment arose.

Outcome: Appeal allowed.

I2 2017/40 Jobseeker's Allowance Summary Decision:

Question at issue: overpayment (department error)

Background: The appellant was in receipt of Jobseeker's Allowance. She claimed assistance when her husband's claim was stopped as it was considered he was in full-time education. Some months later, the appellant's husband re-applied and his payment was reinstated. However, the Department failed to apply the maximum payment provisions that apply to a couple with the result that the appellant and her husband each received the full payment of €432 per week in respect of the family. This resulted in an overpayment of almost €14,000. The error only came to light when the appellant informed the Department that she had commenced a Tús scheme.

Consideration: The Appeals Officer identified the relevant legislation as Section 144 of the Social Welfare Consolidation Act 2005. Based on the legislation and the facts of the case, it was clear that the appellant was overpaid Jobseeker's Allowance. However, the overpayment arose in this case because of a Departmental error. From enquiries made by the Appeals Officer, it appears that a maximum payment indicator was not inserted on the appellant's claim record and as a result both she and her husband received full payments. The Appeals Officer noted that when the appellant's husband re-claimed Jobseeker's Allowance, he clearly stated on his application form that the appellant was already receiving full payment in respect of the family. According to the letter of appeal, the couple had numerous interactions with the Intreo Centre over the course of their claims and always went there together when issues or queries arose. Their ongoing engagement with various activation measures was also mentioned. The appellant also got statements of payments received on four occasions for submission to the university where she studied in the UK. The letter of appeal also states that the couple had never claimed separately before, and they were not aware of the level of payment each would receive. Given their ongoing engagement with the Intreo Centre, they assumed they were receiving their correct entitlement.

The Appeals Officer considered that the over-payment was due to Departmental error. The Appeals Officer acknowledged that it could be argued that the appellant should have realised she was receiving too high a payment, however, given the ongoing engagement with the Department during the claims, the fact that the couple had not claimed separately before and that the appellant's husband declared her payment when re-claiming assistance, an assumption on their part that they were receiving the correct payment was not unreasonable. Having considered the appellants' submission and that of the

Department, and given the circumstances in which the overpayment arose, the Appeals Officer considered
it fair to revise the decision in this case to eliminate the overpayment. He applied Section 302(c) of the Social Welfare Consolidation Act 2005, which gives discretion to vary the effective date of a decision.

Outcome: Appeal allowed.

I3 2017/46 Supplementary Welfare Allowance Summary Decision

Question at issue: Eligibility (rent supplement and overpayment)

Background: The appellant had made an application for Rent Supplement which was awarded from mid-December 2014. On review, her Rent Supplement claim was closed from early February 2016 as she was found by then to be a full-time student and not participating in an approved government education scheme for the academic period of 2014 to 2016. She was told there had been an overpayment of Rent Supplement of almost €3,000 as Section 190(1) of the Social Welfare Consolidation Act 2005 set down conditions for the payment that she did not meet. It provides: 'A person shall not be entitled to receive supplementary welfare allowance while attending a course of study within the meaning of section 148, other than in the circumstances and subject to the conditions that may be prescribed.'

Consideration: The appellant contended in her appeal that she had called to the Department prior to being granted Rent Supplement about an Illness Benefit claim and had informed the Department then that she was a full-time student. She stated that she was informed by an officer that she should put this writing and she contended that she did so. She received correspondence from the Department in mid-October 2014 stating that her application for permission to undertake an education/training course under the conditions for receipt of Illness Benefit had been granted.

Having reviewed all of the available evidence in this case, the Appeals Officer was satisfied that there was no intention on the part of the appellant to misrepresent the situation as regards her entitlement to Rent Supplement. While the appellant perhaps should have informed the Rent Unit separately that she was a full-time student, the appellant was of the understanding that she had in effect done so after she had called to the Department in person in late 2014 and had written to it regarding same. The appellant had afterwards received correspondence from the Department stating that permission was granted to undertake an education/training course, which she understood to have been granted on the basis of complete information.

It was also noted by the Department that the appellant was called to the clinic to discuss the matter in early February 2016, however, a decision regarding the claim was not issued in writing until January 2017. The appellant was told verbally of the conclusion the Department had reached and was given the option to appeal in late 2016.

The Appeals Officer concluded that the assessment carried out by the Department regarding the Rent Supplement was correct, however, given the circumstances of the case, the Appeals Officer decided in accordance with the provisions of Section 319(c) of the Social Welfare Consolidation Act 2005 that the effective date of that decision should be the date it was issued in writing to the appellant, namely, mid-January 2017. This had the effect of negating any overpayment.

Outcome: Appeal allowed.

I4 2017/49 State Pension (Non-Contributory) Oral hearing

Question at issue: Claim against estate

Background: Following the pensioner's death, solicitors acting in the administration of the estate submitted a schedule of assets to the Department, in line with the requirements of the governing legislation. State Pension (Non-Contributory) had been awarded with effect from a date in 1988,and paid on the basis of a nil means assessment. The case was referred to a Social Welfare Inspector for a retrospective assessment of means.

The Inspector reported that the deceased held shares (17%) in a limited company, which was a holding company for some 20 acres of land, with company accounts having valued its assets at some €320,000. In addition, he obtained details as to the value of the lands held by the company. The Deciding Officer noted that the principal activity of the company was the letting of land, and he concluded that the land was an investment and fell to be assessed on a capital value basis. He made a decision revising entitlement throughout the period that pension had been paid and assessed an overpayment of some €50,000, with a claim for repayment being made against the estate.

In an appeal against the decision, made on behalf of the executors, it was asserted that the valuation used for the property owned by the company was unrealistic and not in line with commercial reality; that the shares had not been not valued, only the property was; that there was no recognition of loans to the company, and no account had been taken of the costs of realising the value in the company or the control exercisable by the shareholder; that the deceased had no power to force a sale of the property, and that she had no interest in the debts owed by the company.

Oral hearing: The evidence in the case was examined, including statements as to the value of the shares held and details outlined in the company accounts. Submissions were made on behalf of the Department and by the legal representatives appointed by the appellant (the executors), and by family representatives.

The appellant's legal representatives submitted that the figure of €320,000 referred to authorised share capital, that is, the value to which shares can be issued. It was submitted that a shareholder holds a share in the company and not in the land, reference being made to the fact that a company is a separate legal entity.

It was submitted further that, at 17%, as a minority shareholder, the deceased would have had no right to force a sale: in effect, she was locked into that as it could never have been realised unless with the agreement of all shareholders; the company would have had to wind itself up to distribute the cash. It was submitted that assets might make shares valuable, or not, but what was at issue was the value of the shares.

In addition, a copy of a case study published in the SWAO Annual Report 2016 was submitted; this referred to an overpayment of State Pension (Non-Contributory) assessed against an estate (2016/28). Attention was drawn to the Appeals Officer's statement that overpayments, arising from a revised decision under Section 302 (a) or 302 (b), must be individually justified and the larger the overpayment, the greater the burden of proof and justification required.

The family representatives submitted that the deceased had never derived any benefit from her shares and that the land held by the company had been in the family for many years and had been spread amongst a number of families at the time it was inherited; it had been put into a corporate environment because it made it easier to deal with on the basis of shares. It was submitted that the deceased had been totally dependent on her pension and that, at the time of her claim, she would not have regarded the shares at issue as an asset as they had never yielded anything.

Consideration: The legislation relied upon for the decision is outlined in the Social Welfare (Consolidation) Act 2005: Rule 1 of Schedule 3, Part 3, in relation to the assessment of means and Section 302 (b) in relation to the effect of revised decisions, providing for the implementation of a retrospective assessment.

The Appeals Officer was persuaded that the submission made on behalf of the appellant (the executors) was well founded, that is, that the deceased held a share in the company and not in the land, the company being a separate legal entity, and further that, as a minority shareholder, she could not have forced a sale of the land.

She noted that Schedule 3, Part 3, Rule 1, provides for the assessment of the value of property (not being property personally used or enjoyed) which is invested or is otherwise put to profitable use by the person or which, though capable of investment or profitable use, is not invested or put to profitable use. Having examined the evidence, including that adduced at oral hearing, the Appeals Officer concluded that it had not been established that there was a basis for an assessment of the capital value of the land held by the company at issue in the retrospective assessment of the deceased's means, having regard to the provisions of the governing legislation.

Outcome: Appeal allowed.

I5 2017/51 State Pension (Contributory) Summary Decision

Question at issue: Overpayment (qualified adult)

Background: The appellant was awarded a State Pension (Contributory) from February 2001. His pension included an increase for a full-rate qualified adult payment (IQA) in respect of his wife. He completed and returned a review form that had been issued to him in May 2016. He informed, in the completion of this questionnaire, that his wife had been self-employed since 1 January 2009. He provided information in relation to her income from this self-employment and evidence that this employment and income had been declared and appropriate returns made to the Revenue Commissioners. He received a revised decision informing him that he was not entitled to receive any qualified adult payments for the period January 2011 to January 2013 and that he was only entitled to receive a reduced rate qualified adult payment for the period January 2013 to April 2016 resulting in an overpayment of €29,700 for the period from January 2011 to April 2016.

Consideration: The Appeals Officer was satisfied that this revised decision was appropriately made under Section 302(b) of the Social Welfare Consolidation Act 2005. Section 302(b) provides that a decision 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. This legislative provision allows discretion in determining the appropriate date from which a revised decision should take effect.

The Appeals Officer was satisfied that the appellant was unaware of his obligation to inform the Department of a change in his wife's income circumstances and of its implications for his entitlement to an IQA, given that he was in receipt of a pension based on insurance contributions he had made. He asserted he had no change in his circumstances that prompted him to contact the Department and, given his own age and that of his wife, an annual review by the Department would have been more appropriate rather than allowing an escalation of the debt he was now deemed to have incurred. He made the case that he and his wife are honourable people and make their returns as required.

The Appeals Officer deemed the issue of 'reasonableness' to be a relevant factor in determining the date from which this revised decision should take effect. He took into consideration that the claim not been reviewed by the Department from the date it was awarded in February 2001 up to May 2016 and that the

appellant had reasonable grounds to assert, not being reminded of same, that he was unaware of his obligation to inform the Department of a change in his wife's income circumstances and of its implications for his entitlement to an IQA. The Appeals Officer deemed, in the absence of a review and a reminder of the qualification criteria for an IQA, it was reasonable for the appellant to assume a continued entitlement to the IQA payment he had been getting.

Outcome: Appeal allowed.

I6 2017/318/62 Jobseeker's Allowance

Question at issue: Whether an Appeals Officer had erred when partially allowing an appeal in relation to an overpayment

Grounds for review: The Department contended that the Appeals Officer had erred in law in arriving at her decision, which was somewhat favourable to the appellant, in that the appellant appeared to have acknowledged during interview that the full details of all her financial means should have been provided at the date of application but were not.

Background: The appellant had been employed on a casual basis and applied for Jobseeker's Allowance at a date when her employment was reduced to three mornings per week. She would have been entitled to Jobseeker's Benefit based on her social insurance contributions but she was assessed by the Department as having no financial means and on that basis received a higher rate of Jobseeker's Allowance which she opted to receive. A review of her claim was carried out by the Department a couple of years later when the Department received information from the Revenue Commissioners which outlined interest earned on accounts held by the appellant. Her claim was referred for investigation and she was invited to attend for interview with a Social Welfare Inspector. The appellant disclosed at that point that she held three other bank accounts which she had not declared when she made her claim. The capital amounts were duly assessed and an overpayment in the amount of over €15,000 in relation to the Jobseeker's Allowance was calculated.

At appeal, the appellant acknowledged that she should have declared that she had savings, but also asked whether she had any other entitlement during the period at issue. She repaid in full the amount assessed as having been overpaid. The Appeals Officer concluded that the revised decision should have been made with reference to the provisions of Section 302(b) rather than 302(a) of the Social Welfare Consolidation Act 2005 and, accordingly, the overpayment could be offset against the entitlement that she would have had to Jobseeker's Benefit during the period. The appeal was therefore partially allowed, with the reduced amount of overpayment to be calculated by the Department.

Review: Section 302 of the Social Welfare Consolidation Act 2005 provides for the date of effect of revised decisions as follows:

302.—A revised decision given by a deciding officer shall take effect as follows:

a. *where any benefit, assistance, child benefit, family income supplement, continued payment for qualified children or back to work family dividend 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;

b. where any benefit, assistance, child benefit, family income supplement, continued payment for qualified children or back to work family dividend 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;

Section 302(a) of the Social Welfare Consolidation Act 2005 relates to situations where there is evidence that the person deliberately gave false or misleading information or deliberately concealed relevant information. The standard of proof is a high one and there must be evidence, not just that the person gave false information or withheld relevant information, but also that he/she did so deliberately.

Having considered the documentary and oral evidence, the Appeals Officer concluded that the Department's Deciding Officer had incorrectly relied on Section 302(a) rather than Section 302(b) in determining the effect of the revised decision. In partially allowing the appeal, the Appeals Officer found that the Department's decision as to the appellant's financial means was correct, but that the appellant still had an underlying entitlement to Jobseeker's Benefit based on her PRSI contributions which was not offset, but should have been offset, against the overpayment of Jobseeker's Allowance, thus serving to reduce the sum at issue.

I concluded that the Appeals Officer's evaluation of the evidence and her conclusion that the standard of proof required by Section 302(a) of the 2005 Act had not been fulfilled was correct and that Section 302(b) should instead have been the legal basis used.

Outcome: Decision not revised.

I7 2017/318/65 Disability Allowance (DA) and One Parent Family (OPF)

Question at issue: whether the appellants were cohabiting

Grounds for review: The appellants disagreed with an Appeals Officer's finding that they were cohabiting (as opposed to co-residing) during a period of almost 5 years, which resulted in two significant overpayments being calculated for repayment to the Department, and contended that there were errors of both fact and law in his decisions.

The alleged errors included:

1. the wrongful reliance on and inferences drawn by the Appeals Officer on incomplete and defective documentary evidence obtained via a social media platform (Facebook) as submitted by the Department;
2. the wrongful reliance by the Appeals Officer on 'statements of admission' signed by both appellants, which they argued indicated co-residence only, which had never been denied by them, and not cohabitation;

3. the failure of the Department, and subsequently the Appeals Officer, to apply the Department's guidelines in relation to cohabitation;

4. the misrepresentation of information provided by one of the appellants at the oral hearing in relation to whether or not utility services were provided to a mobile home at the main residence in which one appellant stated he was living;

5. the failure of the Department to conduct a home visit or to investigate the alleged couple's financial arrangements in order to fully consider whether cohabitation existed and the Appeals Officer's apparent reliance on the Department's flawed assertions in that regard.

Background: The appellants separated several years ago. Subsequently, one appellant was awarded One Parent Family Payment and the other was awarded Disability Allowance as a single person. Later investigations by the Department revealed that one appellant had

returned to the family home, but neither appellant had notified the Department of this fact. Consequently, the Department found that they had been cohabiting for almost 5 years, resulting in two significant overpayments arising for the period.

During the course of the investigations which led to the Department's decisions and at the oral hearing, the appellants repeatedly contended that their marital relationship had long deteriorated and that they had separated, and that one appellant moved back into the family home for health reasons only. They consistently contended that they were co- residing, but not cohabiting, and that co-residence is not proof of cohabitation.

Review:

Legislation/Guidelines:

The governing legislation relating to cohabitation and the grounds for disqualification of One Parent Family Payment where cohabitation is established are as follows:

Section 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.

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 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.

Section 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.

In the case of Disability Allowance, where a person is cohabiting, the governing legislation provides that account shall be taken of the income of their cohabiting partner for the purposes of the means test for

that payment.

Burden and Standard of Proof:

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”.In this particular case, the effect of the revised decisions was very significant in that an overpayment totalling approximately €75,000 was assessed against the appellants. In the circumstances, the standard of proof was high and the burden/onus was on the Department to make an evidence-based case that it is highly probable that the appellants were residing with each other during the entire period in question in an intimate and committed relationship in accordance with the governing legislation.I found that 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:

1. The duration of the relationship

2. The basis on which the couple live together

3. The degree of financial dependence of either adult on the other and any agreements in respect of their finances

4. 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

5. Whether there are one or more dependent children

6. Whether one of the adults cares for and supports the children of the other

7. The degree to which the adults present themselves to others as a couple

The available evidence suggested that neither the Department nor the Appeals Officer appeared to have considered evidence in this case in line with these criteria. It was my view that in failing to establish that the Department had applied the above criteria in determining whether cohabitation existed during the entire period of the revised decisions, the burden of proof was not discharged, and the Appeals Officer made an error of law in determining the appeals.

Financial Interdependence:

The available evidence regarding financial dependence/agreements in respect of finances pointed to a

joint mortgage which pre-dated the break-up of the marriage. Apart from this, the couple appeared to have separate bank accounts etc. and there was no evidence on file of any further investigation/enquiry by the Department or the Appeals Officer to establish financial interdependence (this point was also made by the appellants in seeking this review).

Signed Statements:

The Department and the Appeals Officer placed significant evidential value on statements drafted by a Social Welfare Inspector and signed by the appellants in concluding that cohabitation a period of almost 5 years had been admitted or proven therefrom. From my review of the case, I did not accept that the statements could be taken as proof of cohabitation. Both appellants repeatedly denied cohabitation but admitted to co-residence.I noted that they provided plausible explanations as to why one appellant returned to and remained in the family home during that period despite the alleged breakdown of their marital relationship. On a related matter, I noted also that the contention that one appellant had lived for part of that time in a mobile home attached to the family home was rejected by the Appeals Officer, but that the appellants contended later that the Appeals Officer misrepresented a response at the oral hearing in relation to the whether utility services were directly connected to the mobile home. Whatever the actual situation, I was of the view that the conflict in this regard and indeed with regard to whether or not there were separate living arrangements in the family home - could have been verified if the Social Welfare Inspector had paid a visit to the family home at some stage during his investigation of this case. As this did not happen, the conclusion reached was not on solid ground.

Social Media/ 'Facebook' Evidence:

The 'Facebook' evidence appeared to have been viewed by the Department and subsequently by the Appeals Officer as the key determining evidence pointing to cohabitation in this case. However, alternative explanations for many of the photographs in question were provided by the appellants, in particular in relation to photographs of family events and a holiday which they contended they attended not as a couple, but individually, along with a significant number of other family members. I noted also that there were a number of photographs and posts among the Facebook evidence which could point to an intimate and committed relationship of the kind that is envisaged in the governing legislation (in particular the alleged renewal of marriage vows), however, the appellants contended that those Facebook postings were posted by other family members as a prank. All of the explanations provided by the appellants were rejected out of hand by the Social Welfare Inspector, the Deciding Officer, and by the Appeals Officer, without any further investigation or attempt by the Department to seek confirmation or denial from the third parties allegedly involved. While I accepted, on the face of it, that the Facebook evidence appeared to point, at a minimum, to a cordial relationship between the appellants, I was of the view that the alternative explanations adduced by them cast some doubt on that evidence and may have merited further investigation by the Department. In particular, it was my view that the photographic evidence of the presence of the appellants attending family events together did not in any way prove cohabitation within the meaning of the governing legislation.

With regard to the issue of Facebook evidence generally, I did not accept the appellants' contention that an Appeals Officer must be an expert on Facebook or other forms of social media in order to properly determine an appeal involving evidence of this nature. In determining an appeal, an Appeals Officer must of course give due consideration to and weigh up all of the evidence presented, including evidence of social media interactions, in order to decide on the weight which should be applied to that evidence and/or the veracity of same.

Conflicting Statements:

I felt it was significant that the veracity of directly conflicting assertions made by one of the appellants and a Social Welfare Inspector was decided by the Appeals Officer in favour of the Social Welfare

Inspector, despite the fact that there was a signed statement on file from the Inspector confirming that the appellant's version of events "may have happened" and this possibility was apparently reconfirmed by the same Inspector at the oral hearing. In light of all of the above, I accepted that the question of whether or not cohabitation existed during the period in question had not been proven by the Department and was not properly explored by the Appeals Officer. In misdirecting himself on where the burden of proof lay, the Appeals Officer appeared to have accepted at face value much of the evidence adduced by the Department and in doing so placed an unreasonable burden of proof on the appellants to show that they were not in a cohabiting relationship.

Outcome: Both decisions revised and appeals allowed.

I8 2017/318/68 State Pension (Non-Contributory)

Question at issue: Overpayment assessed (means)

Background: The appellant in this case was the legal personal representative of the deceased pensioner who applied for State Pension Non-Contributory in 2003 and known at the time as Old Age Non-Contributory Pension. A means assessment was conducted and the person concerned was assessed with weekly means of approximately €50 which derived from 'income received from renting his land'. He was awarded the pension at the rate of €101.50 with effect from June 2003.

The person concerned, who had been a farmer, sold his dwelling and lands in 2008 and lodged the proceeds of the sale to the bank. The Department only became aware of this following the death of the person concerned in 2015, when a schedule of assets was sent to the Department. A Deciding Officer, relying on Sections 301 and 302(b) of the Social Welfare Consolidation Act 2005, made a revised decision to the effect that, because of his increased means from the sale of the land, the person concerned had no entitlement to State Pension Non-Contributory from May 2008. An overpayment of almost €80,000 was assessed against the estate for the period from May 2008 to February 2015.

Following an oral hearing of the appeal in September 2017, the Appeals Officer disallowed the appeal.

Grounds for review: Legal representatives on behalf of the personal representative set out a number of grounds for my consideration in this review. The main point was that the farm had been disclosed as an asset at the time of the original application for the pension and that if it had not been sold there would not have been any questions raised regarding overpayments. It was also stated that the person concerned was advanced in years when he sold his house and lands and that his health deteriorated further and he became incapable of notifying the Department or enjoying the proceeds of the sale. The representative submitted that the Appeals Officer did not give sufficient weight to medical evidence provided in this regard. The representative also noted that the person concerned moved into a nursing home in 2008 following the sale and that this was notified to the Department; it was submitted that this would have been a good opportunity for the Department to review the appellant's pension entitlements, and that by failing to take this opportunity, the Department contributed to the overpayment. The representative also referred to guidelines and case studies on welfare.ie and questioned why long standing practices of the Department appeared to have been ignored in this case.

Review: The primary legislative provisions governing entitlement to State Pension Non- Contributory are contained in Chapter 4 of Part 3 of the Social Welfare Consolidation Act 2005. In accordance with Section 153 (b) of the 2005 Act a person shall be entitled to State Pension Non-Contributory where among other things 'the means of the person as calculated in accordance with the Rules contained in Part 3 of Schedule 3 [of the 2005 Act] do not exceed the appropriate highest amount of means at which pension may be paid to that person in accordance with section 156'.

In accordance with Part 3 of Schedule 3 means are assessed under cash income (including income from work), value of capital (which includes savings, investments, cash on hand and property but not the person's own home) and income from property personally used.

When the person concerned applied for State Pension Non-Contributory in 2003, a means assessment was conducted and took account of income derived from the letting of his land, in accordance with the above provisions. The representative contended that an asset that was disclosed at date of application and later sold should not be assessed on the basis of its capital value. Section 251 (10) of the Social Welfare Consolidation Act 2005, which both the Deciding Officer and Appeals Officer relied on in their decision making, provides that "*Where a person is in receipt of assistance or has made a claim for assistance which has not been finally determined, and his or her means have increased since the date of latest investigation of those means, or, where no such investigation has taken place, since the date of making the claim, the person shall, within the period that may be prescribed, give or cause to be given to the Minister written notification of the increase*.".

The period prescribed for the purposes of section 251 is set out in Regulation 190(2) of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142 of 2007) and in the case of State Pension (Non-Contributory) is defined as 3 months.

In assessing the value of capital, the law does not in any way distinguish the source of that money, even where it is contended that the capital was as a result of the sale of property or an asset that had already been disclosed. Clearly where the Act requires that a change in means must be disclosed and sets out a prescribed time for such disclosure, then that change in means constitutes a change of circumstances for the purposes of revising the original decision. I find no error of law in this regard.

It was further contended that the Appeals Officer did not give sufficient weight to the argument that the person's health was deteriorating and became incapable of notifying the Department or enjoying the proceeds of the sale. My attention was drawn to a medical report from June 2016 providing a medical history. In this respect I did not find that the Appeals Officer gave insufficient weight to the evidence that the person's health was deteriorating. The evidence on file indicated that the Deciding Officer considered that as the person concerned had capacity to sign an agreement to sell his residence and land then he should also at that time (or within 3 months) have notified the Department of the proceeds from the sale. It appeared that the Appeals Officer found no reason to disagree with that contention. In my view it was not unreasonable for the Appeals Officer to form this view.

In relation to the lack of review by the Department of the person's entitlement to the pension at an earlier point, while it may be desirable that the Department had reviewed the entitlement there is no legal obligation on the Department to conduct a review of a person's entitlement or continued entitlement. On the other hand there is a legal requirement on all recipients of social welfare payments to notify the Department of any change in circumstances that may impact on their entitlement.

Finally, the representative made reference to guidance to Deciding Officers published on the Department's website. It must be stressed that the case-studies outlined are merely guidance to Deciding Officers and as such do not have the weight of law. In any event the case-studies involved a different set of circumstances to this case and each individual case is considered on its own merits, in accordance with the governing legislation.

Outcome: Decision not revised.

I9 2017/318/69 State Pension (Non-Contributory)

Question at issue: Overpayment assessed (means)

Background: Following the death of her husband in 2000, the appellant (deceased) applied for Widows Non-Contributory Pension. Her late husband was a farmer and died intestate. Under the rules of intestacy she was entitled to inherit two-thirds of her husband's estate, with her children having an entitlement to share equally the remaining one-third. At the time of application for the pension, solicitors for her husband's estate informed the Department that it was the intention of the appellant and her family to release all land to one of her sons who had taken over his father's farming and dealing activities. The appellant and the other children did not intend to exercise their intestacy rights. This was noted in the Social Welfare Inspector's (SWI) report at the time and the SWI recommended a further check be carried out in 6 months to check on the situation regarding the estate. The appellant was awarded Widows Non-Contributory Pension and in 2006 this was transferred over to State Pension Non-Contributory.

In 2004, it emerged that the land had development potential and part of the farm was sold for over €2m. A large portion of the revenue from the sale was used to purchase farms, farm equipment and stock for the appellant's son, under a family settlement. Smaller amounts of money were paid to the appellant's other children and the appellant retained approximately €143,000 herself. This was not notified to the Department and the pension continued to be paid. In 2013, the appellant's entitlement came up for review following information provided by the Revenue Commissioners to the Department relating to DIRT.

Following an investigation by a SWI in March 2016, a Deciding Officer of the Department, relying on Section 302(a) of the Social Welfare Consolidation Act 2005, advised the appellant that payment of her pension had been withdrawn for the period from June 2000 to May 2015 and an overpayment of almost €150,000 was being assessed against her. Section 302(a) relates to situations where there is evidence that the person deliberately gave false or misleading information or deliberately concealed relevant information.

The decision was appealed and an oral hearing took place in January 2017. The Appeals Officer partially allowed the appeal, determining that the reassessment should commence not from 2000 but from September 2004, that being the date funds from the sale of the development land were received. He also decided that Section 302(b) of the Social Welfare Consolidation Act 2005 was more appropriate than 302(a) and should be applied. Section 302(b) relates to new facts or evidence brought to the attention of a Deciding Officer since the original decision or determination was made. The impact of this partial allowance was a reduction in the amount of overpayment, the precise amount to be calculated by the Department.

Grounds for review: Representatives of the appellant made a long and detailed submission in their request for a review of the Appeals Officer's decision. Among the main points raised was that the appellant was never an active owner of the assets involved, the assets were merely 'vested' in her as an administrator of her husband's estate. They also stated that while the farmlands suddenly increased in value because they had development potential attached to them, this was unexpected and not an outcome over which the appellant had control. They stated that the lands were ultimately and always to be for the benefit of the appellant's son who had taken over his father's farm. They also submitted that the partial allowance by the Appeals Officer was indicative of acceptance of the bona fide circumstances put forward on behalf of the appellant and the appeal should be allowed in full.

Review: I reviewed all the papers and submissions that were before the Appeals Officer at the time of his decision as well as the submission from the appellant's representatives requesting the review. In addressing the issues raised by the appellant's representatives, I was satisfied that the Appeals Officer fully understood that the appellant did not 'own' the estate of her late husband and rather that it was vested in her as administrator, and that he made his decision on that basis. I came to the view that the decision of the Appeals Officer would have been correct but for the fact that he failed to take account of the information provided to the Department by the appellant when she first applied for Widow's Non-

Contributory Pension in 2000. The intentions of the appellant and her family as regards the estate of the appellant's late husband were clearly communicated to the Department at the outset. These intentions were noted in the SWI report which included a specific recommendation that a further check on the situation regarding the estate be carried out in 6 months.

I noted that neither decision maker (the Deciding Officer nor the Appeals Officer) made any reference to the fact that at the very outset of the appellant's claim process, the Department knew of the intentions of the appellant and her family as regards the estate of the appellant's late husband. The fact that the estate increased in value due to the development value of the land did not in my view change the situation. While there is no legal obligation on the Department to conduct a review of a person's entitlement or continued entitlement, in this particular case I took into account the lack of a review over the period from September 2000 to December 2013 as it seemed to me that the Department failed to act on a clear recommendation of the SWI that a further check be carried out in 6 months.

In light of these considerations I concluded that the Appeals Officer erred in law and in the circumstances I revised the decision of the Appeals Officer and allowed the appeal. The effect of this revision was that no overpayment arose.

Outcome: Decision revised and appeal allowed.

J1 2018/35 Working Family Payment Oral Hearing

Question at issue: Eligibility (Hours worked)

Background: The appellant was working as a retail assistant and had been in receipt of Working Family Payment since 2013. Her claim was due to be renewed in June 2016 and the Department requested, in addition to the completion of the renewal form, that her employer submit tax deduction cards for the years 2015 and 2016. A re-calculation of hours based on gross pay and her hourly rate was carried out and the Department deemed that as she did not meet the required hours on an average basis she did not have an entitlement to Working Family Payment from January 2015 to June 2016. The effect of the revised decision of the Department was the raising of an overpayment of €17,846.

Oral Hearing: At the oral hearing, the appellant stated that at the time of the application, she was working 26 hours per week. Her hours varied according to the requirements of the job, however she asked her employer on a regular basis for more hours as she was finding it difficult to manage on what she was being paid. The appellant stated that she was not fully aware of the ongoing requirement that she must work minimum hours or that she should inform the Department of any change. The appellant outlined that she had been in receipt of Working Family Payment since 2013 and this issue had never been highlighted at the renewals of her entitlement. The appellant also stated that she had ceased work in October 2017 but then secured a 6 month contract.

Consideration: The Appeals Officer noted that the legislation governing entitlement to Working Family Payment (previously known as Family Income Supplement) refers to a period of payment. The Appeals Officer outlined that the legislation provides that Working Family Payment shall be payable for a period of 52 weeks (or such other period as may be prescribed) beginning on the date on which it is receivable in accordance with regulations and, except where regulations otherwise provide, the weekly rate of Working Family Payment shall not be affected by any change of circumstances during that period. The Appeals Officer noted that the prescribed 'change of circumstances' are an increase in the number of children in the family or the cessation of One Parent Family Payment on or after 4 July 2013.

The Appeals Officer concluded that neither of these conditions applied to the appellant at the time of the renewal in June 2016, or for the earlier periods of the claim contained in the period at issue, between

January 2015 and June 2016. In June 2016, while determining the appellant's on-going entitlement to Working Family Payment, the Department requested that the appellant's employer submit tax deduction cards for 2015 and 2016. It was not explained in the appeal file why the Department chose to review the previous claim which was renewed in June 2015, nor the period of claim from January 2015 to June 2016, this period relating to an earlier period of entitlement, namely June 2014 to June 2015. The Appeals Officer outlined that the conditions for awarding Working Family Payment are that the claimant must work at least 38 hours per fortnight and that this must be expected to continue for at least 3 months.

He concluded that in June 2014 the appellant satisfied this condition and the claim was awarded. There was no evidence on the file to suggest otherwise. The Appeals Officer concluded that as there had been no change in the appellant's circumstances as set out in the governing legislation, the appellant continued to be entitled to Working Family Payment for 52 weeks from the commencement of that claim. The Appeals Officer considered the retrospective examination of the hours worked from January 2015 to June 2015 as erroneous and unfair. With regard to the continuing entitlement from June 2015 to June 2016, the Appeals Officer concluded that the same principle applied. In the absence of any evidence to the contrary on the file, the Appeals Officer had to assume that at the time of renewal of Working Family Payment in June 2015, the appellant was found to be in compliance with the conditions for award, that this was likely to continue for 3 months and was payable for 52 weeks to June 2016.

Outcome: Appeal allowed

J2 2018/39 Jobseeker's Allowance Summary Decision

Question at issue: Eligibility (whether the person was unemployed)

Background: The appellant had been in receipt of Jobseeker's Allowance but secured full- time employment during the period 2 May 2017 to 23 May 2017 and was therefore deemed to be not unemployed for that period resulting in an overpayment of €901.55.

The appellant contacted the Department in May 2017 to state that she had commenced employment and had received a Commencement of Employment form in the post. She stated that the Local Employment Service (LES) Mediator advised her that she could collect payment until she had received the first payment from her employer. The Department told the appellant that she would be assessed with an overpayment. In June 2017, the Department wrote to the appellant advising that she appeared to have been overpaid for the period 2 May 2017 to 23 May 2017. The appellant stated that she had been in regular contact with the LES "who advised me I could continue to claim my allowance up until my first wage". In her appeal, the appellant did not dispute the dates of employment or the fact that she had commenced work, did not inform the Department that she was working and continued to claim and collect her Jobseeker's Allowance. The appellant stated that she received incorrect information from the LES. In the appeal submission, the Deciding Officer did not address the fact that the appellant may have been given incorrect information by the LES. The appeal submission stated "it was explained to the appellant that the LES was not the DSP and that an overpayment would be assessed". No evidence was provided to show that the appellant was not so informed by the LES.

Consideration: The Appeals Officer outlined that Section 302(b) of the Social Welfare Consolidation Act 2005 allows the decision maker, having regard to all the circumstances of the case to determine the effective date of the decision. Having considered all the evidence in this case, the Appeals Officer found that the appellant was not entitled to Jobseeker's Allowance from 2 May 2017 to 23 May 2017 and relying on the provisions of Section 302(b) of the 2005 Act decided that the decision should take effect from the

date of the Department's decision. The effect of the Appeals Officer decision was that no overpayment arose.

Outcome: Appeal allowed.

J3 2018/49 Supplementary Welfare Allowance Summary Decision

Question at issue: Eligibility (eligibility and overpayment)

Background: The customer was in receipt of Supplementary Welfare Allowance on the grounds that she was unfit for work or to register for Jobseeker's Allowance due to illness. Some 11 months after the award of Supplementary Welfare Allowance the appellant commenced an educational course but failed to inform the Department. The Department reviewed her entitlement and disallowed her claim retrospectively for a period of six months, resulting in an overpayment of €5,000. The legal basis for this decision was Section 190 of the Social Welfare Consolidation Act 2005 which provides that, as a general rule, full-time students are disqualified from receipt of Supplementary Welfare Allowance. In her appeal the appellant asked that consideration be given to a number of mitigating circumstances: that she was a lone parent and had encountered medical and psychological issues throughout the life of her claim and had submitted medical certificates to the Department to this effect. Her decision to participate on the educational course resulted from on-going consultation with her GP who recommended activities/courses that would assist her recuperation free of medication. In addition the course would be an initiative that may potentially assist her employment prospects.

Consideration: The Appeals Officer in the first instance emphasised that as a recipient of Supplementary Welfare Allowance the appellant had a clear statutory obligation to notify the Department on commencement of the course. However, the Appeals Officer noted that under Section 190 (3) of the 2005 Act the Department has discretion to grant Supplementary Welfare Allowance to persons attending a course of study "in a case where there are exceptional circumstances." This concession did not appear to have been considered by the Department in this instance. The Appeals Officer considered that the evidence submitted by the appellant in support of her appeal could be regarded as constituting "exceptional circumstances" and the appeal was allowed.

Outcome: Appeal allowed.

J4 2018/53 State Pension (Non-Contributory) Summary Decision

Question at issue: Eligibility (Means and Overpayment)

Background: The appellant had been in receipt of State Pension (Non-Contributory) with effect from a date in 2010. A review of his continued entitlement was carried out by the Department in 2013. The review was initiated when the appellant advised the Department that he was moving to Northern Ireland, and the Deciding Officer had indicated that the appellant would have had an entitlement to State Pension (Non-Contributory) for a period of five years. In the context of this review, it emerged that the appellant had been in receipt of an Attendance Allowance from the Department of Work and Pensions in the UK for specified dates between 2014 and 2016. A revised decision was made by the Department taking account of the UK allowance in the period at issue and an overpayment in excess of €9,000 was raised. Submissions were made by an advocate representing the appellant. The grounds of appeal were that the

appellant has no education and couldn't read or write; he relied on family, friends and services such as the Department, Citizens Information (ROI) and Citizens Advice (NI) when dealing with his affairs; he was in his 70s and in poor health; he understood that the Department were aware of the UK allowance and assumed his rate of pension was correct, and he was shocked to learn that this was not the case. The appellant's advocate submitted that given his literacy issues, continued ill health and the distress and hardship which notice of this overpayment has caused him, the debt should be written off.

Consideration: The Appeals Officer noted that social welfare legislation provides that means must be assessed in order to determine entitlement to State Pension (Non- Contributory) and rules for the calculation of means are set out in Schedule 3, Part 3, of the Social Welfare Consolidation Act 2005. Section 302 of the Act outlines the circumstances in which a revised decision may be deemed to take effect. The question at issue concerned the revised assessment of the appellant's means in the period between 2014 and 2016.

The Appeals Officer noted the grounds of appeal advanced on behalf of the appellant and the Department's statement that it was satisfied that the appellant's failure to inform the Department of his full means was unintentional. The Appeals Officer having had due regard to the grounds of appeal, the specific circumstances presenting in the case and to the Deciding Officer's evaluation concluded that it was appropriate that the revised assessment of means take effect from a current date.

Outcome: Appeal allowed.

J5 2018/54 State Pension Non-Contributory Oral Hearing

Question at issue: eligibility (means and overpayment)

Background: The appellant made an application for State Pension (Non-Contributory) in February 2008. She was interviewed by a Social Welfare Inspector (SWI) in relation to her means, and reported that she held one bank account with a balance of €5,159.71 and a British Retirement Pension, payable at a weekly rate of £39.37 (exchange rate applied: 1.43648). On this basis, she was assessed with weekly means of €56.55 and pension was awarded at the rate corresponding to her means. In December 2013, the Department received information from the Revenue Commissioners under a Protocol for Consultation, Information and Data Exchange which forms part of a Memorandum of Understanding on co-operation and mutual assistance between the two bodies. The data provided referred to Section 125 Deposit Interest, and outlined interest earned on accounts held by the appellant. This prompted a review of the appellant's entitlement and she was interviewed by a Social Welfare Inspector in March 2015.

The Inspector reported that the appellant stated that she had been left money when her husband died and, as this would eventually go to her children, she thought that she did not have to disclose it in connection with her pension claim. The Inspector noted the account transactions over the years, and details of investments to the value of €100,000 as at April 2005. The Social Welfare Inspector reported current balances as: some €90,000 in Irish bank accounts, £858.79 Stg in a UK bank account and investments to the value of €24,280. The Department requested further details and the appellant submitted financial statements as requested. Her pension was suspended with effect from August 2016 as it appeared that her means were such as to have been in excess of the qualifying threshold for pension in 2008, and to allow for further examination of the position. Following various correspondence the appellant sought to explain some of the transactions which had been queried.

The Department, relying on the provisions of Section 302 (b) of the Social Welfare Consolidation Act 2005, held that the appellant was not entitled to pension with effect from the date of application in 2008 as her means had exceeded the qualifying statutory limit.

Arising from this decision, an overpayment in excess of €87,000 was assessed.

Submissions were made on behalf of the appellant to the effect that the appellant honestly believed that what had occurred was attributable to her own misunderstanding of 'assessment of means'. It was the appellant's strong contention that the money held in the bank accounts which were not mentioned was for the benefit of her children. It was submitted that the appellant could not remember very clearly how she came to acquire the pension but was adamant that no effort was ever made on her part to defraud and any failure on her part was due to ignorance. In view of the concerns outlined, the Social Welfare Appeals Office issued a letter to the appellant advising that as the decision at issue was made with reference to Section 302 (b) of the Social Welfare Consolidation Act 2005, there was no question regarding fraud.

Consideration: The Appeals Officer outlined that Social Welfare legislation provides that means must be assessed in order to determine entitlement to State Pension (Non-Contributory) and the rate of payment is set with reference to the level of means assessed. Section 153 of the Social Welfare Consolidation Act 2005 outlines the qualifying criteria and provides as follows in relation to entitlement to pension:

153.—Subject to this Act, a person shall be entitled to State Pension (Non-Contributory) where—

1. the person has attained pensionable age,
2. the means of the person as calculated in accordance with the Rules contained in Part 3 of Schedule 3 do not exceed the appropriate highest amount of means at which pension may be paid to that person in accordance with section 156.

The rules referred to above (set out in Schedule 3) specify the manner in which means are to be assessed and the rates of pension, corresponding to the means assessment, are outlined in Section 156. Section 302 of the same Act makes provision for the effect of revised decisions.

The Appeals Officer noted that, following a review in 2015, it was determined that the appellant's means were in excess of the statutory qualifying limit from the date pension had been awarded and that the decision was applied retrospectively with reference to the provisions of Section 302 (b) of the 2005 Act.

The Appeals Officer noted the submission made on the appellant's behalf, which served to clarify the appellant's finances at the time she made a claim for pension in 2008. The Appeals Officer also noted that it was conceded that the appellant's means were such as would have precluded her qualifying for State Pension had full details been clear at the time of the appellant's claim. The Appeals Officer having had due regard to the submissions made on behalf of the appellant, concluded that the appellant must be held to have had means which were in excess of the qualifying limit for receipt of State Pension (Non-Contributory) and that this was the case with effect from the date of her claim in 2008.

Outcome: Appeal disallowed.

J6 2018/318/66 Carer's Allowance

Question at issue: Eligibility (Care Provided)

Grounds for Review: The appellant's solicitors requested a review, under Section 318 of the Social Welfare Consolidation Act 2005, of the Appeals Officer decision on the grounds that the Appeals Officer erred in fact and law in concluding that the care which the appellant provided to her uncle could not be regarded as full-time care and attention within the meaning of the social welfare legislation.

It was contended that the Appeals Officer failed to take account of the fact that the appellant was effectively on-call 24 hours a day and it was submitted that the on-call periods must be considered as part

of the overall provision of care. It was further contended that there is no legislative basis for the requirement that a carer must be providing 35 hours per week in care. In this respect it was submitted by the appellant's solicitors that arguably such a requirement would be contrary to law, or at least morally indefensible, as it would create an effective pay rate of €5.97 per hour, which is substantially below the minimum pay rate.

Background: The appellant was awarded Carer's Allowance in respect of the care she provided to her uncle. Following an investigation by the Department, a Deciding Officer relying on Section 302(b) of the Social Welfare Consolidation Act 2005 determined that the appellant was not entitled to Carer's Allowance for a two month period as she was not providing full-time care and attention in line with the eligibility criteria for Carer's Allowance. The effect of this decision was the raising of an overpayment. An Appeals Officer disallowed the appeal on the same grounds as the Deciding Officer.

Review: The conditions for receipt of Carer's Allowance are contained in Chapter 8 of Part 3 of the Social Welfare Consolidation Act 2005 and Regulations made thereunder.

Section 179 (1) provides that a "carer" means:

"(a) a person who resides with and provides full-time care and attention to a relevant person, or

(b) a person who, subject to the conditions and in the circumstances that may be prescribed, does not reside with but who provides full-time care and attention to a relevant person.

"relevant person" means a person (other than a person in receipt of an increase of disablement pension under section 78 in respect of constant attendance) who has such a disability that he or she requires full-time care and attention, and who—

1. *has attained the age of 16 years, or*
2. *is under the age of 16 years and is a person in respect of whom an allowance is paid for domiciliary care of children under section 61 of the Health Act 1970;*
1. *The Minister may make regulations specifying the circumstances and conditions under which a person is to be regarded as providing full-time care and attention to a relevant person."*

The circumstances and conditions under which a person is to be regarded as providing full-time care and attention to a relevant person are set out in Chapter 4 of Part 3 of the

Social Welfare (Consolidated Claims Payments and Control) Regulations, 2007 (S.I. No. 142 of 2007).

Article 136 provides:

"136. A carer may, for the purposes of Chapter 8 of Part 3 and this Chapter, continue to be regarded as providing full time care and attention to a relevant person where –

1. *he or she would qualify for payment of an allowance but for the fact that either the carer or the relevant person is undergoing medical or other treatment of a temporary nature in an institution for a period of not longer than 13 weeks,*

or

2. *the relevant person is attending –*

2.a non residential course of rehabilitation training provided by an organisation

(being an organisation recognised by the Minister for Health and Children for the purposes of the provision of such training), or

2. *a non residential place of day care approved by the Minister for Health and Children, or*

3. *subject to paragraph (d), where it is shown to the satisfaction of a deciding officer or an appeals officer that adequate provision has been made for the care of the relevant person, a carer may –*

    3. *engage in employment, or*

    3. *engage in self-employment, or*

    3. *undertake such training or courses of education as the Minister may from time to time determine.*

4. *the aggregate duration of the activities outside the home referred to in sub-paragraphs (i), (ii) and (iii) shall not exceed 15 hours per week.*"

My conclusion, on review, was that the legislation as outlined above envisages the actual provision of care and attention and does not make any reference to the taking account of on- call periods. In this respect, I did not consider that the Appeals Officer had erred in law or in fact. In relation to the contention that there is no legislative basis for the requirement that a carer must be providing 35 hours per week in care, I agreed that it is the case that the legislation does not set out the number of hours of care that constitutes full time care and attention. In the absence of a legal definition, full time care is considered to be 35 hours per week by the Department. I formed the view that it is open to the Department to provide such guidance in order to ensure a consistent approach by all decision makers in their consideration of whether full time care and attention is being provided. The report of the Social Welfare Inspector outlined that the appellant spends approximately 17 hours per week caring for her uncle. The Appeals Officer noted in his report of the oral hearing of the appellant's appeal, that the evidence adduced was very much in line with what the appellant told the Social Welfare Inspector albeit that at the oral hearing the appellant outlined some additional hours in the afternoons. Notwithstanding that, the number of hours of care provided by the appellant per week fell significantly short of the 35 hours per week considered by the Department to be the required number of hours of care in order to be considered to be providing full time care and attention. I did not consider that the decision of the Appeals Officer was rendered erroneous by his adherence to this guidance. In relation to the contention that the requirement to be providing care for 35 hours per week is contrary to law or as contended morally indefensible, I outlined that the rates of payment of all social welfare payments are set out in social welfare legislation as passed by the Oireachtas. Social welfare payments provide income support to people meeting certain contingencies such as unemployment, illness or, as in this case, the provision of care and are also subject to scheme specific eligibility conditions. I outlined that social welfare payments are not 'pay' in the sense of being subject to employment law legislation and/or national minimum wage legislation and as such I found that this contention was misplaced.

Outcome: Decision not revised.

J7 2018/318/67 State Pension (Non-Contributory)

Question at issue: absence from the state

Grounds for Review: The appellant, supported by an advocacy organisation, contended that the Appeals Officer incorrectly disallowed the appeal and took an overly narrow legislative interpretation of the Department's guidelines in relation to absence from the State. It was also submitted that an Appeals Officer must consider whether or not the Department's actions were reasonable when trying to recoup an overpayment. It was submitted that the Department's guidelines clearly stated that 13 weeks payment while absent from the State was permitted. It was contended that the Department's argument that this is a lifetime entitlement, did not stand up to scrutiny as, if so, then this would be the only social welfare payment that has a lifetime limit on periods of absence from the State. It was contended that it is nonsensical in that, by the Department's logic, once a claimant has used up their lifetime entitlement then they are never entitled to payment while absent from the State, regardless of the brevity of the absence or the reason for it. In relation, to the requirement

for prior notification of any absence from the State, it was submitted that it is a long-standing practice across a range of social welfare schemes to accept notifications of absences at any point (even after return to the State) and apply the rules for payment while absent from the State regardless. It was also contended that in initial dealings with the Department following the appellant's return to the State in late August 2016 the appellant was advised that

arrears would issue for the period of absence from the State once payment of the pension was reinstated. As this did not happen, it was contended that the Department shifted the goalposts while the review of the appellant's claim was ongoing and for those reasons it was contended that it was unreasonable to raise an overpayment for the periods concerned and that the pension should be backdated to the date of suspension in July 2016.

Background: The appellant was awarded maximum rate State Pension (Non-Contributory) for himself and his family from January 2013. On review in July 2016, the Department found that the appellant and his family were abroad during certain periods. Following interview upon his return, the appellant provided various dates from 2013 to 2016 when he was abroad with his family. He advised that he thought he could go abroad for up to 13 weeks per year and retain his pension, which was submitted on his behalf by his advocate, who stated this was in the original Departmental Guidelines, which were amended in February 2017

and that the appellant did not know he was required to notify the Department in advance. In November 2016, a letter issued to the appellant from the Department outlining the dates of absence and querying reasons for the absences and requesting information in relation to bank transactions. The appellant supplied a list of dates to the Department, stating that he went to visit his wife's mother and to meet with other family. The Department issued

a revised decision under Section 302(b) of the 2005 Act, retrospectively disallowing the appellant's entitlement to pension for a number of weeks in August 2015, January 2016, April 2016 and July 2016 on the grounds that the appellant was absent from the State. The effect of the revised decision was the raising of an overpayment.

On appeal, the appellant contended that there is nothing in social welfare guidelines that states that 13 weeks is a lifetime limit for allowable absences from the State. He contended that the only reasonable position is that the rule should operate on the same administrative principles as other permitted absences from the State, such as two weeks for Jobseekers Allowance and that he was accordingly allowed 13 weeks absence per annum. A further supporting letter contended that the appellant's pension was disallowed for all periods of absence from the State since awarded, apart from 13 weeks. On behalf of the appellant,

it was contended that the Departmental Guidelines were updated for State Pension in February 2017 and now stated "*You can go abroad in exceptional circumstances for a limited period and the Department will review your entitlement when you return. You must notify the Department in advance of leaving the State.*" It was submitted that the previous Departmental Guidelines stated that a person could go abroad for 13 weeks, and that a reasonable interpretation would be that the same administrative procedure should apply to those in similar schemes with similar provisions, for example Widows Non-Contributory pension which allows 13 weeks per calendar year. It was argued that while the Departmental Guidelines may have been changed during the relevant period at issue the Guidelines stated 13 weeks and did not specifically state that the 13 weeks was per lifetime of the claim and thus the appellant did not incur an overpayment and his claim should be backdated to the date of suspension in July 2016. The appeal was disallowed.

Review: The primary legislative provisions governing entitlement to State Pension Non- Contributory are contained in Chapter 4 of Part 3 of the Social Welfare Consolidation Act 2005. Part 9 of the Social Welfare Consolidation Act 2005 contains general provisions relating to social insurance, social assistance and insurability. For the purposes of this review, I outlined that Chapter 2 of Part 9 sets out certain provisions relating to entitlement, including at Section 249 absence from the State provisions. I noted, as was identified by the Appeals Officer, in so far as State Pension Non-Contributory is concerned, Section 249 (7) provides that '*Subject to subsection (8), a sum shall not be paid on account of State pension (non-contributory) or blind pension to any person while absent from the State*.' Unlike other provisions in Section 249 where power is given to the Minister to vary the provisions of the primary legislation by way of regulations, subsection (7) of Section 249 makes no provision for any concession to this prohibition to payment of State Pension Non-Contributory while absent from the State. That the Department makes some provision for the relaxation of the rule to the advantage of recipients of the pension as set out in its' Guidelines, is a matter that comes within the remit of the Department's discretion, but, it is outside the remit of the Social Welfare Appeals Office to adjudicate on the reasonableness or otherwise of the content or operation of the Guidelines vis a vis other social welfare payments. From my review of the Appeals Officer's decision, I noted that the Appeals Officer was satisfied that the

Department had acted fairly and reasonably in deciding on the period of disallowance in the appellant's case and I did not consider that the Appeals Officer had erred in fact and/or law.

Outcome: Decision not revised.

K1 2019/03 Child Benefit Summary Decision

Question at issue: Qualified Child – ordinarily resident

Background: The appellant had been in receipt of Child Benefit in respect of her children which was disallowed for a period between September 2018 and April 2019. The family had left the State in August 2018 and the children were no longer regarded as being ordinarily resident in the State. The Department had not been notified of the intended absences from the State or the likely duration of the absences and consequently payment of the benefit continued during the absences. On revising the decision, the Department relying on Section 302(b) of the 2005 Act, also raised an overpayment which was in excess of €5,000. In
her appeal submission the appellant set out the background that gave rise to the family's absences from the State, which included seeking work in another EU State, visiting family in America, participating in a training programme and ultimately leaving Ireland in order to work in

another country.
Consideration: Section 219 (1) (c) of the 2005 Act provides that 'a child shall be a qualified child for the purposes of Child Benefit where he or she is ordinarily resident in the State'.
The term 'ordinarily resident' is not defined in legislation and in those circumstances decision makers can apply discretion having regard to the circumstances of the individual case, including the length of the absence.
The Appeals Officer concluded that having regard to the length of the absence, some 6 months, it could not be said that the children in this case were ordinarily resident in the State and in those circumstances found no grounds to allow the appeal. The overpayment as assessed by the Department also stood.
Outcome: Appeal disallowed

K2 2019/44 Jobseeker's Allowance Summary Decision

Question at issue: Eligibility (full-time education)

Background: The appellant was in receipt of Jobseeker's Allowance as a casual worker from September 2017. Following a review of her claim by the Department it emerged that the appellant was registered as a full-time student on a course in an ETB college for the academic year 2017/2018 which covered the period September 2017 to May 2018.
A revised decision was made by the Department in April 2018 disqualifying the appellant from receiving Jobseeker's Allowance for the period from September 2017 to March 2018 on the grounds that she was attending a full-time day course of study. The decision was made in accordance with Sections 148(1) and 302(a) of the 2005 Act. The decision resulted in an overpayment being assessed against the appellant.
Consideration: Section 148(1) of the 2005 Act states that a person shall not be entitled to receive Jobseeker's Allowance while attending a course of study, other than in the circumstances and subject to the conditions and for the periods that may be prescribed. A course of study is further defined as "a full-time day course of study, instruction or training which may take place over more than one academic year at an institution of education".
The Appeals Officer noted that the appellant did not dispute that she was attending a full- time course and there was evidence from the college confirming this.

The decision to disallow the appellant's Jobseeker's Allowance was made under Section 302(a) of the Act which provides for a revised decision to be made due to the person wilfully concealing relevant information or providing false or misleading information. In her application form for Jobseeker's Allowance, the appellant indicated that the course was part- time, 8 hours per week.
The Appeals Officer concluded that as the appellant was in full-time education she was not entitled to Jobseeker's Allowance from the date of claim and that she had provided misleading information to the Department.

Outcome: Appeal disallowed

K3 2019/50 Farm Assist Summary Decision

Question at Issue: Overpayment

Background: The appellant applied for Farm Assist and his means were assessed from farming and from his spouse's insurable employment. The appellant's spouse had been awarded Illness Benefit for a four week period in 2016 and the appellant's Farm Assist was increased from the date of award of Illness Benefit. The appellant's continuing entitlement to Farm Assist was reviewed in December 2018 arising from his application for Fuel Allowance. The Department contended that when the appellant's spouse returned to work from illness, the Department was never informed and the appellant continued to receive a higher weekly payment than that which he was entitled to. When this came to light, on his application for Fuel Allowance in November 2018, the appellant's means were re-assessed and the Department's decision gave rise to an overpayment of in excess of €12,000. The appellant contended that the overpayment was unfair and gave rise to severe financial hardship.
Consideration: Section 302(b) of the 2005 Act provides that consideration can be had to whatever new evidence has emerged and all the circumstances of a particular case in determining the effective date of any revised decision. The Appeals Officer noted the Department's contentions that they were never informed when his spouse returned to work. However, the Appeals Officer noted that the Department were aware of the appellant's spouse's return to work as Illness Benefit ceased on her return to work. The Appeal's Officer also noted that the appellant had informed the Department that his spouse was in employment. The Appeals Officer considered that had the Department acted on this information an overpayment would not have arisen. The Appeals Officer observed that in his application for Fuel Allowance in November 2018, the appellant had declared that his spouse was in employment. The Appeals Officer considered that the delay in revising the appellant's means consequent on his wife returning to work after a short period on Illness Benefit arose from an administrative oversight rather than any delay or neglect on the appellant's behalf. The Appeals Officer applied Section 302(b) of the 2005 Act to vary the effective date of the decision with the result that the overpayment was negated.

Outcome: Appeal allowed

K4 2019/57 Widower's (Non-Contributory) Pension Oral Hearing

Question at Issue: Entitlement: co-habiting

Background: The appellant was in receipt of Widower's (Non-Contributory) Pension since the late 1990s. Following a review by the Department in 2018 of his continued entitlement, it came to light that the appellant had been in a cohabiting relationship since January 2016. The Department issued a revised decision outlining that the appellant was not entitled to Widower's (Non-Contributory) Pension. An overpayment covering the period from 2016 to 2018, which was in excess of €20,000, was raised by the Department by reference to Section 302(a) of the 2005 Act. At the oral hearing of the appeal, the Deciding Officer stated that there

was willful concealment of the cohabiting relationship and therefore reliance was placed on Section 302(a) of the 2005 Act. The appellant, on the other hand, stated that he did not realise the implications of being in a cohabiting relationship for his continued entitlement to this payment and as far as he was concerned he was still a widower and would remain a widower unless and until he re-married.

Consideration: The Appeals Officer was satisfied that the appellant had not willfully concealed the fact that he was in a cohabiting relationship and the appellant himself stated that he had now realised the implications arising from this change in his status. Section 166 of the 2005 Act provides that 'a widow, widower or surviving civil partner, as the case may be, shall not, if and so long as he or she is a cohabitant, be entitled to and shall be disqualified for receiving payment of pension'. Section 302(a) of the 2005 Act relates to situations where there is evidence that the person deliberately gave false or misleading information or deliberately concealed relevant information. As the standard of proof is high there must be evidence, not just that the person gave false information or withheld relevant information, but also that this was done deliberately. Section 302(b) applies in situations where new facts or new evidence have come to light but there was no evidence that the person deliberately gave false or misleading information or deliberately concealed relevant facts. Under this provision, the Deciding Officer had discretion to determine the date of effect of a revised decision, having regard to the new facts or new evidence and to all the circumstances of the case.

The Appeals Officer was not satisfied that the Department had discharged the onus of proof required to make a decision under Section 302(a) of the 2005 Act. The Appeals Officer, therefore, upheld the decision of the Department insofar as the appellant was not entitled to the payment in the period in question and therefore the amount of the overpayment stood. However, the Appeals Officer considered that a decision by reference to Section 302(b) of the 2005 Act was appropriate.

Outcome: Appeal partially allowed

L1 2020/01 Child Benefit – Qualified Person

Background: The Department revised its decision in relation to the appellant's entitlement to Child Benefit on foot of information received that the child was in shared care from 2017 and full- time care from November 2018. Payment of Child Benefit was discontinued from November 2018. The effect of the revised decision also resulted in the raising of an overpayment of almost €1,000.

Consideration: Section 220 of the 2005 Act provides that a person with whom a qualified child normally resides shall be qualified for Child Benefit in respect of that child and is referred to as "a qualified person".

The Appeals Officer noted the appeal contentions that throughout the period in question the appellant was in regular contact with her child, he was a weekly visitor to her home, she maintained a home for him, provided food, shelter and clothing for him and that during this period he essentially was in the dual care of the appellant and the relevant state agency. The appellant stated that she was not aware that in collecting Child Benefit for him and providing for him as she did, that she was doing anything untoward.

The Appeals Officer concluded that for the purposes of the governing legislation that the appellant could not be regarded as the "qualified person" to receive Child Benefit, as on the basis of the available evidence, her child could not be regarded as normally residing with her from November 2018.

Outcome: Appeal disallowed

L2 2020/49 State Pension (Contributory) Summary

Decision

Question at Issue: Eligibility (increase for qualified adult)

Background: The appellant transferred to State Pension (Contributory) at the maximum rate on his 66th birthday in March 2015 having been in receipt of Invalidity Pension immediately before that. His spouse was a qualified adult and the rate of payment included an increase in respect of a qualified adult at a reduced rate.

The appellant's spouse was later awarded State Pension (Contributory) from her 66th birthday. At this point it came to light that the spouse's earnings were in excess of the limit prescribed for the purposes of paying an increase for a qualified adult for some periods of the appellant's claim. Following a more detailed review carried out by the Department it was established that appellant had no entitlement to an increase for the period from January 2018 as his spouse had means in excess of €310 per week. He had entitlement to an increase at a reduced rate for the period January 2017 to January 2018 as his spouse had income from employment between €100 and €310. He had entitlement to a higher rate for the period March 2015 to January 2017. The decision resulted in an overpayment being assessed with offset for arrears due to the appellant for the period March 2015 to January 2017.

Consideration: Social Welfare legislation provides for an increase in the weekly rate of State Pension (Contributory) where a claimant has a qualified adult. The legislation also prescribes the circumstances in which a spouse is specified to be a qualified adult for the purposes of payment of an increase for a qualified adult. The relevant legislation is contained in Articles 6 to 10 of the 2007 Regulations.

The Appeals Officer noted that when the appellant transferred from Invalidity Pension to State Pension (Contributory) no review was carried out with regard to his continued entitlement to an increase in respect of a qualified adult and no reviews were carried out between 2015 and 2019.

The appellant submitted that he was unaware that he was being underpaid for the period from March 2015 to January 2017 and the Appeals Officer accepted that the appellant was also unaware that he was being overpaid for the other periods.

Taking all the circumstances of the case into account the Appeals Officer concluded that it was appropriate to apply the provisions of Section 302 (b) of the 2005 Act. The effect of the decision was that no overpayment arose.

Outcome: Appeal allowed

M1 2021/01 Child Benefit – Qualified Child

Background:

The Department disallowed payment of Child Benefit to the appellant from June 2019 on the basis that the child was not ordinarily resident with him. The disallowance resulted in an overpayment for a period of two months.

The appellant and his partner separated in 2017 and each parent had joint custody of the children and the children's mother received Child Benefit. The appellant started receiving Child Benefit for his son from November 2018 when he moved to live with him full-time while his ex-partner received payment for their other two children. From May 2019, under a new arrangement, the appellant's son had only been living with him 50% of the time. Payment of Child Benefit was awarded to the child's mother in accordance with the governing social welfare legislation.

Oral Hearing:

At oral hearing the appellant stated that the child lived with him for more than 50% of the time. The appellant agreed that the court order was for custody on a 50/50 basis and stated he had not kept close watch on the exact hours that each parent had custody of the children.

Consideration:

A qualifying condition of Child Benefit is that the child must be ordinarily resident with the recipient of such benefit. In this case, the children resided with their mother 50% of the week and with their father 50%. Legislation provides that in situations where custody is shared equally between both parents, Child Benefit is paid to the mother. Section 220(1) and (2) (a) and (b) of the Act and Article 159 (6) and (7) of the 2007 Regulations refer. The Appeals Officer was satisfied that payment of Child Benefit should remain with the mother, noting that custody of all three children was split evenly.

The Appeals Officer concluded that it was more appropriate that the decision in relation to the two-month overpayment be made by reference to Section 302(c) of the Act which meant that the decision was revised from a current date and no overpayment accrued to the appellant.

Outcome: Appeal partially allowed.

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