

## THE HIGH COURT

Record Number: 2014 No. 153 JR

Between:

Aidan Smith

Applicant

And

Chief Appeals Officer Social Welfare Appeals Office Minister for Social Protection

Respondents

**Judgment of Mr Justice Michael Peart delivered on the 19th day of December 2014**

1. The applicant was in receipt of Illness Benefit from 12th January 2012 until 13th March 2014 (except for a short period between April 2012 and May 2012). Previously he had been employed for a period of 39 years with Aer Lingus but retired on medical grounds following four hip operations, the first two of which were defective.

2. In April 2013 he applied to the Minister for Social Welfare for an Invalidity Pension. That application was refused by decision dated 31st May 2013. On 10th June 2013 the applicant sought a revision of that decision under s. 301 of the Social Welfare (Consolidation) Act 2005. By decision dated 23rd July 2013, his application for a revision was refused.

3. Following that refusal, the applicant lodged an appeal on 7th August 2013 pursuant to s. 311 of the Act of 2005. His letter of appeal was acknowledged by letter dated 14th August 2013 which informs him that the notice of appeal had been sent to the Social Welfare Services Office, and that on receipt of their response the papers would be referred to an appeals officer for consideration. By January 2014 he had not received any decision on his appeal, and he wrote a letter to the Minister on 6th January 2014 seeking her assistance and informing her that his inability to work was never going to change. On the following day, the Minister's office replied informing the applicant that his letter had been passed to the Chief Appeals Officer, and to whom the applicant had also written by letter dated 6th January 2014, requesting an update in relation to his appeal. That letter concluded as follows:

*"If further information is required whether medical or other please let me know as soon as possible or can I be granted the facility of an oral hearing where I could answer any questions you might have. I would very much appreciate a prompt reply."* [emphasis added]

4. The applicant received a letter from the Social Welfare Appeals Office dated 28th January 2014 which informed him that following receipt of his appeal the papers and the comments of the Deciding Officer on the matters raised in his appeal had been sought in accordance with the statutory requirements, and that these had now been received. It went on to state *"your case has been referred to an Appeals Officer who will decide whether the case can be decided on a summary basis or whether to list it for oral hearing."* [emphasis added]

5. The applicant did not receive any further letter informing him that he was not being granted an oral hearing, and instead, simply received a letter dated 30th January 2014 from the Social Welfare Appeals Office informing him of the Appeals Officer's decision that his appeal was disallowed. This decision had been taken without any oral hearing, and therefore on a summary basis. In the reasons for the decision, the appeals officer had stated, inter alia *"whilst the evidence indicates that the appellant experiences restriction and is unable for his usual work I am not satisfied that it has been established that he is incapable of work for life in line with the qualifying conditions for receipt of Invalidity Pension."*

6. In fact, part of the materials furnished by the applicant had been a letter from his Consultant Orthopaedic Surgeon dated 29th May 2012 which stated:

*"This man has had bilateral revision hip replacement surgery. He is not fully fit for the job which he is paid to do, and in my opinion will be unfit for this job or any job in the future."*

7. In so far as the appeals officer may have had no medical evidence expressing a view contrary to the above, or may have had evidence expressing a contrary view, it is clearly a case where an oral hearing would have assisted in resolving the medical question as to whether he was fit for any work for the rest of his life or not. The applicant has submitted that in those circumstances, he was entitled to be afforded an oral hearing, especially when he requested one.

8. The applicant then instructed his solicitors to write to the Chief Appeals Officer, and they did so by letter dated 13th February 2014 making the point that their client was entitled to an oral hearing in view of a significant conflict of evidence arising in the case, and called upon the CAO *"to confirm within seven days that our client will be granted an oral hearing to be heard within the next four weeks"* and warned that unless the applicant was afforded such a hearing, judicial review proceedings would follow.

9. The Social Welfare Appeals Office replied by letter dated 19th February 2014 urging the applicant's solicitors to refrain from bringing any judicial review proceedings for the moment so that the applicant's file could be retrieved from the Invalidity Pension Section of the Department of Social Protection, and also so that the Social Welfare Appeals Office could have a reasonable opportunity to *"complete its review of your client's application"*.

10. The applicant's solicitors replied by letter dated 24th February 2014 stating that the breach of their client's right to an oral hearing had already occurred, which entitled their client to commence his judicial review proceedings. They went on to say that it was their understanding that apart from any jurisdiction under s. 317 of the Social Welfare Consolidation Act 2005 (as amended) the appeals officer, having made a decision on a summary basis, was thereafter *functus officio*, and could not re-open the appeal by way of oral hearing. They went on to say that while they had written seeking an oral hearing, they were *"at a loss as to how it will be legally possible for our client to be granted an oral hearing in the absence of an order of certiorari from the High Court in respect of the summary decision that has already been made"*. They concluded their letter by asking for the legal basis for the granting of an oral hearing at that stage.

11. By letter dated 3rd March 2014, the Social Welfare Appeals Office replied that the matter was receiving attention and that a reply would issue within 10 days. Nevertheless, the applicant applied for and was granted leave to seek reliefs by way of judicial review by

Order of the High Court dated 10th March 2014. Leave was granted to seek five substantive reliefs, namely an order quashing the decision dated 30th January 2014 which was made on a summary basis; a declaration that the CAO was obliged to grant the applicant an oral hearing on the basis that the Social Welfare (Appeals) Regulations 1998, as amended by the Social Welfare (Appeals) (Amendment) Regulations 2011 are intended to provide for an oral hearing where there are unresolved conflicts of evidence, and that such conflicts arose in the applicant's appeal; a declaration that the CAO breached the applicant's right to fair procedures, natural and constitutional justice, in failing to provide an oral hearing; a declaration that the CAO, although having reached a decision which was contrary to statute, regulation and fair procedures, is now *functus officio* and cannot re-open the matter by way of an oral hearing in the absence of an order of the High Court since, inter alia, section 320 of the Social Welfare Consolidation Act 2005 provides that the decision is final and conclusive but for the power to revise; and finally, an order of Mandamus compelling the CAO to provide the applicant with an oral hearing within 30 days.

12. Following the commencement of the applicant's judicial review proceedings, the Chief State Solicitor wrote to the applicant's solicitors in the following terms:

*"We note that your client sought an oral hearing of his appeal by letter dated January 6th 2014 but that the Appeals Officer in fact determined the appeal without same.*

*You will be aware that it is the Policy of the Chief Appeals Officer to hold oral appeals where the applicant so requests, save where such a hearing is manifestly unnecessary and unwarranted. It seems that in error this was not adhered to by the Appeals Officer in this matter.*

*Please note that having considered your request as per your letters of February 13th, 2014 and February 24th, 2014 the Chief Appeals Officer proposes to exercise her power under s. 318 of the Social Welfare Consolidation Act 2005 to revise the decision of the Appeal Officer herein and to reschedule an oral hearing before a different Appeals Officer."*

13. The applicant's solicitors replied by letter dated 31st March 2014 stating, inter alia, the following:

*"There is no statutory basis for your proposal as the appeals office is now functus officio but for the power to revise. Consequently, the only legal basis upon which that decision can be set aside and an oral hearing granted is if the original decision is quashed.*

*This can be done before the President or other sitting judge tomorrow or on a later occasion, if the Respondent is agreeable, in which case the Applicant will be seeking his costs to date.*

*Otherwise the Applicant wishes to proceed with the above judicial review proceedings and awaits the Respondents' Statement of Opposition in due course."*

14. In support of the Statement of Opposition, a replying affidavit has been sworn by the Chief Appeals Officer which first of all sets out the history of dealings between the applicant and the social welfare services, and then states that following her review of the case she proposed to exercise the powers under s. 318 of the Act of 2005 to revise the decision of the appeals officer and to reschedule an oral hearing before a different appeals officer. She also referred to what she describes as her "*general policy to hold oral appeals where an appellant so requests, save where such a hearing is manifestly unnecessary and unwarranted*". She went on to say that it appeared to her that "*in error the appeals officer did not have regard to this policy consideration in this case*". Furthermore, she went on in paragraph 18 to state:

*"It has also come to light that the test as applied by the Appeal Officer in this case may be incorrect in light of the applicant's assertion that while he technically re-entered his previous employment, he did not engage in work and continued to be unfit for work. I believe that the appeals officer may have applied the wrong limb of the relevant test in that regard, and I propose to include this in any reconsideration of the matter pursuant to s. 318 of the Social Welfare Consolidation Act, 2005".*

15. The issue in this case is whether for the purposes of a revision being considered under s. 318 of the Act of 2005 the Chief Appeals Officer may hold an oral hearing where one is considered necessary for the purpose of resolving conflicts of evidence.

16. The starting point is s. 318 itself which provides:

*"318. – The Chief Appeals Officer may, at any time, revise any decision of an appeals officer, where it appears to the Chief Appeals Officer that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts."*

17. There can be no doubt in this case that some possible mistakes have been identified by the Chief Appeals Officer in the manner in which the appeals officer dealt with this matter in a summary manner when deciding the appeal, and in relation to the test applied. She has made that clear in her affidavit. There is therefore no doubt that s. 318 provides the necessary jurisdiction for her to consider revising the decision. I refer in passing to the provisions of s. 320 of the Act of 2005 under which the decision of an appeals officer on any question shall be final and conclusive, subject to, inter alia, a section 318 revision.

18. As I have said, the question for decision really amounts to whether for the purposes of such a revision under s. 318 an oral hearing can be directed. In my judgment of even date in the case of *LD v. Chief Appeals Officer*, I dealt with the same issue but in relation to whether there was power to hold an oral hearing for the purposes of a s. 317 revision. I refer to my remarks generally in that decision which, mutatis mutandis, are applicable in the present case. In particular I refer to s.313 of the Act of 2005 which provides:

*"313. -- An appeals officer shall, on the hearing of any matter referred to him or her under this Part have power to take evidence on oath and for that purpose may administer oaths to persons attending as witnesses at that hearing."*

18. The Chief Appeals Officer is an appeals officer – see s. 305 of the Act of 2005. Section 313 empowers the CAO to take evidence on oath on the hearing of any matter referred to him or her under this Part. A revision is part of the appeals process contained within Chapter 2 of Part 10 of the Act of 2005, and an appeal is a "*matter referred to him or her under this Part*". As I stated in *LD*, the power to take evidence on oath at a hearing implies that a hearing can be directed, even though s. 318 does not specifically say so.

19. In so far as the applicant ought to have been given an oral hearing of his appeal, and that is accepted by the respondents, there

is provision for a revision of the summary decision, and as I have found, this can be done by way of oral hearing. The Act contemplates that where some mistake is made in the manner in which an appeal officer decides an appeal, the matter can be corrected where a mistake is identified by the Chief Appeals Officer either as to fact or the law.

20. Given that the applicant is being offered an oral hearing for the purpose of a revision, there is no need to consider quashing the appeal decision. Neither is it necessary to grant the declaration sought at 3 of the Statement of Grounds. Neither is the applicant entitled to the declaration sought at 4, nor the order of mandamus sought at 5 of the Statement of Grounds.

21. The application for reliefs by way of judicial review is refused.