

[2015] NZSSAA 031

Reference No. SSA 140/14 & SSA
141/14

IN THE MATTER

of the Social Security Act 1964

AND

IN THE MATTER

of an appeal by **XXXX & 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

HEARING at WELLINGTON on 14 April 2015

APPEARANCES

The appellants in person
Rosemary Shaw for the Chief Executive of the Ministry of Social Development

DECISION

Introduction

[1] The appellants appeal against decisions of the Chief Executive upheld by a Benefits Review Committee to deduct the payments they receive from the Netherlands known as the Koopkrachttegemoetkoming Oudere Belastingplichtigen top-up payment (KOBT) from their entitlements to New Zealand Superannuation from 23 April 2014.

Background

[2] is aged 80 years. is aged 79 years. Both appellants are in receipt of New Zealand Superannuation. The rate of New Zealand Superannuation they receive is reduced by the amount of the General Old Age pension (AOW) they receive from the Netherlands.

[3] In 2011 the Netherlands government passed legislation which resulted in the payment of an allowance to persons qualifying for the AOW pension. A translation of the name of the legislation which resulted in this payment is the "Purchasing Power for Elderly Taxpayers Act"¹.

[4] The Act begins with the explanation that it is:

"An Act providing for the payment of an allowance to elderly tax payers by way of compensation for their loss of purchasing power resulting from certain policy measures."

and goes on to recite:

¹ Translation issued by Department of Internal Affairs (NZ) on 16 January 2014.

"We have considered it desirable to introduce legislation that provides for the payment of an allowance to elderly taxpayers as compensation for their loss of purchasing power resulting from certain policy measures."

[5] Initially the KOB (as it is referred to) was paid only to persons who were resident in the Netherlands for tax purposes. A case was brought against the Government in the Haarlem District Court² by a person living outside the Netherlands challenging this restriction. The Court found that the KOB allowance must be regarded as an old age benefit. It was therefore subject to EC Regulation 883-2004, which we understand provides that states in the European Community must guarantee that persons moving within the Community retain the "rights and advantages acquired".³ The Court found that there was no justification for making social security rights dependent on the place of residence of the person concerned. The plaintiff was successful in her application.

[6] Following this decision which was delivered on 3 April 2012, changes were made to the legislative regime which provided for the KOB payment. Regulations were promulgated. A translation of the title of these Regulations is: "Regulation for a Purchasing Power Allowance for AOW Pension Recipients not Entitled to a KOB Allowance".⁴ The Regulations provide for a supplement equivalent to the KOB payment to be paid to certain recipients of the AOW living outside the Netherlands. This includes recipients of the AOW living in countries with which the Netherlands Government had a reciprocal agreement on social security. As the New Zealand Government has an agreement on social security with the Government of the Netherlands, the approximately 4,000 recipients of the AOW in New Zealand became entitled to receive the payment, which has become known as the KOB payment. The Regulation provides that the payment is to be backdated to 1 June 2011.

[7] The Sociale Verzekeringsbank (SVB) which is the organisation responsible for the administration of the KOB payment started making payments to people living in New Zealand in 2013. The Ministry of Social Development in New Zealand apparently became aware of the KOB payments late in 2013. The Ministry wrote to AOW recipients in New Zealand on 20 February 2014 to advise them that it was looking into the payments. On 24 April 2014 it wrote to the AOW recipients to advise that it had determined that the KOB payment was deductible from entitlement to New Zealand Superannuation under s 70 of the Social Security Act 1964. The letter advised recipients that they would be entitled to keep the payments without deduction up to 22 April 2014 but from 23 April 2014 they would be deducted from the person's entitlement to New Zealand Superannuation.

[8] The appellants sought a review of the decision to deduct the KOB payments. The matter was reviewed internally and by a Benefits Review Committee. The Benefits Review Committee upheld the decision of the Chief Executive. The appellants then appealed to this Authority.

[9] We note in passing that the KOB payment has since been replaced by a different payment referred to as the AOWT which is a top-up based on the years a person was insured under the AOW pension scheme instead of a flat payment to all recipients.

² Case No. AWB 11/5215, decision 3 April 2012.

³ Para 3.7.

⁴ Translation issued by Department of Internal Affairs (NZ) on 16 January 2014.

Decision

[10] Section 70 of the Social Security Act 1964 (the Act) requires that where a person receiving a benefit (including New Zealand Superannuation) in New Zealand, also receives a benefit, pension or periodic allowance from overseas, the Chief Executive must deduct the amount of the overseas benefit, pension or periodic allowance from the beneficiary's entitlement to the benefit they receive in New Zealand.

[11] In summary, before the provisions of s 70 of the Act apply, the Chief Executive must be satisfied that:

- (a) The beneficiary receives a benefit, pension or periodic allowance granted elsewhere than in New Zealand.
- (b) The benefit, pension or periodic allowance is a payment which forms part of a programme providing benefits, pensions or periodic allowances for any of the contingencies for which benefits, pensions or periodic allowances may be paid under the New Zealand income support legislation.
- (c) The programme is administered by or on behalf of the government of the country from which the benefit, pension or periodic allowance is received.

[12] The AOW pensions the appellants receive from the Netherlands are already deducted from their entitlement to New Zealand Superannuation pursuant to the provisions of s 70. The appellants submit that the supplementary KOBT payment should not be deducted.

[13] The issue in this case is whether or not the KOBT payment meets the criteria of s 70. The first issue is whether or not the KOBT is a benefit, pension or periodic allowance granted elsewhere than in New Zealand.

[14] The appellants say the payment is not AOW "insurance money" and not simply an increase in the pension. Rather, it was a payment established to help boost the economy in the Netherlands following the global financial crisis. The appellants argue that if they are not able to keep the KOBT payments then the money should be returned to the Netherlands Government because it is not achieving its objective, namely boosting the economy of the Netherlands. In fact, it is neither boosting the economy of the Netherlands or New Zealand if it is taken by the New Zealand Government. The appellants also say that the payment was payable not only to AOW pensioners but was also paid to other low income groups.

[15] The decision of the Haarlem District Court refers to the fact that the payment was to compensate "for loss of domestic purchasing power resulting from tax policy measures". There is no reference in the decision to it being to boost the Netherlands economy, although increasing the purchasing power of pensioners might have that effect. The appellants have not provided any independent evidence demonstrating that the primary purpose of the payment was to boost the Netherlands economy or that the payment was anything other than a social security benefit.

[16] The KOBT payment is made from Government funds. It is a standard amount paid to all persons in receipt of the AOW pension not entitled to the KOB payment, who live in the places specified in the Regulation. In the *Haarlem District Court* decision a full bench of the Court concluded that the KOB allowance was a social security benefit and that the provisions of EC Regulation 883-2004 therefore applied.

[17] That ruling was accepted by the Netherlands government who then introduced new Regulations and commenced payment of the KOBT to a wider group of recipients of the AOW pension including pensioners living in countries with which the Government of the Netherlands had reciprocal agreements on Social Security.

[18] Given this background, we are satisfied that the KOBT payment is a benefit, pension or periodic allowance granted elsewhere than in New Zealand.

[19] Secondly, we must be satisfied that the benefit, pension or periodic allowance is a payment which forms part of a programme providing benefits, pensions or periodic allowances for any of the contingencies for which benefits, pensions or periodic allowances may be paid under the New Zealand income support legislation.

[20] The provisions of s 70 of the Act are very wide. It is not necessary, for example, for the benefit, pension or periodic allowance from an overseas country to be identical to one of the benefits paid in New Zealand. It is not a comparison between individual types of benefit or pension but a comparison between schemes for social assistance.

[21] The text of s 70 requires the Chief Executive to look at the programme of the overseas government for income support and compare it with the programme in New Zealand contained in the Social Security Act 1964, the Social Welfare (Transitional Provisions) Act 1990, the New Zealand Superannuation and Retirement Income Act 2001 or (at the relevant time) the War Pensions Act 1954. For the purposes of s 70 it is the total package of income support which is the programme to be considered.

[22] In the context of the Social Security Act 1964, the term “contingency” used in s 70 is intended to mean payments made in certain circumstances or on the occurrence of certain events. The word “contingency” in s 70 relates to the programme of benefits, pensions or periodic allowances. Thus, a programme in the Netherlands which provides for the circumstances of old age, unemployment and sickness benefits is a social security programme which provides for the contingencies provided for in the New Zealand income support legislation which provides benefits for old age (New Zealand Superannuation), disability (Supported Living Payment), and unemployment (Jobseeker Benefit).

[23] The *Haarlem District Court* decision makes it clear that the original KOB was payable on the contingency of old age. The recipient must be 65 years or older. The Regulation under which the KOBT payment is made in effect requires an equivalent payment to be made to certain people living outside of the Netherlands. The receipt of the AOW is still a condition which must be met.

[24] The payment is made to recipients of the AOW pension and is a top-up to the AOW pension to better provide for the support of pensioners. A payment to an AOW pensioner which is said to be compensation for a loss of purchasing power is simply an increase in pension to ensure pensioner purchasing power is not eroded by circumstances such as changes in the taxation legislation. There is no information or evidence which suggests that this payment falls outside the Netherlands income support programme.

[25] The Authority has previously found⁵ that the AOW pension payments are payments forming part of a programme providing benefits, pensions or periodic

⁵ Decision No. 207/2003 (8 December 2003). [2003] NZSSAA 207.

allowances for the contingencies for which benefits, pensions or periodic allowances are paid in New Zealand. The KOB T is simply a top-up payment for recipients of the AOW. It is a payment which is part of the income support programme in the Netherlands.

[26] The issue, then, is whether or not the scheme is administered by or on behalf of the government of the Netherlands. Both the AOW and the KOB T payments in the Netherlands are administered by the SVB.

[27] This organisation is set up by Act of the Netherlands Parliament. It is governed by a Board that is accountable to the Minister of Social Affairs and Employment for its performance and is monitored by an Inspectorate which is part of the Ministry of Social Affairs and Employment.

[28] We are satisfied that the AOW and KOB T payments are part of a programme administered by the SVB on behalf of the Government of the Netherlands.

[29] The appellants submit that it is unethical that the KOB T payment should be deducted from their New Zealand Superannuation. In particular submitted that a person born and bred in New Zealand receives the full New Zealand Superannuation payment when qualifying at age 65 years. This person has cost the New Zealand government far more in respect of childbirth, health care and the cost of education than he and his wife, who arrived when they were aged 25 years and had not previously cost the New Zealand government anything. Furthermore, after arriving in New Zealand at the age of 25 years they worked for 39 years and became New Zealand citizens. He challenges the rationale of the overseas pension deduction policy which is that persons who receive state pensions from overseas should not receive more than other recipients of New Zealand Superannuation.

[30] XXXX' submission seems to overlook the fact that most New Zealand-born men of his age would already have worked and contributed to the tax base for up to 10 years by the time arrived in New Zealand. The submission also overlooks the fact that the tax paid prior to XXXX' arrival in New Zealand by people of his generation, and no doubt the taxes of their parents, contributed to the establishment and development of the infrastructure, education and health care systems which the appellants were immediately entitled to use when they became resident in New Zealand. We are not persuaded that there are any circumstances which might cause the Chief Executive to consider whether deduction of the KOB T from entitlement to New Zealand Superannuation should be deferred for a period longer than 23 April 2014.

[31] XXXX also raises the issue of why he and his wife and other pensioners from the Netherlands were entitled to retain the KOB T payments until 23 April 2014 but not thereafter.

[32] Section 70(2) of the Social Security Act 1964 gives the Chief Executive a discretion to decide the date on which any decision to deduct an amount of overseas pension from entitlement to the New Zealand benefit under s 70 is to take effect. It may be a date before, on or after the date of determination that the payment is one that should be deducted under s 70.

[33] Ms Shaw on behalf of the Chief Executive explained that the Chief Executive did not become aware of the existence of the KOB T payment until November 2013. The Ministry then took some time to research the payment and seek legal advice. The Chief Executive was in a position to make a decision by April 2014. In fact, pensioners

receiving the payment had already received a backpayment of the KOBT and the Chief Executive wished to avoid inconvenience to pensioners by avoiding the establishment of overpayments. It appears to us that these were all legitimate reasons for deferring commencement of the deduction regime until 23 April 2014. We do not think this is a matter for criticism of the Chief Executive. Rather, it was a practical solution to an administrative problem which has not disadvantaged the appellant.

[34] We are satisfied on the basis of the evidence available that the KOBT payment forms part of a programme providing benefits, pensions and periodic allowances payable for the contingencies for which benefits are payable in New Zealand under the New Zealand income support legislation. The programme for income support in the Netherlands is administered by or on behalf of the government of the Netherlands by the SVB. As the appellants receive the KOBT payment, their entitlement to New Zealand Superannuation must be reduced by the amount of this payment.

[35] **XXXX**, in particular, drew attention to the fact that she and her husband are obliged to sign for their Netherlands pension each year. Other New Zealanders do not have to do this. She says this means persons receiving the AOW pension are not treated equally to New Zealand-born pensioners as New Zealand-born people do not have to do this. This is not a matter over which the Authority has jurisdiction but we note that the appellants could reduce the administrative burden of their receipt of the AOW pension from the Netherlands by electing to have their payments from the Netherlands paid under the special banking option rather than having the payments made to them direct.

[36] The appeals are dismissed.

DATED at WELLINGTON this 8 day of May 2015

Ms M Wallace
Chairperson

Mr K Williams
Member

Lady Tureiti Moxon
Member