

[2015] NZSSAA 009

Reference No. SSA 133/13

**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  
Lady Tureiti Moxon - Member

**HEARING** at Hamilton on 16 October 2014

**APPEARANCES**

Mr A Hope for the appellant  
Ms C Rameil for the Chief Executive of the Ministry of Social Development

**DECISION**

***Introduction***

[1] The appellant appeals against a decision of the Chief Executive upheld by a Benefits Review Committee to establish and recover overpayments of Domestic Purposes Benefit, Accommodation Supplement, Special Benefit, Special Needs Grants and Training Incentive Allowance paid in respect of the period 1 September 2002 to 17 October 2008. The amount owing is calculated to be \$98,241.84.

[2] The debt was established on the basis that the appellant was said to be living in a relationship in the nature of marriage with **XXXX** (Mr **XXXX**) during the relevant period.

[3] The doctrine of *res judicata* applies to the issue of whether or not the appellant was living in a relationship in the nature of marriage in the period 1 September 2002 to 30 July 2006. The issue for the Authority is whether they were living in a relationship in the nature of marriage in the period 31 July 2006 to 17 October 2008.

***Background***

[4] The appellant is the mother of two dependent children, namely **XXXX** born on **XXXX** and **XXXX** born on **XXXX**. We understand that Mr **XXXX** is the father of **XXXX** but is not the biological father of **XXXX**.

[5] The appellant first applied for Domestic Purposes Benefit – Sole Parent on 14 August 1998. In her application she noted that she was living apart from her partner Mr **XXXX**.

[6] In October 2010, the Ministry received an allegation that the appellant was living in a relationship in the nature of marriage with Mr **XXXX** and an investigation commenced. As a result of this investigation, it was originally determined that the appellant had been living in a relationship in the nature of marriage with Mr **XXXX** from March 2000 to 17 October 2008, however this was later reviewed and amended to the period 1 September 2002 to 17 October 2008.

[7] A prosecution was commenced and the appellant was found guilty of a number of charges of benefit fraud in respect of the period 1 September 2002 to 31 July 2006. She did not appeal this decision. In relation to charges in respect of the period 1 August 2006 to 17 October 2008 she was found not guilty.

[8] The appellant's lawyer has properly conceded that a decision has been made by a court of competent jurisdiction in relation to the issue of whether or not the appellant was living in a relationship in the nature of marriage with Mr **XXXX** during the period 1 September 2002 to 30 July 2006 and that by virtue of the doctrine of *res judicata*, the appellant is prevented from relitigating this issue. The issues before the Authority then are:

- (i) Whether or not the appellant was living in a *de facto* relationship or a relationship in the nature of marriage with Mr **XXXX** between 31 July 2006 and 17 October 2008?
- (ii) Has the debt been calculated correctly?
- (iii) Should the debt be recovered?

## **Decision**

### *De facto relationship*

[9] Entitlement to Domestic Purposes Benefit is dependent on the recipient having lost the support of her partner. It cannot be paid to a person living in a *de facto* relationship. Receipt of Training Incentive Allowance is dependent on the appellant being eligible for Domestic Purposes Benefit.

[10] Accommodation Supplement, Special Benefit and Special Needs Grants are benefits paid according to the income and relationship status of the recipient. A person who is married or living in a *de facto* relationship is paid a benefit at a different rate from a person who is single. In addition, the income of any partner must be taken into account in assessing entitlement.

[11] The meaning of *de facto* relationship is provided for in s 29A of the Interpretation Act 1999 as follows:

### "29A Meaning of de facto relationship

- (1) In an enactment, **de facto relationship** means a relationship between 2 people (whether a man and a woman, a man and a man, or a woman and a woman) who—
- (a) live together as a couple in a relationship in the nature of marriage or civil union; and
  - (b) are not married to, or in a civil union with, each other; and
  - (c) are both aged 16 years or older.
- ...
- (3) In determining whether 2 people live together as a couple in a relationship in the nature of marriage or civil union, the court or person required to determine the question must have regard to—
- (a) the context, or the purpose of the law, in which the question is to be determined; and
  - (b) all the circumstances of the relationship.
- (4) A de facto relationship ends if—
- (a) the de facto partners cease to live together as a couple in a relationship in the nature of marriage or civil union; or
  - (b) one of the de facto partners dies."

[12] In effect, if a couple are living in a relationship in the nature of marriage they will be considered to be living in a *de facto* relationship. What constitutes a relationship in the nature of marriage in the context of the Social Security Act 1964 was discussed in *Thompson v the Chief Executive of the Ministry of Social Development*<sup>1</sup> and *Ruka v the Department of Social Welfare*.<sup>2</sup> In *Ruka*, the majority of the Court of Appeal considered that emotional commitment and financial interdependence must be found to exist before a relationship could be said to be in the nature of marriage for the purposes of the Social Security Act 1964.

### *Cohabitation*

[13] The Ministry allege that the appellant and Mr **XXXX** lived together at **XXXX** in the period from 31 July 2006 to 17 October 2008.

[14] The Ministry were notified that the appellant had moved to live at **XXXX** on 13 July 2006. Immediately prior to moving to this address she had lived at **XXXX** and on the basis of the District Court decision had lived at that address with Mr **XXXX**.

[15] A Mrs **XXXX** gave evidence to the Authority that her son was the owner of the property at **XXXX** and she managed the property on his behalf. She noted that the tenancy agreement for the property was in the appellant's sole name. She became

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<sup>1</sup> [2013] NZHC 296.

<sup>2</sup> [1997] 1 NZLR 154 (CA).

aware that Mr **XXXX** was “on the scene” soon after the appellant moved in. Mr **XXXX** had been introduced to her as “**XXXX**” and on the occasions that she had seen him at the property she had understood he was there because he lived there. Her belief came about for a number of reasons. The first reason was that his vehicle was regularly in the driveway. Mrs **XXXX** said that she passed the house on an almost daily basis and regularly saw the vehicle parked in the driveway. She knew the vehicle belonged to “**XXXX**”. The second reason was that she had visited the property on a number of occasions in relation to maintenance issues. She particularly recalled an occasion when there was a problem with the garage door. She recalled dealing with Mr **XXXX** about the matter. He had been quite angry about it.

[16] The third reason which led her to believe that Mr **XXXX** lived at **XXXX** was that on an occasion when she went inside the house she noticed a large TV and sound system. When she commented about it she was told that it belonged to Mr **XXXX**.

[17] Mrs **XXXX** noted that she did not believe there was a clear view of the property from a neighbouring property occupied by Mrs **XXXX**. She described a fence and significant vegetation as blocking the view.

[18] Mrs **XXXX** agreed that she and her husband had had to attend to small maintenance issues and had had to ask the appellant to mow the lawns from time to time. She thought this was because some tenants expect the landlord to carry out maintenance items rather than fix things for themselves when they are able to do so. She did not think that it was a case of there being no male at the property capable of fixing things. She noted that the appellant had become more irregular in the payment of her rent towards the end of her tenancy. The property was a three bedroom home and she believed the appellant’s daughter occupied one bedroom and her son the other. The third room was occupied by the appellant.

[19] Mrs **XXXX** also gave evidence of the appellant ringing her and asking her not to speak to Work and Income about her situation.

[20] Mrs **XXXX** gave her evidence in a careful and considered way. She clearly believed on the basis of her observations and interaction with Mr **XXXX** that he lived at the property with the appellant.

[21] Other evidence included in the s 12K report included evidence of Mr **XXXX**’s bank statements. Copies of Mr **XXXX**’s bank statements were sent to **XXXX** from 11 July 2008 to November 2008. Prior to that they had been sent to **XXXX**. As previously noted, this was the address that the District Court found that the appellant and Mr **XXXX** had lived at immediately prior to the shift to **XXXX**.

[22] Police records included in the s 12K report have Mr **XXXX**’s home address recorded as **XXXX** from 5 February 2007 to 13 September 2007. From 13 September 2007 to 22 May 2008, they record him living at **XXXX**. He is recorded as living at **XXXX** again from 22 May 2008 “to present”.

[23] There is a Police record of an incident occurring at **XXXX** on 20 June 2008. Mr **XXXX** was noted as the victim. The offender was apparently his brother Glen **XXXX** and the appellant was a witness to the incident.

[24] Another Police record made on 22 May 2008 is in relation to a Child, Youth and Family request for information about the appellant and Mr **XXXX** living at **XXXX** regarding care and protection allegations.

[25] We understand that at the hearing before the criminal court a neighbour, Mrs **XXXX**, gave evidence which persuaded the Judge and that there was a doubt as to whether the appellant and Mr **XXXX's** lived together at **XXXX** in the period in question. This witness did not give evidence to this Authority and we do not have a transcript of her evidence. Mrs **XXXX's** evidence raised a question as to whether or not the neighbour could have observed the property in any event.

[26] There is also a letter from a Mr **XXXX** included in the s 12K report. In his letter, Mr **XXXX** says that Mr **XXXX** lived with him at various unspecified times. We do not think any significant weight can be given to this document. It is not a sworn statement and does not refer to specific dates. Mr **XXXX** did not attend the hearing to give evidence or be questioned in relation to his letter although the appellant could have required him to do so.

[27] On behalf of the appellant, Mr **XXXX** submitted that the move to **XXXX** represented a change in the appellant's relationship with Mr **XXXX**. He says it is significant that the tenancy agreement was not in their joint names. There might still be a familiarity between them but the earlier relationship had ended. It was not surprising that Mr **XXXX** would visit the property as **XXXX's** father and the person regarded by the appellant's daughter as a father figure. It was submitted that Mr **XXXX** was a person with a transient lifestyle and an anger management problem. The evidence suggests that he was not doing the handyman jobs around the house at **XXXX** such as mowing the lawns.

[28] The appellant elected not to provide an explanation by giving evidence. Proceedings before the Authority are inquisitorial rather than adversarial. In such proceedings there is generally no onus of proof. These are not criminal proceedings. Much of the information on which payment of a benefit depends is particularly within the knowledge of the appellant. In fact, section 11 of the Social Security Act 1964 imposes an obligation on the appellant to answer questions put to her by the Chief Executive and by inference this Authority. The appellant is expected to answer questions openly and honestly; not necessarily to make an admission of any sort but to provide the information on which an assessment can be made about the appellant's relationship status and therefore entitlement to benefit. The evidence relating to cohabitation was such that the appellant needed to provide an explanation. In this case where no explanation was offered, it is open to the Authority to draw an inference adverse to the appellant as to Mr **XXXX's** presence at the property.

[29] Each of the items of evidence relating to Mr **XXXX's** residence at **XXXX**. On their own, might be considered to be insufficient to establish that he was in fact living there but the totality of the evidence persuades us that Mr **XXXX** was living at **XXXX** during the relevant period. We particularly noted Mrs **XXXX's** evidence that he had a "sense of ownership" of the property when she dealt with him. Moreover, it is difficult to understand why he would be dealing with the landlord on a maintenance matter, why he would leave his expensive stereo system at the property, why he would have his bank statements sent to the address or tell the Police it was his address if he did not live at the property.

[30] It is possible that Mr **XXXX** lived away from the property for a period. In the absence of a credible explanation from the appellant it is difficult for us to specify when that might have been. The Police record suggests that Mr **XXXX** may have been living elsewhere between 13 September 2007 and April 2008. While there may be a number of explanations as to why Mr **XXXX** gave a different address in September 2007 it does not necessarily mean that he lived away from the property for all of the time until the next event on the Police records which place him back at **XXXX**. Indeed, the appellant described her relationship status as 'de facto' in April 2008. We are prepared to give the appellant the benefit of the doubt and accept that Mr **XXXX** did not live at the same address as the appellant in the period between 13 September 2007 and 1 April 2008 and that they were in fact separated during this period.

[31] We are satisfied on the balance of probabilities that Mr **XXXX** lived at **XXXX** with the appellant between 12 July 2006 to 13 September 2007 and from 1 April 2008 to 17 October 2008.

### *Financial Interdependence*

[32] The Ministry's financial analyst has endeavoured to analyse the appellant and Mr **XXXX**'s spending. Mr **XXXX**'s spending appears to have been primarily on petrol, takeaways, supermarkets, dairies and other retail businesses. There is no spending which indicates payment of rent, power or telephone. The Ministry's financial analyst has assessed that he withdrew on average \$358.32 cash per week.

[33] The analysis of Mr **XXXX** and the appellant's accounts suggests that Mr **XXXX** spent on average \$84.03 per week at the supermarket and dairy, while in a similar but not identical period the appellant, with two children to care for, spent \$51.63 at the supermarket and dairy. We consider, however, that these figures must be treated with some caution and no significant conclusion can be drawn from them. Perhaps of more significance is the fact that the analyst has calculated that the appellant spent on average \$42.24 per week at licensed premises. A beneficiary with no other source of income would find it difficult to spend this amount on alcohol and keep rent and other basics up-to-date.

[34] The appellant and Mr **XXXX** were the joint owners of a vehicle from 2000 to 2010. The significance of this is that if they separated when the appellant moved to **XXXX**, no changes were made to the ownership arrangements of the vehicle at that point.

[35] The Ministry have identified both the appellant and Mr **XXXX** as spending money at the **XXXX** camping ground in December 2006/January 2007 suggesting that not only were they at the camping ground at the same time, but each used their own resources to support the household.

[36] Given our conclusion that the appellant was living at **XXXX** and that the bank accounts available for Mr **XXXX** show no payments for rent, we infer that there was an arrangement between the appellant and Mr **XXXX** that the appellant would pay the rent. An inference might be drawn that it was as a result of pooling their financial resources that enabled Ms **XXXX** to spend so much money at licensed premises.

[37] We are satisfied that there was financial interdependence between the appellant and Mr **XXXX**.

*Emotional commitment*

[38] The District Court was satisfied beyond reasonable doubt that the appellant and Mr **XXXX** were in a relationship in the nature of marriage between 2002 and 2006. Evidence which indicates an ongoing emotional interdependence after the period to which the District Court decision relates includes the following:

- (a) In her application for finance to UDC in April 2008, the appellant represented herself as being in a *de facto* relationship and appears to have provided details of her partner's income.
- (b) It is reasonable to infer from the evidence in the bank statements that the appellant and Mr **XXXX** were on holiday together at the **XXXX** camping ground at Christmas and New Year 2006/2007.
- (c) Although he is not noted on **XXXX's** birth certificate as his father, Mr **XXXX** made a statement on 27 November 1997 in relation to a previous investigation in which he stated:  
  

"**XXXX** has two children. **XXXX** aged five years. I am not her father. **XXXX** aged five months – I am his **XXXX**."
- (d) The appellant had previously been in a relationship with Mr **XXXX** since at least 1996 and they had a child together. Their association is a long one. Mr **XXXX's** residence in the appellant's house with his son suggests a commitment on the part of the appellant and Mr **XXXX** to raise their son together.
- (e) Residence at the same address and financial interdependence are also indicative of emotional commitment.

[39] We are satisfied on the balance of probabilities that the appellant and Mr **XXXX** continued to live together at **XXXX** after moving from **XXXX** in July 2006. With the exception of the period September 2007 to April 2008 they lived in the same house. There was financial interdependence between them. The length of their relationship, their financial interdependence, and other matters previously referred to persuade us that they remained emotionally committed to their relationship.

[40] We are satisfied that the appellant was living in a relationship in the nature of marriage or a *de facto* relationship with Mr **XXXX** in respect of the period 1 August 2006 to 17 October 2008 with the exception of the period 13 September 2007 to 1 April 2008. She was not therefore entitled to Domestic Purposes Benefit or therefore Training Incentive Allowance. Her entitlement to other benefits needed to take into account her partner's income.

*Calculation of overpayment*

[41] The overpayment will need to be recalculated in the light of the preceding paragraph. No issues relating to the calculation of the overpayment have been raised by the appellant. The calculation of the overpayment of Accommodation Supplement has taken Mr **XXXX**'s income into account.

*Recovery of overpayment*

[42] The issue is whether or not the debt should be recovered. Generally speaking, overpayments of benefit are debts due to the Crown and must be recovered. There is a limited exception to this rule contained in s 86(9A) of the Social Security Act 1964. This provision gives the Chief Executive the discretion not to recover a debt in circumstances where:

- (a) the debt arose as a result of an error by an officer of the Minister;
- (b) the beneficiary did not intentionally contribute to the error;
- (c) the beneficiary received the payments of benefit in good faith;
- (d) the beneficiary changed his position believing he was entitled to receive the money; and
- (e) it would be inequitable in all the circumstances, including the debtor's financial circumstances, to permit recovery.

[43] Pursuant to s 86(9B) of the Social Security Act 1964 the term "error" includes:

- (a) the provision of incorrect information by an officer of the Ministry;
- (b) an erroneous act or omission occurring during an investigation of benefit entitlement under s 12; and
- (c) any erroneous act by an officer of the Ministry.

[44] The requirements of s 86(9A) are cumulative. If one of the criteria cannot be made out it is not necessary for us to consider subsequent criteria.

[45] The first issue to be considered is whether or not the overpayment arose as a result of an error on the part of the Ministry.

[46] The appellant was convicted by the District Court of various charges relevant to the period 1 September 2002 to 30 July 2006. There can be no doubt that the overpayment arose as a result of the appellant's failure to advise of her relationship status correctly during this period.

[47] In the subsequent period, at no time did the appellant advise Work and Income that she was living with a partner and, indeed, she continued to deny her relationship with Mr **XXXX** when interviewed in 2012 and subsequently.



[48] As we are not satisfied that the overpayment was caused as a result of an error by an officer of the Ministry we cannot direct that the debt not be recovered pursuant to the provisions of s 86(9A) of the Act.

*Section 86(1) and s 86A*

[49] Sections 86(1) and 86A give the Chief Executive a discretion to take steps to recover a debt. Section 86(1) applies to debtors who are still in receipt of benefit. Section 86A applies to debtors who have sources of income other than benefit. In our view the principles will be the same whether the recovery action is under s 86(1) or s 86A.

[50] Parliament has specified the circumstances in which a debt should not be recovered in s 86(9A). The occasions that the Chief Executive should exercise his discretion not to take steps to recover a debt or debts which do not meet the criteria of s 86(9A) must therefore be limited.<sup>3</sup>

[51] The considerations to be taken into account in exercising the discretion include the Chief Executive's obligations under the Public Finance Act 1989 to make only payments authorised by law and under the State Sector Act 1988 for the economic and efficient running of the Ministry. The context of the Social Security Act 1964 and the impact of recovery on the debtor and his or her dependents are also relevant.

[52] The circumstances in which the discretion should be exercised have been considered by the High Court on a number of occasions in the context of s 86(1). The circumstances have been described as "*extraordinary*",<sup>4</sup> "*unusual*",<sup>5</sup> and as "*rare and unusual*",<sup>6</sup> but these are not tests.

[53] We understand the appellant's present circumstances are that she is working in a caregiving job for minimum pay. She has a dependent son aged 17 years in her care. We understand that she does not have any significant assets. The debt in this case is very large. The fact that the debt is large on its own is not a reason for not recovering the debt. Repayments can be adjusted from time to time to reflect the appellant's modest circumstances.

[54] Balanced against the appellant's modest circumstances is the fact that the District Court found that a significant part of the debt occurred as a result of the fraudulent actions of the appellant. Furthermore, the appellant has previously had debts established against her as a result of her relationship with Mr **XXXX**.

[55] We are not persuaded that the circumstances in which this debt has occurred, the appellant's financial circumstances, or her family circumstances should result in a direction to the Chief Executive that no steps should be taken to recover the debt. The debt is to be recovered. Any repayments must take into account the appellant's modest financial circumstances and ensure that she has sufficient to meet her basic living costs. The rate of recovery is to be no more than \$25 per week unless the appellant elects to pay more. The amount of recovery may need to be further adjusted from time to time according to the appellant's circumstances.

<sup>3</sup> *Director-General of Social Welfare v Attrill*, [1998] NZAR368.

<sup>4</sup> *McConkey v Director-General of Work & Income New Zealand* HC WN AP277-00, 20 August 2002.

<sup>5</sup> *Cowley v Chief Executive of the Ministry of Social Development* HC WN CIV-2008-485-381, 1 September 2008.

<sup>6</sup> *Osborne v Chief Executive of the Ministry of Social Development* HC Auckland CIV-2007-485-2579, 31 August 2009

[56] Except that the period of the overpayment is to be reduced as outlined in this decision, the appeal is dismissed.

**DATED** at WELLINGTON this 26<sup>th</sup> day of February 2015

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Ms M Wallace  
Chairperson

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Mr K Williams  
Member

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Lady Tureiti Moxon  
Member