

[2015] NZSSAA 014

Reference No. SSA 127/14

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
Lady Tureiti Moxon - Member

HEARING at WELLINGTON on 11 February 2015

APPEARANCES

Mr G Howell for the appellant
Mr D Williment 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 pay a benefit to the appellant at the married rate from 17 February 2014 rather than at the single rate.

Background

[2] The appellant married his wife (**XXXX**) on 14 February 1999.

[3] In 2012, a back injury the appellant had previously suffered became increasingly aggravated by the demands of his employment on a farm. He was forced to give up work. He and his wife returned to live in town at a house at Worksop Road that his wife had owned prior to their marriage.

[4] In July 2012 the appellant was granted a benefit at the married rate, together with supplementary assistance; however, a few weeks later his wife increased her hours of employment with the result that her income exceeded the cut-out point for the benefit the appellant was receiving and the appellant ceased to be eligible for Sickness Benefit.

[5] The appellant made a further application for benefit in October 2012. On 15 October 2012 he was granted Invalid's Benefit at the single rate on the basis that he had advised the Ministry that he was going through a separation from his wife. Difficulties had arisen between them because of money issues. His wife had asked

him to leave and they had moved to opposite ends of the house. He was planning to move out.

[6] In fact, the appellant did not leave the house at Worksop Road and in December 2012 he was granted assistance to have modifications made to the property to accommodate his disabilities.

[7] In January 2014, the appellant's wife applied for emergency assistance as she had had no income between Christmas and 15 January 2014. Her application for assistance was declined on the basis that she was still living with her husband.

[8] At that point, an enquiry began into the living circumstances of the appellant.

[9] The appellant was interviewed. He maintained that he and his wife were living separately in the same house.

[10] XXXX was also interviewed and information obtained from the Wairarapa District Health Board.

[11] A decision was made on 11 February 2014 that the appellant and his wife were not living apart. From 17 February, the appellant's wife was included in the appellant's Invalid's Benefit and her income charged against their entitlement.

[12] The appellant sought a review of 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

[13] The appellant alleges that although they live in the same house, he and his wife are living apart. Both the appellant and his wife gave evidence to the Authority about their living arrangements.

[14] The appellant said that following their move to town in 2012, the relationship between himself and his wife had deteriorated. There were many arguments, primarily about money. The appellant identified the date of separation as 28 September 2014 but did not describe any particular incident which had led to the separation. The appellant said that on that date he simply went to the room he was occupying at one end of the house and closed the door. Since that time he has had the freedom of the house during the daytime while his wife is at work or otherwise out. When his wife is at home he remains in his room. This room is equipped with a special raised bed which particularly meets his needs. It also contains a television set and a DVD player.

[15] The appellant said that he has not moved out of the house because at the time of their marriage he and his wife made an agreement that if he moved out of the house he would no longer have any claim to it. He told the Authority that this agreement is held by their daughter but she is currently unable to find it.

[16] The appellant said that when they separated, agreement was reached between himself and his wife that he would pay his wife \$80 a week for his share of the outgoings on the house such as mortgage, rates, insurance and power. In addition, he would pay his wife \$75 per week in respect of their car repayments. Once his

benefit changed to the single rate it became impossible for him to make the car repayments. His wife met these and the car is now paid off. He is also behind with the payments in respect of the outgoings on the house and now has a debt to his wife in relation to these costs. Precisely how much debt he owes he was unable to say. The appellant confirmed that if he was unable to meet the \$80 per week payment his wife paid the outgoings out of her income in any event. XXXX essentially confirmed this arrangement. She has not kept any record of any debt owed to her by the appellant nor could she specify with any great precision the amount involved.

[17] The appellant said that he prepared his own meals and ate in the kitchen only if XXXX was out, otherwise he eats in his room. The appellant said that prior to his back operation at the end of last year, his wife would buy his food each week. He would write a shopping list for her. The appellant initially said that he left money out for these purchases. When questioned further he said he gave her the use of his card to enable her to purchase his food. XXXX, on the other hand, said that the appellant left money on the table for her. The appellant said that in fact he has had to resort to food parcels in recent times. XXXX said that there was food in the cupboards in the kitchen and she did not note whether or not XXXX had used this food. An inference to be drawn from her description of the arrangement about the food in the kitchen was that the appellant had access to the food in the kitchen which XXXX had purchased and paid for.

[18] The housekeeping arrangements in the household, according to the appellant, are that his wife is primarily responsible for cleaning the lounge and kitchen and he is responsible for cleaning his own room. He said that they each cleaned the bathroom and the toilet as they are used. XXXX, on the other hand, said that she is responsible for cleaning the bathroom and the toilet; the appellant is responsible for vacuuming the house.

[19] The appellant does his own washing, but prior to his back operation XXXX hung it out for him.

[20] Prior to the appellant's back problem being fixed, someone was employed to mow the lawns, but now that his back has been repaired the appellant is responsible for mowing the lawns. He also does minor maintenance around the house.

[21] The car is mainly used by XXXX to get to work. The appellant described it as originally a combined resource but said that he does not now have a lot to do with it. He estimated that he uses the vehicle two to three times per month. XXXX, on the other hand, said that the appellant uses the vehicle one to three times a week. XXXX takes responsibility for the costs including the running costs for the car.

[22] The appellant was clear that he and XXXX do not do things together and that he watches television in his own room. XXXX, on the other hand, said that from time to time they would choose a movie from their collection to watch together and if they have something to eat while watching the movie it is generally something that the appellant has baked.

[23] The appellant and his wife agreed that they had not spent Christmas together for some time but their family are not aware that they are living apart, with the exception of one daughter. Two of their three daughters and their grandchildren are unaware that they are separated. When the grandchildren visit them they put on a

front as they do not want the grandchildren to worry. The appellant joins in whatever is happening, including family meals. XXXX suggested that one friend of hers knew that she was separated from the appellant but her mother does not know.

[24] XXXX said that in addition to the other expenses she pays, she also pays for the expenses in relation to two dogs and a cat. She pays the vet bills and pays for their food. One of the dogs is a working farm dog belonging to the appellant. The cat is also particularly the appellant's.

[25] XXXX confirmed that she had taken the appellant to Wellington for his back operation and picked him up and took him home when he was discharged from hospital. She was relieved that his operation was successful. The appellant, on the other hand, said that friends had picked him up.

[26] The appellant said that he uses notes as a practical way to communicate with his wife. XXXX, on the other hand, spoke of some verbal communication between them.

[27] Both the appellant and his wife suggested in their evidence that their relationship had improved somewhat since the appellant had had his back operation in October 2014. This operation has been very successful and the appellant no longer experiences the pain that he had previously.

[28] The appellant confirmed that he had never seen a lawyer about separating from his wife and they have not divorced. The appellant said that he thought that there was no prospect of he and his wife of getting back together. When asked about whether they might get back together again, XXXX, on the other hand, was less clear. She acknowledged that they were not at loggerheads at the present time and that she would be prepared to attend relationship counselling.

[29] We have serious reservations about the appellant's description of his living circumstances and his credibility. There were a number of significant discrepancies between the evidence he gave and that given by his wife, for example in relation to the availability of food, the purchase of food, the frequency with which the appellant uses the car, the arrangements in relation to the cleaning of the house and who picked him up from hospital after his back operation.

[30] A XXXX gave evidence that she had been working with the appellant since February 2014. She had been to the appellant's home once. We understood that she had not met XXXX. She has regular contact with XXXX and from what XXXX had told her she had a clear understanding that XXXX and his wife were living apart. She told the Authority that when XXXX had not paid his wife an \$80 payment, XXXX had been locked out of the house.

[31] As a result of what XXXX has told XXXX, she had arranged for him to receive food parcels from the Masterton Foodbank once a fortnight.

[32] XXXX repudiated XXXX evidence that she had locked XXXX out of the house because he had not made a payment to her. She indicated she would never do such a thing. XXXX agreed that his wife had never locked him out and said that XXXX must have been mistaken. Apart from XXXX account of his domestic circumstances, XXXX had no independent knowledge which would give her cause to conclude that XXXX was separated from his wife. If, in fact, she had mistaken what XXXX had told

her about being locked out then she was very seriously mistaken, and the inference may be drawn that she is mistaken about other matters that XXXX has told her. We concluded that XXXX understanding of XXXX living circumstances was not to be relied upon.

[33] Section 63 of the Social Security Act 1964 gives the Chief Executive a discretion to treat a married beneficiary who is living apart from their spouse as unmarried.

[34] The central issue in this appeal is whether the Chief Executive correctly determined that the appellant was not "*living apart*" from his wife and that he was therefore to be paid a married rate of benefit.

[35] 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."

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

- (a) *"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 will usually need to be drawn from conduct."*
- (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 matters."*
- (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, the sharing of parental obligations, presentation to outsiders as a couple and the exclusion of emotional and sexual relationships with third persons."*

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

[38] His Honour noted:⁴

¹ [1958] NZLR 912 at 933.

² [1991] NZFLR, 241 at 242.

³ [1997] 2 NZLR 104.

"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."

[39] In the first instance, it is relevant to consider the degree to which the parties are financially independent of each other. This is significant in the context of the Social Security Act 1964. Under the Act, different rates of benefit are paid according to whether a person is single or married or living in a *de facto* relationship. That different rates are paid reflects that living costs are generally higher for a single person than when living costs are shared by a couple.

Financial interdependence

[40] The appellant and **XXXX** agreed that at the time of their separation they closed their joint bank account, but it remains evident that apart from this action their financial affairs remain intertwined. They have not taken any steps to formalise a Relationship Property Agreement.

[41] **XXXX** is primarily responsible for payment of the outgoings on the house. The \$80 which the appellant pays her may cover a half-share of the mortgage, rates and insurance but would not pay for a contribution to the power. **XXXX** apparently meets this expense. Whilst it is said that the appellant owes **XXXX** for the weeks in which he has failed to pay the \$80 in respect of his share of the outgoings on the house and the repayments in respect of the car, there seems to have been no documentation of this and there is no precise figure as to what is owing.

[42] Not only does **XXXX** pay for the outgoings on the house, including the power, but she also pays for the running expenses in relation to the car. **XXXX** is permitted to use the vehicle.

[43] Moreover, while it is alleged that the appellant and his wife cook and eat separately, we infer from **XXXX** evidence that there is an understanding between them that **XXXX** is able to consume whatever food is in the kitchen and she does not complain.

[44] In addition **XXXX** pays for the costs associated with the appellant's dog and cat.

⁴ At 107-109.

[45] We are in no doubt that the appellant and his wife remained financially interdependent, both at the time the decision was made that they should be paid a married rate of benefit and subsequently.

[46] It is it clear that the appellant is dependent on his wife for financial support. Moreover, there was no evidence which might suggest the appellant has higher living costs because of his alleged separation from his wife.

Emotional commitment

[47] We have then considered whether there is evidence of repudiation of the marriage as an emotional commitment.

[48] It is unsurprising that in circumstances where XXXX was suffering from a debilitating back problem that the parties would have separate bedrooms. The Authority has previously found that having separate rooms and no longer sharing a sexual relationship are not on their own determinative of whether a couple have a continuing emotional commitment to each other.

[49] The following matters suggest an ongoing emotional commitment in this case:

- (i) It is apparent that, while there are differences in the evidence about what work each does around the house, prior to the appellant's operation XXXX assisted the appellant by hanging out his washing, purchasing his food and keeping communal areas of the house clean.
- (ii) Apparently only two other people know that they have separated. They like to continue to present to both their children and grandchildren as a married couple. If their children are visiting, the appellant joins in with what is going on.
- (iii) XXXX transported the appellant to hospital for his back operation and collected him when it was time for him to leave.
- (iv) They occasionally watch movies together.
- (v) They continue to nominate each other as the contact person on hospital admission forms. In a patient admission form dated April 2014 relating to the appellant, XXXX is noted to be the appellant's wife and contact person. In a hospital admission dated 8 May 2013 relating to XXXX, the appellant is noted as her contact person. In this form the marital status of the patient has been ticked as "married".
- (vi) The level of financial interdependence between the appellant and his wife indicates a significant degree of trust and ongoing commitment to their relationship.

[50] XXXX evidence led us to conclude that she is very reluctant to withdraw support from the appellant. It appears that in her mind the fact that they no longer sleep in the same room or allegedly have a sexual relationship is the reason they can claim they are living apart.

[51] The period from when they left the farm until the appellant had his back operation may well have been a difficult period in their marriage. No doubt a reduction in income coupled with the physical discomfort XXXX was experiencing made for a trying situation. However it is apparent that XXXX has continued to provide both financial and emotional support for the appellant while he was unwell, and now that he has recovered she has not altered that commitment. Moreover, now that he has recovered his health, XXXX has not moved out and continues to accept his wife's support, suggesting that he remains committed to the relationship. Neither has taken any step which shows a clear repudiation of their marriage.

[52] There is a strong suspicion in this case that the appellant's claim that he and his wife were living apart in 2012 was to increase his income at a time when he and his wife were having difficulty making ends meet on her wages.

[53] The living arrangements between the appellant and XXXX and their financial interdependence indicate a significant degree of trust and ongoing commitment in their relationship.

[54] We are not satisfied that the appellant or his wife had repudiated their marriage or were living apart at the time the Chief Executive decided to begin paying the appellant the married rate of benefit. The Chief Executive was correct to treat the appellant as married in assessing benefit entitlement.

[55] The appeal is dismissed.

DATED at WELLINGTON this 13 day of March 2015

Ms M Wallace
Chairperson

Mr K Williams
Member

Lady Tureiti Moxon
Member