

[2018] NZSSAA 39

Reference No.SSAA 30/16

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 of benefits. The issue arises as the Ministry says the appellant was in a “relationship in the nature of marriage” with XXXX. If that is correct, he was overpaid sickness benefit, jobseeker support, accommodation supplement and temporary additional support. A second issue is an allegation the appellant received undeclared rent that affected his entitlement to benefits.
- [2] The appellant disputes he was in a relationship with XXXX, but he has not disputed the effect of being in a relationship on his benefit entitlements, or the Ministry’s calculations. He says he received no net rent.
- [3] The figure the ministry relies on for overpaid benefits is \$30,427.22.
- [4] Accordingly, the first 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 he was never in such a relationship with XXXX, rather than disputing the period.

- [5] Second, we must determine whether the appellant did receive rental income, and, if so, how much.

The law

- [6] Given the scope of 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 ...

- [7] 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 *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.

- [8] Unsurprisingly, the Court considered that 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.

[9] 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.

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

... 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.

[11] 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.³

[12] 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.

¹ *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.

² At 161.

³ At 163.

- [13] 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:⁴

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.

- [14] Ultimately, the Court emphasised the merging of lives, as noted in [8] above.
- [15] The Court of Appeal in the *Ruka* case 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.
- [16] The issue relating to rental income is a question of fact, without any significant legal complexity.

Procedure

- [17] 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

⁴ At 161–162.

12K report and the Ministry's briefs of evidence were completed, though the hearing was vacated.

[18] 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 his 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.

[19] 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.

[20] The appellant indicated he would not be attending the telephone conference, and considered the Authority had all the information it required.

- [21] 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.

- [22] 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.

- [23] The appellant indicated he would not attend a hearing, expressing the following views:

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

[23.2] The Ministry had falsified statements.

[23.3] The Authority was not independent.

[23.4] The Authority would likely decide in favour of the Ministry, and it was "all too late now".

- [24] After further correspondence regarding those issues from the Case Manager, the appellant said he would attend a hearing. Subsequently, he said he would not attend, as he and XXXX thought the Authority was a waste of time, as it had a dismal record of upholding appeals.
- [25] Accordingly, 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. The appellant also knows what his rental income was. We do not consider it would be appropriate to compel the appellant and XXXX to attend given the clear notification they had regarding the effect of non-attendance.

Discussion

The Ministry's evidence – relationship in the nature of marriage

- [26] The Ministry conducted a substantial investigation into the appellant and Ms XXXX's circumstances. As a summary, the information produced in the investigation included:
- [26.1] Some coincidence of addresses and telephone numbers used by the appellant and XXXX. There was also some evidence of cohabitation.
- [26.2] The appellant and XXXX were identified as next of kin for certain purposes.
- [26.3] XXXX was involved in the administration of a rental property with the appellant.
- [26.4] Some evidence of shared household expenses between the appellant and XXXX.
- [26.5] XXXX had authority over the appellant's television account.
- [26.6] Joint attendance at a family event.
- [26.7] Statements from third parties who think the appellant and XXXX were life partners.
- [26.8] Interviews with the appellant and XXXX. 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 Ministry's evidence – rental income

[27] The appellant's bank accounts showed regular deposits ranging from \$331 to \$335 per week.

[28] Statements were provided by persons who said they were tenants in the appellant's property and they paid rent. Some confirmation was provided by the Tenancy Tribunal's records, and evidence the appellant funded mortgage payments from a source other than his benefit. The Ministry pointed to the mobility of statements the appellant made to its investigators.

[29] The Ministry analysed the evidence and said it established that:

[29.1] there was one property with three rental units (house, cottage, and sleep-out);

[29.2] the difference between rental income and the allowable expenses should be offset against benefit entitlement (on the appropriate scale); and

[29.3] it quantified rent and deducted interest and rates as expenses.

The appellant's evidence

[30] The appellant filed an unsworn statement. The key elements of it were:

[30.1] The Ministry's case was flawed, and the Ministry had a "Millionaires Club", apparently being an allegation that Ministry staff were rewarded for successful investigations.

[30.2] He had disclosed all rental income; his property was inhabited by squatters who were growing cannabis, and wrecked the property. The Ministry took the word of the squatters.

[30.3] He was providing accommodation for "needy beneficiaries" who did not pay. Nobody has been injured, and he is an asset to New Zealand.

[30.4] He received rent of \$320 per week, but there was no income from the property.

[30.5] He is gay.

[31] He later wrote to the Authority saying he only owned one property.

Evaluation of the evidence

[32] 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.

[33] 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.

[34] We have no doubt that viewed on its own, the perceptions 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 appellant’s statement, and the respective interviews of XXXX and the appellant. To find the relationship between the appellant and XXXX was 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.

[35] We are simply left with strong evidence of a relationship in the nature of marriage, and a denial, which the appellant will not support by attending a hearing.

[36] In relation to the rent, the appellant's explanation is not coherent or consistent. He had an obligation to keep accurate records for tenants relating to rental receipts, and both receipts and expenses for making tax returns. If the appellant was in a position to refute the Ministry's evaluation of the records it did obtain, we can only suppose he would have done so. Instead he has made accusations against Ministry staff, and his former tenants, and failed to deal with the records relating to his rental activity. We must accept the evidence the Ministry presented in these circumstances.

[37] It is inevitable that we must dismiss the appeal.

Order

[38] The appeal is dismissed.

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

Dated at Wellington this 31 day of July 2018

G Pearson
Chairperson

K Williams
Member