

THE STATE (HOOLAHAN)

.v.

THE MINISTER FOR SOCIAL WELFARE AND
THE ATTORNEY GENERAL

Judgment of Mr. Justice Barron delivered the 23rd day of
July 1986.

The Prosecutrix is a married woman living separately from her husband. There are two children of this marriage. In early 1977 she applied for and thereafter received deserted wife's benefit. This benefit is payable under Section 100 of the Social Welfare (Consolidation) Act, 1981. Subsection (1) which is the material provision is as follows:-

- "(1) Subject to this Act, deserted wife's benefit shall be payable to a woman who -
- (a) has been deserted by her husband,
 - (b) if she is less than 40 years of age, has at least one qualified child residing with her,
 - (c) satisfies the contribution conditions in section 101, and
 - (d) satisfies such other conditions as may be prescribed."

Other conditions have been prescribed and so far as is material to the present case Article 3(2) of the Social Welfare (Deserted Wife's Benefit) Regulations, 1973 provides that in order to satisfy the conditions pertaining for entitlement to such benefit the person so entitled shall not be cohabiting as man and wife with any other person.

In July 1985 the officials of the Department of Social Welfare became aware of certain facts which indicated to them that the Prosecutrix might be in breach of this latter provision. Accordingly, by letter dated the 12th July, 1985 she was notified that the question as to whether she had incurred disqualification from receiving benefit was under the consideration of a deciding officer; and that if he so decided this would mean withdrawal of her benefit and might also mean that she would be liable to refund benefit already received. She was then given an opportunity to submit a statement or furnish evidence to show that she was not so disqualified.

She consulted a Solicitor and he wrote on her behalf on the 18th July, 1985 seeking first from the deciding officer a detailed statement as to why he might consider her disqualified on the ground of cohabitation. The Department replied by letter dated the 17th September, 1985. This letter was as follows:

"A Chara,

I refer to your letter of 18th July 1985 on behalf of the above named concerning her deserted wife's benefit and the question as to whether she is subject to a statutory disqualification from receipt of this benefit by reason of her and another person cohabiting as man and wife.

Following a recent review of her case by a local officer of the Department she agreed that Mr. Barbour and she lived together as man and wife whenever he stays in her house; he eats his meals with her and the children, she washes any clothes that he might leave when he is going; she has a sexual relationship him; when working, he gives her a few pounds over and above the money which he contributes to the support of his two children who are

resident at 44 Cromcastle Court.

According to the records of the Department Mr. Barbour gave Mrs. Hoolahan's address as his home address for Social Welfare purposes. He is at present in receipt of disability benefit in respect of himself and the two children of his relationship with Mrs Hoolahan and his weekly benefit cheques are posted out to her address.

Coupled with the information above, Desmond Barbour has admitted that he has been residing at 44 Cromcastle Court since February, 1982.

I await hearing from you. If you wish to speak to me in connection with this case, I can be contacted at the above telephone number at any time.

Mise le meas."

The two children referred to in this letter were children born to the Prosecutrix and Mr. Barbour. There is no evidence that the Solicitor for the Prosecutrix at any time availed of the opportunity to contact the writer of that letter by telephone. The Prosecutrix's Solicitor replied by letter dated the 29th October, 1985 in which he made the case that Mr. Barbour did not reside permanently at his client's address and that there was not the degree of permanence in the living arrangements of the couple to constitute cohabitation. He concluded his letter with the word

"I look forward to having your comments at your earliest convenience."

Having considered this letter the deciding officer then decided the matter without referring back to the Prosecutrix's Solicitor. She was notified of this decision by letter dated the 8th November, 1985. By letter dated the 12th November, 1985 her

Solicitor was also notified of the decision which was to the effect that benefit had been terminated with effect from the 4th February, 1982 and that the Prosecutrix had been assessed with overpayment of benefit received since that date. This letter also made the point that the absences of Mr. Barbour from the Prosecutrix's home were necessitated by the nature of his employment as a Sales Representative.

The Prosecutrix appealed the decision and sought an oral hearing. Subsequently she withdrew this appeal and sought a Conditional Order of Certiorari to quash the decision of the deciding officer. This was granted by the President on the 24th February, 1986. The Minister has shown cause and the matter now comes before the Court to make the Order absolute notwithstanding the cause shown.

The first submission made on behalf of the Prosecutrix is that the evidence before the deciding officer did not disclose that the Prosecutrix and Mr. Barbour were cohabiting as man and wife. It was submitted that such a finding was necessary to give the deciding officer jurisdiction to refuse the Prosecutrix benefit. If, as was submitted, such finding was incorrect, then the Order of the deciding officer was made without jurisdiction, and was not merely an error within jurisdiction for which the relief claimed was not available. Reliance was placed upon the State (Ferris) .v. Employment Appeals Tribunal, an unreported decision of the Supreme Court delivered on the 10th December, 1984. In that case the Employment Appeals Tribunal had refused to hear an application for compensation for unfair dismissal upon the ground that the Applicant had sought damages for wrongful dismissal through the Courts. This was in fact incorrect since the Applicant had not brought any such proceedings. It was held that the jurisdiction of the tribunal was dependent upon this finding being correct. Since

it was not the jurisdiction to refuse the application never arose and accordingly the impugned order was made without jurisdiction. The present case is completely different. The jurisdiction of the deciding officer was to determine whether the Prosecutrix was entitled to benefit. His jurisdiction arose once there was a dispute as to the right to benefit. Whether or not there was cohabitation was an issue to be determined by him in exercise of that jurisdiction. If he was wrong in his determination, this was an error within jurisdiction against which Certiorari does not lie. This ground fails and for that reason it is not necessary to deal with the facts arising on this issue in any greater detail than already appears.

The Plaintiff's next submission is that the decision of the deciding officer was made contrary to the guarantee of fair procedure. This decision was a decision made by the deciding officer revising a decision previously made. It was made under Section 300 of the 1981 Act. Section 300 so far as it is material is as follows:-

"(1) A deciding officer may, at any time and from time to time, revise any decision of a deciding officer, if it appears to him that the decision was erroneous in the light of new evidence or of new facts which have been brought to his notice since the date on which it was given or by reason of some mistake having been made in relation to the law or the facts, or if it appears to him that there has been any relevant change of circumstances since the decision was given, and the provisions of this Part as to appeals shall apply to the revised decision in the same manner as they apply to an original decision."

"(5) A revised decision given by a deciding officer or an appeals officer shall take effect as follows -

- (a) where any benefit... will, by virtue of the revised decision, be disallowed or reduced... and the revised decision is given owing to the original decision having been given, or having continued in effect, by reason of any statement or representation (whether written or verbal) which was to the knowledge of the person making it false or misleading in a material respect or by reason of the wilful concealment of any material fact, it shall take effect as from the date on which the original decision took effect, but the original decision may, in the discretion of the deciding officer or appeals officer (as the case may be), continue to apply to any period covered by the original decision to which such false or misleading statement or representation or such wilful concealment of any material fact does not relate
- (b) in any other case, it shall take effect as from the date considered appropriate by the deciding officer or appeals officer (as the case may be), but -
 - (i) any payment of benefit... already made at the date of the revision shall... not be affected."

The function to be exercised by the deciding officer was an administrative one which he had to exercise judicially. This required the deciding officer to make known to the Prosecutrix the basis upon which it was contended that he should decide against her and the basis upon which if he did do so he could require her to refund benefit already received. Having done so he was obliged to give her an opportunity to deal with these contentions and to make such further contentions on her own behalf as she

wished. It was perfectly proper for these procedures to be carried out informally by letter as occurred in this case. What was essential was that the Prosecutrix should know fully the nature and extent of the case being made against her and that no decision should be made until she had been given proper opportunity to deal fully with such case.

There are a number of features of the enquiry as actually held which suggest that these basic essentials may not have been observed. In relation to the basic issue of fact, the deciding officer relied upon an allegation of fact - that Mr. Barbour's absences were necessitated by his employment - to rebut the main part of the Prosecutrix's case. This he did without giving her Solicitor an opportunity to answer it, particularly when such opportunity had been clearly sought. If he had so done, he would probably have had regard to the facts contained in the affidavits and would have been satisfied that the fact was untrue.

Before the deciding officer could have required the Prosecutrix to repay benefit received since the 4th February, 1982 he was required to decide either that the Prosecutrix had made a statement or representation which she knew to be false or misleading in a material respect or else had wilfully concealed a material fact. At no time was it suggested to her or her Solicitor that any such allegation was being made. Although the original letter dated the 12th July, 1985 did suggest that the Prosecutrix might be liable to refund the benefit already received, this was linked not to fraud but to a finding of disqualification.

I am satisfied that the decision requiring the Prosecutrix to refund benefit already received cannot stand. She was never told that her behaviour was being regarded as fraudulent, nor obviously could she have had any opportunity to meet such case.

As regards the decision to disqualify her from benefit, here again the decision was based ultimately on a factor which was never brought to her notice and so never commented on by her. This part of the decision should not be allowed to stand either.

In these circumstances it is not necessary to consider whether or not the 1973 Regulations are ultra vires the 1981 Act. The Conditional Order will be made absolute.

Henry Barron
23/7/86