[2015] NZSSAA 051

Reference No. SSA 012/15

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

HEARING at WELLINGTON on 9 June 2015

APPEARANCES

The appellant in person
Ms E Kirkman 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 gross, rather than the net, amount of the overseas pension received by the appellant's husband from the United States of America (USA) from her entitlement to New Zealand Superannuation.

Background

[2] The appellant is aged 75 years. She is in receipt of the half married rate of New Zealand Superannuation. The appellant's husband (Mr **XXXX**) is aged 83 years. He was born in the United Kingdom. He is entitled to overseas pensions from the USA, the United Kingdom and the Netherlands.

[3] In 2013 Mr **XXXX** applied for a SuperGold Card. This in turn led to him applying for New Zealand Superannuation on the basis that he might be entitled to a top-up. As a result of his application for New Zealand Superannuation, the Ministry assessed that Mr **XXXX** received slightly more than the half married rate of New Zealand Superannuation. He was not entitled to a top-up but a decision was made that the amount of the overseas pensions he received in excess of the half married rate of New Zealand Superannuation should be deducted from the appellant's entitlement to New Zealand Superannuation. As at 1 July 2014, it was assessed that the amount to be deducted was $16.24.

[4] The issue that arises in this case is that Mr **XXXX**'s pension from the USA is taxed at the rate of 30% and the taxation is payable in the USA. The calculation of the amount of Mr **XXXX**'s pension from the USA to ascertain the amount to be deducted from the appellant's New Zealand Superannuation is on the basis of the gross amount payable. The result of using the gross rate of pension in the calculation is that, taking into account their pensions from all sources, the appellant and her husband receive less than the full married rate of New Zealand Superannuation. In effect, they are worse off than a couple who have only ever lived in New Zealand. In fact, they are likely to be worse off than other pensioners who receive pensions from countries other than the USA.

[5] It is submitted that this is contrary to the intention of s 70 of the Social Security Act 1964. Just as s 70 is intended to ensure that persons living in New Zealand and receiving an overseas pension are not financially advantaged over those who have only resided in New Zealand and have no entitlement to an overseas pension, those who have lived overseas or receive pensions from overseas should not be disadvantaged. The appellant requests that the net amount received in Mr **XXXX**'s bank account from his USA pension be used to calculate the amount that should be deducted from the appellant's pension, rather than the gross rate currently used. A calculation prepared to show the appellant's loss suggests that in the period 30 May 2014 to 29 May 2015 she received $1,646.96 less than her actual entitlement.

Decision

[6] The Authority has previously considered the matter raised in this appeal in [2010] NZSSAA 83.

[7] 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(1) are that where:

- a benefit or pension or periodical allowance granted overseas (which forms part of a Programme providing benefits, pensions or periodical allowances) 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 periodical allowances may be paid under the Social Security Act 1964 or the New Zealand Superannuation and Retirement Income Act 2001 or the War Pensions Act 1954; and

- the 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 or the New Zealand Superannuation and Retirement Income Act 2001 and other legislation governing social security benefits.

[8] The Authority has previously found that payments from schemes in the USA,[1] the United Kingdom,[2] and the Netherlands,[3] which Mr **XXXX** receives payments from, meet the criteria of s 70 and must be deducted from benefits paid in New Zealand. The appellant did not dispute that these particular pensions are deductible from entitlement to New Zealand benefits.

[9] In addition, s 70 specifically provides that the overseas pension received by that person's spouse or partner must be deducted from a person's entitlement to New Zealand Superannuation. It is for that reason that any overseas pension received by Mr **XXXX** in excess of the half married rate must be deducted against the appellant's entitlement to New Zealand Superannuation. Again, the appellant did not dispute that particular aspect of this matter. Her concern relates to the amount deducted.

[10] Section 70(1)(b) of the Social Security Act 1964 provides that entitlement to New Zealand Superannuation shall be reduced by "the amount of such overseas benefit, pension, or periodical allowance, or part thereof, as the case may be, being an amount determined by the chief executive in accordance with regulations made under this Act".

[11] In this case, the Regulations which apply are the Social Security (Overseas Pension Deduction) Regulations 2013. These Regulations set out the way in which the Ministry is required to calculate the amount to be deducted from the New Zealand benefit.

[12] Regulation 4(2) provides that:

> (2) Unless provided otherwise in any agreement or convention with an overseas country adopted under section 19 of the Social Welfare (Transitional Provisions) Act 1990, a reference in this regulation to an instalment of a benefit or to an overseas pension is a reference to that instalment or pension before the deduction of income tax (if any).

In short, Regulation 4(2) requires the Ministry to use the gross rate of overseas pension in calculating the amount of any deduction.

[13] New Zealand does not have a reciprocal agreement with the USA in relation to social security. It does have an agreement relating to taxation. The problem for the appellant that arises is because of differences in the tax rates payable in New Zealand and the USA. In many cases there will be a double taxation agreement in place between New Zealand and the country paying the overseas pension, which will provide that tax is paid only in the country of residence of the recipient. In this situation, issues resulting from differences in taxation levels in different countries will not arise. In the case of pensions received from the USA, however, the taxation agreement between the New Zealand Government and the Government of the USA provides exclusive taxing rights in respect of the USA pension to the United States Government. We understand that Mr **XXXX** is not taxed in New Zealand on his pension received from the USA but pays tax in the USA at 30%. By comparison, the taxation rate paid on New Zealand Superannuation in New Zealand is 12.5%. In our earlier decision relating to this particular issue, the Authority concluded that:

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[1] [2006] NZSSAA 69.
[2] [2006] NZSSAA 37.
[3] [2003] NZSSAA 207.

> [31] Where the pension is taxed in the USA at a different rate from that applicable in New Zealand an injustice results. It is an injustice that we do not think was intended by Parliament in enacting s 70.

The Authority noted at [32] that:

> While on the one hand the object of the provision [s 70] is to ensure that those in receipt of overseas pensions are not advantaged over others not entitled to overseas pension, we do not think it can ever have been intended that the recipient of an overseas pension living in New Zealand receive less than the equivalent of the full amount to New Zealand Superannuation.

[14] 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. In our earlier decision we directed the Chief Executive to exercise discretion to commence deduction of only the net amount of the appellant's overseas pension entitlement to New Zealand Superannuation for a period.

[15] However, an issue which did not arise in our earlier decision arises in this case. The appellant completed her application for New Zealand Superannuation on 27 May 2004. The forms specifically required her to provide information about her periods of residence overseas. The appellant noted in her form that she lived in the United Kingdom from 1962 until 1963 when she was on a working holiday. She did not disclose any other periods of residence overseas. It transpires that that was not correct. We understand the appellant also lived with her husband in the United Kingdom, the USA and the Netherlands. The form submitted by the appellant to Work and Income New Zealand also included a requirement that the appellant's partner complete an Overseas Residence Details Form outlining his periods of residence overseas and any pensions he received from overseas. Mr **XXXX** did not complete this section of the form as required. It is difficult not to draw an inference that the appellant's failure to complete her overseas residence details correctly and to supply correct information about Mr **XXXX**'s overseas pension entitlement was deliberate. As a result, the appellant has avoided having her New Zealand Superannuation reduced by any excess pension received by her husband for 10 years. We are unaware of whether or not she may also have had eligibility for an overseas pension.

[16] In these circumstances, we are not prepared to direct the Chief Executive to exercise the discretion to defer deduction of the gross rate of New Zealand Superannuation, pursuant to s 70(2).

[17] In our earlier decision regarding this issue, we urged the appellant to take up the issue raised with the Regulations Review Committee at Parliament, as the Regulations in force at that time resulted in an injustice to the appellant which would not have been anticipated by Parliament when it empowered the making of the Regulations. We are unaware of whether or not that in fact occurred. The Regulations in place at the time of our earlier decision have since been replaced by the Social Security (Overseas Pension Deduction) Regulations 2013, but do not deal with the issue raised in this case.

[18] The appeal is dismissed.

DATED at WELLINGTON this 4th day of August 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

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