

[2015] NZSSAA 007

Reference No. SSA 123/14

IN THE MATTER

of the Social Security Act 1964

AND

IN THE MATTER

of an appeal by **XXXX** of **XXXX**
against a decision of a Benefits
Review Committee

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Ms M Wallace - Chairperson
Mr K Williams - Member

HEARING at AUCKLAND on 11 December 2014

APPEARANCES

Mr M Darke, Advocate for the appellant
Ms R Shaw, for the Chief Executive of the Ministry of Social Development

DECISION

Introduction

[1] The appellant appeals against decisions of the Chief Executive of 3 September 2013 upheld by a Benefits Review Committee determining that the appellant and his wife were not living apart and to pay them a married rate of benefit rather than to pay each of them at the single rate from 2 September 2013.

[2] The appellant and his wife in this case are a married couple. The issue to be determined by the Authority is whether or not they were living apart at the time of the Chief Executive's decision to pay them a married rate of benefit.

Background

[3] The appellant and his wife (Mr and Mrs **XXXX**) were married on **XXXX**. There are three children of their marriage who were born in 1982, 1983 and 1985. They have never divorced. The appellant and his wife live at **XXXX**. They built their home there at **XXXX** on Maori freehold land belonging to **XXXX** and her family.

[4] In 1993 the appellant and his wife advised the Ministry that they had separated. From 28 April 1993 until 28 November 2001 Mrs **XXXX** was in receipt of Domestic Purposes Benefit and was recorded by the Ministry as living in **XXXX**. The report before the Authority includes a letter dated 17 May 1993, sent by solicitors consulted by Mrs **XXXX** to **XXXX's** solicitors, recording proposals for custody of their children and Mrs **XXXX's** intention to set up home in **XXXX**.

[5] It transpires, however, that Mrs **XXXX's** residence in **XXXX** was relatively short-lived and that at some point she returned to live in the family home at **XXXX**. At the hearing of this matter it was suggested that this was approximately two years after the initial separation. However, it was also acknowledged that the children of the marriage

had undertaken their schooling at the school in **XXXX** and not elsewhere. In 1995 Mr **XXXX** advised the Ministry that his son was in his care. There was no suggestion that his daughters also lived with him.

[6] In January 2002 Mr **XXXX** advised the Ministry that Mrs **XXXX** had been living in the house at **XXXX** with him in the previous year. On 27 August 2002 Mrs **XXXX** advised the Ministry that she was living at **XXXX** with her daughter **XXXX** and a granddaughter.

[7] In 2003 the appellant again advised that his ex-wife was living at his address. From that time on, while on the one hand the appellant stated in various Work and Income forms that he was single, he regularly advised that his ex-partner Mrs **XXXX** lived in the same household. In short, the Ministry has known that the appellant and his wife were living in the same household for many years.

[8] In July 2013 a decision was made to investigate the circumstances of the appellant and his wife. As a result of the investigation it was determined that the appellant and his wife were not living apart and a decision was made to pay them benefits at the half married rate rather than the single rate that had previously been paid. The appellant sought a review of that decision. The matter was reviewed internally and by a Benefits Review Committee. The Benefits Review Committee upheld the decision of the Chief Executive. The appellant then appealed to this Authority.

Decision

[9] In general, main benefits are paid at rates which take into account the domestic circumstances of the beneficiary and in particular whether they are married, in a civil union or *de facto* relationship. This is because a couple sharing their costs can live more economically than single persons.

[10] Section 63 of the Act gives the Chief Executive a discretion to regard as unmarried any married applicant who is living apart from his wife or her husband as the case may be.

[11] The central issue in this appeal is whether the Chief Executive correctly determined that the appellant was not "*living apart*" from his wife.

[12] As was observed by Henry J in *Sullivan v Sullivan*:¹

"Physical separation has never been held to be decisive of the fact that the spouses are living apart or separate; nor, on the other hand, has some degree of marital association been held to be conclusive that the spouses are living together."

[13] The issue was discussed by Fisher J in *Excell v Department of Social Welfare*.² The Court found:

"Cohabitation for legal purposes normally requires both some form of mental commitment to live together as husband and wife and a manifestation of that commitment by conduct. No minimum period is involved. In cases of doubt an inference as to intention is usually needed to be drawn from conduct."

¹ [1958] NZLR 912 at 933 (CA).

² [1991] NZFLR 241 at 242.

- (b) *The conduct in question is concerned not with any single factor but with an aggregation of many. No single factor is enough, nor will its absence be fatal. It is the cumulative quality, quantity, continuity and duration of these factors that matter.*
- (c) *No list could ever be exhaustive but the indicia include the extent to which there is a sharing of one dwelling as each party's principal place of residence, emotional dependence and support, the pooling of labour and financial resources, the sharing of household activities, the provision of domestic services, the provision of financial assistance, the sharing of one bedroom, the sharing of a sexual relationship, the sharing of companionship, leisure and social activities, sharing of parental obligations, presentation to outsiders as a couple and the exclusion of emotional and sexual relationships with third persons."*

[14] In *Director-General of Social Welfare v W*,³ a decision of Justice McGechan, the issue of living apart was considered.

[15] The Court found, at pages 107-108:

"To say of a couple 'they are living apart' means, in common parlance, that although the marriage still exists in name the couple dwell separately and the marriage relationship is regarded at least on one side as at an end. ... It is a term of art, involving a mental acceptance the marriage, as an emotional bond, is over.

...

It is, of course, an indicator that parties are living 'apart' in a s 63(a) sense also if finances have become separate, in as much as that is some evidence of disappearance of mental commitment to marriage; but – both before and after Ruka's case – that indicator is no more than an evidential consideration in assessing the s.63(a) criterion, and is not per se determinative.

...

The parties to a marriage are not 'living apart' unless they are not only physically separated, but at least one side regards the marriage tie as dead. The spouse in need must look to other emergency benefits."

[16] It is the position of the appellant and his wife that although both have dwelt in their family home at **XXXX**, **XXXX** for many years, prior to 2011 **XXXX** lived an itinerant existence and her presence at **XXXX** was sporadic. This position has changed since 2011 when she suffered a serious accident. She has left the family home at **XXXX** frequently since then.

[17] The appellant says that although he and his wife live in the same dwelling they live apart. They have separate bedrooms, they do not have a joint bank account. Daily interaction between them is limited and at times fraught. They do not cook together and generally cooperation between them is limited.

[18] Both the appellant and Mrs **XXXX** gave evidence to the Authority. There were some marked differences in that evidence. For example, when questioned by the Authority as to who did the laundry, Mr **XXXX** said that he did his own laundry. He no

³ [1997] 2 NZLR 104.

longer does Mrs **XXXX's** laundry after having damaged some of her clothing. Mrs **XXXX** on the other hand was clear that Mr **XXXX** did her laundry as well as his own.

[19] When asked whether they ate together Mr **XXXX** said he did his own simple cooking and did not sit at the table and eat with Mrs **XXXX**. Mrs **XXXX** referred to eating at the table together at times. When asked about Christmas Day arrangements, Mr **XXXX's** evidence indicated that Christmas Day was just another day and that he was not involved in any particular family celebration. In contrast, Mrs **XXXX** gave evidence of a significant family reunion this year to which Mr **XXXX** is invited. She indicated that in other years the day was a family day and Mr **XXXX** was part of the family gathering. Whereas Mr **XXXX** said he currently sleeps in the lounge with the door open, Mrs **XXXX's** evidence suggested this was not the case.

[20] These differences in evidence cast doubt on the credibility of the evidence given by the appellant. At the same time, we found Mrs **XXXX's** evidence evasive and unconvincing at times.

[21] What emerges from the information available is that both the appellant and his wife live in the same house and have done so for many years. The appellant pays the outgoings on the house which include mortgage, rates and power. Mrs **XXXX** does not contribute to these payments. She explained her lack of contribution on the basis that Mr **XXXX** has lived in the house more than her and continues to be there more often than she is. In any event, she said her ability to contribute was limited because she had agreed to assist her daughter (who lives next door) with the payment of \$75 per week for a Kon Tiki fishing raft. Apart from this item of expenditure Mrs **XXXX** was not able to explain how her money was spent. The financial arrangements between the appellant and his wife whereby the appellant is solely responsible for payment of the outgoings on the house including utilities indicates ongoing financial interdependence between the appellant and his wife.

[22] The house at **XXXX** Road is a small house with a common living area. The furnishing of the lounge includes a TV set acquired by the appellant with Work and Income New Zealand assistance. Both the appellant and his wife watch the TV from time to time. They apparently have a common understanding about how the common living areas in the house are to be kept clean and tidy.

[23] We understand the house is a three bedroom house. One bedroom is occupied by the appellant, the other by Mrs **XXXX**. A third bedroom is used by the appellant as an office for his advocacy work. As noted previously we received conflicting information about the cooking and eating arrangements but we preferred the evidence of Mrs **XXXX** to that of Mr **XXXX** on the point. It seems likely that on the basis of Mrs **XXXX's** evidence there are some shared family meals in the house. Also based on Mrs **XXXX's** evidence it seems that the appellant does the laundry both for himself and his wife. Each keeps their own rooms clean and they have an understanding about this. There was limited acknowledgement by the appellant that on occasion he has provided transport to his wife for her medical appointments. Mrs **XXXX** does not have her own transport but it is said that she regularly catches a bus.

[24] The appellant has also assisted his wife with benefit matters but said that this should be seen in the context of his work as a beneficiary advocate.

[25] It was acknowledged at the hearing that the appellant's grandchildren would see them as living together. They put on an "act" for their grandchildren. Neither party

suggested that their adult children would see them as separated and notably the children did not give evidence to the Authority. The information available is that the community would also consider the appellant and his wife to be a couple.

[26] When questioned about the possibility of a reconciliation, Mrs **XXXX** did not dismiss the idea but said it would require counselling for that to happen. When questioned as to why she did not move in and live with her daughter who lives in the house next door, Mrs **XXXX** said that while she loves her daughter, one or two weeks was long enough living in the same household as her daughter. The inference that might be drawn from this is that living at **XXXX** with her husband was preferable to living with her daughter.

[27] When questioned about why she and the appellant had never divorced, Mrs **XXXX** referred to the cost. This response must be seen in light of her commitment to the purchase of a Kon Tiki fishing raft.

[28] Mr **XXXX** explained his reluctance to leave the house at **XXXX** in terms of his involvement in building the property and paying the outgoings on the property ever since. Mrs **XXXX** on the other hand explained her presence at the property as relating to her ownership of the land. We accept that the ownership arrangement and location may make it difficult for the house to be sold but it is hard to understand why, if there was a long-term separation in 1993, Mr **XXXX** would remain in the property surrounded by his wife and her family when he could conceivably have been directing his financial resources to his own property.

[29] When Mrs **XXXX** had her accident in 2011, Mr **XXXX** was visiting a daughter in Christchurch. Both rushed to Mrs **XXXX**'s bedside in Auckland. While the appellant said his trip was made to support his daughter, an inference could be drawn that his response was a result of an ongoing emotional commitment to his wife.

[30] Mrs **XXXX**, when asked whether she would care for the appellant as his medical conditions deteriorated, said she would not. We found her response unconvincing.

[31] While there is a suggestion there are Police records which would disclose that the relationship has in the past been a violent one, Mrs **XXXX** clearly has the ability to leave the house and has done so in the past. There is no suggestion that she is fearful in her own home. It is difficult to understand why she would want to live in the same house as Mr **XXXX** in preference to the home of some other relative such as her daughter if violence was a significant issue. We consider that rather than her ownership of the property, an ongoing commitment to the relationship with Mr **XXXX** is the reason she lives in the family home.

[32] Mr Darke submitted on behalf of the appellant that the Chief Executive must demonstrate a very good reason to exercise the discretion under s 81 to review the appellant's benefit entitlement, given that the Ministry were aware that the appellant had been living in the same household as his wife for many years.

[33] It will always be the case that the Ministry will need to be particularly cautious in paying a single rate of benefit to a married couple living together in the same house. Since 2011 Mrs **XXXX** has apparently been much more settled in their home at **XXXX** and by 2013, we consider that it was entirely appropriate that the Ministry review the arrangements between the appellant and his wife more carefully. Moreover, the Chief Executive should not be bound by an earlier decision which was wrong.

[34] Mr Darke on behalf of the appellant also submitted that the onus of proof must fall on the Ministry to show that the parties had resumed the relationship to a level whereby they had resumed their marriage.

[35] Proceedings before this Authority are by way of rehearing. They are inquisitorial in nature and in inquisitorial proceedings it will not usually be the case that there is any onus of proof.⁴ It is for the appellant and his wife to give an honest account of their circumstances and for the Authority to determine whether those circumstances warrant the exercise of the discretion to treat them as a married couple living apart. If, having heard the parties on a review, the Authority remained uncertain that the rate of benefit being paid was incorrect then the Authority may be obliged to conclude that it would not be appropriate to alter the rate of benefit paid to them. That situation does not arise in this case.

[36] The evidence is that the appellant and his wife do not live strictly separate lives under the same roof. It is possible that the relationship is dysfunctional and that it is not the same as the relationship they had when they were first married but that does not mean the marriage is at an end. It is apparent that there remains between the appellant and his wife a level of interaction and co-operation in their lives, including financial interdependence indicating an ongoing commitment to their marriage relationship. Taking into account all of the circumstances in this case, we are satisfied on the balance of probabilities that as at September 2013 the appellant and his wife were living together. We consider the Chief Executive was correct to consider them to be a married couple living together and pay them a married rate of benefit accordingly.

[37] The appeal is dismissed.

DATED at WELLINGTON this 13th day of February 2015

Ms M Wallace
Chairperson

Mr K Williams
Member

⁴ See *Kerr v Department for Social Development (Northern Ireland)* [2004] HL UK 23 at [15] & [53].
McDonald v Director General of Social Welfare [1984] FCA 57; 1FCR 354 (27 March 1984)