

[2017] NZSSAA 031

Reference No. SSA 122/16

**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**

**S Pezaro** - Deputy Chair

**K Williams** - Member

**C Joe** - Member

**Hearing** at AUCKLAND on 17 February 2017

### **Appearances**

The appellant in person

K Brereton – Lay Advocate (appearing by audio visual link)

R Shaw – for the Ministry

## **DECISION**

### **Background**

[1] XXXX appeals the decision of the Chief Executive, upheld by a Benefits Review Committee, to cancel his Jobseeker Support from 20 April 2016 due to the overseas income of his spouse which was above the income limit for entitlement.

[2] Mr XXXX applied for Income Support after he was made redundant. When Mr XXXX made this application, he did not know what his redundancy payment would be or when he would receive it. He advised that he was married but received no financial support from his spouse who is not a New Zealand citizen and lives in XXXX.

- [3] Mr XXXX subsequently provided a copy of his husband's payslip to confirm his income and an email from his husband stating that he was unable to support Mr XXXX at this time because, as they did not live together, he incurred his own weekly expenses.
- [4] Once the Ministry had received confirmation of Mr XXXX's husband's income it cancelled his benefit and established a debt for the period 20 April 2016 to 29 May 2016. However the Ministry subsequently wrote this debt off.
- [5] By the time of the hearing Mr XXXX's marriage had ended. He said that the loss of job and income and, consequently, his accommodation strained the relationship and had a significant negative impact on his mental and physical health.
- [6] At the time the Ministry prepared its s12K report it had received a medical certificate from the appellant's doctor confirming that Mr XXXX was separated. As a result the Ministry stated that a jobseeker support application for a single person was pending, dependent on further confirmation from Mr XXXX.
- [7] The issue that we need consider is whether Mr XXXX was entitled to jobseeker support from 20 April 2016.

#### **The case for the appellant**

- [8] For Mr XXXX, Ms Brereton submits that the Ministry should exercise its discretion under s 63(a) of the Social Security Act 1964 to regard Mr XXXX as single because his husband repudiated his marriage vows by refusing financial support. She argues that because Mr XXXX is legally married there is an assumption that he must receive financial support from an overseas spouse when clearly this is not possible. She states that WINZ would not consider him to be in a relationship in the nature of marriage for benefit purposes if he were not legally married. Ms Brereton further submits that if the Authority does not exercise the discretion under s 63(a), an Emergency Benefit under s 61 must be considered.
- [9] Mr XXXX believes that he was entitled to jobseeker support because no allowance was made for the cost of maintaining two households. The cost of international money transfer was a further barrier to his husband sending financial support.

### The case for the Ministry

[10] The Ministry submits that the law is clear that living apart is not determined by physical separation alone. There must also be a break of emotional commitment by one of the parties for them to be considered to be living apart. The Ministry submits that in the appellant's situation, where both parties agreed that they were committed to their relationship at the relevant time, they cannot be considered to be living apart for the purposes of s 63(a) of the Act.

[11] On this basis the Ministry says it was required to take Mr XXXX's spouse's income into account. As it was over the required threshold, he did not qualify for jobseeker support.

### Relevant law

[12] The relevant parts of s 63 of the Social Security Act 1964 (the Act) are:

#### 63 Conjugal status for benefit purposes

For the purposes of determining any application for any benefit, or of reviewing any benefit already granted... the chief executive may in the chief executive's discretion —

- (a) regard as single any applicant or beneficiary who is married or in a civil union but is living apart from his or her spouse or partner:
- (b) regard as married any 2 people who, not being legally married or in a civil union, have entered into a relationship in the nature of marriage ...

[13] The interpretation of s 63 of the Act was considered by the High Court in *Fong v Secretary for War Pensioners*,<sup>1</sup> a case involving a similar provision in the War Pensions Act 1954. In *Fong*, Williams J considered cases under the Act and observed that the relevant intention in terms of deciding whether a married couple are living apart is the intention to end all obligations inherent in the marriage relationship. His Honour cited *Director-General of Social Welfare v W* where the High Court found that a couple separated by economic circumstances who maintained an emotional commitment were not living apart:<sup>2</sup>

<sup>1</sup> *Fong v Secretary for War Pensioners* [2012] NZHC 1618.

<sup>2</sup> *Director-General of Social Welfare v W* [1997] 2 NZLR 104 (HC) at 108.

The parties to a marriage are not "living apart" unless they not only are physically separated, but at least one side regards the marriage tie as dead.

- [14] At the hearing Mr XXXX confirmed that he considered he was in a committed relationship at the time that he applied for jobseeker support and that the relationship was ended recently by his spouse.

### **Discussion**

- [15] There is no authority to support the appellant's argument that a couple who are emotionally committed to each other but physically separated should be treated as living apart for the purpose of s 63 of the Act. The courts have consistently taken the level of emotional commitment to the relationship into account and found that one party must regard the relationship as at an end for the parties to be living apart for the purpose of benefit entitlement.
- [16] It is consistent with s 1A(c)(i) of the Act that people first use the resources available to them before seeking financial support under the Act. Where there is an emotional commitment between the parties, as in Mr XXXX's case, the spouse's financial situation is relevant to the level of entitlement. It is not reasonable or practical for the threshold entitlement for financial support to be as nuanced as Mr XXXX suggests. We do not accept that there is any basis for taking into account circumstances such as exchange rates or the cost of living in different countries.
- [17] The inevitable conclusion is that at the time that he applied for jobseeker support as a married man, Mr XXXX did not qualify for this assistance.
- [18] For similar reasons Mr XXXX's claim that he was entitled to an emergency benefit also fails. Section 61 of the Act provides that the chief executive may grant an emergency benefit on account of hardship to a person who due to age, physical or mental ability, domestic circumstances or any other reason is unable to earn a sufficient livelihood and is not qualified to receive a main benefit under the Act.
- [19] The discretion to grant an emergency benefit is subject to certain conditions. The condition relevant to Mr XXXX's situation is contained in s 61A which provides that a spouse or partner of a person granted an emergency benefit may be subject to a work test. This provision assumes that the spouse or partner is not in employment. However Mr XXXX's spouse was in employment when his application for jobseeker support was declined.

[20] For the reasons given in [16] above, a person seeking financial support is expected to use the resources available to them. In this case Mr XXXX was expected to obtain financial support from his spouse. While there may be circumstances in which it would not be reasonable to expect an applicant to seek financial support from their spouse or partner, such as where the applicant is subject to domestic violence, this was not Mr XXXX's situation at the relevant time.<sup>3</sup> Therefore we conclude that he was not entitled to an emergency benefit.

### **Decision**

[21] For these reasons this appeal is dismissed.

**Dated at Wellington** this 28<sup>th</sup> day of June 2017

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**S Pezaro**  
Deputy Chair

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**K Williams**  
Member

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**C Joe JP**  
Member

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<sup>3</sup> *Ruka v Department of Social Welfare* [1997] 1 NZLR 154.