

[2015] NZSSAA 103

Reference No. SSA 039/15

IN THE MATTER

of the Social Security Act 1964

AND

IN THE MATTER

of an appeal by **XXXX** of Mapua
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 9 November 2015 by telephone

APPEARANCES

The appellant in person
Ms R Shaw for 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 payments he receives from the Canada Pension Plan from his entitlement to New Zealand Superannuation from 8 October 2014.

[2] The decision to deduct the appellant's Canada Pension Plan payments from his entitlement to New Zealand Superannuation was made pursuant to the provisions of s 70 of the Social Security Act 1964.

Background

[3] The appellant is aged 68 years. He immigrated to New Zealand in 1975.

[4] The appellant was granted New Zealand Superannuation from 27 October 2011. He was required to test his eligibility for a Canadian pension. The appellant subsequently confirmed that he had been granted both Canadian Old Age Security pension and Canada Pension Plan pension.

[5] We understand the Canadian Old Age Security pension payments were deducted from the appellant's entitlement to New Zealand Superannuation from 15 November 2013. Canada Pension Plan payments have been deducted from the appellant's entitlement to New Zealand Superannuation since 1 October 2014.

[6] The appellant appeals the Chief Executive's decision to deduct the amount of the Canada Pension Plan payments from his entitlement to New Zealand Superannuation. He submits that:

- The Canada Pension Plan payments are not part of the programme for social assistance in Canada.
- The Canada Pension Plan was introduced as part of the Canadian government's response to a market failure to supply annuities.
- Contributions to the Canada Pension Plan are not a tax. The contributions constitute payment for a service provided, namely an annuity pension.
- The Canada Pension Plan scheme is not administered for or on behalf of the government of Canada.

Decision

[7] A useful summary of the Canada Pension Plan is contained in the High Court decision of *Latimer v Chief Executive of the Ministry of Social Development*.¹

[4] The CPP was established by the Canada Pension Plan Act, RSC 1985 c C-8. It is a compulsory scheme for all people working in Canada outside the province of Quebec which has its own, similar plan. CPP is funded by worker and employer contributions based on earnings. Neither the Canadian Government, nor the Governments of the provinces of Canada, contribute to the CPP except in their roles as employers.

¹ [2015] NZHC 2779, 10 November 2015.

[5] Contributions to the CPP are collected by the Canada Revenue Agency, a Government department similar to New Zealand's Inland Revenue Department. These funds are paid into the Canadian Consolidated Revenue Fund and credited to the Canadian Pension Plan Account. Any amounts that exceed the immediate obligations of the Account are transferred to the Canada Pension Plan Investment Board, which manages the fund. The directors and chairperson of the Canada Pension Plan Investment Board are appointed by, and accountable to, the Canadian Government.

[6] Under ss 92 and 117 of the Canada Pension Plan Act, the Ministers of Social Development and National Revenue have "control and direction of the administration of the Act", and must report to the Canadian Parliament on the administration of the Act. There is also provision for the Minister of Finance to review the financial state of the CPP and make recommendations on the benefits and contribution rates provided by it pursuant to s 113 of the Canada Pension Plan Act.

[7] Service Canada, a Canadian Government agency, administers the CPP. It is responsible for functions such as managing applications for CPP benefits.

[8] When Mr Latimer applied for his CPP pension, it was payable on retirement between the ages of 60 and 70. The legislation subsequently changed, and now people eligible for a CPP pension can apply to have it started any time on or after the age of 60. There is no longer a retirement requirement. The amount paid depends on how much the individual and the employer have contributed to the plan, the length of time over which the contributions have been made, and the age at which the pension started.

[9] The Canadian Government provides a Canadian old age security pension (OAS) which provides a monthly pension for all persons attaining the age of 65 years provided they meet certain residential requirements. ...

[8] Section 70 of the Social Security Act 1964 (the Act) 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:

- the recipient of a benefit in New Zealand (or his spouse or partner or dependent) receives a benefit or pension or periodical allowances granted overseas, which forms part of a programme providing benefits, pensions or periodical allowances; and
- the programme provides for any of the contingencies for which benefits, pensions or periodical allowances may be made under the Social Security Act 1964, the New Zealand Superannuation and Retirement Income Act 2001 or the Veteran's Support Act 2014; and

- the overseas programme is administered by or on behalf of the Government of the country from which the benefit, pension or periodical allowance is received;

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

[9] The provisions of s 70(1) are very wide. It is not necessary for the overseas pension or benefit paid to be identical to one of the benefits paid in New Zealand. The comparison is not between individual types of pension but between programmes for income support.

[10] The issue of whether or not the Canada Pension Plan payments the appellant receives from Canada are payments which must be deducted pursuant to s 70 has been considered by the High Court on a number of occasions². In each of those cases the High Court was satisfied that payments received from the Canada Pension Plan are subject to the deduction regime in s 70 of the Social Security Act 1964.

[11] In the first instance, in considering the provisions of s 70, we must determine whether or not the payment received by the appellant is part of a programme providing for any of the contingencies outlined in the three pieces of legislation referred to in s 70(1)(b) of the Act.

[12] Turning to the appellant's submissions, we note that the appellant refers to the programme in New Zealand as one of social assistance. We think it more accurate to describe the programme provided in the Social Security Act 1964, the New Zealand Superannuation and Retirement Income Act 2001 and the Veterans Support Act 2014, as a programme for income support. Social assistance suggests a wide variety of social support. The programme in the legislation referred to in s 70(1)(b) is monetary in nature, and in the case of New Zealand Superannuation and Child Disability Allowance is not income tested.

² *Hogan v Chief Executive of the Department of Work and Income* HC Wellington AP49/02, 26 August 2002; *Horn v Chief Executive of the Ministry of Social Development* HC Wellington CIV-2010-485-1589, 15 November 2010; *Latimer v Chief Executive of the Ministry of Social Development* [2015] NZHC 2779.

[13] The Concise Oxford Dictionary (10th ed) defines ‘contingency’ as:

1. a future event or circumstance which is possible but cannot be predicted with certainty, a provision for such an event or circumstance.
2. the absence of certainty in events.

[14] In the context of the legislation, we consider that the term “contingencies” is intended to mean payments made in certain circumstances or on the occurrence of certain events.

[15] Section 70 uses the word “contingencies” suggesting that a programme will provide for more than one type of event. An overseas programme which provides for just one of the contingencies provided for in the New Zealand income support programme will suffice.

[16] The New Zealand programme is a programme for income support which provides for the contingencies (or eventualities) of old age/retirement (New Zealand Superannuation), disability (Supported Living Payment and Disability Allowance), survivors, Orphan’s Benefit, and unemployment (Jobseeker Support).

[17] The appellant submits that the Canada Pension Plan scheme is best described as a “mandatory private savings scheme” which the government has legislated for to deal with a market failure to supply annuities. It can be distinguished from a needs-based programme for what the appellant refers to as “social assistance or support” which provides primarily for hardship. The appellant submits that in Canada the needs-based programme includes the Old Age Security pension but not the Canada Pension Plan. This is because the Canada Pension Plan payments are related to the amount of wages received and contributions paid over a lifetime. They are not based on need or hardship. The appellant submits that the decision of the Human Rights Review Tribunal (HRRT) in *Heads v Attorney General*³ is instructive in its conclusion that the Accident Compensation (ACC) scheme in New Zealand is not part of the wider social security scheme. Adopting a similar approach to that taken by the HRRT would lead to the conclusion that the Canada Pension Plan is not part of the Canadian Government’s programme for income support.

[18] In *Heads* the HRRT was considering whether a restriction on receiving earnings-related compensation following the death of a spouse by accident, in circumstances where the recipient of the compensation was over 65 years of age, amounted to discrimination on the basis of age which could not be justified.

³ [2015] NZHRRT 12.

[19] Part of the Crown case was to allege that the restriction on payments to persons in receipt of New Zealand Superannuation in the ACC legislation, was part of the principle that no one should receive two forms of publicly-funded main income support. The Tribunal concluded that ACC earnings-related compensation payments are not made for financial support but as compensation for lost earning capacity in the specific circumstances of accident. They could not be regarded as a benefit. By comparison, it concluded that the social security benefit system is based on need.

[20] We understand the appellant's submission to be that the Canada Pension Plan payments are not based on need, unlike the payments under the Old Age Security pension, and just as the HRRT has found that ACC earnings-related compensation is not based on need, the Canada Pension Plan is not needs based and should not therefore be considered part of the Canadian Government income support programme.

[21] That the HRRT should find that ACC payments, which come from a unique scheme for workers compensation and which replaced significant common law rights to compensation for injury, are not benefit payments is understandable. The conclusion that the social security system in New Zealand is needs based must be seen in the context that the government has made legislative provision to meet income needs in certain circumstances. The programme itself is not entirely dependent on lack of income or hardship in that New Zealand Superannuation and Child Disability Allowance are not income tested benefits.

[22] Ultimately, we do not consider the HRRT's approach to whether or not ACC payments are a benefit, to be useful in the context of s 70. This is primarily because the provisions of s 70 require an examination of the contingencies provided for in the programmes for income support in overseas countries, rather than the precise terms on which a benefit or pension is paid.

[23] The Authority has previously noted, based on information obtained from the Human Resources Development Canada website, that Canada's retirement income system has three pillars or levels:

- (i) The first level is the Old Age Security pension (OAS). OAS provides a modest monthly pension for all persons attaining the age of 65 years provided they meet certain residential requirements.
- (ii) The second level of the system is the Canada Pension Plan. The Canada Pension Plan is paid over and above the Old Age Security pension to people who have worked and contributed to the Canada Pension Plan.

- (iii) The third level is private pensions and savings. The Canadian Government offers a range of incentives to encourage this form of saving for retirement.⁴

[24] As we understand it, the Canadian programme follows a World Bank model for income support in the event of old age, as do many other countries.

[25] Service Canada⁵ is a division of Human Resources and Development Canada, a department of the Canadian Government. Its website describes Canada Pension Plan payments as a monthly benefit for contributors to the Canada Pension Plan who can take their full pension at age 65, or an enhanced pension after age 65, or permanently reduced pension as early as age 60.

[26] The Old Age Security (OAS) pension is described as a monthly benefit for people who have lived in Canada for more than 10 years after age 18 and they are aged 65 and over. A further supplement entitled Guaranteed Income Supplement is described as a non-taxable benefit for low income Canadians age 65 and over who receive the OAS pension.

[27] The long title of the Canada Pension Plan Act describes it as “An act to establish a comprehensive programme of old age pensions and supplementary benefits payable in Canada to and in respect of contributors”.

[28] The long title of the Old Age Security Plan Act states that it is “An Act to provide for old age security”.

[29] In effect, the Canadian Government, as part of its programme of income support, has put in place legislation to meet the need of its citizens and residents for income on reaching retirement or old age. Those in employment with sufficient contributions are covered by the Canada Pension Plan. Those who have not been in employment or whose contributions to the Canada Pension Plan are insufficient to provide a certain level of income are covered by the Old Age Security pension. Both packages are part of the Canadian Government programme for income support in the event of retirement or old age. In addition to the contingency of retirement or old age, both the Canada Pension Plan and Old Age Security pension schemes contain provision for disability and survivors' benefits.

[30] The Canadian Government also has in place what is referred to as an Unemployment Insurance Scheme to cover the contingency of unemployment. This is

⁴ Social Security Appeal Authority Decision No. 142/01.

⁵ www.servicecanada.gc.ca.

also part of the Canadian Government income support programme administered by Service Canada.

[31] The appellant has presented no evidence to suggest that the Canada Pension Plan was introduced as part of the Canadian Government's response to a market failure to supply annuities. In reality, the Canada Pension Plan is one pillar of the Canadian pension programme and is as much part of the programme as the Old Age Security pension scheme.

[32] The appellant submits that contributions to the Canada Pension Plan scheme are not a tax and should instead be considered to be savings. Section 70 does not require the decision-maker to consider sources of funding. In any event, we do not consider compulsory contributions can be regarded as savings in the usual sense of the word. For example, the appellant does not have access to the contributions he has made, other than on the terms set out in the Canada Pension Plan legislation.

[33] It is also interesting to note that in the United States of America which has a similar contributory scheme covering those in employment, government literature relating to the scheme refers to the individual's contributions as 'social security taxes'. Referring to compulsory payments as contributions is arguably a matter of semantics, which perhaps makes the compulsory payments more acceptable.

[34] We are satisfied that the Canada Pension Plan payments the appellant receives are part of the Canadian Government programme for income support payable in respect of the contingencies of retirement/old age, disability and survivor. As such, the payments are paid in respect of contingencies provided for in the New Zealand income support programme referred to in s 70.

[35] We must now consider whether the scheme is administered by or on behalf of the Government of Canada.

[36] The appellant submits that the Canada Pension Plan Investment Board is, in effect, a private company and legislation establishing the Board is designed to make the company independent of the Government to avoid political interference. Any involvement by the Government in administration of the scheme is simply to lend credibility to the savings scheme and give confidence to contributors.

[37] We note the following:

- (i) The Canada Pension Plan has been established by legislation enacted by the Canadian Government. That in itself makes it part of a government

programme. The inference to be drawn is that the Canadian Government considered it necessary to put in place a scheme to provide for its citizens in the event of old age or retirement.

- (ii) The compulsory payments by persons covered by the legislation are paid to the Canadian Inland Revenue Service as part of the PAYE scheme.
- (iii) The payments are then transferred to an Investment Board. The Investment Board was set up in 1997 by the Canada Pension Plan Investment Board Act.⁶ The Canada Pension Plan Investment Board website states:⁷ “we operate at arm’s length from government, while also being strictly accountable through policies, regulation and our enabling legislation”. Members of the Board are appointed by the Governor-General on the recommendation of the Minister and the board is accountable to the Minister of Finance. It is difficult to equate such a board with a private company.
- (iv) The applications for, and payments made, to recipients of the Canada Pension Plan are administered by an organisation called Service Canada. We have previously noted this is a division of a government department in Canada.

There can be no conclusion other than that the Canada Pension Plan is administered by or on behalf of the Government of Canada.

[38] We are in no doubt that the Chief Executive was correct to conclude that the Canada Pension Plan payments the appellant receives are part of a programme in Canada providing for one or more of the contingencies provided for in the New Zealand income support programme contained in the Social Security Act 1964, the Veterans Affairs Act 2014 and the New Zealand Superannuation and Retirement Income Act 2001. The programme in Canada is administered by or on behalf of the Government of Canada. As a result, the payments the appellant receives from the Canada Pension Plan must be deducted from his entitlement to New Zealand Superannuation.

⁶ Found at laws-lois.justice.gc.ca/eng/acts.

⁷ www.cppib.com.

[39] The appeal is dismissed.

DATED at WELLINGTON this 22nd day of December 2015

Ms M Wallace
Chairperson

Mr K Williams
Member

Lady Tureiti Moxon
Member

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