

[2015] NZSSAA 026

Reference No. SSA 114/13

**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  
Lady Tureti Moxon - Member  
Mr K Williams - Member

**HEARING** at AUCKLAND on 11 March 2015 and by telephone conference call on 24 March 2015

**APPEARANCES**

Mr J Robinson advocate for the appellant  
Ms N Jaura for Chief Executive of the Ministry of Social Development

**DECISION**

***Introduction***

[1] This case concerns the Ministry's right to recover benefit payments from Accident Compensation Corporation (ACC) payments and the calculation of the amount that should be recovered.

[2] The Authority issued an interim decision relating to this matter on 11 April 2014 under decision number [2014] NZSSAA 023. This decision needs to be read in conjunction with that decision.

[3] In the course of the original hearing the appellant's advocate alleged that in part the appeal concerned the amount of benefit to be recovered by the Ministry from arrears of ACC payment due to the appellant in respect of the period 3 August 2012 to 19 May 2013.

[4] The appellant and **XXXX** were paid a married rate of benefit during that period and the Ministry seeks to recover the married rate of benefit paid from the appellant's backdated payment of ACC. At the original hearing of this appeal, the appellant's advocate alleged that the appellant and **XXXX** ceased to live together in a relationship in the nature of marriage on 2 August 2012. The Ministry were wrong to continue paying them a married rate of benefit after that date. He submits that the amount to be recovered from the ACC payments from 3 August 2012 to 19 May 2013 is a single rate of Invalid's Benefit.

[5] The issue of the appellant's relationship status had not been investigated by the Ministry. Nor was it raised at the Benefits Review Committee hearing. In the

circumstances, this aspect of the appeal was adjourned for the Ministry to investigate the appellant's relationship status during the period specified. As a result of this investigation, the Chief Executive concluded that the appellant and XXXX had continued to live together in a relationship in the nature of marriage in the period concerned.

[6] The issue for the Authority is whether the appellant and XXXX were living in a relationship in the nature of marriage in the period 3 August 2012 to 19 May 2013.

### **Background**

[7] Both the appellant and XXXX gave evidence to the Authority.

[8] XXXX confirmed that she and the appellant were living in a relationship in the nature of marriage in the period 3 August 2012 to 19 May 2013. The appellant said that this was not correct.

[9] XXXX said that she met the appellant approximately 10 years ago through various whanau and hapu meetings. She described courting or getting to know the appellant for a period culminating in the appellant moving into her home at XXXX Road. To some extent this may have been precipitated by the difficulties the appellant was experiencing in his own home due to a family dispute. Precisely when the appellant moved to live with XXXX at XXXX Road is not clear but XXXX at least was clear that the appellant moved into her home prior to the appellant's ACC payments being cancelled. These payments ceased in November 2009.

[10] Ministry records indicate that when the appellant's ACC payments ceased in November 2009, the appellant sought a benefit from the Ministry. Initially he was paid the single rate of Sickness Benefit and from December 2009 the single rate of Invalids Benefit. On 10 June 2011, the appellant and XXXX met with a case manager at Work and Income. At this meeting they advised that the appellant would be moving into XXXX address. As a result, XXXX was included as the appellant's partner in his Invalid's Benefit from 10 June 2011 and her income was assessed in calculating the rate of benefit payable. XXXX was working at a rest home at the time. From that time, the appellant and XXXX were paid the married rate of Invalid's Benefit which was abated to take account of XXXX income from employment. In accordance with normal practice, half of the benefit was paid to the appellant and half to XXXX. We do not believe that XXXX was unaware of this arrangement as suggested at the hearing.

[11] In August 2012 there was a further change in the benefit payments when XXXX ceased work. At that point, XXXX began caring for her father in XXXX. It is apparent that the Ministry were advised of this. As a result, XXXX was granted a Domestic Purposes Benefit (Care for the Sick and Infirm) which was paid at the half-married rate. The appellant continued to receive the half-married rate of Invalid's Benefit.

[12] Both the appellant and XXXX described their relationship between 2011 and 3 August 2012 to the Authority. They agreed that there was a sexual relationship between them and they shared a bedroom. They agreed that they did not share bank accounts or have access to each other's bank accounts. The appellant said that when he first moved to XXXX Road there was no power at the property. Part of his contribution to the household living expenses was to purchase a generator which cost him \$3,000. During the period from 2011 to August 2012 much of his income was spent on purchasing fuel for the generator. It cost as much as \$20 a day. In addition he paid for a lawnmower, a chainsaw, and a tractor. He had the driveway upgraded.

The appellant said that he owned a vehicle when he first arrived at XXXX Road but it lost registration shortly after he moved there and he relied on, and indeed continues to rely on, a vehicle owned by XXXX for transport. XXXX paid for the costs relating to the telephone and the rates on the property and for food, at least until August 2012.

[13] XXXX agreed that she paid for the food but noted that she also paid for petrol, diesel, candles, lanterns and batteries. She said the cost of the telephone was shared.

[14] The parties agreed that they shared duties around the house. While XXXX was still working at the rest home the appellant said that he did the dishes, swept up, and fed the chooks and the ducks, while XXXX primarily did the cooking (otherwise they would not eat). XXXX, on the other hand, said that they both did the cooking and the appellant took particular responsibility for the work outside. At the end of 2013 the appellant arranged for solar panels to be installed at the property at a cost of approximately \$2,600. XXXX confirmed that this was a project which had been in the pipeline for some time.

[15] In the period up to August 2012 both the appellant and XXXX described themselves as being friends and lovers.

[16] There was a significant change to their domestic arrangements at the beginning of August 2012.

[17] XXXX father had become increasingly unwell. He lived in XXXX family home at XXXX (about 30 kilometres from XXXX Road) and cared for a disabled son. Eventually XXXX father's situation deteriorated to the extent that XXXX decided to give up her employment and move into the house at XXXX to care for her father and brother. In addition to her father and brother, in December 2012, two of XXXX grandchildren came to live with her at XXXX when their mother went to Australia. XXXX father died in March 2013. By this time XXXX was also involved in caring for her sister who was in the final stages of cancer. Her sister died in May 2013.

[18] There is no dispute that the appellant remained living primarily at XXXX Road when XXXX went to XXXX to look after her father. When XXXX moved to XXXX the appellant remained at XXXX Road. There was some difference in the evidence between the appellant and XXXX as to what happened about this time, but significantly neither suggested that any dispute had arisen between them or that there was any rancour in their relationship. Family responsibilities simply meant that XXXX was obliged to take care of her father and then other family members in XXXX. There was, in effect, a common understanding that XXXX needed to take care of her father and brother in their own home. The appellant did not join XXXX at XXXX, in part because once the grandchildren took up residence with the appellant at XXXX the household was too noisy for the appellant who suffers from a head injury, and in part because he finds it difficult to cope with the appellant's disabled brother for any length of time. The appellant said he is a man of the bush who likes a quiet life.

[19] Despite living in separate households XXXX did not suggest that this constituted a break in the relationship. The appellant visited the house at XXXX. He said once a week. XXXX said once a week or once a fortnight. In addition, from time-to-time XXXX brothers would relieve her of her caring duties and she would return to XXXX Road where she continued to share a bedroom with the appellant and to have a sexual relationship with him.

[20] In addition to the appellant visiting XXXX and XXXX returning home to XXXX Road from time-to-time, they kept in contact by telephone. The appellant said that this

was on a daily basis. More recently telephone contact has been more like every second day.

[21] The appellant said that if XXXX came to XXXX Road she would bring food with her and if he visited her in XXXX he would take eggs for the household there. He continued to use XXXX vehicle for transport. XXXX said the appellant had been a great moral support to her during this difficult period.

[22] Following the death of her father and subsequently her sister, XXXX contracted pneumonia. It was the appellant who took her to the doctor. While she was in hospital the appellant moved to XXXX to look after her grandchildren. The children call the appellant "Papa". They regard the appellant as their grandfather. While XXXX was in hospital they all visited her every night or every second night. The appellant was named as XXXX contact person on hospital admission forms.

[23] The appellant said that XXXX and her family continued to pay the rates on the property at XXXX Road while he was living there. XXXX said that she and Mr XXXX currently share payment of the rates.

[24] XXXX children regard the appellant as their stepfather.

[25] XXXX said that living in separate households has created some tension in their relationship, primarily due to the appellant not having her sole attention. She continues to care for XXXX when he is unwell. XXXX was clear that her whanau continue to see herself and the appellant as "a good team". As her *de facto* partner, the appellant will have a life interest in the property at XXXX Road if she should pre-decease him.

[26] As part of its investigation, the Ministry interviewed both the appellant and XXXX.

[27] XXXX made a statement that she and the appellant were in a marriage-type relationship in the period 3 August 2012 to 19 May 2013 and they considered themselves to be partners.

[28] The investigator interviewed the appellant in the presence of his advocate. The investigator gave evidence to the Authority of taking notes at the time of this interview with the exception of the last one or two paragraphs which were written after the conclusion of the interview. Subsequently the investigator typed up a memorandum of the interview which was passed on to the advocate. The advocate made changes to this statement; in particular he added words after a sentence in the statement which reads:

"XXXX and XXXX stated that they can accept the dates in question (3 August 2012 to 19 May 2013) regarding the relationship."

The words added were:

"As far as XXXX was concerned but for XXXX the relationship changed in August 2012."

[29] XXXX further wrote on the back of this document:

"spoke with John today at 1 o'clock the 21st August and confirmed my belief that I was no longer in a married relationship with XXXX but live in hope that one day she will return home and we can have a chance to rebuild what has been lost since August 2012." This was then signed by the appellant.

[30] We have reservations about the part played by the appellant's advocate in the stance taken by the appellant, both in the alterations made to the statement prepared by the investigator and in his evidence to the Authority.

[31] On behalf of the appellant, XXXX submitted that while XXXX might see XXXX as her partner, XXXX did not see Ms XXXX as his partner in the period concerned. Moreover, there was no financial interdependence between them. This is of particular significance in the context of determining whether a couple are living in a relationship in the nature of marriage for the purposes of the payment of benefit under the Social Security Act 1964.

### **Decision**

[32] The rates of main benefit paid under the Social Security Act 1964 are paid according to whether a person is married, single or living in a *de facto* relationship or civil union. In this case the appellant and XXXX were paid 'married' rates of benefit on the basis that they were living in a *de facto* relationship.

[33] 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.”

[34] 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.

[35] What constitutes a relationship in the nature of marriage in the context of the Social Security Act 1964 was discussed in *Thompson v Department of Social Welfare*<sup>1</sup> and *Ruka v 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.

[36] We have no doubt that the appellant and XXXX were living in a *de facto* relationship from 2011 until 3 August 2012. The evidence is that they lived in the same house and were financially interdependent in that they shared the expenses of the household. They shared a sexual relationship and were clearly committed to their life together.

[37] The issue for the Authority is whether or not this *de facto* relationship continued after XXXX moved to XXXX in August 2012.

#### *Cohabitation*

[38] The evidence is that the appellant remained living at XXXX Road in XXXX house from 3 August 2012 onwards while XXXX spent more time living at XXXX rather than XXXX Road but returned to her home with the appellant from time to time. The appellant remained living at XXXX Road despite the fact that he apparently has his own home elsewhere.

[39] In *Shannon v Shannon*<sup>3</sup> the High Court found:

“In the context of changing social patterns, other forms of marriage or relationships are becoming more common. There are marriages where the parties live in different countries, where they live apart during the week because of professional commitments, where although generally living together they holiday separately, or where they live in different households but in the same city. There are marriages which subsist although one or both partners have had physical relationships with others. The physical indicia while remaining important will not always be conclusive. ... Therefore the more difficult mental element becomes of great importance.”

[40] The evidence suggests that while XXXX was spending significant periods away from XXXX Road, the house at XXXX Road was still regarded by the appellant and XXXX as their home together. Simply living at different locations for an extended period will not necessarily negate the proposition that a couple continue to live together.

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<sup>1</sup> [1994] 2 NZLR 369.

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

<sup>3</sup> HC, Auckland CP13/98 29 May 2000, Cartwright J at [21].

*Financial interdependence*

[41] The following are examples of financial interdependence between the appellant and XXXX during the period 3 August 2012 to 19 May 2013:

- (i) The appellant retained the use of XXXX's vehicle for his transport.
- (ii) The appellant continued to reside in XXXX's home without the payment of rent. It is suggested that his work around the property should be treated as reimbursement for rent but in reality there was no suggestion that the amount of work XXXX did around the property after 3 August 2012 was any different from the work he had done previously. We think the inference to be drawn from the appellant continuing to work around the property is that it was a continuation of the work that he and XXXX had been doing to improve and maintain their home.
- (iii) The telephone bill was either paid by XXXX (according to the appellant) or by the appellant and XXXX (XXXX's evidence). In either event the appellant was not solely responsible for the telephone bill and it is apparent that the arrangements for the payment indicate financial interdependence.
- (iv) The rates for the property were either paid by XXXX and her family (the appellant) or by the appellant and XXXX (XXXX's evidence). In either event the appellant did not have sole responsibility for payment of the rates in respect of the property he was living in. The arrangement constitutes financial interdependence.
- (v) The appellant said that XXXX would bring food with her when she returned for weekends during this period and he provided eggs to the household at XXXX.
- (vi) XXXX's Co-operative Bank statements show that in July 2012 she began making a payment of \$25 per week with the notation of "XXXX due" and a number. These payments continued to be made from her account until November 2012. XXXX then began making a payment of \$25 per week with the notation "Mike MTS bank XFR" from January 2013. When asked about the payments from XXXX's account at the end of the hearing, XXXX said they were payments to him by XXXX to reimburse him for his purchase of the generator for the property. The difficulty about this explanation is that there are no deposits to XXXX's account for \$25 coming from XXXX. If in fact the payments relate to the generator, it would appear that for a period XXXX made payments and then stopped. XXXX then took up responsibility for the payments.
- (vii) Later in 2013, after the period to which the appeal relates, XXXX installed solar panels on XXXX's house using money from his backdated payment of ACC. XXXX said this had been a project that had been in the pipeline for some time. Her explanation suggested it was a project they were both involved in, with XXXX meeting the cost. While this example of financial interdependence occurred after the period with which we are concerned, it throws light on the state of the relationship between the appellant and XXXX earlier in the same year.

[42] XXXX, on behalf of the appellant, submitted that the appellant and XXXX had separate bank accounts and did not own anything together, indicating that there was no

financial interdependence. While the appellant and XXXX may have had separate bank accounts, that is not an unusual arrangement in this day and age, particularly for an older couple who are used to managing their own finances.

[43] It is apparent that the appellant and XXXX continued to share their financial resources after XXXX began caring for her father. We consider that the evidence discloses a significant degree of financial interdependence between the appellant and XXXX in the period 3 August 2012 to 19 May 2013.

*Emotional commitment*

[44] There seems to have been no doubt in XXXX's mind that she and the appellant were in a relationship in the nature of marriage in the period concerned. This is evidenced by both the statement that she made to the investigator in 2014 and her evidence to this Authority. On behalf of the appellant it is submitted that this may have been XXXX's position but it was not his.

[45] The evidence of an ongoing emotional commitment can be seen in the following:

- (i) There was no evidence of a break in the relationship when XXXX moved to XXXX.
- (ii) XXXX permitted the appellant to continue to use her house and car. The degree of financial interdependence generally is indicative of an ongoing commitment to their relationship.
- (iii) When XXXX returned to XXXX Road for breaks from her caregiving duties, she and the appellant continued to share a bedroom and have a sexual relationship. The appellant accepted this was the case.
- (iv) The appellant generally provided support for XXXX during what was a difficult time for her in relation to her obligations to care for various family members. XXXX referred to how supportive he had been.
- (v) Shortly after her sister died, when XXXX was admitted to hospital the appellant rose to the occasion by moving to XXXX and caring for her grandchildren. He visited her with the grandchildren in hospital and we understand he was named as the contact person on the hospital admission form.
- (vi) XXXX's grandchildren continued to refer to the appellant as "Papa" and regarded him as their grandfather.
- (vii) XXXX's children continue to regard the appellant as their stepfather. They also apparently regard him as the appellant's *de facto* husband. XXXX explained that because her whanau regard the appellant as her partner, he will have a life interest in the house at XXXX Road if she were to die.
- (viii) Neither party went to the Ministry and advised that they were living apart during the period concerned or requested that they be paid a single rate of benefit.
- (ix) The appellant said he and XXXX remained good friends during this particular period and continue to be good friends.



[46] We accept that XXXX ceasing to live full-time at XXXX Road may have put a strain on the relationship but there is no evidence which suggests that the appellant renounced the relationship, either in August 2012 or had done so by May 2013. If anything, the appellant provided support for XXXX during this difficult period, indicating his ongoing emotional commitment to her.

[47] We consider that there is evidence of both financial interdependence and emotional commitment to an ongoing relationship in the period 3 August 2012 to 19 May 2013. We must then consider the totality of the evidence. What stands out in this case is that it was the appellant and XXXX who went to Work and Income and advised that they were moving to live together in 2011 and as a result continued to receive a married rate of benefit from then until 19 May 2013. At no time during that period did either of them contact the Ministry and suggest that they had separated. We do not accept that the appellant was simply doing what Work and Income told him to do or that he was unaware of what benefit he was being paid and that the rate of benefit he was being paid was a result of his relationship with XXXX. The appellant has suffered a head injury but he did not appear to have any difficulty answering his advocate's questions or questions put to him by the Authority in the course of the hearing.

[48] Also significant is the fact that there is no suggestion of a dispute or significant estrangement between the appellant and XXXX. They remained good friends during the period concerned. Friendship is of course usually a key ingredient of marriage. It is perfectly apparent that if XXXX's caregiving responsibilities in respect of her brother changed and she were to return to XXXX Road on a permanent basis, the appellant would be very happy.

[49] We are satisfied, on the balance of probabilities, that in the period 3 August 2012 to 19 May 2013 the appellant and XXXX remained in a relationship in the nature of marriage and were therefore in a *de facto* relationship.

[50] In essence, the argument made on behalf of the appellant involves the calculation of the amount required to be repaid. We are satisfied that the Chief Executive was correct to continue paying the married rates of benefit to the appellant and XXXX in the period 3 August 2012 to 19 May 2013 and that the amounts they received need to be repaid from the arrears of ACC paid to the appellant.

[51] In the Authority's first decision relating to this appeal – [2014] NZSSA 023, the Authority found at paragraph [23] that it was satisfied that the amount received by XXXX in respect of Domestic Purposes Benefit – Care for the Sick and Infirm needed to be taken into account in assessing how much was required to be repaid to the Ministry from the arrears of ACC payable to the appellant.

[52] We are not satisfied that the amount repaid by the Accident Compensation Corporation to the Ministry from the backdated payment of ACC due to the appellant was incorrect.

#### *Recovery of overpayment*

[53] We have considered whether provisions of s 86(9A) of the Social Security Act 1964 apply in this case.

[54] 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.

[55] Pursuant to s 86(9B) of the Act 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.

[49] We do not consider that there was any error on the part of the Ministry in making payment of social welfare benefits to the appellant and his partner during the period relevant to this appeal. The debt has occurred as a result of the appellant successfully establishing his claim in respect of ACC for the period he was in receipt of benefit. Because there was no error on the part of the Ministry we cannot direct that the debt not be recovered pursuant to s 86(9A).

[50] The debt has now been recovered and no further action is required by the Chief Executive.

[51] The appeal is dismissed.

**DATED** at WELLINGTON this 20 day of April 2015

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Ms M Wallace  
Chairperson

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Lady Tureti Moxon  
Member

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Mr K Williams  
Member