

[2015] NZSSAA 022

Reference No. SSA 069/14

**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**

Ms M Wallace - Chairperson  
Mr K Williams - Member  
Lady Tureiti Moxon - Member

**DECISION ON THE PAPERS**

***Introduction***

[1] The appellant appeals against a decision of the Chief Executive upheld by a Benefits Review Committee declining his application for New Zealand Superannuation to be paid in Australia.

[2] The appellant's application was declined on the basis that he is not entitled to the Australian Age Pension. The rate at which any New Zealand Superannuation should be paid is therefore 'nil'.

***Background***

[3] The appellant is aged 66 years. He lived and worked in New Zealand from 1975 until 2007 when he returned to live in Australia.

[4] In August 2013 the Ministry received an application for New Zealand Superannuation from the appellant. The application was forwarded to the Ministry by Centrelink. The information provided with the application included advice from Centrelink that the appellant was not eligible for an Australian Age Pension due to his receiving a Service pension from Veteran's Affairs in Australia.

[5] The appellant's application for New Zealand Superannuation was declined. The original reasons given for the decline appear to be incorrect.

[6] The appellant sought a review of 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.

## ***Decision***

[7] Section 21 of the New Zealand Superannuation and Retirement Income Act 2001 (the Act) provides that a person cannot receive New Zealand Superannuation while they are absent from New Zealand unless they can bring themselves within one of the exceptions contained in the Act. One exception is where New Zealand has a reciprocal agreement with the country in which the applicant for benefit is residing. New Zealand has a reciprocal agreement with Australia which is contained in the Social Welfare (Reciprocity with Australia) Order 2002. New Zealand Superannuation can be paid in Australia only in terms of the reciprocal agreement.

[8] There is no dispute that the appellant meets the basic age and residence criteria for New Zealand Superannuation but because he no longer lives in New Zealand he does not meet the requirement that he be ordinarily resident in New Zealand on the date of his application. He can therefore be paid New Zealand Superannuation on the terms contained in the reciprocal agreement.

[9] On receiving the appellant's application for New Zealand Superannuation the Ministry has calculated that the correct proportional rate payable to the appellant would be \$229.69 per week.

[10] Article 9(3) of the Reciprocal Agreement with Australia however provides that the amount of New Zealand Superannuation or New Zealand Veteran's Pension to be paid in Australia must not exceed the amount of the Australian Age Pension that would have been payable to the person if they were entitled to receive an Australian Age Pension but not entitled to receive New Zealand Superannuation or a Veteran's Pension.

[11] In the appellant's case, on the basis of the advice from Centrelink that the appellant was not entitled to Australian Age Pension, the rate of New Zealand Superannuation payable has been assessed to be 'nil'.

[12] On behalf of the appellant it is submitted that in Australia a person applies for either a Service Pension or an Australian Age Pension. A person entitled to a Service Pension would not apply for an Australian Age Pension. The Australian Service Pension should be treated as equivalent to the Australian Age Pension. It is submitted that the appellant is entitled to be paid \$229.69 per week New Zealand Superannuation as this is the lesser of the Service pension he receives and the proportional rate of New Zealand Superannuation calculated.

[13] The information from Centrelink includes the advice that the appellant's annual income from his Service Pension is \$31,657.50 and his receipt of this pension was taken into account in assessing his eligibility for the Australian Age Pension. The maximum rate of Australian Age Pension for a single person is \$21,018.40 per annum. It seems apparent that the appellant's Service Pension is a significantly better pension for him to be on than the Australian Age Pension. It is not entirely clear why the Australian Age Pension was declined, but we infer there is a legislative provision preventing receipt of both Australian Age Pension and a Service Pension.

[14] Article 9(3) makes no reference to the Australian Service Pension in assessing the rate of New Zealand Superannuation or Veteran's Pension payable. The provision very clearly states that the rate of New Zealand Superannuation payable is linked to the eligibility for Australian Age Pension. There appears to be no basis for

substituting the words “Australian Service Pension” for the “Australian Age Pension” in Article 9(3). In *Bredmeyer v Chief Executive of Work and Income* the High Court found:<sup>1</sup>-

“But to read in to or remove words from, Article 9.3 as the appellant contends, would require the Court to move into the impermissible area of legislating even if it be for subordinate legislation.”

[15] Clause 9(3) indicates that it is specifically intended that persons receiving New Zealand Superannuation in Australia should not be advantaged over the recipients of the Australian Age Pension in Australia. To pay the appellant New Zealand Superannuation in Australia in addition to his Service Pension would confer on the appellant a significant advantage over recipients of Australian Age Pension.

[16] Payment of New Zealand Superannuation to a person who apparently receives substantially more than the maximum rate of the Australian Age Pension would require specific reference in the reciprocal agreement.

[17] We do not consider that the words “Australian Service Pension” should be substituted for the words “Australian Age Pension” in Clause 9(3).

[18] In answering the questions posed in the case stated in *Bredmeyer*, the High Court and the Court of Appeal, in effect, found that:

- (i) Article 9(3) requires an application for an Australian Age Pension to be made in order to determine the rate of New Zealand Superannuation that can be received; and
- (ii) if the person cannot satisfy the means test imposed by the social security law in Australia for an age pension and is not entitled to an Australian Age Pension then he or she is not entitled to be paid New Zealand Superannuation.

[19] If the appellant is not entitled to an Australian Age Pension by virtue of the receipt of his Service Pension, whether it be as a result of a means test or some other reason imposed around the eligibility criteria for the Australian Age Pension, ultimately the fact that his entitlement to the Australian Age Pension is ‘nil’ means that the rate of New Zealand Superannuation payable to him is ‘nil’.

[20] Section 12K report provided by the Ministry also outlines why the appellant is not entitled to a New Zealand Veteran’s Pension in Australia. Article 9(3) applies to both New Zealand Superannuation and New Zealand Veteran’s Pension payment. In fact, New Zealand Veteran’s Pension would not be payable in Australia for the same reason that New Zealand Superannuation is not payable. The appellant would also need to meet the other eligibility criteria for payment of a Veteran’s Pension, including the requirement that he must have served as a member of the New Zealand Defence Forces or Mercantile Marine or Emergency Reserve Corps in a war or emergency. The Secretary of Veteran Affairs in New Zealand has determined that the appellant did not have service in a recognised war or emergency while serving with the New Zealand Defence Forces.

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<sup>1</sup> HC, Wellington CIV-2007-485-105, 20 September 2007 at [34].

[21] We are satisfied the Chief Executive was correct to decline the appellant's application to be paid New Zealand Superannuation in Australia.

[22] The appeal is dismissed.

**DATED** at WELLINGTON this 2 day of April 2015

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Ms M Wallace  
Chairperson

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Mr K Williams  
Member

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Lady Tureiti Moxon  
Member