[2018] NZSSAA 53

Reference No. SSA 162/17

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

Mr C Joe - Member

Appearances

For the Appellant: Mr Howell (with the appellant)

For Chief Executive of the Ministry of Social Development: Mr R Signal

DECISION

Background

[1] The essential facts are that the appellant is married. Her husband left New Zealand on 10 April 2017 and told her that he was going to look after his mother who was ill. The appellant remained in New Zealand with two dependent children. The appellant and her husband have four children, but two are no longer dependent.

[2] After about six weeks the appellant's husband sent an email to the Benefits Rights Service, saying he "will not come back to New Zealand, due to the continuation of health problem of my sick mother." He asked the service to help his family get support at the rate of a sole parent benefit. That entitlement would only be available if he and his wife were living apart.

[3] When he left, the appellant had expected her husband to be away for about a month. His travel had been funded by his uncle. He did not return, and on 28 November 2017, the appellant travelled to the country where her husband was located with the two dependent children. Family members funded this

travel. The appellant and her husband discussed their future while she was there, and she returned to New Zealand on 2 February 2018. Her husband remains with his mother.

[4] The question we must determine is whether the appellant is entitled to sole parent support, or, because of her relationship with her husband, is entitled only to jobseeker support at half the married rate. In effect, this turns on whether the appellant and her husband are "living apart".

The legal issue

[5] The parties agree that to qualify for sole parent support the appellant must either meet the requirements of ss 20A(a) or 63(a) of the Social Security Act 1964 (the Act). The former would entitle the appellant to the benefit, and the latter provide a discretion to allow that result. The parties agree the only contentious words in both provisions are "living apart". Both provisions use those words, and, given they are in the same Act, the parties agree they will carry the same meaning. It appears that their view is correct, certainly in the context of this matter.

[6] The only decision that considers those words in the Act to which the parties referred us was *Director-General of Social Welfare v W* [1997] 2 NZLR 104. It is a decision of the High Court that discusses the words "living apart" in s 63(a).

[7] The purpose of the words is to define when people who have been in a relationship in the nature of marriage will be treated as individuals, due to a breakdown in the relationship. In the *W* case McGechan J recognised that "living apart" could simply mean spatial separation, but found in context more was required. In that case, a couple lived apart, one in American Samoa, and the other in New Zealand. Their separation was not only spatial, they also kept separate finances. However, the separation was for a shared purpose, not due to the emotional relationship breaking down. The wife was living in American Samoa with the intention of gaining United States citizenship, and then returning to New Zealand.

[8] McGechan J found that to come within the words "living apart" means that "at least one side [must regard] the marriage tie as dead."

[9] Somewhat surprisingly, the Ministry cited authority dealing with "living apart" in the context of whether cohabitation had resumed, thus altering the period of separation required to qualify for divorce under laws that have long since

been repealed. The particular authority cited was *Sullivan v Sullivan* [1958] NZLR 912 (Court of Appeal). That line of authority is not relevant, it was not discussed in the *W* case, and concerned a very different statutory context. We are obliged to apply the approach in the *W* case. We have to determine whether either the appellant or her husband regarded their marriage tie as dead, and, if so, when that was the case.

[10] The Ministry also cited *Excell v Department of Social Welfare* HC Hamilton AP 98/90, 4 October 1990. That case is not relevant as it noted that s 63 was not of any consequence. Regardless, the case concerned whether parties were "living together", not whether they had started living apart.

Discussion

Facts

[11] We heard from the appellant, and an officer in the Ministry. At the outset, it is necessary to note that the appellant speaks English, but there are limits to her facility in the language. The hearing was conducted with the aid of an interpreter.

[12] It became apparent to us that the appellant's capacity to communicate in English was limited. It was apparent that her agent had misunderstood what she communicated during his dealing with the Ministry on her behalf. The Ministry officer who gave evidence accepted that his discussion with the appellant was not in depth, and he had not sought to search into details of the appellant's relationship with her husband. Accordingly, our evaluation is that the only reliable account is the one we heard at the hearing with the aid of the interpreter. We find the appellant's evidence plausible, and it is fully consistent with the documented circumstances; we accept her account.

[13] The appellant says she supported her husband going to look after his sick mother, and expected him back in New Zealand after about a month. He did not return, and claimed his mother needed ongoing support. His mother is frail and elderly, with failing eyesight. However, she does not have health issues that mean she has a limited time to live.

[14] The appellant and her husband have an interfaith marriage (Moslem and Christian). For that reason, she has only met her mother-in-law once, the difference in faith is an issue for the respective families. However, the appellant and her husband have lived in New Zealand, and a large city overseas, so it has been possible to keep the families separate. Between

themselves, the appellant and her husband have managed their interfaith relationship without any particular difficulties.

[15] When the appellant arrived in the country where her husband was living she stayed with her sister. Her husband visited for about two of the six or so weeks she was in that country. She had anticipated she and the children, or just the children, would go to see her husband's mother, who lived in a village some distance from the city where she was staying. However, none of them did so. The key things that transpired were:

[15.1] Her husband had developed a more intense interest in his religion. The appellant was concerned about her children being influenced in that regard, so she did not want them to go to visit their grandmother.

[15.2] The appellant raised the question of divorce. Her husband deflected the issue, but did not provide any assurance regarding the marriage.

[15.3] The appellant's husband left, returning to his village, saying he needed to be with his mother.

[16] The appellant has returned to New Zealand. Her husband makes intermittent contact, but it is more with the children than her.

[17] The appellant's husband has given no indication he will return to New Zealand, or take any other steps to resume his life with the appellant.

We are satisfied the appellant and her husband are living apart

[18] Before discussing the test for "living apart", we note that s 20A(a) requires, in this case, that the appellant must be the mother of dependent children to be eligible for sole parent support. There is no dispute about that. She must have also lost the support of, or been inadequately maintained by, her husband. We accept that her husband has provided no financial support or maintenance since he left, and has not provided any other kind of support either.

[19] We must simply address the question of whether the appellant or her husband regard the marriage tie as dead. We are satisfied that the appellant's husband has abandoned the appellant. His actions are the most important evidence; he now lives in another country, and chose to have limited contact when the appellant visited. The appellant did not want that outcome. She went to see him, and was rebuffed. He made it clear that he preferred to be with his mother, rather than his wife and children. His equivocal response to the

discussion on divorce further supports the view that he has no commitment to the marriage.

[20] The appellant did not seek the geographic separation, or the lack of financial and emotional support. However, we are satisfied her husband has resolutely committed to that position. There is no point speculating as to what would happen if he changed his mind, or returned to New Zealand. The short point is that the appellant has tried to alter the situation, but that is not something she can achieve.

[21] We now turn to consider when the appellant or her husband first considered their marriage tie dead. We do not have the advantage of evidence from the appellant's husband, and must largely rely on what we know of his conduct. The starting point is that he left New Zealand; apparently, for a legitimate family purpose. The appellant supported him. Clearly, the appellant had some misgivings by the time she travelled overseas with her children. That was some eight months after her husband left. In our view, during that visit, when the appellant's husband left the appellant and the children to return to his mother it was probably because he regarded the marriage tie as dead. We find:

[21.1] he decided he was no longer committed to the marriage; and

[21.2] the appellant must have appreciated she could not reasonably anticipate that situation changing unless her husband changed his views.

[22] The appellant was not entitled to a benefit until she returned to New Zealand. Accordingly, we consider she was entitled to a sole parent benefit from the date she returned to New Zealand. We understand that was on 2 February 2018.

Decision

[23] The appeal is allowed. The appellant is entitled to sole parent support from 2 February 2018.

Notice

[24] We have had to decide this appeal on limited information, given that the appellant's husband's attitudes are the key factor. We have decided he has abandoned the appellant, and their marriage ties are dead, but without hearing from the appellant's husband.

[25] We wish to give the appellant very clear notice that if there is any evidence that in fact there is an ongoing relationship between her and her husband, she can expect to have support at the sole parent rate terminated, and overpayments recovered. For example, if she were to begin supporting her husband financially it would be strong evidence the marriage ties are not regarded as dead. She has an obligation to inform the Ministry if there is any change in the relationship with her husband, and that does not require that they live together. The level of support depends on the marriage ties being dead.

Dated at **Wellington** this 19th day of October 2018

G Pearson
Chair

K Williams
Member

C Joe JP
Member