Casebase Number: G0135

Thematic Note of SWAO Case Studies: Overpayment of Social Welfare and Cohabitation

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Theme: Overpayment of social welfare - Cohabitation

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Casebase No. Case G0135

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.

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).) A person can appeal the

revised decision alleged fraud and if successful, the fact and circumstances that gave rise to the overpayment can also be considered in the appeal.

Observations on appeal outcomes in SWAO Case Studies re Cohabitation

The onus is on the Department to establish that cohabitation (i.e. in an intimate and committed relationship) exists based on evidence. It is not for 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. For - an example of a situation where there was sufficient evidence of cohabitation, see Case Study D1 2012/15 One Parent Family Payment.

See Case Study G3 2015/22 & 2015/23 for an example where cohabitation was not found on appeal. It is states as follows:-

“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.”

Likewise, see Case Study H5 2016/318/36 One parent family payment where is states:-

“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.”

In addition the CAO notes: "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."

For comments on reliance on Facebook evidence, see Case Study I7 2017/318/65 Disability Allowance (DA) and One Parent Family (OPF):-

" 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."

Relevant Case Studies of the SWAO Annual Reports 2009-2021

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.

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.

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.

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

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