

[2016] NZSSAA 084

Reference No. SSA 025/16

IN THE MATTER

of the Social Security Act 1964

AND

IN THE MATTER

of an appeal by **XXXX** of
Auckland 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 AUCKLAND on 29 July 2016

APPEARANCES

P Blair for the appellant
N Jaura 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 as follows:

Domestic Purposes Benefit 29/3/2013 to 14/7/2013	\$4,556.37
Sole Parent Support 15/7/2013 to 22/3/2015	\$26,200.05
Accommodation Supplement 29/3/2013 to 22/3/2015	\$6,062.15
Disability Allowance 4/11/2013 to 4/5/2014	\$130.95
Temporary Additional Support 29/3/2013 to 22/3/2015	<u>\$4,296.12</u>
Total	<u>\$41,245.64</u>

[2] The overpayments of Domestic Purposes Benefit and Sole Parent Benefit were established on the basis that the appellant was married and not living apart from her husband during the relevant periods. The overpayments of supplementary benefits were established taking into account her husband's income.

Background

[3] The appellant and her husband were married on XXXX. They were living at XXXX Road in Auckland at the time of their marriage.

[4] There are two children of their relationship: XXXX, born on XXXX, and XXXX, born on XXXX.

[5] The appellant says that she and her husband separated in 2010. She was working at the time. She moved from the family home at XXXX Road. The appellant travelled to Australia with her children in May/June 2011. She travelled to Australia with the intention of re-establishing herself there, however, she had a falling out with her sister and was obliged to return to New Zealand. On her return in June 2011, the appellant applied for Domestic Purposes Benefit (now known as Sole Parent Support). She was granted that benefit from 14 June 2011. The appellant's application for Domestic Purposes Benefit is no longer available. Domestic Purposes benefit would have been granted on the basis that the appellant advised the Ministry she had separated from her husband.

[6] In March 2013, the appellant took up the tenancy of a property at XX XXXX Place. The appellant moved to live there on or about XX March 2013. Mr XXXX also took up residence in a sleepout at the back of the property. He continued to live there until early 2015, when it became apparent that his presence would affect the benefit received by the appellant.

[7] In 2014, as a result of an anonymous allegation, an investigation was commenced into whether or not the appellant and her husband were in fact living apart. The Ministry concluded that the appellant and her husband were not living apart. As a result, the overpayments of benefit previously referred to were established.

[8] 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 the Authority.

[9] The appellant gave no particular explanation of any incident or event leading to her separation from Mr XXXX in 2010. The appellant said that she moved to XXXX

Road at that point. Following her return to New Zealand in 2011, she resumed living at XXXX Place. By this time her mother-in-law had taken over the tenancy and was living there with her two sons, including the appellant's husband. The appellant says she returned to live at XXXX Place as she had nowhere else to go. She claims she slept in a shed out the back. The appellant eventually moved, first to XXXX Road and later to XXXX Road. Towards the end of her tenancy at XXXX Road, Mr XXXX moved into a room underneath the house. She told the Authority she moved to XXXX Place with the children initially, but two weeks later, Mr XXXX moved into a sleepout at the back of the property because he had nowhere else to live. The appellant said she allowed Mr XXXX to stay at XXXX Place for the sake of the children. They had not reconciled. The appellant said, on the one hand she permitted him to stay because she wanted her children to have a relationship with their father. On the other hand, she said she was not happy about him staying as she was scared of him. She went so far as to suggest that she often asked her husband to leave, in fact almost as often as every week, but he always had an excuse for not leaving and she eventually gave up asking.

[10] The financial arrangement between them was that Mr XXXX paid her \$150 per week. This covered his rent and power, toilet paper and toothpaste. The appellant said that she used the \$150 Mr XXXX paid to do the supermarket shopping.

[11] The appellant said when they separated, she had retained the joint account and Mr XXXX had obtained his own new separate account. The only common financial arrangement at the time relevant to the appeal was that they were both making payments to clear up an outstanding BNZ loan account, which had originally been taken out just before they were married. Mr XXXX was paying \$50 per week in respect of this account and the appellant was paying \$25 per week. The appellant said that there were no other common financial arrangements.

[12] The appellant told the Authority that she did Mr XXXX's laundry, primarily because she wanted to look after her washing machine. She did not do any ironing for him. She did all the household chores including mowing the lawn.

[13] There were no cooking facilities in the sleepout but Mr XXXX generally arrived home quite late and ate takeaways. On the weekends, he would cook a boilup in the facilities in the kitchen which their daughter XXXX might share. The appellant said that she did not socialise with Mr XXXX. She had her own motor car given to her by her daughter. The appellant had previously told a Ministry investigator that Mr XXXX only used her car in very rare situations.

[14] She agreed that she took Mr XXXX's mother shopping once a fortnight. She did this primarily because Mr XXXX had asked her to.

[15] The appellant said that Mr XXXX was not involved in the children's schools or taking the children to the doctor. She did not speak to him about the children. She also said that the children went backwards and forwards between the main house and Mr XXXX's sleepout.

[16] Mrs XXXX confirmed that she had never consulted a lawyer about separation and divorce, but she had had conversations with the doctor and with the Community Advisory Bureau. She instigated the process for obtaining a trespass notice against Mr XXXX the day before the hearing before the Authority.

[17] The appellant said that Mr XXXX was like a brother to her. The appellant explained that she had been brought up in foster care and had no family. Having a family was therefore particularly important to her.

[18] The appellant also said that she was frightened of Mr XXXX and recounted an episode of violence before their marriage in 2006 which resulted in him being prosecuted for assault with a stabbing/cutting weapon. As a result of this incident, Mr XXXX had been required to undertake, amongst other things, a non-violence course. She did not recount any instances of physical violence since that time but said that Mr XXXX could become verbally violent. She told the Ministry investigator that he was a happy person when drunk.

Decision

[19] Sole Parent Support (formerly Domestic Purposes Benefit) is payable where a person who is the mother or father of one or more dependent children is living apart from and has lost the support of or is being inadequately maintained by the person's spouse or partner. In short, it cannot be paid to a woman who is married and is not living apart from her husband.

[20] Other benefits such as Accommodation Supplement, Disability Allowance and Temporary Additional Support are income tested. If a married couple are not living apart then the income of the person's spouse or partner must be taken into account in assessing a person's entitlement to those benefits.

[21] Pursuant to the provisions of s 63(a) of the Social Security Act 1964, the Chief Executive has a discretion to regard as unmarried any married applicant or beneficiary who is living apart from his wife or husband as the case may be.

[22] The central issue in this case is whether or not the appellant and her husband were living apart during the period in respect of which the overpayments have been established.

[23] As was observed by Henry J in *Sullivan v Sullivan* [1958] NZLR 912 at p.933:

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.

[24] What constitutes a married couple living apart was discussed by Fisher J in *Excell v Department of Social Welfare*.¹ 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 is usually 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.

[25] The issue was also considered in *Director-General of Social Welfare v W*² The Court found at 107-100 [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.

¹ [1991] NZFLR 241 at 248.

² [1997] 2 NZLR 104.

[26] This importance of a break in the mental commitment to the marriage was also referred to in *Shannon v Shannon*³ where Cartwright J found at page 10:

... The physical indicia while remaining important will not always be conclusive. It is not unknown, for example, for a couple to satisfy a court that although living together in the same household their marriage relationship has not continued. Therefore the more difficult mental element becomes of great importance.

[27] In summary, the key issue in determining whether a married couple are living apart is whether or not one or both parties regards the marriage as at an end. Reference to the indicia of a common residence, financial interdependence and emotional commitment will assist in making this determination.

Credibility

[28] We had some reservations about the reliability of the appellant's evidence in this matter for the following reasons:

- (i) On the one hand, the appellant made a strong statement at the outset that she wanted her children to have contact with their father and be part of a family. On the other hand, at a later point she said that Mr XXXX was not a good father, did nothing for the children and that she was scared of him.
- (ii) She told the investigator that Mr XXXX had been living at XXXX Place ever since she had moved there. In evidence at the hearing, she said that Mr XXXX moved to XXXX Place a week or two after her. She did not explain where he lived from the time she relinquished the XXXX tenancy to the time she moved to XXXX Place.
- (iii) She told the investigator that while her husband ate takeaways when he came home from work "we" (presumably meaning herself and the children) did not eat takeaways. That is inconsistent with the information contained in her bank accounts from which it is apparent that she regularly purchased takeaways.
- (iv) The appellant completed many forms applying for benefits between 2011 and 2014. In response to questions asking her to disclose who she was living with in the period that she was living at XXXX Place, at no time did she declare that she was receiving \$150 per week from Mr XXXX, e.g. the Benefit Review form of 26 May 2014.

³ HC CP 13/98 & CP 35/97, 29 May 2000, Cartwright J.

(v) The appellant was questioned about regular deposits into her account between September 2013 and July 2014 from XXXX. She claimed they were her XX year old son's wages. There was however, no evidence of similar amounts being withdrawn from the account, or indeed other amounts which might be partial recovery of the wages by her son, indicating her son reclaiming his wages. The bank statements suggest the money from this source appears to have formed part of the appellant's normal spending. It is implausible that a XX year old would not require his wages to meet his expenses, including his work-related expenses such as travelling to and from work. We did not believe the appellant's explanation.

[29] These matters lead us to conclude that the appellant's evidence must be treated with caution.

Common residence

[30] There is no dispute that the appellant and her husband were living at the same address during the period concerned, although it is alleged that Mr XXXX lived in a sleepout. The sleepout did not have kitchen or bathroom facilities. Power was supplied from the main house and Mr XXXX had access to the main house for cooking and the use of bathroom facilities.

[31] There is evidence that the appellant and Mr XXXX had lived at the same address prior to living at XX XXXX Place. The evidence is that both had lived at XX XXXX Road in 2011 and XXXX Road in 2012, before moving to XX XXXX Place. It seems more likely than not that they moved to XXXX Place together.

[32] Evidence of both the appellant and her husband living at XXXX Road and XXXX Road at the same time is contained in the addresses to which bank statements were sent and in the school records relating to XXXX and XXXX as well as the appellant's evidence.

Financial Interdependence

[33] The appellant says that Mr XXXX gave her \$150 cash on a regular basis. She used this money to buy food for her household. Mr XXXX also paid Child Support through the Child Support system. The appellant says his payment did not include food but apparently did include non-food items such as toothpaste and toilet paper and power. The rent for the property at XXXX Place was \$370 per week. An inference might be drawn is that if the only payment Mr XXXX was making was \$150 per week, the appellant was subsidising Mr XXXX's costs to some extent.

[34] The appellant's bank statements show that she spent most of her income each week. Except in the weeks when there were deposits from XXXX, the appellant would have had difficulty in making ends meet without the money paid by Mr XXXX. For example, in 2014 when her income from Work and Income was approximately \$660 per week, after payment of rent, power, telephone and her BNZ payment she would have had approximately \$160-\$170 to meet all other expenses, including food and transport costs for herself and her two teenage children. The inference that might be drawn is that in taking the tenancy of a property with a rental of \$370 per week the appellant was relying on Mr XXXX to provide financial support for his wife and children.

[35] The appellant and her husband were repaying an old BNZ loan debt. Mr XXXX was paying \$50 per week in relation to that debt. Instead of paying the debt directly to the bank, the payment went into the appellant's account first. The inference that might be drawn from this is that the appellant was in charge of the repayment of this debt and the appellant and her husband were co-operating and had a mutual agreement over the repayment of the debt.

[36] There are some, but not regular purchases, from Mr XXXX's account for meat from the Mad Butcher and fruit and vegetables from Thai Heng Grow. On the occasions those purchases were made, the amount involved appears to have been significantly more than would be required to purchase food for a single person. The inference to be drawn from this is that from time-to-time, Mr XXXX purchased food for the household at XXXX Place.

[37] There is reference in the Ministry's report to the appellant paying Mr XXXX's Telstra Clear Account. The evidence of this, included in the s 12K Report, is inadequate and we have not taken it into account.

[38] However, the information available indicates a degree of financial interdependence and co-operation between the appellant and her husband.

Emotional Commitment

[39] In his statement to the investigator, Mr XXXX said that he loved the appellant as a friend. In her evidence to the Authority, the appellant said that she viewed Mr XXXX as a brother. The appellant's mother-in-law described the relationship between the appellant and Mr XXXX as friends. A key element of a marriage relationship is of course friendship.

[40] The appellant and Mr XXXX lived at the same address prior to moving to XXXX Road and it is more likely than not that they moved there together. This and their

residence at the same address during the period in question suggests an ongoing commitment to their relationship.

[41] The appellant took her mother-in-law on shopping trips on a regular basis apparently at Mr XXXX's request. On the one hand, she referred to the outings being beneficial to her mother-in-law. On the other hand, she said she was forced to take her out. The inference to be drawn is that the appellant still considered herself to be part of Mr XXXX's family with social obligations to an elderly member of that family.

[42] While the appellant says she did Mr XXXX's laundry to protect her washing machine, she also did all the housework and the lawns in circumstances where Mr XXXX apparently worked weekends and sometimes late. Sharing her labour in this way might also be consistent with an ongoing commitment to the marriage relationship.

[43] The appellant's reference to Mr XXXX as her spouse/partner in hospital admission forms suggests that they had not separated.

[44] There is a level of financial interdependence and co-operation in relation to financial matters which suggests an ongoing commitment to a relationship.

[45] The evidence discloses a degree of emotional commitment to an ongoing relationship.

Violence in the relationship

[46] We have considered whether violence in the relationship may have negated the proposition that the marriage relationship still subsisted or that the appellant was a battered woman who had mentally left the marriage relationship, but was unable to physically leave. There was a nasty instance of violence in the relationship prior to the appellant and Mr XXXX marrying, but the appellant did not suggest that there had been any physical violence since. She said that Mr XXXX could become verbally violent. She told the investigator that he was a "happy drunk". On the one hand, the appellant said that she had asked Mr XXXX to leave the house at XXXX Place but had eventually given up asking him to leave. On the other hand, it is apparent that Mr XXXX left XXXX Place to live with his mother when the implications of the Ministry's investigation and the effect on the appellant's benefit became apparent.

[47] The appellant was apparently able to leave her husband when she went to Australia and on her return took up residence in the same household as him. She says she moved to XXXX Drive without him. This tends to indicate that the appellant was able to move away from Mr XXXX when she wanted to.

[48] At no time did the appellant seek a Protection Order against Mr XXXX or apparently consult a lawyer about her circumstances. We are not satisfied that the appellant was subject to the type of unremitting violence considered in the case of *Ruka v Department of Social Welfare*⁴ which might negate the proposition of a continuing marriage relationship.

Matters suggesting that the marriage is at an end

[49] There is some evidence to suggest that the nature of the marriage relationship had changed as follows:

- (i) There is support for the proposition that the appellant and Mr XXXX have separate rooms in the evidence of Mr XXXX's mother.
- (ii) There is no evidence of a sexual relationship.
- (iii) The appellant and Mr XXXX have separate bank accounts.
- (iv) There is no evidence of the appellant and Mr XXXX socialising together away from their home. They both however, spend significant amounts on alcohol and the appellant said Mr XXXX drinks at home.
- (v) Although Mr XXXX regularly receives his wages in his bank account of \$500 – \$600 per week, presumably after the deduction of Child Support, it is not altogether clear that the greater part of his wages is committed to supporting his family. The only regular amounts he was committed to paying are the board of \$150 per week to the appellant and \$50 per week for the BNZ debt and payments to Finance Now and of Child Support. Every week there is significant expenditure at lunch bars, on takeaways and on alcohol. There are irregular purchases of meat and vegetables, probably for family purposes. It is possible that the cash withdrawals from Mr XXXX's accounts are used to meet some household costs.

[50] Each of these matters on its own is not sufficient to displace the proposition that the appellant and Mr XXXX are not living apart. The totality of these matters must be balanced against the evidence of the appellant and Mr XXXX living at the same address, their level of financial interdependence and emotional commitment to their relationship.

Conclusion

⁴ [1997] 1 NZLR 154 (CA).

[51] The appellant and her husband live at the same address. It may well be the case that this is in part brought about by their mutual commitment to the children. It may also be the case that there are unsatisfactory aspects to their relationship. Nevertheless, they regard each other as friends and continue to share their labour and their financial resources. Friendship is a key element of most marriage relationships. The lack of a sexual relationship does not negate the proposition that emotional commitment to their marriage has ended. Nor does the existence of separate bank accounts when there is clear evidence of financial interdependence and co-operation. Taken as a whole, the picture presented does not indicate a degree of separation in their arrangements that would suggest that either the appellant or Mr XXXX regards their marriage as being at an end.

[52] We are satisfied, on the balance of probabilities, that the appellant and her husband were not living apart during the period relevant to this appeal and therefore should be regarded as married for benefit purposes.

Calculation of debt

[53] The appellant and her advocate did not raise any issues relating to the calculation of the debt in this instance. The calculation of the debt is set out at Exhibit 6 in the Section 12K Report. The debt in relation to supplementary assistance has been calculated taking Mr XXXX's income into account. The calculations show that in most weeks the appellant and her husband would have been entitled to some amount for Accommodation Supplement but not the full amount paid. There is no entitlement to Disability Allowance. In some weeks there was a small entitlement to Temporary Additional Support but not the full amount paid. We accept the calculation of the debt is correct.

Recovery of debt

[54] The issue for the Authority is whether or not the overpayments should be recovered.

[55] 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 enables the Chief Executive not to recover a debt in circumstances where:

- (a) the debt was wholly or partly caused as a result of an error by an officer of the Ministry;
- (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 would not have to repay it; and
- (e) it would be inequitable in all the circumstances, including the debtor's financial circumstances, to permit recovery.

[56] 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 other erroneous act or omission by an officer of the Ministry.

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

[58] The first issue we must consider is whether or not the overpayment arose as a result of an error on the part of an officer of the Ministry. There is no suggestion that the Ministry were aware that the appellant was not separated from her husband or ought to have been aware that the appellant was not separated from her husband. The appellant never disclosed that Mr XXXX was living at the same address as her or disclosed the payments from Mr XXXX to her. As a result, we are not satisfied that it can be said that the overpayments have occurred as a result of an error on the part of the Ministry. We cannot direct that the debt not be recovered pursuant to the provisions of s 86(9A) of the Act.

[59] It is open to the appellant to negotiate a rate of repayment with the Ministry.

[60] The appellant's husband may be able to approach the Inland Revenue Department regarding a refund of the Child Support paid on the basis that the appellant was not entitled to a Domestic Purposes Benefit during this period and must repay the benefit paid.

[61] The appeal is dismissed.

DATED at WELLINGTON this 29th day of August 2016

Ms M Wallace
Chairperson

Mr K Williams
Member

Lady Tureiti Moxon
Member