[2015] NZSSAA 095

Reference No. SSA 121/14

IN THE MATTER of the Social Security Act 1964

AND

IN THE MATTER of an appeal by **XXXX** of Whangaparaoa against a decision of a Benefits Review Committee

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Ms M Wallace - Chairperson
Mr K Williams - Member

HEARING at **AUCKLAND** on 11 December 2014

APPEARANCES

The appellant in person
Ms P Siueva for the Chief Executive of the Ministry of Social Development

DECISION

Introduction

[1] The appellant appeals against a decision of the Chief Executive upheld by a Benefits Review Committee to deduct the full amount of the United Kingdom pension received by the appellant from his entitlement to New Zealand Superannuation.

[2] The appellant says that the Additional pension he receives from the United Kingdom should not be deducted from his entitlement to New Zealand Superannuation as he received that pension as a result of voluntary contributions.

Background

[3] The appellant was born in the United Kingdom. We understand he lived and worked there until November 1987 when he emigrated to New Zealand.

[4] The appellant was granted New Zealand Superannuation from 5 December 2013 at the living alone rate. He was advised that the full amount of the pension he received from the United Kingdom would be deducted from his entitlement to New Zealand Superannuation. As at 29 September 2010, his pension payment from the United Kingdom was made up as follows:

Basic State Pension	£ 87.89	
Additional State Pension	£ 60.15	
Graduated Retirement Pension	£ 6.34	
Total	£154.38	per week

[5] The appellant sought a review of this decision. The matter was reviewed internally and by a Benefits Review Committee. The Benefits Review Committee upheld the decision of the Chief Executive. The appellant then appealed to this Authority.

[6] The appellant was employed by International Computers Limited (ICL) in the United Kingdom from 1966. He left for a short period in or about 1969 but resumed employment with ICL a short time later and continued to work there until 1987 when he emigrated to New Zealand. The appellant said that when the Government of the United Kingdom replaced the Graduated Pension Scheme with the State Earnings Related Pension Scheme (SERPS) in 1978, an exception was made whereby employees who belonged to an approved work-based scheme were not obliged to contribute to the Government scheme, provided the work-based scheme was the equivalent to or better than the Government scheme.

[7] The appellant says ICL was one employer that contracted-out of the Government scheme and provided a work-based scheme. He contributed to this scheme. The appellant said that at the time of the change he read the relevant legislation. It occurred to him that there was nothing stopping him joining the State scheme as well as being a member of his employer's scheme. Up until the point that he resigned from ICL, he contributed to both the ICL scheme and the Government scheme. His payments to the Government scheme were completely voluntary. Therefore, he requests that the portion of the Additional pension he receives that is derived from voluntary contributions not be deducted from his entitlement to New Zealand Superannuation.

[8] On behalf of the Chief Executive it is submitted that there is no evidence that the National Insurance contributions the appellant made, which resulted in his entitlement to an Additional pension, were derived from voluntary contributions.

[9] It is further submitted that the letters from the United Kingdom Pension Service to the appellant indicate that he is entitled to an Additional State Pension "*free of any CODs*" (contracted-out deductions). The information suggests that the appellant's particular ICL pension was not a scheme that met the contracting-out requirements and that the National Insurance contributions made by the appellant from 1978 until 1987 were compulsory.

[10] A variety of information has been provided relating to SERPS.[1] In summary:

- From 1961 to 1978 an earnings-related pension scheme, in addition to the basic pension, known as the Graduated Pension Scheme was in place in the United Kingdom.

- In 1978 the Graduated Pension Scheme was replaced by the SERPS scheme. This scheme also provided for an earnings-related pension on top of the basic pension.

- Once the SERPS scheme was introduced, an employer was able to contract out of the SERPS regime provided they had in place an alternative scheme which met certain requirements.

- Where an employee was a member of a contracted-out scheme, they and their employer paid a reduced rate of National Insurance contribution, designed to reflect the cost of providing the benefits forgone.

- When a person reaches pensionable age, the total amount of Guaranteed Minimum Pension is subtracted from the total amount of Additional State pension built up between 1978 and 1997. This is referred to as a "contracted-out deduction".

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[1] For example: UK Pension Service publications "A detailed guide to State Pensions for advisers and others", (August 2008) and "A Guide to State Pensions" (April 2004);
Standard Note SN/BT 2674, State Second Pension: Contracted-out deductions (House of Commons Library).
Standard Note SN 04956, Guaranteed Minimum Pension (House of Commons Library).

- When the contracted-out deduction is subtracted from the Additional State pension, the remaining Additional State pension includes an increase linked to prices.

- The information provided does not indicate whether or not it was possible for an employee to make voluntary contributions to the SERPS.

Decision

[11] Section 70 of the Social Security Act 1964 provides for benefits received from overseas to be deducted from entitlement to New Zealand benefits in certain circumstances. The essential elements of s 70 are that where:

- a benefit or pension or periodic allowance granted overseas which forms part of a programme providing benefits, pensions or periodic allowance is paid to the recipient of a benefit in New Zealand or that person's spouse, partner or dependent; and

- the programme provides for any of the contingencies for which benefits, pensions or periodic allowances may be paid under the Social Security Act 1964 or the New Zealand Superannuation and Retirement Income Act 2001 or the Veterans Support Act 2014; and

- the programme is administered by or on behalf of the Government of the country for which the benefit, pension or periodic allowance is received;

the payment received must be deducted from the amount of any benefit payable under the Social Security Act 1964 or the New Zealand Superannuation and Retirement Income Act 2001 or the Veteran's Support Act 2014.

[12] In the case of a payment received from the United Kingdom Government pension scheme, deduction is also provided for under Article 15 of the reciprocal agreement on Social Security with the United Kingdom.[2]

[13] Section 70(2) of the Social Security Act 1964 gives the Chief Executive a discretion to decide the date on which his determination of the amount to be deducted shall take effect. This includes a date after the determination has been made. From time to time the discretion in s 70(2) has been used to ameliorate the effects of an apparent injustice arising as a result of the strict application of s 70. One situation where it has been used is in cases where the recipient of an overseas pension has been able to

[2] See the Social Welfare (Reciprocity with the United Kingdom) Order 1990.

demonstrate that part of a pension caught by the provisions of s 70(1) has in fact been derived from voluntary contributions.

[14] Contrary to the submission made on behalf of the appellant, and in his February letter to the UK Authorities, there is no law that an exception should be made in the case of voluntary contributions. It is entirely a matter of the Chief Executive using the discretion in s 70(2) in each case to determine the date of commencement of deduction.

[15] The primary evidence that the ICL employees' pension scheme to which the appellant belonged was a contracted-out scheme, as a result of which the appellant was not obliged to make standard class 1 National Insurance contributions to the Government scheme, was the appellant's oral evidence.

[16] The appellant was given an opportunity following the hearing in December 2014 to provide documentary evidence supporting the position that the Additional pension he receives, or part of it, is a result of his voluntary contributions. On 12 May 2015 he advised that he had sent a tracked letter to the UK Pension Service but had not received a reply. The letter he sent to the UK Authorities indicates ICL had both "contracted-out" and "contracted-in" schemes for employees' pensions. Since that time the appellant has not provided any further evidence that the ICL scheme he belonged to was a contracted-out scheme or that his contributions to the SERPS were voluntary. We do not consider it appropriate to delay this matter any further.

[17] In addition to his oral evidence, the appellant submits that the letter from the United Kingdom Pension Service dated 9 September 2010 supports his position. Under the heading "Additional State Pension" this letter states:

> "Based on your earnings from 6 April 1978 to 5 April 1997. This is £60.15 but Contracted-Out Deductions (COD) of £0.00 have to be taken away as you have been in an employer's or a personal pension scheme from 6 April 1978 to 5 April 1997. So your additional State Pension is £60.15."

[18] The appellant says that the letter evidences the fact that he was in a "contracted-out" scheme from 1978 onwards and there is no reduction in his Additional pension as a result of contracted-out deductions. This could only happen if he had contributed to both the state-run SERPS and the contracted-out scheme.

[19] We accept that the appellant believes he continued to make full National Insurance contributions to the SERPS while being in a contracted-out scheme. It is possible that the 2010 letter reflects the fact the appellant's National Insurance payments did not reduce because he voluntarily agreed to maintain them. It may also be the case that the appellant's memory is incorrect and the letter is a standard letter. It is possible

that there may have been periods at the commencement of the SERPS when he continued to make compulsory payments, prior to acceptance that the ICL scheme he belonged to was a contracted-out scheme. However, it seems unusual that there are no contracted-out deductions if the appellant was in a contracted-out scheme. Contributions to the SERPS were required to be made by both employees and employers. It would be surprising if the appellant was in a contracted-out scheme organised and partly-funded by his employer, that his employer would continue to make full National Insurance contributions to the SERPS, as well as whatever contributions were required to be made to the contracted-out scheme. We infer that a reduction in National Insurance contributions from the employer would mean that the full Class 1 National Insurance contributions had not been made and this would have had an impact on any Additional pension payable.

[20] We cannot discount the possibility that part of the Additional pension received by the appellant is the result of voluntary contributions, but it would have been a simple matter for the appellant to obtain supporting evidence that it was possible for him to make voluntary contributions and that his Additional pension or part of it was a result of voluntary contributions. We are unaware of whether he has received a reply to his letter to the United Kingdom Pension Service. Unfortunately the appellant's letter did not simply ask whether or not he had made voluntary contributions to the scheme. Nor did it ask for confirmation that the records showed he was part of a contracted-out scheme or whether all or part of his Additional pension was the result of his voluntary contributions. These simple questions ought to have elicited a clear response.

[21] We do not think it is for the Chief Executive to prove that the appellant's contributions to the scheme were voluntary. It is within the power of the appellant to obtain evidence from the United Kingdom that demonstrates whether or not his contributions to the SERPS were voluntary.

[22] At this point, on the basis of the evidence provided, we are not satisfied on the balance of probabilities that all of the Additional pension payable to the appellant was the result of voluntary contributions. If further evidence comes to hand in the future, it is open to the appellant to take the matter up with the Ministry again.

[23] Ultimately, the position is that the pension payments which are derived from voluntary contributions are not exempt from the provisions of s 70(1) of the Act. The power to defer deduction under s 70(2) is entirely discretionary. It does not automatically follow that because the payments were voluntary, they should not be deducted. The Chief Executive must consider all the circumstances.

[24] We note in passing that if the appellant was a member of a contracted-out scheme which either the Chief Executive has decided he cannot or should not deduct under s 70, or as has happened in this case, the appellant ceased to be a member of a contracted-out scheme and the appellant's ICL pension has been transferred to New Zealand, that is a matter to be taken into account in exercising the discretion in s 70(2) in relation to the appellant's Additional pension. An immigrant from the United Kingdom who belonged to a contracted-out scheme would be significantly advantaged over a United Kingdom immigrant who was not a member of a contracted-out scheme.

[25] In these circumstances the Chief Executive may be justified in declining to exercise the discretion to defer deducting the Additional pension received by the appellant under s 70(2), even if he was able to demonstrate that receipt of this pension was due to his voluntary contributions.

[26] Finally, we note there is brief reference in the submissions filed alleging that the Graduated Pension received by the appellant should also be excluded from the deduction regime in s 70. The appellant did not suggest his contributions to this scheme were voluntary. Indeed, contributions to this scheme were compulsory for all workers in the United Kingdom at the time they were required to be paid. The Authority has previously found that the Graduated Pension must be deducted from entitlement to New Zealand Superannuation.[3] We do not think any matter raised in this case should result in us reconsidering our position.

[27] The appeal is dismissed.

DATED at WELLINGTON this 4th day of December 2015

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Ms M Wallace

Chairperson

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Mr K Williams

Member

[3] [2002] NZSSAA 37.