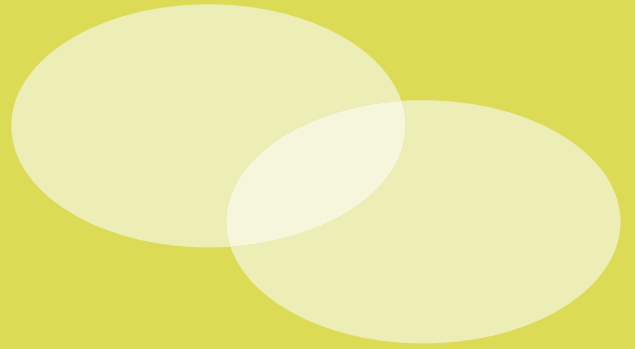


# 2004



Social Welfare  
Appeals Office  
Annual Report



# Contents

	Foreword	02
	Statistics and Analysis 2004	03
	Administration	08
	Meetings and Consultations	09
	Court Proceedings	12
	Case Studies	13
	Organisation chart	24



SOCIAL WELFARE  
APPEALS  
OFFICE

Social Welfare Appeals Office  
D'Olier House  
D'Olier Street  
Dublin 2  
Telephone: LoCall 1890 74 74 34  
Facsimile: 01 671 8391  
e-mail: [swappeals@welfare.ie](mailto:swappeals@welfare.ie)

# To The Minister for Social and Family Affairs Mr Séamus Brennan TD.

In accordance with the provisions of Section 254(1)  
of the Social Welfare (Consolidation) Act, 1993,  
I submit the report of the Social Welfare Appeals  
Office for 2004.

Brian Flynn  
Chief Appeals Officer  
June 2005

PRN.A5/0581

# Foreword

The Appeals Office seeks to provide all those who use its services with an experience that respects their rights and their dignity. It aims to offer a service that is fair, friendly, accessible, and above all, professional with a particular emphasis on natural justice.

Appeals are determined as quickly as possible but by their very nature they cannot be rushed in a way that undermines the principles of fair procedure. Each appeal is unique. Each category of appeal type has its own requirements. For these reasons citing an average appeal clearance time is not particularly helpful. However, we constantly strive to reduce processing times.

What we most emphatically guarantee is that each and every appeal will be determined in a manner that is completely free from all undue influence. The Social Welfare Appeals Office operates as an independent entity and strives to ensure that appellants receive decisions that are not compromised in the slightest way by any inappropriate consideration. While those who win their appeals will likely be happier with their experience of our system than those who don't, we hope that the latter will at least be able to accept the integrity of our approach.

This report sets out our relevant statistics for 2004 and shows a trend that is consistent with recent years. The number of appeals lodged is down on the previous year but progress in further reducing the number on hands at the end of year is marginal due to staff changes. It is hoped to make further progress in 2005.

Currently a new Appeals Office website is being constructed. It is proposed to publish a good cross-section of case studies on the site. This will allow interested parties gain access to many more decisions than is currently possible in the context of an annual report (in which we are only able to publish a relatively small number of cases).

For the first time this report is being published in bi-lingual form. I am pleased to welcome this important development.

# Statistics

## Appeals received

The number of appeals received during 2004 (14,083) showed a decrease of 1,141 (7.5%) on receipts for 2003 (15,224).

With the 14,083 appeals received in 2004 and 5,331 appeals on hands at 1 January 2004, this represented a total workload of 19,414 appeals. (There were 6,156 appeals on hands at the beginning of 2003 which, combined with receipts of 15,224, represented a total workload of 21,380 for that year).

There were notable decreases in the number of appeals received for some scheme types; viz., Disability Benefit down 15% to 3,071, Unemployment Benefit down 13% to 1,421, Unemployment Assistance Means down 22% to 907 and Carers down 26% to 598.

The only scheme to show a significant increase in numbers was Child Benefit where appeals went up to 324, an increase of 283%.

## Appeals Disposed of

During 2004 the number of appeals disposed of (14,089) exceeded the number of appeals received (14,083) by just 6. The number of appeals on hand at the end of 2004 has fallen, therefore, to 5,325. (There were 5,331 appeals on hand at the end of 2003) - [Since 1995, the number of appeals disposed of exceeded receipts for the first time in 2001 and has continued to do so up to 2004].

Of the 14,089 appeals disposed of during 2004, 8,696 (61.7%) were determined by an Appeals Officer, 3,550 (25.2%) were resolved by way of a revised Deciding Officer's decision, and the remaining 1,843 (13.1%) cases were withdrawn.

### Determination by Appeals Officers:

Of the 14,089 appeals disposed of in 2004, 8,696 (61.7%) were determined by an Appeals Officer. In 2003 the number of appeals determined by Appeals Officers was 9,908 (61.7%).

- Of the 8,696 appeals determined by an Appeals Officer, 2,652 (30.5%) were allowed fully in favour of the appellant – (28.3% in 2003).
- A further 363 cases (4.2%) were partially allowed with some improvement made in the person's favour (5% in 2003)
- In the remaining 5,681 (65.3%) appeals determined by an Appeals Officer, the initial decision by the Deciding Officer was adjudged to be correct and the appeal was disallowed – (66.7% in 2003).

Of the 8,696 appeals determined by an Appeals Officer, 6,051 (69.6%) followed an oral hearing of the appeal. [Of these, 2,632 (43.5%) had a favourable outcome for the appellant]. The remaining 2,645 (30.4%) appeals determined by an Appeals Officer were dealt with by way of a summary decision. [Of these 383, (14.5%) had a favourable outcome for the appellant].

### Outcome of all Appeals:

- Of the 14,089 appeals disposed of 6,565 (46.6%) had a 'favourable' outcome for the appellant (Allowed, Partially Allowed and Revised Decision by a Deciding Officer) – (43.8% in 2003)
- 5,681 (40.3%) appeals resulted in 'unfavourable' decision (Disallowed) - (41.2% in 2003)
- and a further 1,843 (13.1%) were withdrawn or otherwise not pursued by the appellant (Withdrawn) – (15% in 2003)

## Appeals by Gender

A breakdown of appeals received by gender (excluding appeals received from corporate entities) shows the percentage of appeals from men and women were 42.8% and 57.2% respectively. Of these, 43.1% of men and 49.4% of women were successful in their appeals.

## Appeals in Progress and Clearing Times

The appeals on hands at the end of the year were at various stages of the procedural process as follows (2003 figures in brackets):

• Decision to be notified and appeal closed	88	( 47)
• Oral hearings scheduled for the coming weeks	192	( 309)
• Work in progress in the Social Welfare Appeals Office	2,199	(1,816)
• Work in progress in the Social Welfare Services	2,445	(2,661)
• Response awaited from the appellant	401	( 498)
<b>Total:</b>	<b>5,325</b>	<b>(5,331)</b>

During the year the average time taken to process all appeals was just over 20 weeks (20.08). Of this, just less than 8 weeks (7.9 weeks) was attributable to process in the Social Welfare Appeals Office, 2 weeks where responses were awaited from appellants and the remaining 10 weeks is attributable to the Social Welfare Services.

If allowance is made for the 25% most protracted cases, the average time to process all appeals is 12.23 weeks.

Additional statistical information is provided in the following Tables 1,2,3 and 4.

# Table 1: Appeals received and disposed of 2004

	In Progress 01 Jan 04	Receipts	Decided Appeals Officer	Revised Decision Deciding Officer	Withdrawn	In Progress 31 Dec 04
Old Age Pensions	139	328	262	40	27	138
Retirement Pensions	13	39	20	4	13	15
Pre-retirement Allowances	5	21	12	3	1	10
Old Age (contributory) Pensions	117	104	53	16	24	128
Disability Benefit	1,272	3,071	1,107	1,373	795	1,068
Invalidity Pension	234	519	276	151	50	276
Disability Allowance	802	2,252	954	795	502	803
Occupational Injuries Benefits	259	470	361	26	36	306
Treatment Benefit	2	50	30	11	0	11
Unemployment Benefit	388	1,421	1,210	167	72	360
Unemployment Assistance (Payments)	318	1,956	1,594	149	63	468
Unemployment Assistance (Means)	268	907	684	109	92	290
Widows/Widowers and Orphan Pensions	29	64	49	11	2	31
One-parent Family Payment	950	1,271	1,075	301	80	765
Maternity Benefit	4	14	10	4	0	4
Child Benefit	14	324	114	47	12	165
Carer's Benefit and Allowances	275	598	318	281	25	249
Family Income Supplement	26	47	23	19	6	25
Farm/Fish Assist	61	107	86	32	11	39
Supplementary Welfare Allowances	38	370	325	5	13	65
Rent Allowance (Private Rented Dwellings Act)	0	0	0	0	0	0
Liabile Relatives (contributions)	6	5	5	0	0	6
Insurability of Employment	111	145	128	6	19	103
<b>Totals</b>	<b>5,331</b>	<b>14,083</b>	<b>8,696</b>	<b>3,550</b>	<b>1,843</b>	<b>5,325</b>

# Table 2: Appeals received 1998–2004

	1998	1999	2000	2001	2002	2003	2004
Old Age (non contributory) and Blind Pensions	570	503	558	575	433	376	328
Retirement Pensions	29	29	23	25	33	46	39
Pre-retirement Allowances	81	38	48	32	28	24	21
Old Age (contributory) Pensions	98	87	77	106	239	155	104
Disability Benefit	3,813	3,917	3,968	3,434	3,284	3,634	3,071
Invalidity Pension	543	554	626	491	509	529	519
Disability Allowance	1,254	1,302	1,750	1,861	1,832	2,257	2,252
Occupational Injuries Benefits	793	741	806	677	575	503	470
Treatment Benefit	1	1	5	3	4	9	50
Unemployment Benefit	1,370	1,738	2,481	1,881	1,588	1,626	1,421
Unemployment Assistance (Payments)	1,157	1,865	2,821	2,262	1,983	1,874	1,956
Unemployment Assistance (Means)	2,911	2,246	1,757	1,511	1,511	1,167	907
One-parent Family Payment	578	597	779	762	840	1,348	1,271
Maternity Benefit	14	20	16	9	9	10	14
Child Benefit	116	85	50	56	46	41	324
Carer's Benefit and Allowances	285	756	1,009	1,334	1,376	812	598
Family Income Supplement	64	57	63	78	72	43	47
Farm/Fish Assist	0	481	298	157	134	127	107
Supplementary Welfare Allowances	115	213	239	354	289	433	370
Rent Allowance (Private Rented Dwellings Act)	1	2	1	2	0	0	0
Liable Relatives (contributions)	0	3	18	117	6	7	5
Insurability of Employment	96	127	106	92	120	139	145
<b>Totals</b>	<b>14,014</b>	<b>15,465</b>	<b>17,650</b>	<b>15,961</b>	<b>15,017</b>	<b>15,224</b>	<b>14,083</b>

# Table 3: Outcome of appeals by category 2004

	Allowed	Partly Allowed	Revised DO Decision	Disallowed	Withdrawn	Total
Old Age (non contributory) and Blind Pensions	61 19%	27 8%	40 12%	174 53%	27 8%	329
Disability Benefit	573 17.5%	14 0.4%	1,373 41.9%	520 15.9%	795 24.3%	3,275
Invalidity Pension	150 31.4%	0 0%	151 31.7%	126 26.4%	50 10.5%	477
Disability Allowance	375 16.7%	26 1.2%	795 35.3%	553 24.6%	502 22.3%	2,251
Occupational Injuries	180 42.6%	54 12.8%	26 6.1%	127 30%	36 8.5%	423
Unemployment Benefit	311 21.5%	49 3.4%	167 11.5%	850 58.7%	72 5%	1,449
Unemployment Assistance (Payments)	287 15.9%	42 2.3%	149 8.3%	1,265 70%	63 3.5%	1,806
Unemployment Assistance (Means)	110 12.4%	52 5.9%	109 12.3%	522 59%	92 10.4%	885
Widows/Widowers and Orphan Pensions	16 25.8%	3 4.8%	11 17.7%	30 48.4%	2 3.2%	62
One-parent Family	331 22.7%	37 2.5%	301 20.7%	707 48.6%	80 5.5%	1,456
Carer's Allowances	105 16.8%	12 1.9%	281 45%	201 32.2%	25 4%	624
Family Income Supplement	5 10.4%	3 6.3%	19 39.6%	15 31.3%	6 12.5%	48
Farm/Fish Assist	13 10.1%	17 13.2%	32 24.8%	56 43.4%	11 8.5%	129
Supplementary Welfare Allowances	83 24.2%	14 4.1%	5 1.5%	228 66.5%	13 3.8%	343
Insurability of Employment	35 22.9%	11 7.2%	6 3.9%	82 53.6%	19 12.4%	153
Other Appeals – (OACP, Pre-retirement Allowances, Treatment Benefits etc)	17 4.5%	2 0.5%	85 22.4%	225 59.4%	50 13.2%	379
<b>Totals</b>	<b>2,652</b> <b>18.8%</b>	<b>363</b> <b>2.6%</b>	<b>3,550</b> <b>25.2%</b>	<b>5,681</b> <b>40.3%</b>	<b>1,843</b> <b>13.1%</b>	<b>14,089</b>

# Table 4: Appeals in progress at 31 December 1998 – 2004

	1998	1999	2000	2001	2002	2003	2004
Old Age (non contributory)							
Blind Pensions	229	275	263	332	212	139	138
Retirement Pensions	13	10	12	13	18	13	15
Pre-retirement Allowances	23	21	36	14	4	5	10
Old Age (contributory) Pensions	30	43	47	72	179	117	128
Disability Benefit	1,696	1,770	1,676	1,522	1,374	1,272	1,068
Invalidity Pension	231	254	352	272	227	234	276
Disability Allowance	625	695	946	852	857	802	803
Occupational Injuries Benefits	521	522	489	429	358	259	306
Treatment Benefit	1	1	4	0	2	2	11
Unemployment Benefit	448	618	682	582	432	388	360
Unemployment Assistance (Payments)	387	686	719	607	541	318	468
Unemployment Assistance (Means)	950	644	593	392	405	268	290
Widows and Orphans Pensions	58	64	113	86	62	29	31
One-parent Family Payment	340	379	568	722	658	950	765
Maternity Benefit	8	7	5	3	6	4	4
Child Benefit	41	33	18	25	23	14	165
Carer's Allowances	133	449	691	749	514	275	249
Family Income Supplement	46	19	40	43	31	26	25
Farm/Fish Assist	0	301	116	52	57	61	39
Supplementary Welfare Allowances	14	34	50	44	42	38	65
Rent Allowance (Private Rented Dwellings Act)	1	0	0	0	0	0	0
Liabe Relatives (contributions)	0	2	7	58	28	6	6
Insurability of Employment	84	120	110	104	126	111	103
<b>Totals</b>	<b>5,879</b>	<b>6,947</b>	<b>7,537</b>	<b>6,973</b>	<b>6,156</b>	<b>5,331</b>	<b>5,325</b>

# Administration

## Resources

The Organisation Chart on page 24 sets out the structure of the Office. Staff numbers remained fairly constant throughout the year. At the year's end there were 18 Appeals Officers serving (full-time equivalent 16.3), along with 42 administrative staff (full-time equivalent 35.95). The Chief Appeals Officer, Deputy Chief Appeals Officer and Office Manager bring the full staffing complement up to 63 persons.

During the year two Appeals Officers – Marie McArdle and Frank Conway – retired and I would like to take this opportunity to thank them for their contribution to the work of the Office during their time here. I am, of course, appreciative of the contribution of all personnel of the Office and for their continuing unstinting efforts in providing the appeals service.

## Appeals Venues

In Dublin, where almost a third of the appeals originate, hearings are held in D'Olier House, D'Olier St. Throughout the rest of the country hearings are held in approximately 70 locations. Of the 8,696 appeals determined in 2004 by Appeals Officers 6,051 required an oral hearing. The rest were decided summarily.

## Freedom of Information

During the year 49 formal requests were received under the Freedom of Information Act. Three requests related to non-personal information, the rest were in respect of personal information.

## Correspondence and Parliamentary Questions

### Correspondence:

During the year 2,359 (2,797 in 2003) enquiries and representations on behalf of appellants were received, a decrease of 438 on the 2003 figure.

### Parliamentary Questions:

Where a Parliamentary Question is submitted on a case currently the subject of an appeal, the question is dealt with by this Office. During 2004, 203 Questions (240 in 2003) were received relating to:

Unemployment Assistance (means issues)	9
Unemployment payments (statutory conditions)	23
Sickness payments	87
Pensions and other schemes	74
Policy issues	10

Most questions relate to the present status of an appeal and many are withdrawn by the deputy concerned following contact with him/her and an explanation of the position. 166 questions were dealt with in this manner. Replies to the remaining 37 were given in Dáil Éireann.

## Assessors at Oral Hearings

Assessors are required to be present at oral appeal hearings where questions relating to Unemployment Benefit and Assistance are heard. Assessors are drawn from area-based panels of nominees of trade union and employer interests and are in a position to provide an insight into the employment situation in a locality. Under the legislation it is a matter for the Chief Appeals Officer to decide the type of appeals that would require the assistance of Assessors at appeal hearings.

Assessors are not currently required to attend oral hearings of sensitive cases where the question at issue might relate to:

- (i) Means Test (income),
- (ii) Dependency (including cohabitation), or
- (iii) Concurrent working and claiming (i.e. an allegation of fraud).

During 2004 the Chief Appeals Officer excluded three further categories from those requiring the attendance of Assessors - where the question under appeal related to: -

- (iv) Limitation in the amount of UB / UA payable to "a couple",
- (v) Late claims and backdating of payment, and
- (vi) The Habitual Residence Condition

During the year the Appeals Office also provided advice and assistance to work being carried out for the Irish Congress of Trade Unions in updating the guidelines used for Assessors from the trade union panel.

We appreciate the assistance of the Irish Congress of Trade Unions and the many employer organisations in providing nominees for the Assessor panels and would encourage them to continue to provide nominees for this important public service. There is some concern at the frequent failure of Assessors to attend appeal hearings. If this trend continues it may be necessary to review the requirement for Assessors at oral hearings.

## Decentralisation

The Social Welfare Appeals Office is included in the decentralisation plans of the Civil Service. As a front-line service with a third of its business in the Dublin Area and frequent recourse to the higher courts this obviously presents a challenge to a system that is geared around a knowledge-based central hub. Specific information on which to plan ahead was not yet available in 2004. Retention of cost-efficiency, expertise and overall effectiveness will be a major focus of forthcoming planning.

# Meetings and Consultations

Under the legislation governing the social welfare appeals system meetings of Appeals Officers are held on a number of occasions throughout the year. The main purpose of these meetings is to ensure consistency among Appeals Officers in administering the social welfare code.

There is also the need to keep up-to-date on changes in the requirements of administrative law as they impact on appeals procedures and, also, to ensure that the appeals system remains responsive to the needs of appellants and others who deal with the Office.

Meetings and consultations also took place with the Decisions Advisory Office and with officials from the Department of Social and Family Affairs who have responsibility for the administration of the various schemes. The following is a summary of some of the matters that were discussed at these meetings.

## One Parent Family Payments *OPFP*

The OPFP is a means tested payment for lone parents who are bringing up a family without the support of a spouse or partner. A lone parent may continue to receive payment of the OPFP provided his/her gross weekly earnings do not exceed €293. Previous annual reports for the years 2002 and 2003 highlighted the concerns of Appeals Officers regarding some of the cases that were arising in which substantial overpayments were assessed against the lone parents (i.e. where the decisions disallowing entitlement are backdated for a number of years).

In a number of these cases it has been found that the weekly earnings limit was exceeded inadvertently by the lone parent and often by a very small amount.

This matter was the subject of further discussions during 2004. The concerns of Appeals Officers fell under a number of headings:

- (i) The Department of Social and Family Affairs has not reviewed the OPFP claims of those who are in employment on a regular basis, even though it has access to the earnings information through links with the Revenue. Such a systematic review process would have minimised or even prevented overpayments arising in the first instance.
- (ii) Lack of clarity between the weekly earnings threshold provision of the legislation [Section 158 of the SW (Consolidation) Act, 1993 as amended] and the Means Assessment provisions at Part II of the Third Schedule to the same Act. As the law currently stands a person is not entitled to receive OPFP in any week in which his/her earnings exceed €293 yet if this level of earnings were treated as means there would be an underlying entitlement to the payment.
- (iii) Lack of information to lone parents concerning the operation of the weekly earnings threshold. [It is noted that there have been recent improvements in the quality of information but this is of little benefit to those whose claims have already been disallowed with substantial penalties in the form of over-payments].

- (iv) Some of the cases that have arisen on appeal demonstrate a lack of proportionality in the consideration of the evidence at the initial decision stage – for example, the “wrong” that is alleged to have been done is disproportionate to the penalty (i.e. amount of overpayment) that is assessed.
- (v) The practice of using average weekly earnings (annual earnings divided by 52) instead of obtaining precise weekly earnings figures. This fails to take account of situations where, for example, an end of year bonus might increase earnings in a particular period but not for the whole year.

During 2004 Appeals Officers determined some 148 OPFP appeals involving backdated decisions with substantial overpayments assessed. Of these 55 (37%) were successful in the sense that no recoverable overpayments were due.

The case study at page 21 illustrates the nature of the problem and concerns of Appeals Officers.

## Unemployment Payment Schemes

### Entitlement to Unemployment Benefit (UB) during term breaks - School Traffic Wardens

A new policy was introduced by the Department of Social and Family Affairs in relation to claims from School Traffic Wardens for UB during periods of layoff for mid-term holidays / breaks etc. Under this new policy, days of “accrued holiday entitlement” were not treated as days of unemployment for UB purposes. In effect, UB would not be paid in respect of days on which there is entitlement to holiday pay - even where there may be an agreement between the School Warden and employer that the payment of the holiday entitlement would be deferred. For example, many School Wardens would choose to defer payment of holiday entitlement until the Summer break.

The Appeals Officers raised concerns about this new approach and questioned the statutory basis for it. Attention was also drawn to the fact that the School Traffic Wardens could lose out on future social welfare entitlements by not having PRSI contributions paid or credited for weeks in which they were neither employed by their employer (and thus not liable to pay PRSI contributions) nor unemployed according to the new policy (and awarded credited contributions).

It is understood that the Department is re-examining this matter.

### Unemployment Benefit entitlement and “Substantial Loss of employment”

Under the legislation Unemployment Benefit (UB) is not payable to any person who has not suffered a “substantial loss of employment” in any week. This measure was introduced specifically

to prevent people in part-time employment from qualifying for payment of UB for the days they were not employed.

The "substantial loss" condition applies to people who are in regular part-time employment but does not apply to "casual workers" as defined in the regulations (Article 33 of SI 417 of 1994). During 2004 differences of opinion arose regarding the employment status of Dockers who are employed in Limerick and Cork harbours. Deciding Officers in the Department decided that the Dockers were part-time employees and consequently came within the scope of the "substantial loss" condition (and as a consequence were not entitled to payment of UB in certain weeks). However, the Appeals Officers who dealt with the subsequent appeals held, on the basis of the available evidence, that they were "casual workers" and, therefore that the "substantial loss" requirement did not apply. In arriving at their conclusions the Appeals Officers noted, in particular, that the Dockers concerned had no assurance of being re-employed by the same employer after each period of employment. The Appeals Officers also considered that there were shortcomings with the level of investigation by the Department and the quality of evidence being submitted in these appeals.

## Disability Allowance – residents of institutions

Under the legislation, Disability Allowance is not payable for any period where a person is resident in institutional care and where the person's maintenance is being met in whole or in part by a Health Board [Section 191 B (3) of the Social Welfare (Consolidation) Act, 1993]. Difficulties and anomalies have arisen in relation to the interpretation and application of these provisions – with particular reference to the argument that Health Board funding to some community-based residences is directed at the care rather than the maintenance of the individuals concerned. This matter was raised with the Department of Social & Family Affairs on a number of occasions in the past – see Appeals Office Annual Report for 2002 – and was again raised during 2004.

The Appeals Office is pleased to note that legislative changes have now been introduced which should help to resolve the problem (Section 8 of Social Welfare & Pensions Act, 2005).

## Habitual Residence Condition HRC

### General

New legislation was introduced with effect from 1 May 2004 whereby applicants for Unemployment Assistance, Old Age (Non-contributory) Pension, Blind Pension, Widow(er)'s and Orphans Non-contributory Pensions, One Parent Family Payment, Carers Allowance, Disability Allowance, Supplementary Welfare Allowance and Child Benefit must establish that they were "habitually resident" in the State. The legislation is framed in a manner that presumes that a person shall not be habitually resident until the contrary is shown. There is also a rebuttable presumption that a continuous period of residence (2 years) in the State or in the Common Travel Area is required.

As with all new statutory provisions there was considerable discussion about the interpretation and application of the new HRC to cases coming on appeal. Appeals Officers were concerned about the adequacy of safeguards to ensure consistency of the decision making process by the Department – for example whether it would be possible for a person to satisfy the HRC for Supplementary Welfare Allowance purposes but not for Unemployment Assistance. See also the case study on the HRC at page 22.

## Child Benefit and the HRC

There are particular concerns in relation to the application of the HRC to the Child Benefit Scheme – including a view that Child Benefit should have been excluded from the remit of the HRC altogether. Under EU legislation Child Benefit is a "Family Benefit" which confers rights to "migrant workers" who are nationals of the European Economic Area (EEA) and resident in the State. What this means in effect is that the HRC cannot be applied in the manner envisaged for Child Benefit purposes to EU "migrant workers".

Appeals Officers consider that there may be other grounds for excluding Child Benefit from the scope of the HRC. For example, there is a concern that the HRC provision may be in breach of the United Nations Convention on the Rights of the Child – to which Ireland is a signatory.

The concerns of Appeals Officers have been conveyed to the Department of Social and Family Affairs and, it is understood, will be considered as part of a review of the operation of the HRC that is ongoing.

## Decisions Advisory Office

Meetings with the Director of the Decisions Advisory Office and his staff are the main forum for liaison between the Appeals Office and the Department of Social & Family Affairs. Comment is provided in relation to legislative issues and concerns raised where administrative practice has been the subject of contention at appeal.

### Administrative Delays

Delays by some areas in the Department in forwarding the relevant file papers to enable the Appeals Office to process appeals has been mentioned in previous reports. In co-operation with the Decisions Advisory Office some positive results have been achieved by way of a reduction in the overall number of appeal files outstanding. Upon receipt of these outstanding files special arrangements were put in hand by the Appeals Office to prioritise the processing of the appeals. The situation in relation to files being forwarded by the Department of Social & Family Affairs to the Appeals Office has improved generally and is being kept under ongoing review.

### Administrative Thread mill – Continuous pattern of Claims & Appeals

During 2004 a number of clients found themselves in a continuous cycle of claims and appeals. Typically this situation

arose where the person concerned was disallowed Unemployment Assistance (UA) - on the basis for example that s/he was not "genuinely seeking work". The person concerned would then make an appeal to the Social Welfare Appeals Office and also claim Supplementary Welfare Allowance (SWA) while the appeal was being processed. In the event that the UA appeal was unsuccessful (i.e. disallowed) the person's ongoing entitlement to SWA is also reviewed - sometimes also disallowed. In a number of cases the person concerned may be encouraged (compelled) by a Community Welfare Officer to make a repeat claim for UA in order to maintain entitlement to SWA - and so the cycle starts again.

#### Qualified Adult

An increase in social welfare payments may be awarded in respect of a spouse or partner (referred to as a "Qualified Adult") who is "wholly or mainly" maintained by the claimant / applicant. The amount of the increase is affected by the weekly income of the "qualified adult" - reduced rates of increase apply where the qualified adult has income in excess of a specified amount (currently €88.88 per week). Where the "qualified adult" owns capital or property a means test is used to calculate the weekly income.

During 2004 a problem arose in relation to the method used by the Department of Social & Family Affairs in calculating the weekly income of a "qualified adult" in respect of her half-share interest in second house jointly owned by the couple. The Department were reluctant to accept that the weekly means test calculation could only be applied where the second property was "capable of being put to profitable use". [If the property is being personally used by the claimant / applicant it should not be taken into account for calculating the weekly income of the "qualified adult"].

#### Administrative Law

To keep up to date with changes in administrative law and employment law an expert in those domains made presentations to the Appeals Officers about recent developments and court judgments. These presentations included sessions on: -

- Employment Law issues - mainly relating to Contract of and for Services
- The doctrine of Fair Procedures - with special reference to the relevant provisions of the European Convention on Human Rights Act, 2003
- The doctrine of Proportionality
- Bias and Administrative Law

Appeals Officers are conscious of the fact that administrative law is an integral part of their functioning environment as is statute social welfare law. Keeping abreast of developments is, therefore, equally as important for the proper exercise of their duty as is the more obvious knowledge of changes in the social welfare code.

# Court Proceedings

## Judgements in 2004

### Employment status and PRSI position of Artificial Insemination (AI) technicians – High Court & Supreme Court

An Appeals Officer decided that AI technicians engaged by the Castleisland Cattlebreeding Society Ltd were employees of the Company (and the PRSI Class A rate applied). The Company sought a review of these decisions by the Chief Appeals Officer (CAO) under social welfare legislation but, following this review, the decisions were unchanged. The company then appealed to the High Court (Castleisland Cattlebreeding Society Ltd -v- Minister for Social & Family Affairs – Ref. 2001 No 391 Sp), and Judgement was delivered by Mr Justice Donovan on 7 November 2003. The High Court found against the Appeals Officer and held that the AI technicians were self-employed. The High Court Judgement also expressed criticism of the procedure used by the CAO in conducting a review of the Appeals Officers decision [under Section 263 of the Social Welfare (Consolidation) Act, 1993]. In particular the Court found that the CAO had erred by not conducting a further oral hearing as part of the review process. It was decided to appeal against this decision to the Supreme Court.

In a Judgement dated 15 July 2004 the Supreme Court (Ref. 408 / 2003) upheld the High Court decision on the substantive question of the employment status of the AI technicians (i.e. self-employed).

The full implications of the Judgement are being examined in the Appeals Office. Of particular interest are:

- The significance of the delay (10 years after the company had effected a change from employee to contract status) before the workers sought to have their employment status (PRSI position) reviewed
- The importance attached to the written contracts of employment
- The implications of their tax declarations as self-employed in the intervening years, and
- The criticisms by the Courts of the weighting given to various aspects of the evidence.

An important element of the Judgement was that the Supreme Court disagreed with the findings of the High Court in relation to the review process exercised by the CAO under Section 263 of the Social Welfare (Consolidation) Act, 1993. In particular, the Supreme Court held that this was a review process mechanism and should not be viewed as a double appeal. Furthermore, the Supreme Court held that there was no obligation on the CAO to convene a further oral hearing as part of that process.

While the overall result was negative, it was nevertheless most important for the business of the Appeals Office to have the issues regarding the statutory role of the CAO under Section 263 of the legislation clarified. Failure to do so would have resulted in possible misunderstandings about that role and may have led to expectations of a further avenue of appeal.

### Disability Benefit – Capable of Work

Judgement was delivered by Mr Justice Roderick Murphy on 27 May 2004 in the case of Martin Maher -v- the Minister for Social & Family Affairs (Ref: - 2003 No 166 JR). This was an application for Judicial Review against the decision of an Appeals Officer

that the appellant (plaintiff / applicant) was not entitled to be paid Disability Benefit on the grounds that he was “capable of work”. The High Court proceedings were taken on a number of grounds but with particular reference to the degree of significance that was attached to different elements of the medical evidence that was before the Appeals Officer.

Mr Justice Murphy dismissed the appeal and was satisfied that the Appeals Officer was very thorough in her consideration of this matter.

## Some Court Cases Pending

High Court proceedings have been initiated in the following two cases:

### Unemployment Assistance – Not “Genuinely Seeking Work”

These are Plenary Proceedings against the Minister for Social & Family Affairs taken by an applicant whose Unemployment Assistance claim was disallowed on the grounds that he was “not unemployed” while attending a course of education. The social welfare appeals process was not finalised when the High Court proceedings were initiated. These proceedings are being taken on a number of grounds (mainly procedural) – including allegations that the oral hearing proceedings were unfair. A full Defence has been filed and the claim is being fully contested. (Ref. 2004 P 205)

### Employment status and PRSI position of Contract Meter Readers

An Appeals Officer decided that Contract Meter Readers engaged by the Electricity Supply Board (ESB) were employed as employees (i.e. under a Contract of Service) and that the PRSI Class A rate of contribution applied. The Company appealed against this decision to the High Court (The Electricity Supply Board -v- the Minister for Social & Family Affairs and others - Ref.: - 2002 / 187 SP). The Company contend that the Contract Meter Readers are self-employed contractors. The Contract Meter Readers have been joined as Notice Parties to these proceedings.

During 2004 a number of procedural delays arose in the processing of this case – mainly in relation to the exchange of affidavits between the ESB and the Notice Parties (Contract Meter Readers). All of the affidavits have now been submitted and it is expected that a date will be allocated for the hearing of the case in the High Court in 2005.

# Case Studies of Appeals Officers' Decisions

The objective in selecting cases for inclusion in this section of the report is to clarify the process by which appeals are determined, whether by way of a summary decision or following an oral hearing. The basis for the Appeals Officer's decision in each case is outlined, as are questions raised in relation to current legislative provision or to the requirements of natural justice and fair procedures.

## Carer's Allowance

**Question at issue:**

Whether the appellant (the child's minder) satisfied the conditions for receipt of payment.

**Background:** The appellant's claim to a Carer's Allowance was rejected on grounds that she was not the primary care giver and was not providing full-time care and attention for a child with a severe disability. The child's parents were both in full-time employment and the appellant had provided care primarily while they were at work. The child's mother was in receipt of a Domiciliary Care Allowance from the Health Board.

**Oral Hearing:** The appellant was accompanied at the oral hearing by a representative from the local Citizens Information Centre (CIC). The Social Welfare Inspector attended at the request of the Appeals Officer.

The Social Welfare Inspector indicated that he had interviewed the child's mother some four months earlier. She advised him that the appellant was at that stage caring for the child at home, whereas the child had originally been cared for in the appellant's home.

The appellant said that she had cared for the child from nine o'clock in the morning until six o'clock approximately in the evening on weekdays and sometimes on Saturdays also. In reply to questions put by the Appeals Officer, the appellant indicated that if the parents were away for a day or two, she would keep the child in her care overnight. She stated that even when the child's mother was on leave from work, she still provided assistance in caring for the child.

The CIC representative referred to a statement in the information booklet provided by the Department of Social and Family Affairs in relation to the Carer's Allowance (SW41), indicating that where a full-rate Domiciliary Care Allowance was in payment, a Carer's Allowance was also payable. He argued that payment of a Domiciliary Care Allowance to the child's mother in this case did not preclude payment of a Carer's Allowance to the appellant. He contended that the appellant provided care for forty-seven and a half hours each week, pointing out that the Department's guidelines indicate that eight hours per day may be deemed to be full-time care. He argued also that the appellant was not employed, stating that she was paid €70 per week to cover the expenses associated with bringing the child to school and to physiotherapy in her own car. The appellant confirmed that this was the sum that had always been paid, even when she travelled 30 miles approximately per day in order to provide care in the child's own home. She added that she and the child's parent were not relatives.

**Consideration of the Appeals Officer:** The Appeals Officer noted that the question of payment to the appellant was somewhat unusual in that it was contended that she was not employed and that the sum of €70 per week was intended to cover the cost of travel. He noted that this payment appeared to have stayed the same, irrespective of whether the child was brought to the appellant's home or the appellant travelled to the child's home.

The Appeals Officer considered that full-time care and attention means precisely that, in other words that the carer must be available full-time as and when required over a 24-hour period. He concluded that the appellant in this case was not in a position to provide this level of care, given that she was providing care only while the child's parents were at work. He considered that the fact that some additional assistance might have been given at other times did not materially alter this position. Noting that the person being cared for was a minor, he considered that the appellant did not stand in *loco parentis* and that in her role as carer, the appellant did not supplant the role of the child's parents. He concluded that the child's parents were in fact the primary carers of the child at all times, with the appellant supplying limited care and attention only for the duration of the mother's absence on a working day. In the circumstances, he was satisfied that the appellant was not entitled to payment of Carer's Allowance as she was not providing full-time care and attention and was in effect engaged to look after the child when the parents were at work.

**Outcome:** Appeal disallowed.

## Unemployment Benefit

**Question at issue:** Nine-week disqualification.

**Background:** The appellant was disqualified from receiving Unemployment Benefit for a period of nine weeks on grounds that he was dismissed from his employment through his own misconduct. He had been employed as a dog warden at an animal shelter. An internal appeal against his dismissal had been disallowed. The case was referred subsequently to a Rights Commissioner under the Labour Relations Commission but had not been heard at the time of the oral hearing. The question at issue was determined by the Appeals Officer following a second oral hearing, the first hearing having been adjourned in order to obtain a copy of the letter of dismissal issued to the appellant.

**Oral Hearing:** The appellant attended, accompanied by his trade union representative. The Deciding Officer attended at the request of the Appeals Officer, as did the employer and another employee of the animal shelter. Two assessors had been invited to attend, one from the employer's panel and one from

the employee's panel. On the day of the oral hearing only the assessor from the employer's panel attended. The appellant gave his consent to proceeding in the absence of the other assessor. The Appeals Officer read out the report of the earlier hearing and advised that a full copy of the letter of dismissal was now on the appellant's file.

In her evidence, the Deciding Officer stated that she had disqualified the appellant for the maximum period of nine weeks. She said that she considered this appropriate as he had been dismissed for gross misconduct. In support of her decision, she relied on a partial photocopy of the letter of dismissal issued to the appellant. She contended that she had photocopied the document she had been given by the appellant and that it had contained only two pages, the first page of the letter and the page outlining allegations numbers 6 and 7. She indicated that when she made her decision, these were the only issues she was aware of.

The Appeals Officer asked the employer to comment on each of the allegations set out in the letter issued to the appellant. These referred to the length of time for which stray dogs were held at the shelter before being put down, the matter of the appellant's having kept his own dogs at the shelter and an allegation that the appellant bred dogs there for sale. The employer made reference to the provisions of the Control of Dogs Act, 1986 and outlined his concerns as to the ability of the shelter to fulfil its role if additional dogs were accommodated there. He indicated also that it was contrary to the ethos of the organisation to use their kennels to breed dogs for sale and he contended that the appellant had not maintained the Stray Dog Register in accordance with the Control of Dogs Act, 1986.

In response to the employer's assertion that the appellant had an ethical responsibility to seek the owners of stray dogs, his trade union representative argued that this was not outlined in his written job description. The appellant agreed that he had kept his own dogs at the shelter but denied that this had caused any capacity problem in the kennels. He acknowledged that he had bred two litters for sale. In relation to the Stray Dog Register, his trade union representative produced a copy of the relevant legislation, arguing that the appellant was not required under the Act to register his own dogs. His employer accepted that the legislation did not require the appellant to enter his own dogs in the register.

The appellant made some additional points in relation to his dismissal and to the internal appeal against that dismissal, arguing in effect that he had been unfairly dismissed. In response, his employer submitted a folder containing all the documents he held in relation to the case, pointing out that there had been no notice of an unfair dismissal claim. The hearing concluded when all parties indicated that they had nothing further to say.

#### Consideration of the Appeals Officer:

The Appeals Officer noted the inconsistency in the evidence in relation to the letter of dismissal issued to the appellant. While the appellant insisted that he gave the complete letter to the

Deciding Officer, she was adamant that all she got was a document containing the first and last pages of the letter. The Appeals Officer was satisfied that the Deciding Officer's version was the more reliable one, though he considered that this did not excuse the fact that no attempt was made to get the remainder of the letter when it was self evident that it was incomplete. The Appeals Officer considered that it had been established that the appellant had used the employer's kennels for keeping his own dogs for breeding purposes. He considered that this had had the effect of reducing the number of spaces available for stray or impounded dogs, or those handed in by their owners, compromising the level of service the organisation could provide in the area. He noted also that the evidence indicated that some dogs were put down without being kept for the statutory period of five days and that the Stray Dogs Register was not maintained to the standard required by the appellant's employer. In terms of the governing legislation, he noted that the legislators might not have envisaged that dog wardens would keep their own dogs at the pound. The Appeals Officer concluded that the appellant had lost his job as a result of misconduct. He considered, however, that a nine-week disqualification was not justified by the circumstances of the case. He noted that the appellant had already suffered a good deal, having lost the job he had held for many years and with little prospect of finding other work at his age. In the circumstances, he considered a disqualification for three weeks to be more appropriate.

**Outcome:** Appeal partially allowed.

## Supplementary Welfare Allowance

**Question at issue:** Whether Supplementary Welfare Allowance (basic rate and rent supplement) may be paid to the appellant, an 18-year-old student.

**Background:** The appellant, a foreign national, came to Ireland as an unaccompanied minor and was subsequently granted refugee status. He had been living in a hostel initially and was paid Supplementary Welfare Allowance. On attaining 18 years of age, he went to live in a flat close to the school he was attending. His claim to the basic rate of Supplementary Welfare Allowance and to a rent supplement under the scheme was disallowed. An officer of the Health Board decided that there was no reason to use those legislative provisions which allow for payment in exceptional circumstances and that, were it not for the fact that he was a student, the appellant could claim Unemployment Assistance. A Health Board Appeals Officer upheld the decision on grounds that the governing legislation provided that Supplementary Welfare Allowance was not payable to a person attending a course of study.

**Oral Hearing:** The appellant was accompanied by the liaison teacher at the secondary school he attended and by an Information Officer from the Refugee Information Service. The Superintendent Community Welfare Officer involved in the case attended at the request of the Appeals Officer. The Superintendent Community Welfare Officer indicated that the appellant was in receipt of both a basic rate Supplementary

Welfare Allowance and a rent supplement payment as a temporary arrangement, one implemented by the Health Board in order not to put him at risk. He said that while the Health Board would normally authorise payments up to the end of the academic year for a person who was completing a course, what was at issue in this case was effectively a three-year cycle – if the appellant was to complete his education. He accepted that there was a problem to be addressed but considered that it was not one for resolution by the Health Board.

The question as to the appellant claiming Unemployment Assistance was examined and it was pointed out that under that scheme, he could eventually qualify for a Back to Education Allowance. In this regard, however, the Information Officer from the Refugee Information Service pointed out that it would take some time for the appellant to qualify for such an allowance. She argued that he would, in effect, be required to abandon his education in the meantime, becoming a burden on the State.

The school liaison teacher said it was the appellant's first year in full-time education in this country and that he was in transition year in order to improve his English and maths and to enable him to enter fifth year. He reported that the appellant had made considerable progress and argued that it was vital that he continued his second level education in order that he could to make a contribution to Irish society. In response to a question from the Appeals Officer, the liaison teacher said that he was not aware of any other student in the school being in a similar situation.

The appellant said that it was important for him to finish his education so that he would not be a burden on the social welfare system in the long term.

**Consideration of the Appeals Officer:** The Appeals Officer considered the appellant to be at a considerable disadvantage in his current circumstances. He noted that, over the years, a range of employment supports and educational options had been introduced to assist the unemployed. He did not consider it a realistic proposition, however, to request the appellant to cease his education and to sign on for Unemployment Assistance, with a view to applying for Back to Education Allowance some two years hence. He considered that from the Health Board perspective, it would never have been the intention that the Supplementary Welfare Allowance scheme would finance students for a number of years. Nonetheless, he considered that this case should be regarded as exceptional, recognising that there would not appear to be any support mechanism or specific scheme in place to assist the appellant to continue his education and to reach his potential. He was satisfied that primary legislation [Section 172(3) of the Social Welfare (Consolidation) Act, 1993] provided that in a case where there are exceptional circumstances, Supplementary Welfare Allowance may be granted to a person who would qualify other than for their exclusion [under Section 172(1)] while attending a course of study. Accordingly, he considered that the appellant had ongoing entitlement to payments under the Supplementary Welfare Allowance scheme.

**Outcome:** Appeal allowed

## One Parent Family Payment

**Question at issue:** Non-disclosure of means.

**Background:** The appellant claimed a One Parent Family Payment following separation from her husband. The question of cohabitation was examined but her claim was disallowed subsequently on grounds of means.

**Oral Hearing:** The appellant attended the hearing unaccompanied. The Appeals Officer had asked the Social Welfare Inspector to attend but she was unable to do so. In her absence, the Appeals Officer read from her report. It stated that when she had called to the address given for the appellant's husband, she was told that he was not there but was still living with the appellant. It indicated that the appellant had been informed of this and told that her husband's address would have to be established and that he should contact the Inspector or provide details of his address. It referred to the appellant's denial that they were still living together but stated that no contact had been made with the Inspector. The report stated that the Social Welfare Inspector visited his parents' home for a second time and was told again that he was living with the appellant. The appellant had been informed of this but denied that they were living together, saying she could not understand why his family would have said that this was the case. The appellant had supplied details of the apartment where she said her husband was living at that stage but the Inspector reported that it was an incomplete address. The appellant's claim was disallowed subsequently on grounds that she had failed to show that her means were not in excess of the statutory limit because she had not provided a full and proper address for her husband.

The appellant outlined the circumstances leading to the breakdown of her marriage, referring to difficulties her husband had encountered in coming to terms with the death of his younger brother. She reported that their relationship had deteriorated over time and that they had encountered financial problems when he began gambling. She said that he moved out of the family home eventually and went to live with his parents initially, moving to an apartment some time later. She contended that she had no contact with her estranged husband following their separation, other than when he called to see their children. She said that he did not take any meals in the house and that they did not socialise together. She reported that while the local authority tenancy agreement remained in both their names, all other household bills were now in her name. She said that she found it very difficult to cope financially and outlined details of her income and of the maintenance contribution for the children. She reported that she and her husband were now on better terms and that she had told him that she needed to know his full address for social welfare purposes. She gave these details to the Appeals Officer.

**Consideration of the Appeals Officer:** The Appeals Officer considered that the appellant's claim had not been handled well and that there had been a breach of the rules of natural justice. He noted that she had been advised that her claim might be

disallowed on grounds of cohabitation, as the evidence available at the time supported such an assertion. The disallowance imposed, however, referred to means. He pointed out that disallowance on means grounds is totally different from one based on cohabitation and that it might be argued that the appellant had in fact been misled. He considered that the evidence indicated that only limited efforts had been made to verify the address details or to interview the appellant's estranged husband. In the circumstances, he concluded that the decision was not soundly based and that the appeal must succeed.

**Outcome:** Appeal allowed.

## One Parent Family Payment

**Question at issue:** Whether the appellant, originally from a central African country, satisfied the conditions for receipt of One Parent Family Payment.

**Background:** The appellant first claimed a One Parent Family Payment in 2000 on the basis that she was separated from her husband. The claim was disallowed, and the decision upheld on appeal, on grounds that she could not be regarded as a separated spouse as she still maintained some contact with her husband and the marriage tie was deemed not to have been broken. She claimed a One Parent Family Payment again in 2002, this time as a single parent. Following receipt of a report from a Social Welfare Inspector, the Deciding Officer wrote to the appellant, seeking a response to the contention that her status was unchanged and that she remained separated geographically only. The appellant did not reply and her claim was disallowed. Solicitors acting for the appellant made an appeal against this decision, arguing that she was not legally married. They contended that she was married by tribal / traditional ceremony only and therefore she should be treated as a single woman who cohabited with her partner. An oral hearing of the case had already been scheduled when the appellant submitted a death certificate for her former partner (who had died in 2001). The Appeals Officer then proceeded to determine the appeal without an oral hearing, on the basis of the evidence available.

**Consideration of the Appeals Officer:** The Appeals Officer considered that the death of the appellant's partner had obvious implications for her claim. If she had been legally married, she was now widowed with potential entitlement to a One Parent Family Payment as a widow. In these circumstances, she would be required to provide a marriage certificate as well as a death certificate. He recognised that there was an obstacle to her doing so where she claimed that the marriage was traditional and therefore unregistered in her home country. If, on the other hand, she was not legally married as her solicitors had argued, then her entitlement to a One Parent Family Payment had to be determined in relation to her status as a single parent.

The Appeals Officer sought clarification from the General Registrar's Office. He was advised that traditional marriages

could be recognised where such marriages were conducted 'under native law and custom' and where:

- the marriage had complied with Irish law so that the participants were aged 18 years or over and the marriage was not polygamous;
- a marriage ceremony had taken place, and
- the ceremony had legal status in the country where it had taken place.

The Appeals Officer was also advised that provision exists for the General Registrar's Office to verify such details, with information being provided from persons such as tribal elders through the relevant embassies.

The Appeals Officer noted that the appellant's late partner had died in 2001, almost a year before the earlier Appeals Officer's decision in relation to her first claim. He considered that while it might be regarded as remarkable that she had been unaware of his death, it might also be taken as confirming their separation and constituted new evidence that was not available to the Appeals Officer in 2002. He noted that the appellant had presented herself at various stages as a married woman, such as when she made her first claim and also when she sought refugee status (which had been granted in 2002). Her solicitors, however, disputed that she was legally married and argued that her traditional marriage had no legal status in this country.

The Appeals Officer considered that the question to be determined in the case was the claim made by the appellant in 2002 as an *unmarried person*. He considered that the Deciding Officer's decision on this claim was not correct as the appellant's 'husband' was in fact deceased at the time. He noted that her solicitors argued that the appellant's marriage was informal and that her status was 'unmarried'. He was satisfied, however, that a traditional marriage such as this one could not be disregarded and that a mechanism exists whereby it could be formally recognised. He noted that there was significant evidence to indicate that the appellant had been married but considered that it was unlikely to be sufficient to allow her to qualify for a One Parent Family Payment as a widow. He regarded this as being a matter for the Department of Social and Family Affairs, noting the existence of a mechanism through which the appellant could have her traditional marriage recognised.

The Appeals Officer concluded that the appellant had an entitlement to a One Parent Family Payment, either as a single person or a widow. In determining the appeal, he accepted her solicitors' contention that at that time she could be regarded only as a woman who had previously cohabited with a partner. Accordingly, he allowed her appeal from the earlier date in 2000, noting that she would have been in receipt of payments from the Health Board for much of this time.

**Outcome:** Appeal allowed.

## Old Age (Non-Contributory) Pension

**Question at issue:** Backdating award of pension. Issue as to the provision of information on entitlements also raised.

**Background:** The appellant claimed an Old Age Non-Contributory Pension in June 2003 and was awarded €39.00 per week from the date of his claim. He sought to have the award backdated to September 2002, when he returned to Ireland.

**Oral Hearing:** The appellant attended the hearing unaccompanied. He outlined the grounds on which he sought to have his pension backdated. He reported that when he returned to Ireland, having worked for some years in the United Kingdom, he went to the local Citizens Information Centre to enquire as to housing and any other entitlements he might have had. He was given a number of information leaflets, including some which referred to social welfare schemes. He reported that he was not asked about his British retirement pension, nor was he advised that if he considered he was entitled to any Irish pension, he should apply without delay in order to avoid loss of payment. He made it clear that while he felt aggrieved by this, he did not blame those in the Citizens Information Centre for not informing him more fully as to his entitlements.

**Consideration of the Appeals Officer:** The Appeals Officer regarded the appellant as a credible witness and accepted what he said as true. He considered that there was more at issue in the case than simply a lack of knowledge as to entitlements. He noted that at the earliest possible opportunity, the appellant had made enquiries at an officially funded information centre. He considered that having done so, the appellant should have left with all of the information he needed to make a prompt claim for an Irish pension. He noted that social welfare legislation provides for backdating an award of payment where the delay in making the claim is due to information given by an officer of the Minister (under Statutory Instrument 159 of 2000). While recognising that those who work in the Citizens Information Centres are not officers of the Minister, the Appeals Officer noted that the Centres themselves are funded by the Department of Social and Family Affairs through Comhairle (the statutory agency responsible for supporting the provision of information, advice and advocacy on social services). On this basis, he concluded that the staff of the Centre in question were, indirectly, acting on behalf of the Minister and he backdated the award of pension to September 2002.

**Outcome:** Appeal allowed.

## Unemployment Assistance (Overpayment)

**Question at issue:** Overpayment of Unemployment Assistance for days on which it is alleged that the appellant was working.

**Background:** Following investigation of his claim by a Social Welfare Inspector, the Deciding Officer concluded that the appellant was paid Unemployment Assistance for days on which he had been working. Accordingly, he was deemed not to have been entitled to receive payment for those days and the amount involved was assessed as an overpayment.

**Oral Hearing:** The appellant attended unaccompanied. The Social Welfare Inspector was requested to attend but failed to do so.

In the absence of the Social Welfare Inspector, the Appeals Officer read from his report. It referred to a letter he had written to the appellant's employer in May 2003, requesting details of those days on which the appellant had worked for him. The employer completed a form, showing that the appellant worked on dates in April and May 1999. The Appeals Officer referred to evidence indicating that the appellant had signed for Unemployment Assistance on the dates in question. He advised the appellant that the P35 returns made by his employer to the Revenue Commissioners indicated that he was employed for 50 weeks in the 1999/2000 income tax year. In response, the appellant was adamant that he did not work for 50 weeks in that year. In his evidence, he denied that he worked on the days in question. He acknowledged that he had worked for two days without pay, on a trial basis, shortly before he qualified for a Back to Work Allowance but said that he could not recall on which two days he worked.

**Consideration of the Appeals Officer:** The Appeals Officer considered that there was a conflict of evidence in the case and noted that the Social Welfare Inspector had not attended to corroborate his report. He noted also that in an unsigned, typed letter (dated 24 May 1999), the employer stated that the appellant had started working for him only on 13 May 1999. He concluded that in all of the circumstances it would be unwise to disallow the appeal and considered that any court would act in a similar manner, in the absence of corroboration of the evidence. He made the point that Appeals Officers are bound by the same rules of evidence.

**Outcome:** Appeal allowed.

## Occupational Injuries Benefit

**Question at issue:** Whether the appellant suffered a prescribed disease within the meaning of the Occupational Injuries Benefit legislation.

**Background:** The appellant worked for a health care company for almost 13 years, until she was diagnosed with asthma in 1998. Following that diagnosis, she was on sick leave until 2003 when she resigned her position with the company. Her claim to Occupational Injuries Benefit was rejected on grounds that she did not suffer from a prescribed disease within the meaning of the governing legislation.

**Oral Hearing:** The appellant was accompanied by her husband. The Appeals Officer outlined the question at issue and advised the appellant as to the evidence she had before her.

The appellant outlined the background to her illness. She reported that she had worked in a room where penicillin powder was bottled. The process involved scooping penicillin powder from a drum into a bottling machine. The bottles were then packed into boxes but the contents of reject bottles were emptied back into a drum. She said that the process of emptying the bottles released a lot of powder into the atmosphere. She reported that her skin became very dry and that she experienced

breathing difficulties. She reported a particular incident where she had to scoop up spilt powder with her hands in order to dispose of it. She reported experiencing breathing difficulties shortly after this incident. She said that the problem became worse over time and that she was often absent from work in the following years. Her family doctor diagnosed bronchitis and prescribed steroids for short periods. She said that when the condition improved, following treatment, she used to return to work. She contended, however, that her condition always deteriorated on resumption of work. Her asthma was diagnosed in 1998 by a consultant in respiratory medicine and a copy of his report had been submitted in advance of the oral hearing. The appellant reported that she had taken a civil action against her employer and that it had been settled out of court.

**Consideration of the Appeals Officer:** The Appeals Officer concluded that the appellant's illness did not fall within the list of prescribed diseases, given that exposure to penicillin is not prescribed in relation to occupational asthma. She considered also whether the appellant's asthma might be deemed to have resulted from an accident at work but was satisfied that the sequence of events outlined by the appellant did not support such a conclusion. She considered that this was an instance of a disease which, though clearly attributable to employment, is not a prescribed disease covered by the legislation. In the circumstances, she concluded that the appeal could not succeed.

**Outcome:** Appeal disallowed.

## One Parent Family Payment

**Question at issue:** Whether the appellant was entitled to receive a One Parent Family Payment during the period when her husband was in prison.

**Background:** The appellant made a claim to a One Parent Family Payment in December 2002. The Deciding Officer requested that she provide her own and her children's birth certificates, her marriage certificate and a statement from the prison governor concerning her husband's incarceration. The Deciding Officer wrote to her some three weeks later, advising that her claim had been withdrawn as she failed to furnish the information sought. The appellant replied, insisting that she had not withdrawn her claim. The Deciding Officer then wrote to the prison authorities and sent a further request to the appellant for the information sought originally. As she had changed her address, a Social Welfare Inspector was asked to report on her means and change of circumstances. That report was completed in September and indicated that the appellant satisfied the conditions for receipt of payment and that she had not withdrawn her claim. The appellant also wrote again to the Department of Social and Family Affairs, reiterating her position in relation to her claim. Nonetheless, the Deciding Officer disallowed her claim on grounds that it had been withdrawn, replicating the decision of April 2003. In December 2003, the appellant submitted another claim form, enclosing all the necessary certificates. The prison governor had, in the meantime, confirmed the details as to her husband's sentence. This claim and an accompanying letter from a Community Welfare Officer were treated as an appeal. The Deciding Officer awarded

payment at the maximum rate from the date of receipt of the certificates. In her written appeal submission, she stated that she did not backdate payment as she considered that the appellant had had ample opportunity to furnish the documents at an earlier date. The Appeals Officer dealt with the appeal on a summary basis.

**Consideration of the Appeals Officer:** The Appeals Officer pointed out that it is not open to a Deciding Officer in any circumstances to withdraw a claim so that the two decisions made on this basis were null and void. He examined the third one as the only valid decision in the case. He concluded, however, that it was incorrect as it awarded payment only from a date in December 2003, effectively imposing a very significant penalty on the appellant. He noted also that the appellant was not informed that her claim for the period December 2002 to December 2003 had been disallowed and that she was not informed of the reason for the disallowance. He considered that she was, therefore, deprived of her right to make her case against the disallowance and that this represented a breach of the rules of natural justice. The Appeals Officer noted that the claim made in December 2002 was still extant as it had not been withdrawn by the appellant and he awarded payment with effect from that date. While he conceded that much of the delay in this case was attributable to the appellant's tardiness in submitting the necessary documentation, he expressed concern also at the time taken by the Department in dealing with the claim. He expressed the view that allowance needs to be made for clients who are from a disadvantaged background as was clearly the case in relation to the appellant.

**Outcome:** Appeal allowed.

## Old Age (Non-Contributory) Pension

**Question at issue:** Retrospective assessment of means, to take account of the fact that the appellant's wife had been in employment while he had been paid a qualified adult increase for her in his pension. An overpayment of some €21,000 was assessed.

**Background:** The appellant, a farmer, was in receipt of an Old Age Pension based on an assessment of his means. When his wife claimed Unemployment Benefit in 2000, it emerged that she had been employed in the years 1993 to 1999, during which time his pension had included a qualified adult payment for her. Following investigation, the Deciding Officer revised the assessment of his means and the corresponding rate of pension to take account of his wife's earnings and assessed an overpayment of some €21,000. It was alleged that the appellant had failed to disclose the fact that his wife had commenced employment.

**Oral Hearing:** The appellant attended alone and the Social Welfare Inspector attended at the request of the Appeals Officer.

In her evidence, the Social Welfare Inspector reported that the Department's computer-held records showed that the appellant's wife had earnings from employment in the years 1993 to 1999 and that she had been on a FÁS return-to-work programme with effect from March 2000. She had submitted a report to

that effect to the Deciding Officer who then made a revised decision, reducing the rate of the appellant's pension with effect from a date in 1993.

In relation to the assessment of his means by the Department of Social and Family Affairs, the appellant referred to the lower farm assessments accepted by the Revenue Commissioners for income tax purposes. The Appeals Officer explained that assessments for income tax purposes could differ from those undertaken for social welfare purposes but the appellant was unwilling to accept this. The appellant asked why the revised assessment was not made in 2000 when he had a full review of his means carried out. The Appeals Officer read from a report on the file and pointed out that the Social Welfare Inspector who interviewed the appellant at the time had asked whether his wife was in employment. The appellant offered no explanation as to why he had not told the Inspector about his wife's employment. The Appeals Officer went through all the figures on the means assessment form completed in 2000 and asked the appellant if he wanted to challenge any of them. The appellant accepted that the figures were correct but contended that they did not represent a typical year and said that it might even have been the best year he ever had. He asked for some time in order to get more detailed information from the Revenue Commissioners and the Appeals Officer gave him a month in which to do so.

**Consideration of the Appeals Officer:** The Appeals Officer noted that the additional information which the appellant hoped to submit might not be of much help as it consisted of very basic farm accounts which he had completed himself. He considered, however, that there were two other important points in the case which the Deciding Officer had overlooked. The first was that in March 2000, the Department was required to certify that the appellant's wife was in receipt of an unemployment payment before she could participate in a FÁS scheme. On this basis, the Appeals Officer concluded that the Department could not have been unaware of the employment in 2000, or before that. Secondly, he noted that no allowance had been made for family labour when assessing farm income and he regarded this as a fundamental error. As the appellant was almost 78 years of age, the Appeals Officer considered that his capacity to run the farm unaided had to be taken into account. He was satisfied that, in the circumstances, allowance must be made for family labour and concluded that a sum in the region of €76.50 per week was appropriate. As this was close to what the appellant's wife had earned, he set the offset for labour at a sum equivalent to her earnings, with effect from the date on which his pension was reduced. Accordingly, the appeal was successful.

**Outcome:** Appeal allowed.

## Social Insurance Status

**Question at issue:** Whether the appellants are engaged under a contract of service as employees, insurable at the Class A rate of social insurance, or a contract for service as self-employed persons, insurable at the Class S rate.

**Background:** The case involved four appellants, all founders and equal shareholders in a private limited company established in 2000 to supply props to television companies. In 2003, their accountant noted that Class A contributions had been returned but contended that Class S was the appropriate rate and sought a refund of the difference. Following investigation, a Social Welfare Inspector reported that he considered the appellants to be self-employed. The Deciding Officer determined, however, that they were insurable at the Class A rate. While he accepted that none was subject to control and direction, he considered that the employment was under a contract of service as each supplied labour only, rendered personal service and could not hire a helper or send a substitute. In his decision, he referred to the High Court Judgment in the case of *Stakelum v. Canning* [1976] IR 314 where it was held that a director was deemed to be a salaried employee.

**Oral Hearing:** One of the appellants attended, along with the accountant representing all four. The Deciding Officer and Social Welfare Inspector attended at the request of the Appeals Officer.

On behalf of the appellants, their accountant submitted that there was no overall boss; no specific job was allocated to any one of the appellants; no one individual was answerable to the others for specific tasks, and none was obliged to report to the others. He contended that all decisions were made by consensus, that each of the appellants took holidays as they wished, merely informing the others for practical reasons. He asserted that there were no stated minimum hours of work, that remuneration was dependent on the level of profitability and that no individual was entitled to an agreed sum irrespective of the profitability level. He contended that the individuals concerned were artists who were highly motivated and adopted a collegiate approach to work, as was evident in the participation of all four in negotiations to purchase a workshop.

The Deciding Officer outlined the grounds on which he had held that the appellants were insurable as employees, at the Class A rate. He stated that all the appellants were minority shareholders and that any one of them could, therefore, be out-voted. He referred to the principle, established in *Stakelum v. Canning* [1976] IR 314, that a director and shareholder could be regarded an employee.

Their accountant did not accept that the fact that the appellants were minority shareholders necessarily meant that they could not be regarded as self-employed. He argued that in the legal field, partnerships could contain partners with both full and junior status, with junior partners being required to report to a managing partner and to account for their work. He referred also to a High Court case involving three brothers who were joint shareholders and directors of a hotel. One of the brothers considered that the actions of the others were prejudicial to his interests and took an action against them. The Court held that he had a right of redress on the grounds of repression of a minority interest and ruled that his brothers should purchase his interest. (The Appeals Officer noted that he might have had in mind the *Murphy's Restaurant* case, involving proceedings to wind up the company.)

The appellant who attended the oral hearing said that he and the three others had wanted to go into business together. He reported that they had set up as a limited company, without any great forethought, as a means of limiting their personal financial exposure. He stated that there were no other workers, although they contracted out work from time to time.

**Consideration of the Appeals Officer:** The Appeals Officer considered that the points made by the Deciding Officer were not without merit but concluded that it was necessary to take a wider view and to look behind the formal structure of the company concerned. He considered that what had transpired was that four individuals with artistic talent came together and were advised to form a limited company in order to limit their financial exposure. In doing so, they were setting up in business themselves and not with the intention of working for someone else as employees. He considered that each enjoyed personal autonomy in their work, that all were founders and investors in the business, all participated in management and investment decisions and stood to gain from its success, or to incur losses if it failed. He concluded that the appellants were, in effect, partners working together under the guise of a limited company. Accordingly, he was satisfied that the employment was under a contract for service and that Class S, in respect of self-employed status, was the appropriate rate of social insurance contribution.

**Outcome:** Appeal allowed

## Carer's Allowance

**Question at issue:** Whether Carer's Allowance is payable to each of two carers on a week on/week off basis.

**Background:** The appellants in the case were involved in a fostering arrangement where each cared for a disabled child in her own home on a week-on/week-off basis. This arrangement had been in place for some seven years. There was no residential care involved. A Domiciliary Care Allowance had been awarded by the Health Board and paid to each of the appellants in respect of the period for which she cared for the child.

An oral hearing was held in 2000. Both appellants attended, as did the social worker involved in the case. The appellants outlined the extent of the care required, contending that no one person could provide such a level of care on their own. The social worker supported them in this assertion. She advised that the child was in the care of the Health Board and pointed out that he would be in residential care were it not for the fostering arrangement in question. She contended that this was an exceptional situation and was, to her knowledge, the first such shared care arrangement in the country.

**Consideration of the Appeals Officer:** The Appeals Officer noted the extent of the care being provided and observed that the appellants were involved in a labour of love. He concluded, however, that the shared fostering arrangement did not meet the requirement to provide full-time care and attention, as outlined in the governing social welfare legislation. Accordingly, he concluded that the appeal could not succeed.

During 2004, the question of shared care in the context of the qualifying conditions for the Carer's Allowance was examined in the Department of Social and Family Affairs. It was concluded that while the relevant legislation specified that only one Carer's Allowance was payable in respect of the full-time care and attention being provided in any particular case, there was nothing in the legislation to prevent payment to a carer on a week-on/week-off basis. In light of this review, and with reference to the Department's conclusion in relation to the question of shared care, the Appeals Officer re-examined the appeal. He concluded that as the Department had effectively withdrawn its case, it was appropriate to revise his earlier decision with effect from the relevant date in 2000. He determined that each appellant was entitled to receive Carer's Allowance for any week in which full-time care and attention was provided for the child.

**Outcome:** Appeal allowed.

## Old Age (Non-Contributory) Pension

**Question at issue:** Means assessment – capital acquired by the appellant following settlement of her late brother's estate.

**Background:** The appellant and her brother, both of whom remained single, had lived in the family home all their lives. When her brother died, a claim was made against his estate on behalf of a child, born following a relationship he entered into late in life. The estate consisted of a pub and the overhead residence where he and the appellant had lived. The balance of the capital, after settlement of the child's claim, was of the order of €100,000. This was assessed as means and the appellant failed to qualify for an Old Age Pension.

**Oral Hearing:** The appellant attended, accompanied by her solicitor and her nephew. The Social Welfare Inspector attended at the request of the Appeals Officer.

It was submitted that the public house and the dwelling house at issue in the case were effectively one premises, with the dwelling being over the pub. This had been the appellant's family business and she had always lived on the premises. The pub and the dwelling house had been sold in one lot following the death of the appellant's brother. The property was bought by her nephews, who leased the pub to another party and allowed the appellant to live rent-free in the overhead accommodation. She was liable for all expenses in relation to the dwelling and paid all service charges. She had no role in the running of the pub and was not engaged in any form of employment.

Her solicitor argued that while the legislation did not provide specifically for disregarding capital in cases such as this, the arrangement might almost be described as sheltered accommodation, put in place by the appellant's family as a means of providing care for her. He asserted that the lump sum at issue would be dissipated in living expenses over the years if the appellant did not qualify for a pension, and that it would not be available to her for nursing home care when the time came. He contended that it would have been impossible for the appellant to buy alternative accommodation with the sum involved.

The Social Welfare Inspector observed that the appellant would not have expected to have to rely on her lump sum to live on, and that she was likely to have depended very heavily on her pension for day to day living expenses.

The Appeals Officer put it to her solicitor that the appellant's situation, though unusual, might be compared with that of a person who re-mortgaged a dwelling and keep the proceeds in a bank account. The solicitor argued, however, that there was a major difference in that the appellant had no choice in the matter as her brother's liabilities had to be met.

**Consideration of the Appeals Officer:** The Appeals Officer considered this to be an unfortunate case and, in her experience, unique as to its circumstances. She noted that the appellant was not in nursing home care, that she had not purchased an alternative residence, and that she was not renting alternative accommodation. Even if her nephews were to charge her a nominal rent, she noted that the appellant would still not qualify for a capital disregard, as she had continued to live in the home she sold. Despite the fact that the circumstances requiring the sale of her home were thrust upon her, the Appeals Officer observed that the appellant was in the same situation as a person who realised capital by re-mortgaging, although such a scenario was unlikely in the case of someone of pension age. While she considered that the appellant had suffered because of the circumstances in which she found herself, the Appeals Officer concluded that existing legislation did not provide any means to alleviate her situation. Accordingly, she determined that the capital must be assessed in full.

**Outcome:** Appeal disallowed.

## Old Age (Contributory) Pension (EU Pro-Rata)

**Question at issue:** Whether the correct rate of pension had been awarded in light of the appellant's assertion that she had been in employment for which no social insurance contributions were recorded.

**Background:** Under Regulations intended to protect the acquired social security rights of those moving within the European Union and European Economic Area, provisions exist for coordinating rights granted under the legislation of EU Member States. These provisions allow for the aggregation of periods of insurance in order to allow individuals to acquire the right to certain benefits. In this case, the appellant had been awarded a pro-rata Old Age Pension in Ireland, calculated in line with these provisions. She was also in receipt of a pro-rata Retirement Pension from the United Kingdom, calculated on a similar basis. She contended that there were additional periods during which she had worked in Ireland, in respect of which she was entitled to social insurance contributions. Her appeal referred also to aspects of her claim dealt with by the UK authorities.

The appellant's case had been referred for the attention of the Department of Social and Family Affairs who allowed a further eight social insurance contributions in respect of two periods in

1953 and seventeen contributions in respect of the 1956/57 contribution year. The Appeals Officer noted that no action had been taken in relation to the amended social insurance record and he arranged to have the file referred to the Deciding Officer for urgent review. The Deciding Officer revised his earlier decision and awarded the appellant an increased rate of pension, backdated to her 66th birthday.

**Oral Hearing:** The appellant attended, accompanied by her husband. The Deciding Officer attended at the request of the Appeals Officer.

The Appeals Officer outlined the question at issue and the appellant confirmed that she had now been informed of the decision to award an increased rate of pension based on her additional Irish contributions.

The second of the appellant's grounds for appeal referred to another (UK) National Insurance number having been traced. The Appeals Officer advised her that this issue would be examined in the UK and that, in the event of additional social insurance contributions/credits coming to light, her claim would be reviewed.

The appellant also referred to the arrears of her Irish EU pro-rata pension having been paid direct to the UK authorities and not to her. She contended that while she had been in receipt of some income support in addition to her UK pro-rata pension, the amount of pension arrears was in excess of the income support she had received. The Appeals Officer explained the position with regard to Competent Institutions under EC legislation and the requirement that initial claims for benefit and pension be made in the country of residence - in accordance with the requirements of EC Regulation 1408/71 (Article 46). He referred also to the legislative provisions relating to overlapping benefits, including the requirement to send arrears of payment to the Competent institution in the relevant EU state. He advised that his interpretation was that only the amount of income support paid could be recouped, with the balance of arrears being paid to the individual concerned. He told the appellant that he would refer to the matter in his report and the Deciding Officer undertook to raise the issue with the UK authorities.

**Consideration of the Appeals Officer:** The Appeals Officer noted that the appellant in this case was satisfied that the additional contributions allowed in respect of her periods of employment in this country had led to a revised decision, increasing the rate of Irish EU pro-rata pension payable. He noted also that she was satisfied that questions regarding her UK National Insurance number and the payment of arrears of Irish pro-rata pension had been referred to the UK authorities. He determined that the appeal had, in effect, succeeded.

**Outcome:** Appeal allowed.

## One Parent Family Payment

**Question at issue:** Retrospective assessment of means derived from earnings with consequent overpayment of some €18,500.

**Background:** The appellant's entitlement to a One Parent Family

Payment was examined during a special project undertaken by the Department of Social and Family Affairs, in which earnings data were reviewed. In March 2004, a Deciding Officer revised an earlier decision and determined that she qualified for a transition (half) rate of payment for one year, up to May 2001, and that she did not qualify for any payment with effect from that date until a date in October 2003. Her earnings were deemed to have been in excess of the statutory limit of €293 per week for the period in question and, as a result, an overpayment of some €18,500 was assessed.

**Oral Hearing:** The appellant attended accompanied by her mother. The Deciding Officer attended at the request of the Appeals Officer.

The Deciding Officer outlined the background to the case, indicating that the appellant had claimed a Lone Parent's Allowance in 1996. She was working at the time, with earnings of £100 per week. When the One Parent Family Payment was introduced, she was switched to that payment. At that stage, her earnings had increased to €180 per week. He asserted that in correspondence at these times, the appellant would have been advised of the need to notify the Department of any change in her means or circumstances. He pointed out that a statement to this effect was also printed on the payable order book. He said that there was no record on file of any notification from the appellant since January 1997. He argued that the onus was on an individual to advise the Department of any change as to their circumstances or means and said that the appellant had failed to do so.

The appellant acknowledged that she had signed a payable order each week but said that she had not read it. She accepted that she should have done so. She said that she had paid tax on the payment she received and had assumed that the Department of Social and Family Affairs had access to her earnings details and were checking her entitlement each time they issued her with a new payment book. She referred to the fact that the Health Board had reviewed her entitlement to a medical card and had withdrawn it. She said that she could not understand how the Department had allowed the overpayment to build up to such an extent and argued that it should have been dealt with earlier.

**Consideration of the Appeals Officer:** The Appeals Officer considered that a decision which results in a substantial overpayment being assessed against a client is a very serious one. Notwithstanding the onus on an individual to notify the Department, he considered that there is an onus also on the Department to ensure that it acts promptly and that its decision is correct in all aspects. In this case, he noted that in making a revised decision under Section 249 (b) of the Social Welfare (Consolidation) Act, 1993, it had been accepted that there was no fraud involved. The decision as to entitlement, made with reference to Section 158 of the Act, was made on grounds that the appellant's earnings exceeded €293 for each week in the period at issue. He noted, however, that the Deciding Officer appeared simply to have divided annual earnings by 52, taking that figure as the earnings for each week. The Appeals Officer

indicated that he was not aware of any provision in the legislation which allowed for such averaging. He noted that details as to weekly earnings had been obtained some 8 months after the initial decision was made, indicating an acceptance that averaging was not provided for in legislation. He was not satisfied that getting earnings data at a later date and essentially applying them retrospectively was legislatively sound.

The Appeals Officer considered that it would be prudent for the Department of Social and Family Affairs to keep under review those cases where reduced rates of One Parent Family Payment were awarded because of earnings from employment. This might lead to decisions being taken at an earlier date and reducing the number of cases where substantial overpayments are raised years later. From the number and type of these cases arising, he considered that there was need for a review of procedures to ensure that clients were aware of precisely what and when they should notify to the Department. He noted that the Department appeared to be moving in that direction with the printing of the earnings limit (€293) in payment books, issued with effect from April 2004.

Having regard to all the circumstances of the case, the Appeals Officer considered that it would be inappropriate to uphold the overpayment. While allowing the decision of the Deciding Officer to stand, he determined that it should take effect from a date in October 2003 and, accordingly, that no overpayment would arise.

**Outcome:** Decision upheld but overpayment deemed not to arise.

## One Parent Family Payment (Habitual Residence Condition)

**Question at issue:** Whether the appellant may be regarded as having satisfied the Habitual Residence Condition for purposes of her One Parent Family Payment claim.

**Background:** With effect from 1 May 2004, a person claiming a social assistance or Child Benefit payment is required to be 'habitually resident' in the State. The Department of Social and Family Affairs has published Guidelines on the Habitual Residence Condition referring to those factors recognised as relevant by the European Court of Justice in determining whether someone may be deemed to be 'habitually resident'. Briefly, these refer to the length, continuity and general nature of actual residence in the State. In this case, the appellant's claim to a One Parent Family Payment was rejected on grounds that she was not habitually resident in this country. She is a native of a southern African country, aged 21 years and single. She has a son born in Ireland in 2004 and a daughter, aged 3 years, still living in her country of origin.

**Oral Hearing:** The appellant attended unaccompanied. She stated that her parents had divorced some years earlier; both have remarried and her daughter lives with her mother. She reported that her father and stepmother, together with her sister and brothers, came to Ireland over 5 years ago. Her father and stepmother both hold work permits and are employed.

Her sister and brothers attend the local school. She reported that she had come to Ireland in October 2002 when she had finished school. She said that she could not afford to bring her daughter with her at that time. She had stayed with her family originally and had worked for nine months in a local fast-food outlet and for a time with another local company, although she did not hold a work permit.

She reported that she had been obliged by the emigration authorities to enter the asylum process, having been informed that she could no longer be regarded as a dependant of her parents, nor afforded the benefit of their status in the country. She had lived in 'direct provision' accommodation for the previous five months. She was in receipt of a weekly payment of €28.70 under that scheme and was paid Child Benefit also.

She reported that she had applied for refugee status earlier in the year but had not yet been interviewed. She stated that it was her hope and intention to stay in Ireland. She pointed out that she had family in Ireland and that she hoped she could arrange for her daughter to join her. She reported that the father of her son was from the same country but that their relationship had ceased.

**Consideration of the Appeals Officer:** The Appeals Officer considered that the appellant's oral evidence was credible. He noted that she had spent more than two years in the country, that she had worked here, that her family was based here and that her father and stepmother were both working here. He noted her statement as to her intention to remain and her hopes of finding work. He was satisfied that the weight of the evidence and the circumstances of the case indicated that the appellant should be regarded as habitually resident in Ireland.

**Outcome:** Appeal allowed.

# Social Welfare Appeals Office Organisation Chart 31 December 2004

