

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

S Pezaro - Deputy Chair

C Joe - Member

Dates of hearing: 29, 30 March 2017; closing submissions 7 April 2017.

Appearances:

Appellant in person

Simonette Boele, counsel for Ms XXXX

Jennifer North, counsel for the Chief Executive

DECISION

Background

- [1] XXXX appeals the decision by the Chief Executive on 26 November 2014, upheld by a benefits review committee, to stop her benefit payments for sole parent support, accommodation supplement and temporary additional support, on the basis that she was living in a relationship in the nature of marriage with Mr Z from 26 November 2011 to 24 November 2014 (the relevant period). She also appeals the Chief Executive's decision, upheld by a Benefit Review Committee, to establish and recover an overpayment of \$68,726.82 relating to the relevant period, and not to apply relationship debt sharing during the period from 8 July 2014 to 23 November 2014.
- [2] Ms XXXX is 33 years old and has five children. The father of her two oldest children is her former husband. Two children, A (born XXXX 2012) and B (born XXXX 2014), were born during the relevant period. Ms XXXX says that Mr Z is the father of A and that although B's paternity is not certain, she is

raised as Mr Z's daughter. The fifth child was born this year—outside of the relevant period. Mr Z and Ms XXXX have been friends since they were teenagers and continue to be part of the same social group.

- [3] As part of regular reviews of her benefit entitlement Ms XXXX completed forms, annually until June 2014, declaring that she was single and not receiving any financial support or income from any source. On 18 June 2014 the Ministry suspended Ms XXXX's accommodation supplement and temporary additional support following advice that she had moved house in early May.
- [4] On 27 June 2014 Ms XXXX confirmed her change of address and stated that she had begun having a relationship with Mr Z. The Ministry records that Ms XXXX said that Mr Z stayed overnight from Wednesday to Friday and that he did not provide any support for her or her children.
- [5] On 7 July 2014 Ms XXXX attended an appointment to discuss her relationship with Mr Z. The case worker recorded that Ms XXXX was trying to establish a relationship with the father of her two year old, he was staying 3 nights per week, he could not support himself financially, and that she advised Ms XXXX that she needed to be sure of her relationship status as it could affect her benefit entitlement. Another appointment was made for 5 September 2014 to discuss this situation.
- [6] On 2 October 2014 Ms XXXX attended an interview with a case manager. She said that she had, unsuccessfully, tried many times to establish an ongoing relationship with Mr Z, but had now decided to live by herself. They would remain good friends and he would continue to have a relationship with their daughters.
- [7] On 26 November 2014 the Chief Executive stopped Ms XXXX's benefits because he decided, as a result of investigations, that she was living in a de facto relationship with Mr Z. The Chief Executive also determined to establish and recover an overpayment of \$68,726.82, and not to apply relationship debt sharing during the period from 8 July 2014 to 23 November 2014.
- [8] Ms XXXX now appeals both decisions. However at the hearing, in light of the decision in *S v Chief Executive of the Ministry of Social Development*,¹ counsel agreed that the hearing of the appeal in relation to the overpayment,

¹ *S v Chief Executive of the Ministry of Social Development* [2017] NZHC 414.

SSA062/16, should be deferred until the appeal against the decision to stop benefit payments is determined, allowing Mr Z to be added as a party and given an opportunity to prepare a defence and bring an appeal.

The issues

[9] The issues that we need to determine are:

- a) whether Ms XXXX was in a relationship in the nature of marriage between 26 November 2011 and 24 November 2014, or for any period within that time; and
- b) whether, if Ms XXXX was in a relationship in the nature of marriage for the period 27 June 2014 to 24 November 2014 and therefore not entitled to a benefit during this period, the Ministry is entitled to recovery when it knew that Ms XXXX was attempting to establish a relationship at this time.

[10] The parties have not disputed the effects on the support Ms XXXX is entitled to receive, if she was in a relationship in the nature of marriage during the relevant period.

The legislation

[11] The issue that the Authority has to determine is governed by s 63 of the Social Security Act 1964 (the Act). In this case s 63(b) is the relevant provision:

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—

and may determine a date on which they shall be regarded as having commenced to live apart or a date on which they shall be regarded as having entered into such a relationship, as the case may be, and may then in the chief executive's discretion grant a benefit, refuse to grant a benefit, or terminate, reduce, or increase any benefit already granted, from that date accordingly.

What is required to establish a relationship in the nature of marriage

[12] The Court of Appeal's decision in *Ruka v Department of Social Welfare*² is the leading authority on what the phrase "a relationship in the nature of marriage" means in section 63 of the Act.

[13] The Court considered that the analysis requires a comparison with a legal marriage. Richardson P and Blanchard J observed:³

The comparison must seek to identify whether there exist in the relationship of two unmarried persons those key positive features which are to be found in most legal marriages which have not broken down (cohabitation and a degree of companionship demonstrating an emotional commitment). Where these are found together with financial interdependence there will be such a merging of lives as equates for the purposes of the legislation to a legal marriage.

[14] Thomas J noted at 181:

It is this underlying commitment to the relationship which distinguishes marriage from the relationship of couples who may nevertheless share premises and living expenses. A relationship will not be a relationship in the nature of marriage for the purposes of s 63(b), therefore, unless it exhibits this mutual commitment and assumption of responsibility. In the context of the Social Security Act, this will necessarily include financial support or interdependence or, at least, a mutual understanding about the parties' financial arrangements of the kind I have suggested.

[15] The Court took the view that in the context of the Act financial interdependence was a central consideration.⁴ The reasoning of the majority was that:⁵

... an essential element is that there is an acceptance by one partner that (to take the stereotypical role) he will support the other partner and any child or children of the relationship if she has no income of her own or to the extent that it is or becomes inadequate. The commitment must go beyond mere sharing of living expenses, as platonic flatmates or siblings living together may do; it must amount to

² *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 (CA).

³ *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 (CA) at 162, See also 182, per Thomas J, regarding the merging of lives.

a willingness to support, if the need exists. There must be at least that degree of financial engagement or understanding between the couple.

...

[16] The central feature of a relationship in the nature of marriage is commitment to financial responsibility, including commitment to provide support in future adverse circumstances. The Court found that the Courts below had applied the wrong test by failing to look primarily at the financial aspects of the relationship.⁶

[17] However, financial commitment alone is not sufficient to find there is a relationship in the nature of marriage. The Court also found that emotional commitment was essential:⁷

Where financial support is available nevertheless there will not be a relationship in the nature of marriage for this purpose unless that support is accompanied by sufficient features evidencing a continuing emotional commitment not arising just from a blood relationship. Of these, the sharing of the same roof and of a sexual relationship (especially if it produces offspring) are likely to be the most significant indicators. But, since the amendment to s 63 in 1978, the sharing of a household is not essential. And, particularly in the case of older couples, the absence of sexual activity will not in itself deprive the relationship of the character of a marriage.

The statutory context is of great importance in determining what is a "relationship in the nature of marriage". Other statutes use the same expression but for different legislative purposes. What is or is not such a relationship may be viewed differently for different purposes.

[18] Ultimately, the Court emphasised the merging of lives, as noted at [13] above. The Court noted that strategies to withdraw support to obtain a benefit would not be effective.

[19] The Court of Appeal considered earlier authorities such as *Thompson v Department of Social Welfare*⁸ which placed some emphasis on a "checklist"

⁴ *Ruka* at 156, per Richardson P and Blanchard J, discussing the central importance of this aspect.

⁵ At 161.

⁶ At 163.

⁷ At 161.

approach to determining whether a relationship was one in the nature of marriage. While acknowledging the checklist approach may provide assistance in deciding some cases, the Court considered a better approach was the more comprehensive consideration set out above.

- [20] *Ruka* was discussed by the Court of Appeal in *Cameron v R*.⁹ In *Cameron* the Court referred to s 63 of the Act as reflecting the legal obligation between legally married people to support each other financially when the need arises. The Court considered that s 63 extends that obligation to relationships in the nature of marriage and any entitlement to a benefit under the Act therefore considers the financial position of the couple rather the individual.

The case for the Chief Executive

- [21] We have evaluated the evidence by first considering the evidence for the Chief Executive and then the evidence for Ms XXXX. The position of the Chief Executive is that Ms XXXX was in a relationship in the nature of marriage with Mr Z between 26 November 2011 and 24 November 2014. The Chief Executive determined the start date of the relationship based on the information obtained by James Reid, the investigator, and on the fact that Ms XXXX attended an open home for a rental property with Mr Z and took this tenancy from on 26 November 2011 and.

Submissions

- [22] Ms North made oral opening submissions and filed written closing submissions. Unfortunately most of the authorities she relies on are misinterpreted and do not support the submissions. Also of concern is the disclosure of an appellant's name in a case where the court prohibited publication.
- [23] Ms North framed the issue for the Authority as "whether or not the Chief Executive of the Ministry of Social Development had sufficient evidence to determine that Ms XXXX and Mr Z were in a relationship in the nature of marriage". She suggested that there is "still certainly enough evidence to sustain the decisions made by the Chief Executive and upheld by the BRC".
- [24] However in accordance with the Supreme Court in *Arbuthnot v Chief Executive of the Department of Work and Income*, the Authority is required to

⁸ *Thompson v Department of Social Welfare* [1994] 2 NZLR 369 (HC).

⁹ *Cameron v R* [2015] NZCA 363.

reach a correct view on the facts and is not constrained by the earlier processes.¹⁰ It is therefore our role to determine the issues on the available evidence and in accordance with the law; not review the decisions made by the Ministry or the BRC.

- [25] Ms North refers to the High Court decision in *Whitehead v R*¹¹ as authority that the checklist applied in *Thompson* provides a broad set of criteria for determining whether or not a couple are in a relationship in the nature of marriage. She submits that although the court in *Ruka* ‘dismissed’ the application of a checklist, ‘courts still use these criteria in assessing relationships, to this day’.
- [26] However the issue in *Whitehead* was whether the jury in a prosecution for fraud was misdirected by a reference to the *Thompson* criteria. *Whitehead* is not authority for applying the *Thompson* criteria to determine whether there is a relationship in the nature of marriage under the Act.
- [27] Ms North also argues that emotional commitment is demonstrated by text messages from April 2014 to July 2014, Ms XXXX’s admission that she tried to have a relationship with Mr Z during the 2011 to 2014 period, and the fact that they had two children in this time. However Ms XXXX’s unchallenged evidence is that there is no certainty that the second child born during this period is Mr Z’s. Ms North also referred to a child born this year however this birth is outside the relevant period. She also referred to the texts between Ms XXXX and Mr Z as showing their strong emotional commitment.
- [28] Ms North submits that Ms XXXX’s failure to call Mr Z as a witness is relevant. She asserts that “a lack of rebuttal from a partner involved in the marriage-type relationship appeals has gone some way to persuade the Court that this type of relationship did in fact exist, when taken into account with other factors involved”. Ms North relied on *Breen v Housing New Zealand*¹² as supporting this proposition, however Ms North has misread *Breen*. The passage she cites from the High Court decision was cited by the High Court from the District Court decision and, significantly, the District Court was referring to the appellant’s own failure to appear to rebut evidence, not a failure by the appellant to call evidence from his partner.

¹⁰ *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55 at [20] – [26].

¹¹ *Whitehead v R* [2014] NZCA 573 at [10].

¹² *Breen v Housing New Zealand* [2012] NZHC 1118.

- [29] Ms North argues that the financial interdependence is readily apparent in Ms XXXX's case and that there was indirect financial support between Ms XXXX and Mr Z. She states:

As Mr Z did not really operate a bank account as any normal 36 year old male usually does, it is hard to see actual financial intermingling through examination of his bank account alone.

That does not by any means mean that he was not financially supporting Ms XXXX.

There was a significant drop in Ms XXXX's food shops for at least a year period, even though she had three children to feed. Ms XXXX claims part of the reason for this was due to mental health issues and that this directly impacted on her ability to shop specifically at supermarkets.

...

It is submitted that Mr Z was the one buying food for his family during this period – provisions for his two young children, his children's siblings and for the mother of his two children.”

- [30] Ms North also refers to the Sky TV account which was in Mr Z's name and submits that, although Ms XXXX paid these accounts, Mr Z's readiness to claim responsibility for them shows a commitment by him to provide both financially and emotionally for Ms XXXX and his family.

The witnesses for the Chief Executive

- [31] The Chief Executive called evidence from C who rented a garage adjacent to the [Place A] tenancy, D, a neighbour living in [Place B], E, the ex-partner of Mr Z; and James Reid, an investigator employed by the Ministry.
- [32] James Reid interviewed Ms XXXX and all the witnesses for the Chief Executive. The transcripts were produced in the Ministry's report. Mr Reid was the only witness to give evidence on the question of financial interdependence and, for the reasons that follow, we give limited weight to his evidence on this issue. The other witnesses for the Chief Executive gave evidence on cohabitation and the extent of emotional commitment.

C

- [33] Mr C rented the shed at [Place A] - where Ms XXXX lived until 2 May 2014. In his interview with James Reid and in his brief, Mr C said that he went to the shed about once every six weeks. In his brief, Mr C said that Mr Z was always there within a few minutes of his arrival and he got the impression that he lived there.

- [34] We note that when interviewing C, James Reid asked if he had rented the garage 'while Ms XXXX and Mr Z were living at that address'. Clearly leading questions are not appropriate in an investigative interview and the weight which can be given to responses to such questions is generally limited.
- [35] In oral evidence C said that he was never there during work hours; he was there either on the weekend or after work. Mr C said that he would have been there between six and nine times per year, sometimes for 5 – 10 minutes and other times for three to four hours.

D

- [36] D lives across the road from [Place B] where Ms XXXX has lived since the end of July 2014. He confirmed that he did not know the occupants but assumed that they were husband and wife. He said he had seen Mr Z come home every night. However Mr D's evidence coincides with the period when Ms XXXX stated that she was attempting a relationship.

E

- [37] James Reid interviewed E twice – on 7 July 2014 and 24 November 2014. Ms E said that she and Mr Z separated in 2008 and were 'on and off' until the end of 2009. However, Ms E also said that she and Mr Z were sleeping together when Ms XXXX was nine months pregnant with A who was born in XXXX 2012.
- [38] Ms E said that while Ms XXXX lived at [Place A], Ms XXXX and Mr Z would fight and break up. However, Ms E said that she was 'pretty sure' he had lived there most of the time; there was 'just a few months' when he wasn't. Ms E said that Ms XXXX and Mr Z were 'on and off' during this pregnancy and that Ms XXXX went through quite a bit of the pregnancy on her own because Mr Z didn't want the baby.
- [39] Ms E said that she knew Mr Z was living with Ms XXXX at [Place A] as he was there when she dropped their daughter off to him before kindergarten. However Ms XXXX produced 21 sign in sheets for Ms E's daughter's kindergarten between 14 March 2012 and 26 September 2012. Four were signed by Mr Z and the rest by Ms E. This indicates that during this period, Mr Z took his daughter to kindergarten only four times.

- [40] In the July interview Ms E said that for the past 'couple of months' she had been dropping her daughter to Mr Z at his parents' place. This interview occurred during the period when Ms XXXX told WINZ that she was trialling a relationship with Mr Z at this address. In the November interview Ms E said that Mr Z did not want her to know where he lived currently and texted her to arrange to drop off their daughter at his parents' place; if he was not there Ms E would wait until he arrived. However Ms E told Mr Reid that she knew he lived with Ms XXXX because her daughter had told her.
- [41] Mr Reid asked Ms E how long Ms XXXX and Mr Z had been in a de facto relationship; she replied 'off and on, three years'. Mr Reid did not provide any explanation or definition of what constitutes a de facto relationship nor did he ask Ms E to explain the basis of her assessment.
- [42] In evidence Ms E said that she and Mr Z began a relationship when Ms XXXX was about 8-9 months pregnant—around February 2012—which continued for a couple months before A was born. However as A was born in XXXX, if the relationship between Mr Z and Ms E lasted a couple months, it must have begun before February 2012.
- [43] Ms E said that they were going to get back together when A was born. In response to Ms North's question about how her relationship with Mr Z ended, Ms E said that Mr Z became 'weird and emotional' about the baby and Ms XXXX. He told Ms E that he and Ms XXXX were 'going to try' and Ms E said that she was angry and 'he pissed me off'.
- [44] Ms North acknowledged that "it could be argued that [Ms E] is not an entirely non-biased witness" but submits that Ms E has an insight into the relationship because she shares custody of her daughter with Mr Z and is "privy to everything her nine-year-old daughter discloses to her". Ms North contends that, although Ms XXXX and Ms E are not close, they used to be friends and Ms E's evidence should not be discredited due to 'strained relations'.
- [45] The suggestion that Ms E's evidence is independent is untenable. She has had a sexual relationship with Mr Z over several years and has described her anger when he said he was trialling a relationship with Ms XXXX. Ms E's evidence was also somewhat inconsistent. In her brief she stated that she had a very brief physical relationship with Mr Z when Ms XXXX was nine months pregnant. However in oral evidence she said that she and Mr Z were

together for a couple of months before A was born, and were going to get back together. This oral evidence suggests that she had a more significant relationship with Mr Z during this period than she described in her brief or in her interview with Mr Reid.

- [46] For these reasons we did not find Ms E a reliable witness and consequentially give less weight to her evidence.

James Reid

- [47] Mr Reid said that he made the decision to prosecute and impose a penalty on the overpayment. He decided that there was a relationship in the nature of marriage from 26 November 2011 because that was the date that Ms XXXX began living in [Place A] after attending an open home for prospective tenants with Mr Z. He said he also relied on the evidence given to him by E.
- [48] Mr Reid concluded that Ms XXXX was financially supported by Mr Z from looking at the grocery and utility payments in her bank statements. In his opinion “a family of four does a big shop once a week or fortnight”. He said that as this type of shop was not evident he considered that Ms XXXX did not spend enough money on food for a family of four. We note that, although he described the family as four people, Ms XXXX had two children and a baby at the time.
- [49] Under cross-examination Mr Reid accepted that Ms XXXX did not have a huge amount of money left after paying her fixed expenses. However, he said he would expect to see ‘trips’ for grocery shopping. He said that if he did not see that, he would think that there was another source of income. He did not ask whether Ms XXXX had a vegetable garden or where Ms XXXX shopped. He said he looked at all food purchases and concluded that there was either another source of income or support. Ms Boele asked Mr Reid what figures he used to set his expectation of what should be spent on shopping. Mr Reid said that he did not apply particular figures or use information from budget advisers.
- [50] Mr Reid said that the Sky subscription and a pay TV channel which were in Mr Z’s name at all addresses were evidence that Mr Z lived with Ms XXXX. However under cross-examination he accepted that Mr Z may have had the Sky TV in his name because Ms XXXX had a bad credit rating and that it was

Ms XXXX who paid the account. Mr Reid said that although the debts that she was paying off were evident from her bank statements, he was not aware of the level of debt.

- [51] In his affidavit Mr Reid said that six out of eight hospital admission records for Ms XXXX showed Mr Z listed as her partner. Although Ms XXXX produced 15 hospital admission forms for the same period, under cross examination Mr Reid did not agree that his records were incomplete.
- [52] The majority of the hospital admission forms produced by Ms XXXX listed her mother as the first contact. When Ms Boele asked Mr Reid why he did not state that the hospital required two contact names with 'preferred contact' before 'partner', Mr Reid said that he did not see any relevance in the fact that the form asked for the partner's name after the preferred contact nor did he attach any more weight to the admission records that were signed by Ms XXXX than the unsigned computer generated forms.
- [53] In his affidavit, Mr Reid said that on 30 June 2014 he requested information from 2 Degrees mobile and that the response included text messages for the period 15 April 2014 to 17 July 2014. The Chief Executive produced these texts in the s 12K report and Ms North submitted that these messages showed that Ms XXXX was aware of Mr Z's financial situation and give a 'true picture' of their emotional commitment.
- [54] When cross examined about these texts, Mr Reid denied that they covered the period when Ms XXXX told WINZ that she was trialling a relationship. However, in the s 12K report it is accepted that they coincide with this period. When asked why these were the only text records he produced, Mr Reid said that the 2011 records were not available. However, the statement in his affidavit that the records provided by 2 Degrees *included* this period indicates that there was a process of selection.
- [55] We are concerned that Mr Reid appears to have predetermined the outcome of his investigation by asking leading questions, such as those put to C and D. Due to the manner in which he questioned these witnesses, we do not accept that their evidence can be relied on to demonstrate the type of mutual commitment and assumption of responsibility required to demonstrate a relationship in the nature of marriage for the purposes of the Act.

- [56] In addition, Mr Reid's evidence indicates that he has made assumptions about the accuracy of the evidence he has obtained. For example, in his affidavit Mr Reid states: "*Ms E could tell me fairly accurately when and where Ms XXXX and Mr Z were due to the pickup and drop off of their daughter as well as what the daughter would say to Ms E*". Mr Reid did not provide any basis for his assessment that Ms E's responses were accurate and, at the time of this interview her daughter was nine years old.

The case for Ms XXXX

- [57] Ms XXXX denies that she was in a relationship in the nature of marriage during the relevant period. She accepts that she has had a sexual relationship with him and a child and that there was a period within this time when she was attempting to form a committed relationship with Mr Z. In her affidavit Ms XXXX stated that this period began around 27 June 2014 when she notified WINZ of the relationship. In oral evidence she said that 'maybe she should have told WINZ about the relationship in April 2014'. Ms XXXX believed that WINZ allowed her three months to decide whether the relationship would continue.

- [58] Ms XXXX and her mother, F, gave evidence at the hearing.

Submissions

- [59] Ms Boele submits that Ms XXXX and Mr Z are committed parents to their children, and that the support Mr Z gives to assist with the children is focussed on them. There is no mutual support between Mr Z and Ms XXXX, such as in a committed relationship.
- [60] Ms Boele submits that the financial situation is the crucial factor in determining whether there is a relationship in the nature of marriage under the Act; without financial interdependence there is no basis for a finding of a relationship in the nature of marriage.
- [61] Ms Boele argues that the Chief Executive's conclusion of financial interdependence is based on an assumption that Mr Z contributed financially due to the amount Ms XXXX spent on supermarket shopping.
- [62] Ms Boele noted that the witnesses, evidence and text messages relied on by the Ministry focus on the few months preceding Ms XXXX's notification to

WINZ that she was attempting to renew the relationship with Mr Z. Ms Boele contends that this evidence constitutes 'snapshots' from witnesses who were only present occasionally during a short period.

Ms XXXX

[63] Ms XXXX said that she did not receive any financial support from Mr Z during the relevant period, including the period when she was attempting a relationship. Her evidence fell into three periods, defined by the addresses she lived at during the relevant period.

[Place A]: 21 November 2011 – 2 May 2014

[64] Ms XXXX lived in [Place A] from 21 November 2011 to 2 May 2014. Ms XXXX said that in mid-2011 when Mr Z's then partner, Ms E, was unfaithful he came to Ms XXXX for support. They had a sexual relationship and she became pregnant. Ms XXXX said that when she was about four months pregnant she thought that she and Mr Z might try to have a relationship, but he went back to Ms E.

[65] Ms XXXX said that because she was pregnant with her third child and the [Place A] property was advertised as being for rent to a family, she asked Mr Z to come with her to inspect it. She believed that she would have a better chance in the post-earthquake housing shortage if she presented as a family.

[66] The tenancy agreement was in her name only. While she lived at this property Ms XXXX said she had an on and off relationship with Mr Z. Ms XXXX said that when she enrolled her eldest daughter at high school Mr Z was named as father at her daughter's request because she has no contact with her birth father and Mr Z is like a father to her. In evidence she said that she had dishonestly recorded Mr Z's address as her own on this form.

[67] Mr Z then resumed his sexual relationship with Ms E. Ms XXXX said that he did not offer any financial support during her pregnancy and after the baby was born he did not want his details on the registration form. Mr Z had no contact with the baby for some three to four months. He then began to have weekly contact with the baby, eventually picking her up every Saturday to spend time with his family. This continued for the rest of 2012.

- [68] Ms XXXX said that she relied on her parents for support. They helped maintain the property at [Place A] by mowing the lawn and maintaining the large vegetable garden. They also bought her a car and paid for the repairs. Her mother paid doctor, optometrist and podiatrist accounts for her and the children as well as school and activity expenses, clothing, shoes and food.
- [69] From January 2012 Ms XXXX's parents moved items out of storage to the garage at [Place A] and paid her for the storage. Later they paid her broadband and landline accounts in exchange for the storage. Ms XXXX said that in 2013 she had debts which she was paying off weekly and was left with less than \$100 per week for food. Her bank statements show that while she lived at [Place A] she paid rent, power, food, school costs, Sky rental and \$20 per week towards a debt.
- [70] During 2013 she suffered from anxiety and panic attacks. She was physically and mentally reliant on her mother who assisted with the children and spent a significant amount of time with her.
- [71] At the end of 2013 Mr Z used the garage at [Place A] for storage space. They again had a sexual relationship and she found out four days before Christmas 2013 that she was pregnant. In February 2014 she was given notice to vacate the tenancy as the landlady needed the house for her daughter.

[Place C] 2 May 2014 – 31 July 2014

- [72] Ms XXXX lived in [Place C], the home of Mr Z's parents, from 2 May 2014 until the Zs' took possession of the rental property they purchased at [Place B].
- [73] On 27 June 2014 Ms XXXX told WINZ that she was in a relationship with Mr Z and that the move to [Place C] was temporary until she could move to the rental property. She understood that WINZ allowed her until September 2014, without any effect on her benefit, to make a firm decision in respect of the relationship with Mr Z. She regarded this as a trial period.
- [74] While she lived at [Place C] Ms XXXX enrolled A in day-care as [A] Z, and named Mr Z as her partner on a hospital outpatient form dated 16 May 2014.

[Place B]: August 2014

[75] Ms XXXX moved into [Place B] and shortly after she gave birth to B. On 2 October 2014 Ms XXXX told WINZ that she had abandoned the attempt to make the relationship work. Her benefits were cancelled from 26 November 2014.

The evidence of F

[76] Ms F gave evidence of the financial and emotional support that she and her husband gave Ms XXXX and her children. Ms F stated that during the time Ms XXXX lived at [Place A] she was depressed. Ms F spent significant time with her, caring for the children, shopping and dropping off groceries, and maintaining the vegetable garden on the property. Ms F said that they rented one of the garages at [Place A] and paid Ms XXXX, initially for the storage and then for her phone and internet in lieu of storage costs. She also paid a number of school expenses for the two older children.

[77] In 2013 when Ms XXXX suffered significant anxiety attacks Ms F gave her support and said that she took her to Accident and Emergency at times. This evidence is supported by hospital records.

[78] Ms F said that she was relieved that when Ms XXXX had to leave the property at [Place A] and that Mr Z's parents had offered their place for her to live in and subsequently their rental property.

[79] Ms F produced her bank statements going back to 2011. She had carefully annotated these bank statements and prepared a chronology.

[80] It was her evidence that the amount she spent at the supermarket and on vegetables during the relevant period exceeded what she would normally spend on herself and her husband. In her bank statements she marked all grocery, vegetable, and meat purchases and identified places where she had purchased meals for more than two people. She said that as she and her husband hardly drink any alcohol and do not smoke the amount spent is predominantly for food.

[81] She also said that a portion of the purchases were clothing and shoes for the children, after school activities and she identified medical and prescription payments for the children.

[82] In addition Ms XXXX's parents bought her a car and Ms F provided evidence that they had paid for repairs to the vehicle.

Evaluation of the evidence – financial interdependence

[83] James Reid's evidence that Ms XXXX did not spend an adequate amount on food to feed her family was given without reference to any recognised standard for measuring food costs and there is no basis for treating Mr Reid's opinion on household budgets as that of an expert.

[84] Although Ms F's evidence cannot be considered independent, it was coherent, consistent and supported by financial records and accounts. We accept that she provided support to her daughter. She stated that she and her husband maintained a productive vegetable garden at [Place A], purchased and maintained her car, paid school and activity related expenses and medical costs, bought food, and bought clothing for the children. This evidence was supported by the careful records she kept and produced of her expenditure during the relevant period. The only attempt to challenge this evidence was Ms North's assertion that some of the expenditure fell within what grandparents 'normally' do for their grandchildren. However Ms F agreed that school holiday treats and presents fell within this category and said that she had not included them in her records. We conclude that, if what Ms XXXX spent on food was less than could reasonably be expected, it was supplemented by her vegetable garden and assistance from her parents.

[85] The television accounts were in Mr Z's name and the addresses were always those of Ms XXXX. The Sky account was opened by Mr Z on 23 April 2013, some 18 months into the relevant period, and he was the only person with authority to deal with the account. While this shows that Mr Z had some knowledge of Ms XXXX's financial situation and a willingness to assume financial responsibility for a service of benefit to her, this evidence is not conclusive.

[86] Ms XXXX's bank statements demonstrate that she paid all accounts for regular outgoings such as power, phone and television during the relevant period. Although it appears that she did not pay rent for the period that she was living in [Place C], between 2 May 2014 and 31 July 2014, she paid \$80 per week for power. There is no evidence that Mr Z supported her during this

period and her bank statements show payments to school, payments for baby and maternity requirements, food, petrol, pharmacy and incidentals.

- [87] Ms XXXX was not asked whether rent was paid during this period and, if so, by whom. Even if Mr Z's parents did not charge rent during this period, we would consider that this was assistance provided by them and cannot be attributed to Mr Z; they were the grandparents of some of Ms XXXX's children and could reasonably be expected to care for their wellbeing.
- [88] We find that Ms XXXX received support from her parents and Mr Z's parents in many forms during the relevant period. We are not satisfied that there is any evidence that she was supported financially during the relevant period by Mr Z. Nor is there evidence that their finances were merged to the extent that the type of financial engagement and interdependence referred to in *Ruka* is apparent.
- [89] We considered whether there is any evidence that Ms XXXX structured her financial situation to qualify for benefits. However the Chief Executive decided not to hold Mr Z jointly liable for the debt because he concluded that there was not sufficient evidence that Mr Z was aware that Ms XXXX was receiving a benefit. In these circumstances we are satisfied that there is no basis for finding that Ms XXXX assumed financial responsibility or concealed any support from Mr Z in order to qualify for a benefit.

Evaluation of the evidence –cohabitation and mutual commitment

- [90] We have first considered the period when Ms XXXX acknowledged that she was trialling a relationship. Based on the Ministry's case note of 7 July 2014 we are satisfied that Ms XXXX was entitled to believe that WINZ allowed her a trial period until mid-September to determine whether the trial relationship would become permanent. We note that the only record of the Ministry providing Ms XXXX with information on what constitutes a relationship in the nature of marriage under the Act is on 2 October 2014. As this was after she stated that the relationship had ended we are not satisfied that she was properly informed of the criteria applied.
- [91] In these circumstances the only basis on which we could find that Ms XXXX is not entitled to the benefit during the trial period is if she misrepresented her

situation and was in a relationship in the nature of marriage prior to the acknowledged trial period.

- [92] The Chief Executive submits that there is an overwhelming amount of evidence supporting the conclusion that Mr Z's ordinary place of residence was with Ms XXXX during the relevant period. The documentary evidence relied on is the hospital admission forms, TV channel and SKY subscriptions, early childhood and high school enrolment forms and text message records.
- [93] As we observed, the documentary evidence was presented selectively. The hospital records relied on were not complete and there were only two occasions when Mr Z's name appeared before that of Ms XXXX's mother. There are hospital admission forms recording Mr Z as 'partner' and describing Ms XXXX as being in a de facto relationship but the only forms that give Mr Z's name as the first contact are dated 21 December 2013 and 16 May 2014. The first date was when Ms XXXX had a scan in early pregnancy. The second date is four weeks before Ms XXXX notified WINZ that she was trialling a relationship. When Mr Z was named on hospital admission forms, his address was his parents' house. Although Ms XXXX lived at this address, [Place C], for a short time she did so during the period when she advised WINZ that she was trialling a relationship.
- [94] We accept the explanation for the high school enrolment form for Ms XXXX's daughter identifying Mr Z as her father and do not consider this is indicative of a committed relationship between him and Ms XXXX. No other records were produced for either her enrolment or her school age sibling.
- [95] The text messages cover a short period, most of which coincides with the trial period. They contain terms of endearment, references to shared meals, picking up children and 'home'. We accept that these indicate a level of involvement but a relationship in the nature of marriage requires a commitment and involvement that is more than transitory. There is rarely a clear start date for a relationship, particularly when parties already know each other well. We do not accept that this 'slice of time' evidence demonstrates that Ms XXXX was in a relationship in the nature of marriage, with the merging of lives implied by that term, in the period between early April and the end of June 2014, immediately prior to the trial period.

- [96] The witnesses for the Chief Executive describe seeing Mr Z at each of the places Ms XXXX lived during the relevant time. For the reasons given, we do not find Ms E a credible or reliable witness. The only other direct evidence called was from C and D and, for the reasons given, we give limited weight to their evidence. Evidence of intermittent observations of Mr Z there is not sufficient to support a finding that he and Ms XXXX were in a relationship in the nature of marriage at the time.
- [97] In relation to the period before the trial relationship we accept that Mr C saw Mr Z at [Place A] but in the absence of anything other than his brief and occasional conversations with Mr Z we do not accept this as convincing evidence of a committed and supportive relationship. In relation to the time after the trial period, Mr D's evidence is not sufficiently compelling to demonstrate that from 2 October 2014 to 26 November 2014 Ms XXXX was in a relationship in the nature of marriage. There is no other credible evidence to support his account; the record of the text messages stop at 17 July 2014 and the bank statements for Ms XXXX and Mr Z obtained by the Ministry go to the end of September 2014.
- [98] It is apparent that Ms XXXX and Mr Z have had an intermittent sexual relationship and friendship over many years and they raise Ms XXXX's children jointly. However, the evidence of cohabitation amounts to observations of Mr Z at Ms XXXX's home intermittently for the first 18 months of the relevant period and for 6 weeks after she told WINZ that she had given up on any relationship with him. In circumstances where Mr Z has children at the address and is assisting with their care frequent visits are reasonable. While the Court in *Ruka* found that a sexual relationship is a significant indicator, in the absence of financial interdependence and ongoing mutual commitment and support we are not satisfied that this indicator alone justifies a finding of a relationship in the nature of marriage under the Act.
- [99] Accordingly we are not satisfied that Ms XXXX was in a relationship in the nature of marriage during the relevant period.

Decision

- [100] The appeal is granted.

- [101] Ms XXXX is entitled to payment of sole parent support, accommodation supplement and temporary additional support between 26 November 2011 and 24 November 2014.

Observation

- [102] Mr Reid's second interview with Ms XXXX took place on the same date that a letter was sent to her telling her that her sole parent support benefit had been stopped, 26 November 2014. On the same day, he interviewed her landlady who was not called to give evidence. On 28 November 2014, Mr Reid interviewed C and the two real estate agents.
- [103] At this interview Mr Reid confirmed to Ms XXXX that during his investigations he contacted an ex-partner against whom she has a protection order. Mr Reid said that under s 12 of the Act he can contact anyone who may be able to assist him with his investigation. When Ms XXXX said that as a result she was now having to deal with him again, Mr Reid said she should contact the police or his manager if she had an issue with his actions. It was immediately after this that Mr Reid told Ms XXXX that her benefit would be stopped. Such disregard for the safety of the appellant and her children is of great concern.
- [104] We are also concerned about the process Mr Reid followed in his interviews and the manner in which he determined the outcome. Ms Boele asked Mr Reid about the way he had reached his conclusion. She referred Mr Reid to the transcript of his second interview with Ms XXXX where he stated: "So we are establishing an overpayment which you're going to have to pay back. You have review rights". Mr Reid followed this with: "And then I have to review – refer it to our solicitor and see if we prosecute you, based on all the documents that you filled in falsely".
- [105] Ms Boele asked Mr Reid if he liked to take time to consider his decision after an interview. He responded that he liked to really involve himself in his cases. He said that he knew that at the end of that interview there was evidence to prove a relationship in the nature of marriage. In his opinion, a gap between the interview and making the decision puts pressure on the client. He said that the decision is usually clear and that it is not premature to tell the person because he also tells them that they have review rights. When asked why he continued to conduct interviews after he had made the decision, Mr Reid said that it 'would do the person a disservice if their benefit continued'. His

explanation is patronising, the benefit should not have been discontinued for the reasons discussed.

- [106] Interviewing persons potentially in a relationship in the nature of marriage requires skill and objectivity.
- [107] It also requires that the interviewer is functioning in a managed environment. It is not appropriate to grant an interviewer power over interview subjects to make statutory decisions as they go; premised on their own evaluation of how effective their interview techniques have been.
- [108] We find it most concerning that either Mr Reid predetermined the outcome, or made his own evaluation of the effectiveness of his interview, and felt free to inform Ms XXXX the outcome would be that her benefit is suspended, and an overpayment established. As far as we are aware, the invariable practise of Ministries and Departments in similar situations is to conclude such interviews on the basis they will be considered, a decision or recommendation made and reviewed within the hierarchy of the Ministry or Department.
- [109] If Mr Reid had no authority to suspend Ms XXXX's support and establish a debt, he inflicted the taint of predetermination on the Chief Executive's delegates who did have the authority to make those statutory decisions.
- [110] The reality is that Mr Reid either lacked the skills to conduct his interview with Ms XXXX, or chose not to conduct it properly. The evidential value of the interview was severely compromised by his conduct. Had it been reviewed by an appropriate superior, that would have been obvious. Unfortunately this is not a new situation. It is now some 20 years since the Court of Appeal pointed out that leading questions regarding being in a relationship will lead to unsatisfactory investigations. In *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 (CA) Henry J made these observations at p 168:

This prosecution and others have hinged on whether or not the defendant had been in a relationship of the nature of marriage. That is because the practice of the department is to include a question to that very effect in the form of application, and the further practice to charge a defendant with failing to disclose that fact. As is now abundantly clear the concept of such a relationship and what facts need to coexist to establish it is a difficult one. In many cases its existence in a particular set of circumstances would be debatable. It would be beyond the ability of many beneficiaries to assess the issue properly

in a complex situation such as we have here. Section 127 is designed to prevent the fraudulent provision or non-disclosure of information which is relevant to a benefit entitlement. In this case what is relevant is the information which the Director-General can properly take into account before making a decision that the relationship in fact exists, and then a further decision whether or not to exercise his discretion to regard the parties as husband and wife. **We would have thought that the application form could be drafted and interviews constructed to achieve that object**, as could a charge when instituting a prosecution. Any prosecution would then be directed to the fraudulent provision or non-disclosure of pertinent and identified information. (emphasis added)

- [111] Those observations from the Court of Appeal are obvious, compelling, and must be understood by an investigator conducting an effective interview in any case like the present case. Instead, Mr Reid seems to have simplistically thought that leading questions proposing someone is in a relationship are effective. It was Mr Reid's duty to understand what a relationship in the nature of marriage is in law, and conduct interviews into the relevant factors. He did not do that.

Costs

- [112] The Appellant may apply for costs, which must be accompanied by a calculation of actual costs within 15 working days of this decision.
- [113] The Respondent may within a further 10 working days reply to the application.
- [114] Either party may then request a telephone conference to discuss how the application for costs should be heard; if they agree, it may be heard on the papers without further submissions.

Dated at Wellington this 20th day of October 2017

S Pezaro
Deputy Chair

C Joe JP
Member