

[2018] NZSSAA 38

Reference No. SSAA 31/16

**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**

**Mr G Pearson** - Chairperson

**Mr K Williams** - Member

**Hearing** on the papers

## **DECISION**

### **Background**

- [1] This appeal concerns a claimed overpayment, and underpaid rent for social housing. The issue arises as the Ministry says the appellant was in a “relationship in the nature of marriage” with XXXX. If that is correct, she was overpaid unemployment benefit and jobseeker support, and underpaid income-related rent.
- [2] The appellant disputes she was in a relationship with XXXX, but she has not disputed the effect of being in a relationship on her benefit and rent, or the Ministry’s calculations. The figure the ministry relies on after some adjustments is the sum of \$25,154.82.
- [3] Accordingly, the sole issue to determine is whether the appellant was in a “relationship in the nature of marriage” with XXXX during the period from 13 January 2013 to 7 April 2015. The appellant has contended she was never in such a relationship with XXXX, rather than disputing the period.

## The law

- [4] Given the scope of the dispute, it is sufficient to refer briefly to the legislation. Section 63 of the Social Security Act 1964 is the provision in dispute, the relevant parts 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 ...
- [5] The Court of Appeal's decision in *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 is the leading authority on what the phrase "a relationship in the nature of marriage" means in section 63. However, the context in *Ruka* was quite different from this case. The appellant in *Ruka* was the victim of extreme domestic violence and the case considered whether she was in a relationship in the nature of marriage with her abuser.
- [6] Unsurprisingly, the Court considered the analysis required a comparison with a legal marriage. Richardson P, and Blanchard J observed at 162:

... 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.

- [7] 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.

- [8] As that passage indicates, the Court took the view that in the context of the Act financial interdependence was a central consideration.<sup>1</sup> The reasoning of the majority was that:<sup>2</sup>

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

- [9] Ultimately, the Court of Appeal found that the Courts below had applied the wrong test by failing to look primarily at the financial aspects of the relationship.<sup>3</sup>

- [10] The Court noted that strategies to withdraw support to obtain a benefit would not be effective. However, it is clear that the central feature was a commitment to financial responsibility, including a commitment to support in future adverse circumstances.

- [11] However, financial commitment was not sufficient to find there was a relationship in the nature of marriage. The Court also found emotional commitment was essential:<sup>4</sup>

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

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<sup>1</sup> *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 at 156, where Richardson P and Blanchard J discuss the central importance of this aspect.

<sup>2</sup> At 161.

<sup>3</sup> At 163.

<sup>4</sup> At 161–162.

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.

- [12] Ultimately, the Court emphasised the merging of lives, as noted in [6] above.
- [13] The Court of Appeal in *Ruka* considered some of the earlier authorities such as *Thompson v Department of Social Welfare* [1994] 2 NZLR 369, which placed some emphasis on a "checklist". While acknowledging the checklist approach may "give assistance in deciding some cases", the Court considered a better approach was the more comprehensive consideration set out above.

#### **Procedure**

- [14] This appeal has had a concerning history. It was set down for hearing in May 2016, however the section 12K report was not completed in time by the Ministry. The next significant point was reached in February 2017, when the report was still not complete, despite the appeal being set down for hearing on 16 February 2017. The Authority set out its concerns in a minute dated 7 February 2017, and indicated if there was to be no section 12K report the Authority would have to proceed regardless. The section 12K report and the Ministry's briefs of evidence were completed, though the hearing was vacated.
- [15] In May 2017, the Authority sought to hold a telephone conference so that the Authority could discuss the issues, and review what was required for the appellant to present her case. As a preliminary matter, the Authority issued directions identifying the apparent issues, and expressing concerns regarding the Ministry's evidence. The concerns expressed extended to stating the witness statements fell "far short of the standard expected by any judicial authority". The directions identified that the statements included sections using identical words, while purporting to be the statements of different people, and failed to explain unsupported assertions.
- [16] The Authority took the view that as the appellant and XXXX were not represented it would use its inquisitorial powers to decide the appeals,

and examine the appellants and a representative of the Ministry. The Ministry's representative would be expected to address concerns the appellant and XXXX raised regarding the Ministry. The directions noted that the appellant and XXXX were not expected to have legal skills, and the Authority would conduct the hearing to ensure that the appellants were treated fairly. The directions noted that at the telephone conference:

The Authority will explain to the appellants it cannot deal with this appeal fairly without trying to hear evidence from them, and witnesses for the Chief Executive.

The Authority will also wish to ensure the appellants understand this Authority is completely independent of the Ministry of Social Development. It is responsible for finding out what the facts are and then making a decision based on law.

The Authority will also explain the legal issues, if the appellants have any questions.

[17] The appellant indicated she would not be attending the telephone conference, and considered she would "be on the back foot". She said she only wanted a hearing on the papers.

[18] The Authority then issued further directions, and explained the importance of the appellant and XXXX participating in their appeals, stating:

The appellants are the only people who really know whether they were in a relationship in the nature of marriage. They have already provided some statements denying they were in such a relationship. However, there is nothing they have presented that proves beyond question they were not in a relationship in the nature of marriage.

If appellants are not willing to have their claims tested by questioning, the Authority cannot give very much weight to their untested denial.

If the appeals are heard on the papers as they stand the appeals will almost certainly be dismissed. That is because the appellants have a case to answer, and if they are not been prepared to have their answer tested, it is likely to be because they do not have a good answer.

[19] The Authority also noted in respect of the appellant's concerns:

This authority is required to accommodate persons with vulnerabilities, and it will not allow any unfair treatment of them.

If the appellants were not in a relationship in the nature of marriage it is in their interests to attend a hearing, and support their case. If in fact they were in a relationship in the nature of marriage, it is of course unsurprising that they may choose not to attend.

If one of the appellants wishes to attend, and the other refuses, the Authority would issue a summons to require the attendance of the other party.

[20] XXXX appeared to reply for the appellant, and the appellant also replied. They expressed the following views:

[20.1] As a matter of principle, a person could not prove they were not in a relationship with someone.

[20.2] The Authority was not independent and should have made a decision in favour of the appellant before that point.

[20.3] The Authority would decide in favour of the Ministry.

[21] After further correspondence regarding those issues from the Case Manager, the appellant said she would attend a hearing. Subsequently, she said she would not attend, as she and XXXX did not think their attendance would change the outcome of the appeal.

[22] There is no alternative to hearing the matter on the papers, or compelling the appellant and XXXX to attend using summonses. Ultimately, we must accept that the appellant and XXXX are the only persons who know what their relationship was with any certainty. We do not consider it would be appropriate to compel their attendance given the clear notification regarding the effect of non-attendance.

## **Discussion**

### *The Ministry's evidence*

[23] The Ministry conducted a substantial investigation into the appellant and XXXX's circumstances. As a summary, the information produced in the investigation included:

[23.1] Some coincidence of addresses and telephone numbers used by the appellant and XXXX. There was also some evidence of cohabitation.

[23.2] The appellant and XXXX were identified as next of kin for certain purposes.

- [23.3] The appellant was involved in the administration of a rental property with XXXX.
- [23.4] Some evidence of shared household expenses between the appellant and XXXX.
- [23.5] The appellant having authority over XXXX's television account.
- [23.6] Joint attendance at a family event.
- [23.7] Statements from third parties who think the appellant and XXXX were life partners.
- [23.8] Interviews with XXXX and the appellant. They each denied being life partners, and generally denied or explained information to the contrary. The interviews were not particularly well directed to the legal issues of what amounts to a relationship in the nature of marriage.

*The appellant's evidence*

- [24] The appellant filed an unsworn statement to the effect that XXXX is gay, they did not share financial responsibilities, and any dealings between them amounted to no more than friendship.
- [25] She said she could establish some of the Ministry's witnesses would retract what they said, or say they said things to the Ministry out of ignorance and fear.
- [26] The appellant said the Ministry and the Benefits Review Committee acted unfairly.

*Evaluation of the evidence*

- [27] We must decide whether the appellant and XXXX were probably in a "relationship in the nature of marriage" at the relevant time. We must consider all the material we have to make that decision.
- [28] The evidence the Ministry presented did not establish to a point of certainty that the appellant and XXXX were in a relationship in the nature of marriage. Typically, in cases such as this one, the perceptions of third parties may or may not reflect the true nature of the relationship. We are always mindful that the relationships people form are varied, and are sometimes fluid, even between the same people. For that reason, what

the persons themselves say, measured against the objective evidence of how they related, is often critical. That is so in this case.

[29] We have no doubt that viewed on its own, the perceptions of the Ministry's witnesses, and the documentary evidence the Ministry has produced, point strongly to the appellant and XXXX being in a relationship in the nature of marriage. We have considered the denial made in the appellant's statement, and by both her and XXXX in their respective interviews. To find the relationship between the appellant and XXXX is anything other than a relationship in the nature of marriage, their denials would have to be tested. Their denials are not strong, as they do not demonstrate the Ministry's evidence was wrong, or that there was some obvious misunderstanding on the part of the Ministry. Witnesses, who are likely to know, say the appellant and XXXX were in a relationship in the nature of marriage. Their denials can carry little weight unless tested by cross-examination, and are, to a significant extent, directed to challenging the motives of the Ministry rather than addressing facts. The Authority has repeatedly pointed out to the appellant and XXXX that if they do have an explanation, they need to attend a hearing and present it. However, what is in their interests is a matter for them to decide.

[30] We are simply left with strong evidence of a relationship in the nature of marriage, and a denial that the appellant will not support by attending a hearing. It is inevitable we must dismiss the appeal.

**Order**

[31] The appeal is dismissed.

[32] We reserve leave to deal with any issues of quantification following our decision.

**Dated at Wellington this 31 day of July 2018**

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**G Pearson**  
Chairperson

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**K Williams**  
Member

