

THE HIGH COURT

[2022] IEHC 454

RECORD NO. 2021/247JR

BETWEEN

FD

APPLICANT

CHIEF APPEALS OFFICER

- and -

SOCIAL WELFARE APPEALS OFFICE

- and -

THE MINISTER FOR SOCIAL PROTECTION

RESPONDENTS

JUDGMENT of Ms. Justice Niamh Hyland delivered on 18 July 2022

Summary of Decision

1. This is an application for judicial review of a decision of an appeals officer of 26 November 2020 upholding a decision of a deciding officer under the Social Welfare (Consolidation) Act 2005 (the “2005 Act”) that the applicant repay the sum of €54,184.10, in circumstances where it was held she had an entitlement to a lower rate of carer’s allowance from 2014 to 2018 and no entitlement to carer’s allowance from 2018 to 2019.
2. The challenge is brought exclusively on the basis that the appeals officer ought to have directed an oral hearing prior to determining the appeal but failed to do so. Various

reliefs are sought, including an Order of *certiorari* quashing the decision of 26 November 2020. I conclude that in the factual circumstances of this case the appeals officer did not err in fact or law in deciding that no oral hearing was required. It is accepted by the parties that the test is whether an oral hearing was necessary to fairly dispose of the appeal. Here, where the applicant failed to identify any conflict either of fact or law which would have necessitated an oral hearing, or any issues requiring to be resolved by an oral hearing, there was no unfairness in making the decision on the papers before the appeals officer.

3. I have also concluded that the applicant ought not to have proceeded by way of judicial review where she had an alternative appeal mechanism open to her under s.317 of the 2005 Act. The appeal would have permitted her to seek a revision of the appeals officer's decision and put forward any factual or other material justifying the necessity for an oral hearing. Had she proceeded on this basis, she could have relied on new material not previously before the appeals officer. Instead she sought to put the new material before the Court so that the Court could consider it – an impermissible approach in judicial review, where the Court has no role as first instance decision maker.

Facts

4. The applicant was receiving a carer's allowance in respect of her daughter, who has special needs. By way of a decision of 9 January 2020, the deciding officer directed the applicant to repay the sum of €54,184.10, on the basis that the applicant had an entitlement to a lower rate of carer's allowance from 2014 to 2018 and no entitlement to carer's allowance from 2018 to 2019. The decision was stated to be made under sections 179, 181 and 302(b) of the 2005 Act. The applicant was informed that she had

either a right to request a review of the decision by a deciding officer or a right to appeal the decision to the Chief Appeals Officer.

5. On 30 January 2020 the applicant wrote to the Chief Appeals Officer indicating that she wished to appeal the decision and that she would write shortly to “*comprehensively outline [her] case*”.
6. On 5 March 2021 she wrote identifying her grounds of appeal in respect of the correspondence of 9 January 2020 as follows:

“Carers Allowance Payment is made in respect of the care of a special needs child

The Department has incorrectly calculated the means of my family

The means of my husband should not be counted

The Department never reviewed my entitlement/payment

The decision is contrary to EU law

The decision is contrary to the ECHR Act 2003

The provision of the Act governing means is unconstitutional

The Deciding officer accepts that any alleged overpayment arose out of a mistake and not by deliberate acts or omissions, thus the Appeals Officer has a discretion as to the date from which and alleged overpayment is sought.

I am seeking an oral hearing.

Further grounds and submissions to follow (either before or during an oral hearing)”

No further submissions or material were provided by the applicant.

7. On 14 October 2020, she received a letter from the second respondent in the following terms:

“The Appeals Officer dealing with this case has asked that I write to you

He refers to your appeal, and in particular to a number of contentions you raised in your notification of appeal, dated 5 March 2020. In this notification letter you stated that further grounds and submissions would follow. It is now seven months since this correspondence, which is deemed sufficient time in order to have gathered such grounds. Please forward any evidence or information which you wish to be taken into account to this office. Your appeal file, along with any new evidence provided, will be reviewed again on 2 November.”

8. The last paragraph of the letter addressed the question of an oral hearing and was in the following terms;

“It is noted that you requested an oral hearing. Regulation 13 of Statutory Instrument 108/1998 (Social Welfare (Appeals) Regulations 1998) provides that where an Appeals Officer is of the opinion that the case is of such a nature that it can be properly determined without a hearing, he or she may determine the appeal summarily. The Appeals Officer feels this to be the position here.”

9. I pause the chronology at this point to observe that at paragraph 9 of his affidavit of 29 November 2021, Mr. Noble, solicitor for the applicant (who was acting for the applicant while the appeal was ongoing), avers that although the applicant sought an oral hearing, she was never informed that the appeals officer intended to proceed to determine the appeal summarily. It is hard to understand why this manifestly incorrect averment was included. As identified above, in the letter of 14 October, the appeals officer was at pains to give his preliminary opinion that the appeal could be determined summarily while giving her a chance to put in more material.
10. The applicant could at that point have submitted material that might have raised the necessity for an oral hearing. Instead, she replied on 22 October 2021 as follows:

“Further to your letter dated 14/10/2020 I wish to rely upon my letter dated 05/03/2020 and look forward to the opportunity to present my case and answer any questions an appeals officer may have at an oral hearing.”

11. The above recitation of the correspondence constitutes the totality of the interactions between the applicant and the appeals officer.

Decision of appeals officer

12. On 26 November 2020 the decision the subject matter of these proceedings was delivered. The letter disallowed the appeal and provided reasons. Under the heading “*Background*” it is stated as follows:

“As part of a review, the appellant was interviewed by a Social Welfare Inspector 20/06/19 where it became apparent the family means had changed considerably from the start date of the payment and were higher than the maximum means permitted by legislation. The appellant was written to on 19/8/19 in order to give them the opportunity to comment or challenge these findings. The appellant was given 21 days within which to reply to the information the Department had put forward but did not do so. An overpayment was assessed as a result.”

13. There is reference to evidence on file that the appellant was contacted on 5 August 2014 with a continuing eligibility certificate which listed changes in circumstances which must be notified to the Department including changing weekly income of either the appellant or their spouse/partner. Reference is also made to a declaration that was signed in 2013 by the applicant, where she agreed to inform the Department when their means or circumstances changed. A summary of appeal grounds i.e. as contained in the letter of 5 March is identified.

14. The appeals officer noted that the Department were unaware of changes in the level of pay of both the applicant and her partner for the period 2014 onwards which came to light following a review. It was noted the applicant was assessed retrospectively and the Department decided she was paid a level of payment which was higher than that which she should have received. She was told the means had been calculated on a combination of information gained from payslips, internal systems and information which appears to have been provided by the applicant.
15. In an important paragraph, the appeals officer stated as follows:

“I note the appellant’s grounds for appeal, and the fact that she stated she would provide further evidence to counter the Department’s position. Seven months have passed since she stated she would provide this evidence. In order to give the appellant further opportunity to provide this evidence the Appeals Officer contacted her by letter, dated 13/10/20, requesting any further evidence she wished to proffer. The appellant replied in a letter dated 22/10/22 stating she wished to rely upon her letter of 05/03/20 and looked forward to the opportunity to present her case and answer any questions at oral hearing. In light of the current coronavirus restrictions, and based on the information available, the Appeals Officer feels that this case can be dealt with summarily without need for recourse to an oral hearing.”

16. The applicant’s counsel relies heavily on the sentence at page 40 that goes as follows:

“I am satisfied that the appellant was aware that earnings and changes in circumstances had a direct effect of the rate of Carer’s Allowance payable, and that for whatever reason she failed to inform the Department about relevant changes in the couple’s earnings.”

17. The appeals officer concludes that he is satisfied that the appellant's means appear to have been assessed in line with governing legislation but nonetheless urges the Department to review the figures to ensure they are correct.

Proceedings

18. On 12 April 2021 Meenan J. gave leave to seek to judicial review of the contested decision and liberty to amend their Statement of Claim. An amended Statement of Grounds was filed on 23 April 2021. The applicant swore a verifying affidavit on 26 January 2021 and a further affidavit on the same day. She swore another affidavit on 23 April 2021. The Statement of Opposition was filed on 27 July 2021 and Mr. Aidan Jennings, the appeals officer swore an affidavit on 27 July 2021 verifying this. Mr. Paul Dorr, the deciding officer, swore an affidavit on 28 July 2021. The applicant swore a replying affidavit on 25 November 2021. A separate replying affidavit, replying to the affidavits of Mr. Dorr and Mr. Jennings, was sworn by Mr. Gareth Noble, solicitor for the applicant, on 29 November 2021. Mr. Dorr swore a supplemental replying affidavit on 17 June 2022. The third respondent swore an affidavit on 17 June 2022 and Mr. Jennings swore a supplemental replying affidavit on 20 June 2022.

Relevant law

Legislative provisions

19. Carer's allowance is defined by s.179(1) of the 2005 Act. It is a means tested payment payable to a carer who provides full time care and attention to a relevant person. A relevant person is defined as a person who has such a disability that he or she requires full-time care and attention and is over 16 years.

20. Article 13 of the Social Welfare (Appeals) Regulations, 1998 (S.I. 108/1998) (the "1998 regulations") provides:

“Save as provided in section 270, where the appeals officer is of the opinion that the case is of such a nature that it can properly be determined without a hearing, he or she may determine the appeal summarily.”

21. Article 14 of the 1998 regulations, as substituted by the Social Welfare (Appeals) (Amendments) Regulations 2011, provides:

“Where, in the opinion of the appeals officer, a hearing is required he or she shall, as soon as may be, fix a date and place for the hearing, and give reasonable notice of the said hearing to the appellant, the deciding officer or designated person, as the case may be, and any other person appearing to the appeals officer to be concerned in the appeal”

22. Section 302 of the 2005 Act distinguishes between situations where a revised decision results from false or misleading statements or wilful concealment, and situations where the decision is as a result of new evidence or facts. In the former case, the entire amount overpaid shall be repaid whereas in the latter situation the deciding officer has discretion as to the amount to be paid. Section 302 provides as follows in relevant part:

“302. A revised decision given by a deciding 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 or determination having been given, or having continued in effect, by reason of any statement or representation (whether written or verbal) which was to the knowledge of the person making it false or misleading in a material respect or by reason of the wilful concealment of any material fact, it shall take effect from the date on which the original decision or

determination took effect, but the original decision or determination may, in the discretion of the deciding officer, continue to apply to any period covered by the original decision or determination to which the false or misleading statement or representation or the wilful concealment of any material fact does not relate;

(b) where any benefit ... will, by virtue of the revised decision be disallowed or reduced and the revised decision is given in the light of new evidence or new facts (relating to periods before and after the commencement of this Act) which have been brought to the notice of the deciding officer since the original decision or determination was given, it shall take effect from the date that the deciding officer shall determine having regard to the new facts or new evidence and the circumstances of the case;”

Case law

23. The law is well settled in respect of when an oral hearing is required in a social welfare context. As per the decision in *Kiely v Minister for Social Welfare* [1977] IR 267, where an earlier provision similar to Article 13 of the 1998 Regulations was considered, Henchy J. observed as follows:

“The fact that power to determine the appeal summarily is given only in those terms means that an oral hearing is mandatory unless the case is of such a nature that it can be determined without an oral hearing, that is to say, summarily. An appeal is of such a nature that it can be determined summarily if a determination of the claim can be made fairly on a consideration of the documentary evidence. If, however, there are unresolved conflicts in the

documentary evidence as to any matter which is essential to a ruling of the claim, the intention of the regulations is that those conflicts shall be resolved by an oral hearing.”

24. In *Galvin v Chief Appeals Officer and Minister for Social Protection* [1997] 3 IR 240, Costello J. observed that “[t]here are no hard and fast rules to guide an Appeals Officer or, on an application for judicial review, this court, as to when the dictates of fairness require the holding of an oral hearing”. Costello J. continued:

“The case (like others) must be decided on the circumstances pertaining, the nature of the inquiry being undertaken by the decision-maker, the rules under which the decision-maker is acting, and the subject matter with which he is dealing and account should also be taken as to whether an oral hearing was requested.”

25. Costello J. held that he had to decide:

“whether the dispute between the parties as to (a) the reliability of the evidence before the Appeals Officer of the applicant and Mr. Higgins on the one hand and (b) the accuracy of the departmental records on the other made it imperative that the witnesses be examined (and if necessary cross-examined) under oath before the Appeals Officer.”.

He concluded that without an oral hearing it would be extremely difficult if not impossible to arrive at a true judgment on the issue which arose in this case because of the “*cumulative effect*” of various considerations, including that the relevant period which the Appeals Officer was required to consider began nearly 50 years prior to the decision, the fact that errors had been made by officers in the Department due to the fallibility of the records, and the fact that consideration had to be given to evidence adduced on the applicant’s behalf with a view to weighing it against the evidence

touching on the reliability of the Department's records. Unsurprisingly, in those circumstances, Costello J. concluded that the conflict between the parties could not be properly resolved in the absence of oral testimony and cross examination.

26. In *LD v Chief Appeals Officer* [2014] IEHC 641, Peart J. observed that:

“there is no absolute entitlement to an oral hearing at the appeal ... [t]he appeals officer has a clear discretion to decide whether an oral hearing is necessary in the light of the materials which formed the basis of the appeal ... there is the possibility of an applicant being heard in person, not because there may be a better chance of succeeding in the application if one has the opportunity of putting one's case face to face with the decision-maker, but rather because there may be reasons identified and put forward either by the applicant or the decision-maker which make it desirable that an oral hearing should take place. An obvious example of where an oral hearing is considered essential from a fair procedures point of view where there are disputes of fact, or differing professional opinions, which bear upon the question of entitlement”

27. This case law shows that the question of whether an oral hearing is required in any given case will depend on the facts of a given case but that the principles to be applied in making that decision are clear.

Necessity of oral hearing to dispose fairly of the appeal

28. As identified in the oral submissions of the applicant, the question I must consider is the very net one as to whether an oral hearing is necessary to fairly dispose of the appeal. Counsel for the applicant identifies two areas where he argues there were conflicts necessitating an oral hearing.

29. The first is in relation to the matters that the applicant has raised in her replying affidavits. These include matters such as properties herself and her husband own,

queries about how the respondents concluded that her husband's earnings had increased substantially, the use of the system utilised by the deciding officer referred to as ISTS, the personal circumstances of her family and the state of her mortgage. These matters may or may not have given rise to factual conflicts such as to necessitate an oral hearing had they been articulated by the applicant in the appeal. However, since none of them were put before the respondents in the only substantive appeal document submitted by the applicant i.e. the one-page letter of 5 March quoted in full above, they cannot possibly be relied upon at this stage as the basis for a conflict of fact necessitating an oral hearing.

30. The respondents have identified the approach that was adopted by the appeals officer, Mr. Jennings, in the instant case. At paragraph 18 of his affidavit sworn 27 July 2021, he sets out his understanding of the exercise that he must carry out when deciding whether a case can be determined without a hearing as follows;

“18. In forming my opinion as to whether a case can properly be determined without a hearing I consider a number of factors, including the overall nature of the case, any request that has been made for an oral hearing, whether there are unresolved conflicts in the documentary evidence as to any matter essential to a determination of the appeal, whether there are any disputes of fact (if any), differing professional opinions or dispute, doubt or controversy that could benefit from airing at an oral hearing. I am aware of the requirements of fair procedures and I am conscious of these requirements in exercising the discretion available to me under the Social Welfare regulations. I consider all of these factors and the case as a whole in forming an opinion as to whether the case is one that can be properly determined by me summarily or alternatively

whether the convening of an oral hearing is required to ensure a proper determination of the appeal.” (page 81)

31. That is in my view an appropriate summary of the obligations of an appeals officer when deciding whether to grant an oral hearing. Here, as noted above, the applicant relies upon alleged unresolved conflicts in the documentary evidence and argues that their resolution required an oral hearing. But given none of those issues were identified in the appeal, she cannot rely on them in these proceedings.
32. Next, the applicant argues that the resolution of the grounds identified in her letter of 5 March required an oral hearing. As noted above, the only material I can consider are the documents that were before the appeals officer in the appeal process. When one analyses the letter of 5 March, there is simply no material in it that identifies a conflict of fact or law necessitating an oral hearing. The paucity of material is difficult to understand given that Mr. Noble makes it clear at paragraph 7 of his affidavit that he was acting for the applicant during her appeal.
33. Taking each of the grounds in that letter in turn, the applicant identifies that the Department has incorrectly calculated the means of her family but does not provide any documents or any detail in relation to this issue. Simply asserting a state of affairs, without providing any detail on that state of affairs, cannot be considered to give rise to a conflict requiring an oral hearing.
34. Next, she says the means of her husband should not be counted. Again, no basis for this assertion is provided nor any documentation in this respect. In fact, as is pointed out in the deciding officer’s response to the appeal, carer’s allowance is a means assessed payment and therefore all means are assessed. As the appellant is married, both her and her husband’s means are necessary for the compilation of means assessments.

35. Third, she states that the Department never reviewed her entitlement/payment. In fact, it is clear from the deciding officer's response to the appeal that her carer's allowance entitlement was reviewed by the Dublin North Special Investigations Unit ("SIU") as part of the SIU's 2019 carer's project pertaining to assessing compliance by carers in receipt of carer's allowance with the criteria of the scheme. It is impossible to see how this statement about the lack of a review, which *prima facie* appears to be incorrect, could give rise to the necessity for an oral hearing in the absence of the provision of any further detail or documentation.
36. The applicant's next grounds of appeal are that the decision is contrary to EU law, contrary to the European Convention on Human Rights Act 2003 and is unconstitutional. Without any particulars of these complaints, the appeals officer was quite correct in deciding this did not give rise to the necessity for an oral hearing.

Cause of overpayment

37. In support of his argument that an oral hearing was necessary, counsel for the applicant has focused almost exclusively on the very last ground of appeal in the letter of 5 March:
- "The Deciding Officer accepts that any alleged overpayment arose out of a mistake and not by deliberate acts or omissions, thus the Appeals Officer has a discretion as to the date from which and alleged overpayment is sought"*.
38. It is argued that this ground of appeal necessitated an oral hearing. I deal with that argument in detail below. However, before doing so, it is necessary to consider what is meant by that sentence. In my view, it reflects the fact that the decision was made under s.302(b) as explicitly identified in the decision of 9 January 2020. There is a clear distinction in the legislation, as noted above, between a situation where repayment is required because of false or misleading statements or wilful concealment— s. 302(a) - and where repayment is required in the absence of any such finding being made –

s.302(b). The latter subsection does not refer to a “mistake”: rather it captures the situation where new facts or new evidence exist that necessitate a revised decision.

39. The legal consequence of that is as stated by the applicant i.e. that the appeals officer has a discretion as to the date from which the alleged overpayment is sought, in contrast to the position where there has been deliberate wrongdoing. In the latter situation, there is no discretion as to the date from which the alleged overpayment is sought. In other words, the thrust of the applicant’s last ground of appeal appears to be that, because this was not a case of a “deliberate act or omission”, there is a discretion as to how much of the overpayment found by the Department should be directed to be refunded. That is a correct statement of the position.

40. The sentence in question could also be read as an application that the appeals officer would consider directing repayment of less than the full amount, given the undoubted jurisdiction to do so in the absence of a finding of false or misleading statements. However, any such argument is implicit rather than explicit. If the applicant wished to explain why, in her case, an amount less than the full amount should have been paid to her, then she ought to have done so, with reference to documentation where relevant. However, neither in the letter of 5 March, nor in her letter of 22 October, following the opportunity afforded to her on 14 October to expand her grounds of appeal, did she do so. At no point in her appeal did she explain why the appeals officer should vary the deciding officer’s decision to direct repayment of a lesser amount than that due and owing.

41. As part of his argument in this regard, counsel for the applicant heavily focused on the sentence in the appeal decision to the effect that the appeals officer was satisfied that the appellant was aware that earnings and changes in circumstances had a direct effect on the rate of Carer’s allowance payable and failed to inform the Department about

relevant changes in the couple's earnings must be interpreted as constituting a factual conflict that necessitates an oral hearing. He argues that the sentence meant there was a dispute about her understanding of the rules, which in turn was relevant to the amount that should be directed to be repaid, and that an oral hearing was required to address this. There are various problems with this submission.

42. First, it is not pleaded at all and no identification of this alleged conflict is identified in the Statement of Grounds. Even if one treats it as covered by the general pleas, the core of the argument appears to be an oral hearing was necessitated so that the applicant's understanding of her obligations could be tested. But when one returns to the letter of 5 March 2020, there is no sign of any attempt by the applicant to make a case in respect of her understanding of her obligations and no reasons are given as to why a lesser amount should be directed to be repaid either by reference to her understanding of her obligations or for any other reason. She never says she did not understand her obligation to tell the Department if her means or circumstances changed, or that she did not understand an obligation to repay could arise, or that her lack of understanding means she should pay an amount less than the full amount owing. All she does is identify that the appeals officer has discretion in her case to direct the payment of a lesser amount, a proposition that all are agree upon.

43. In fact, the respondents had ample material to conclude that the applicant was aware of her obligations. The statement in the decision on the appeal was uncontroversial in this regard. In the deciding officer's submission on the appeal provided under cover of a letter of 24 August 2020 to the Chief Appeals Officer, it was stated:

“Furthermore, in the letter at TAB A1, the appellant writes about the Deciding Officer accepting that any overpayment arose out of a mistake and not by deliberate omission. In relation to this, it cannot be seen in any letters sent to

the appellant that the Deciding Officer accepts that an overpayment arose out of a mistake. In letters sent to the appellant, the Deciding Officer has clearly shown the reasoning as to why they made their decision. Nowhere in these letters does it state any matter linked to what the appellant has discussed regarding mistakes and deliberate omissions pertaining to overpayments”.

44. That is a simple statement of fact. It is repeated in the affidavit of Mr. Dorr of 28 July 2021 where he says at paragraph 29(iv) as follows:

“Further to the Applicant’s claim that it is accepted that any overpayment arose out of a mistake and not by deliberate omission, it is not clear the basis on which the applicant made this statement. It is not stated in any of the correspondence from the Third Named Respondent that it is accepted that the overpayment arose out of a mistake”.

45. Neither of these statements give rise to the kind of conflict that counsel for the applicant suggests exists. The paragraph impugned by counsel for the applicant is relevant to the decision to require full payment. There was material before the appeals officer to justify the finding that the applicant was aware that earnings and changes in circumstances had a direct effect on the rate of carer’s allowance payable. That may be seen from the draft decision of 19 August 2019, provided to the applicant prior to the decision of the deciding officer of 9 January 2020, which states:

“The information available to the Deciding Officer is as follows:

- You had means from employment that you failed to disclose to the Department*
- Your Spouse means from employment increased substantially and you failed to notify the Department*
- You signed the Carers Allowance application declaration on the 12/02/2013 this stated ‘I will tell the Department when my means or circumstances change’.*

- A completed Continuing Eligibility Certificate was received in the Department on the 05/08/2014. This gave a list of changes in circumstances that the Department must be notified of, this included 'Change in your means/means of your Spouse/Civil Partner/Cohabitant (weekly household income). On the form it asked 'Has there been a change in any of the above circumstances since your last contact with the Department', you ticked the box for the answer No.'

46. That was provided to the appeals officer as part of the deciding officer submissions. Further, in the deciding officer submissions, it was identified that the applicant had been told when she was awarded the allowance in 2013 that, if her means or that of her spouse increased, she was legally obliged to notify the Department of the increase and that if she did not notify the Department of increases in her means, she might incur an overpayment of carer's allowance which she would have to repay.
47. No response was provided to the decision of 19 August 2019 by the applicant despite the letter identifying that she had 21 days to reply and if no reply was received within 21 days the case would be decided on the evidence available. The applicant says in her affidavit of 25 November 2021 that she did not make submissions because she was so stressed from being told that she was due to make a payment of €54,184.10, that she was unable to articulate all the relevant information in writing, and that an oral hearing would have afforded her the opportunity to do so (see paragraph 6). In fact, she had not been informed at that stage that there was an overpayment in the sum of €54,184.10. That sum was not furnished to her until the decision of 9 January 2020. Further, at that point there was no question of an oral hearing – she was simply being asked to respond to the points being made. She did not seek further time to reply. No step at all was taken by her.

48. In those circumstances I am satisfied that the appeals officer was entitled to rely on the material provided to him by the deciding officer and to conclude that the appellant was aware that earnings and changes in circumstances had a direct effect on the rate of allowance. The statement that she failed to inform the Department of those relevant changes is not controversial in circumstances where no assertion is made by her that any changes were notified. In the circumstances, there was nothing precluding the second respondent including this conclusion without an oral hearing. The applicant had not put forward any argument in relation to her knowledge or lack of same in respect of changes of circumstances. She had not raised any issue or conflict of fact in respect of this issue. The sentence in the letter of 5 March referring to entitlement of the officer to direct payment of a lesser amount does not amount to same.

49. In summary, the decision not to direct repayment of a lesser amount to be repaid cannot be used as the basis to argue for an oral hearing in circumstances where no evidence was put before the second respondent as to why a lesser amount should be imposed. Nor did the statement that the applicant was aware of her obligations to notify changes in circumstances necessitate an oral hearing where she had not raised any issue about her awareness about her obligations, or lack of same. In the premises, the applicant has failed to identify any controversy in this respect requiring an oral hearing.

Mandatory entitlement to oral hearing

50. Although in the written submissions it was argued that, where a decision is made pursuant to s.302(b) i.e. where there is a discretion as to the date from which an alleged overpayment is sought, an oral hearing is essential, at the hearing counsel for the applicant resiled from the breadth of this proposition. However, the argument was maintained that because the applicant had sought an oral hearing and had indicated that she would present her case and provide further information in that way, that the appeals

officer could not determine the matter summarily. That approach appears to suggest that it is for an applicant to decide whether to present their case by providing information when stating the grounds of appeal, or to reserve the right to provide such information at an oral hearing.

51. However, that approach is inconsistent with the case law cited by the applicant which makes it clear that an oral hearing is only required if the case cannot be determined without an oral hearing. It is for the appeals officer on considering the material that has been put before them by an appellant to decide whether the case can be determined summarily. An appellant is not entitled to indicate that they will hold off on placing material that might suggest a conflict until the oral hearing itself. Such an approach would make it impossible for the appeals officer to carry out their obligations under Article 13 and form an opinion as to whether the matter can be determined with or without a hearing.

52. The applicant's theme of an oral hearing as an entitlement is continued in the analysis by the applicant of the decision in *LD* – a case where the applicant had not requested an oral hearing. The applicant suggests that Peart J. was of the view that an oral hearing would be an entitlement if an applicant so required. However, that is not a correct reading of *LD*. Peart J., at paragraph 37, when discussing the difference between an appeal and a revision of the appeal decision under s.317, notes as follows:

“But there is no absolute entitlement to an oral hearing at the appeal. One can be requested, but it does not follow that it must be permitted. The appeals officer has a clear discretion to decide whether an oral hearing is necessary in the light of the materials which formed the basis of the appeal.”

53. The applicant correctly identified the legal test at the start of his submissions, being whether in the circumstances of any given case an oral hearing is necessary to dispose

fairly of the appeal. For the reasons I set out above, there is no legal flaw in the decision of the appeals officer to decide this appeal could be disposed of fairly without an oral hearing.

Decision on oral hearing two stage process

54. In the written legal submissions of the applicant, an argument is made that the exercise carried out by the appeals officer when deciding whether to grant an oral hearing is a two-stage process. It is argued that first the appeals officer must form an opinion as to whether they can determine the appeal summarily. If that is the case, only then is the discretionary exercise of whether to convene an oral hearing triggered. It appears to be suggested that this analysis of the regulations meant that the second respondent could not summarily determine the appeal without replying to the applicant's request on 22 October 2020 for an oral hearing.

55. There are two problems with this approach. The first is that it was not pleaded in the Statement of Opposition. The rules in respect of pleadings and judicial review are well established, as per the decision in *AA v Medical Council* [2003] IESC 70 which makes it clear that in judicial review, points must be pleaded to be determined. Accordingly, I decline to adjudicate on this issue on the basis that it has not been identified in the pleadings.

56. Second, even if it had been pleaded, it is difficult to see why, even if this analysis was correct – and I make no finding on this – it would have prevented the second respondent from proceeding on a summary basis, in circumstances where the second respondent was aware from the letter of 5 March 2020 that the applicant was seeking an oral hearing.

Lack of reasons

57. The applicant devotes considerable space in the written legal submissions to an alleged failure to give reasons. This necessitated the respondents having to reply to this argument in their written submissions. However, as counsel for the applicant accepted at the hearing, there was no plea in respect of a failure to give reasons in the Statement of Grounds and therefore the applicant was not entitled to raise same in the proceedings. That meant that the submissions on both sides were pointless and resulted in an increase in legal costs that could have been avoided. Where a party has not pleaded a matter in judicial review, they should not attempt to introduce it by the back door by including material on the point in their legal submissions, whether written or oral.

Alternative remedies

58. The respondents separately argue that the applicant is not entitled to maintain or succeed in these proceedings on the basis that the applicant had alternative remedies available to her, namely s.317 and or s.318 of the 2005 Act. At hearing, the argument focused on s.317.

59. Under s.317, an appeals officer may at any time revise a decision of an appeals officer in certain circumstances including where it appears to them that the decision was erroneous in the light of new evidence or new facts which have been brought to their notice since the date upon which the decision was given. In the case of *LD*, Peart J. observed that new facts or evidence was not confined to matters that may have happened since the decision but may consist of material or evidence which, although it existed before the appeal decision was made, was not before the appeals officer at the time the appeal decision was made. At paragraph 38, commenting upon the revision paragraph in s.317, Peart J. observed that;

“It seems clear therefore that the Act contemplates that a hearing can take place in relation to a revision so that any new facts and new evidence can be adduced

and considered. It is certainly arguable that a request for an oral hearing itself constitutes a new fact, even if it does not constitute new evidence, and that the appeals officer could proprio moto decide to hold an oral hearing once asked to do so, and to hold it for the purpose of a s. 317 revision.”

60. That strongly suggests that the applicant could have, on receiving the appeal decision, sought a revision under s.317 by another appeals officer and in that context could have put before the appeals officer the new material she now seeks to put before the Court by way of affidavit. She could have sought an oral hearing on the basis of the conflicts thrown up, on her case, by that material. She did not do so but rather sought leave to apply for judicial review, where she is not entitled to introduce new factual material not put before the decision maker. She does not explain why she did not take this course.

61. Moreover, on 9 July 2021 the Chief State Solicitor’s Office wrote to the solicitors for the applicant indicating as follows:

“While your client had in her letter dated 5 March 2020, in which she outlined her grounds of appeal, indicated that further grounds or submissions would follow, no such further grounds or submissions were provided.

In the event that there are any new facts or evidence to be considered in this appeal, the Appeals Officer will consider same in accordance with s.317 of the Social Welfare Consolidation Act, 2005.”

62. This offer was refused by letter of 16 July 2021 by the solicitors for the applicant on the basis that, in the circumstances of this case, an oral hearing was mandatory. The letter went on to state that s.317 could not remedy the unfairness visited upon the applicant by the respondents by virtue of an unlawful decision.

63. Here where:

(a) the only complaint made by the applicant is that she should have had an oral hearing;

(b) she was offered an opportunity to submit new material and seek an oral hearing on the basis of same;

(c) the decision not to grant an oral hearing was because she had raised no conflicts or issues necessitating an oral hearing, I conclude that she had an alternative remedy which would have been far more suitable to her situation than bringing the within proceedings. She has sought to ask the Court to step into the shoes of the appeals officer by producing material that she says warrants an oral hearing. It is not the role of the Court to act as an appeals officer; I can only consider what was before the appeals officer at the relevant time.

64. However, had she availed of the s.317 mechanism she could have deployed the very same material to argue for an oral hearing. In those circumstances the alternative remedy was particularly suited to her concerns and therefore she ought to have pursued this avenue before issuing the within proceedings. In fact, this was the approach taken in *Galvin* where the applicant in that case sought to revise the decision of the appeals officer and was given a further decision refusing his appeal in addition to the first unsuccessful appeal. Accordingly, I conclude that the applicant failed to exhaust the alternative remedy available to her pursuant to s.317 of the 2005 Act.

Affidavit evidence in the proceedings

65. By affidavit sworn 29 November 2021, Mr. Noble, solicitor for the applicant swore an affidavit where he averred at paragraph 3 that he made the affidavit in light of his experience as a practitioner working in the area of social welfare law. At paragraphs 4 to 8 and paragraphs 11 to 14 he gives evidence about his experiences of the utility of oral hearings and identifies certain features of them on the basis of his experience as a solicitor practising in the area since 2006. A flavour of the approach taken may be seen from the following extract from paragraph 6:

“I further say that it is a feature of oral hearings that they will uncover nuances to a case that might otherwise go unnoticed or unexplored if decided summarily on a review of the papers alone. I am struck how often at Oral hearings, Appeal officers comment on the value of exploring matters further with appellants by conducting oral hearings. I am aware of cases, even where an overpayment has been found to be made, they are often revised downwards following further review in light of the representations made at an oral hearing. Personally, I have never participated in an oral hearing in social welfare matters that did not result in a reasonably substantial reduction in the overpayment demanded”

66. All solicitors should be aware that there is a difference between factual witnesses and expert witnesses. Mr. Noble is of course entitled to put himself forward as an expert witness in any case not involving his own client if he considers he has the necessary expertise, but obviously he cannot act as an expert witness where he is the applicant’s solicitor. Insofar as Mr. Noble chose to swear an affidavit as a factual witness, as he did in this case, he is limited to those facts that are relevant to the proceedings and is not entitled to go beyond that boundary. The bulk of his averments in his affidavit are wholly inadmissible in that Mr. Noble sought to avert to matters that were not directly relevant to this case but were the type of matters an expert might aver to as to his or her general experience of oral hearings in social welfare appeals.

67. Moreover, the consequences of including such averments were that the respondents were forced to incur further expense and time in providing an affidavit from the Chief Appeals Officer, Ms. Joan Gordon, who was obliged to swear an affidavit of 17 June 2022 replying to those averments. She correctly observed that the averment of Mr. Noble in that respect were not in response to the respondents’ affidavits and that no liberty had been granted by the Court for such averments.

68. In the circumstances, I have entirely disregarded paragraphs 4 to 8 and 11 to 14 except where they refer to the applicant's own situation.

Conclusion

69. For the reasons set out in this judgment, I refuse the reliefs sought by the applicant. I will hear oral submissions on any application for costs, and I propose **27 July at 10.30am remotely** for those submissions. The parties have liberty to apply for a different date but if they wish to do so, they should agree a date in advance and provide same to the registrar.