

[2015] NZSSAA 094

Reference No. SSA 127/13

IN THE MATTER

of the Social Security Act 1964

AND

IN THE MATTER

of an appeal by **XXXX** of
Christchurch against a decision of a
Benefits Review Committee

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Ms M Wallace	-	Chairperson
Mr K Williams	-	Member

DECISION ON THE PAPERS

Introduction

[1] The appellant appeals against a decision of the Chief Executive upheld by a Benefits Review Committee to deduct the old age pension payments she receives from the Russian Federation from her entitlement to New Zealand Superannuation.

Background

[2] The appellant is aged 79 years. She was born in Russia on 24 March 1935. She arrived in New Zealand on 15 November 2001. She applied for and was granted New Zealand Superannuation from 17 April 2012.

[3] The appellant studied in Russia from 1953 to 1959 and commenced work, initially as a senior technician, in 1959. From November 1959 she was employed as an engineer in various State-run research institutes until she retired. At the relevant time the retirement age for women in Russia was 55 years.

[4] The appellant was granted an old age Labour Pension awarded under the "Regulation on Administration of State Pension Awards and Payments, approved by Resolution of the Council of Ministers of the USSR on 3 August 1972". The information

from the Pension Fund of the Russian Federation says her pension of 120 roubles per month was awarded on 24 March 1990. This conflicts with the submission made on behalf of the appellant in which it is stated she retired on 19 April 1991. The appellant would have attained the age of 55 years on 24 March 1990. It seems likely, therefore, that the date in the letter from the Pension Fund is correct.¹

[5] A decision was made by the Chief Executive to commence deducting the appellant's Russian pension from her entitlement to New Zealand Superannuation from 4 July 2012.

[6] 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.

[7] It is submitted by the appellant's lawyer that:

- (i) The pension the appellant receives consists of a basic labour pension and a secondary insurance savings component based on a savings record. The basic pension may arguably be a universal entitlement but it is subject to qualifying conditions relating to her work history. The insurance savings component is not a universal entitlement and the rate of payment differs and reflects the savings record. It is submitted that the insurance savings component is not funded from tax but from insurance contributions voluntarily made by the appellant and her employer. It should be regarded as akin to a private pension scheme. It is claimed that the appellant commenced voluntary payments towards the insurance savings scheme in about 1957/1958. Moreover, the insurance savings component was a pension earned by the appellant, not granted as part of a general contingency. The insurance component should be regarded as something akin to the New Zealand National Provident Fund or the New Zealand KiwiSaver scheme. It is submitted that the insurance savings component of the appellant's labour pension is not caught by the provisions of s 70 of the Social Security Act 1964.
- (ii) The Authority's determination should reflect the position prior to the appellant's retirement in 1991 not the current arrangements or post-1991 changes.
- (iii) Case law referred by the Chief Executive should be distinguished where the contributions made were wholly mandatory or compulsory rather than

¹ Letter from the Pension Fund of the Russian Federation dated 2 July 2010.

voluntary, and where the countries had reciprocal agreements with New Zealand.

- (iv) The appellant was employed in a government occupation and it is only by reason of that service that her entitlement to the insurance savings component of her Russian pension is payable; it should therefore be regarded as a Government Occupational Pension.

Decision

[8] Section 70 of the Social Security Act 1964 provides for benefits and pensions 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:

- the recipient of a benefit in New Zealand (or his spouse or partner or dependent) receives a benefit or pension or periodical allowance 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 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 example, 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 payable for any of the contingencies covered in the New Zealand income support legislation.²

[10] The Authority has been provided with a variety of material from the Ministry and the appellant describing the Russian scheme. There have been significant changes to that scheme since the appellant first started working, as a result of changes in the

² See *Hogan v Chief Executive of the Department of Work and Income* HC Wellington AP49/02, 26 August 2002; *Tetley-Jones v Chief Executive of the Department of Work and Income* HC Auckland CIV-2004-485-1005, 3 December 2004.

political and economic arrangements in Russia, particularly since 1990. To test the appellant's claims in relation to her pension, including the claim that she made voluntary contributions which resulted in the award of her old age pension, it is necessary to consider the history of pension arrangements in Russia.

[11] An article entitled "*Income Security in Transition for the Aged and Children in the Soviet Union and in the Russian Federation*" by Lilian Liu,³ explains the developments through to 1993. The information in this article is supported by the other information provided.

[12] In summary, prior to 1990 two laws governed pension programmes in the former Soviet Union:

- the 1956 law on State pensions, which covered workers and employees of State farms, enterprises and institutions; and
- the 1964 law on pensions and benefits for collective farmers, which covered members of the collective farms and their families.

[13] In addition, there were other income support payments such as allowances to families with a large number of children which had been first introduced in 1944. In 1977 the Constitution of the USSR incorporated a family benefit programme.

[14] The appellant's situation was covered by the 1956 law on State pensions. The pensions payable under this programme were wage-related. Pension funding was based on a combination of government budget allocations and employer contributions; employees did not contribute. State sector employers paid an average of 9% of the payroll to social security in 1989. The 1956 law provided that the normal pension age for men was 60 and for women 55, with required minimum years of employment. The pension payable was based on wages in the last 12 months before retirement. Financing of the scheme was based on the pay-as-you-go method whereby current obligations to beneficiaries were funded by the current generation of workers.

[15] As part of an effort to bring a pluralistic approach to income security, in 1987 the government introduced a voluntary complementary pension programme to supplement social security income. The article describes this as "*an unprecedented move*". The scheme allowed workers to choose to pay monthly premiums through their employers as part of a group insurance "contract" with the State's insurance administration. Depending on the number of years under the contract, the size of the premium and the

³ Published in *Social Security Bulletin* Vol 56, No 1, Spring 1993.

age of the participant, the worker could receive 10 to 15 roubles per month, in addition to his or her monthly pension from the State-operated social security system.

[16] The article records that in the late-1980s three further developments included:

- (i) A draft proposal for a social safety net during the transition to a market economy.
- (ii) Resolutions and decrees further expanding the coverage and improving the benefits for families with children.
- (iii) In May 1990, the USSR State Pension Law.

The article also notes that by April 1991 there were 11 categories of benefits available to families with children.

[17] In May 1990, the USSR State Pension Law of 1990 came into force. The article notes that the central government pension programme was no longer to be the sole source of income for pensioners. Changes included:

- Provision for income security for pensioners, the elderly and disabled who had not earned entitlement to a pension through covered employment. This was a social pension for those who did not have the required years of work to qualify for a work-related labour pension.
- Unified pension benefits for urban workers and collective farmers.
- The minimum pension would be linked to the minimum wage.
- A social insurance model was adopted for income security. As a result, the government budget would minimise its subsidies for pensions, benefits and family allowances. Instead, social security for employed persons would be financed mostly by payroll contributions from employers and partly from employee contributions.
- Pension programme financing would be based on a pay-as-you-go method.

[18] The breakup of the Soviet Union then intervened as a result of which legislation setting up the Russian Federation Pension Fund was established in November 1990, effective 1991. This largely followed the May 1990 USSR model.

[19] The new Russian Federation provisions raised the level of guaranteed minimum pension income for old age from 70 roubles a month under the USSR programme, to 100 roubles a month; and increased minimum benefits for disability, for orphans and for

the newly created social pensions for those elderly and disabled who do not qualify for work-related labour pensions. The article records the intention to establish individual records for employees' contributions in 1993. The article records that the Russian Federation also established a new non-State pension fund in May 1991 to enhance retirement income.

[20] We record at this point that the appellant's pension was granted in March 1990, presumably under the 1956 legislation and before the Russian Federation Pension Programme came into existence.

[21] The article records that from March 1991, the Russian social security programme provided two broad categories of pension: work-related labour pensions paid on the basis of a contribution record and social pensions paid to the disadvantaged, aged, disabled persons and survivors with less than five qualifying years of employment. Each broad category provides for the contingencies of old age, disability and survivors.

[22] There are three sources of funding for the pension programme. Payroll contributions from employers and employees, State budget allocations for social pensions, and an employment fund for payment of benefits to unemployed older workers retiring up to two years before normal pensionable age.

[23] In 2001 the Russian Federation enacted a further law on labour pensions. A translation of this statute is included in the Section 12K Report. The preamble to the legislation recites: "This Federal law establishes, in accordance with the Constitution of the Russian Federation and the Federal law 'on compulsory pension insurance and the Russian Federation' the grounds of the right of Russian Federation citizens to receive labour pensions and the procedures for giving effect to this right".

[24] We understand this legislation constitutes a reform of the November 1990 Russian Pension Plan. This legislation sets out the conditions for award of an old age labour pension, an invalid's labour pension and an award of a labour pension for loss of a breadwinner (survivors of a deceased breadwinner) pension.

[25] Article 5 provides that a labour pension may consist of (1) an insurance component; and (2) a savings component.

[26] Article 30 requires that on the introduction of this new law, an assessment be made of the pension rights of insured persons as at 1 January 2002. A formula for carrying out this process is provided.

[27] In summary, the current programme for income support in the Russian Federation includes the labour pension regime which is a compulsory contributory scheme for all

workers and a second tier of support for persons who do not qualify for labour pensions. This part of the programme is funded from general taxation. In addition, there are various types of payments for children.

[28] The provisions of s 70(1) of the Social Security Act 1964 do not require a comparison between eligibility for benefits or funding mechanisms. All that is required is that the overseas pension be part of a programme of benefits, pensions or periodical allowances paid to cover similar eventualities to those provided for in the New Zealand income support programme.

[29] The programme to be considered is the current programme in the Russian Federation, but in any event both the USSR Government programme for income support in existence at the time the appellant's pension was awarded, and the current Russian Federation programme both provide (or provided) for the events or circumstances of old age/retirement, disability, dependents and survivors. Both the old programme and the current programme include provision for contingencies provided for in the New Zealand income support programme such as benefits in the event of old age or retirement (New Zealand Superannuation), disability (Supported Living payment/Disability Allowance) and survivors (for example, Orphan's Benefit).

[30] We understand that the appellant does not dispute that the Russian Pension Fund from which she receives her payment is administered by or on behalf of the government of the Russian Federation, but we note:

- (i) The scheme from which the appellant receives her payments was originally established by legislation dating back to 1956. The legislation governing the current Russian Federation pension plan is contained in federal law number 173-FZ of 17 December 2001.
- (ii) The scheme is administered by the Pension Fund which was set up on 22 December 1990 by decision of the Supreme Soviet of the Russian Soviet Federative Social Republic, number 442-1 "on Organisation of the Pension Fund of the RSFSR".
- (iii) Correspondence received from the Pension Fund refers to that organisation as a State institution.
- (iv) A government department oversees the activities of the Pension Fund and is responsible for policy development.

[31] We are satisfied that the appellant receives a payment which forms part of a programme paying benefits, pensions and periodic allowances for one or more of the

contingencies in the New Zealand income support legislation. This scheme is administered by or on behalf of the Government of the Russian Federation. As a result, the payments the appellant receives must be deducted from her entitlement to New Zealand Superannuation pursuant to the provisions of s 70 of the Social Security Act 1964.

Voluntary contributions

[32] The appellant has elected to have this matter dealt with on the papers. She has not given evidence to the Authority. The submission made on her behalf is that the insurance savings component of her pension referred to in the letter from the Russian Federation Pension Fund is not funded from any form of taxation but from insurance contributions, voluntarily made by the appellant and her employer, and these contributions are akin to a private scheme.

[33] 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 pursuant to s 70(1) 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 which the discretion has been used is in cases where the recipient of an overseas pension has been able to demonstrate that part of a pension caught by the provisions of s 70(1) have in fact been derived from voluntary contributions. Section 70 does not provide that an exception should be made in the case of voluntary contributions. It is entirely a matter for the Chief Executive, using the discretion in s 70(2) in each case, to determine the date of commencement of deduction.

[34] In relation to the appellant's claim that her pension is derived from voluntary contributions, we note the following:

- The evidence makes it clear that there was no voluntary scheme in place in Russia prior to 1987, a matter of three years before the appellant retired.
- The voluntary scheme put in place in 1987 was a separate scheme from the basic labour pension. The letter from the Russian Federation Pension Fund of 2 July 2010 does not suggest that the appellant was granted any pension other than the pension awarded under the Regulation on Administration of State Pension Awards and Payments.
- The Russian Federation Pension legislation, which made provision for what is referred to as a basic pension and an insurance-related portion, came into force after the appellant's pension was granted in March 1990.

- The reference in the letter of September 2010 to the appellant receiving a pension made up of a basic part and an insurance part is as a result of the 2001 law which required existing pension rights to be converted to fit into the new labour pension regime.

[35] There is no evidence of a probative value that the appellant made contributions to the voluntary scheme which came into force in 1987. Prior to that, the only pension available was funded by State and employer contributions. There is nothing to suggest the appellant made any contributions to the pension scheme provided under the 1956 legislation. The claims made on her behalf that she made voluntary payments to a scheme from 1956 or 1957 onwards appear to be seriously flawed.

[36] We are not satisfied that the appellant made voluntary contributions to the scheme which resulted in the pension awarded in March 1990, and which should be considered when exercising the discretion in s 70(2) of the Act about the date for deductions to be commenced.

Reciprocal Agreements

[37] It is submitted on behalf of the appellant that the previous cases referred to in the Ministry's Section 12K Report are not relevant because New Zealand had reciprocal agreements with the countries concerned. Section 70 is not dependent upon whether or not New Zealand has a reciprocal agreement with the country concerned.

[38] In fact, the current Russian model for income support is based on the three-pillar model of pension provision. It appears to be very similar to other programmes which the Authority has considered such as the Canadian Pension programme.

Government Occupational Pension

[39] It is submitted on behalf of the appellant that because she was employed as a civil servant by the Government of the Soviet Union throughout her working life her pension should be regarded as a Government Occupational Pension. Government Occupational Pensions are exempt from the s 70 deduction regime.

[40] The definition of Government Occupational Pension is contained in s 3 of the Social Security Act 1964 as follows:

Government occupational pension—

- (a) means a benefit, pension, or periodical allowance paid by or on behalf of the Government of any country to a person by reason of—
 - (i) a period of employment, direct or indirect, by that Government of that person or that person's deceased spouse or partner or that person's deceased parent; or

- (ii) a period of service to that Government (including, without limitation, service in the armed forces, service in the Police, and service as a judicial officer or other person acting judicially) by that person or that person's deceased spouse or partner or that person's deceased parent; but
- (b) does not include any part of that benefit, pension, or periodical allowance that is paid by the Government of that country by reason of anything other than that period of employment or service; and
- (c) does not include any part of that benefit, pension, or periodical allowance to which the Government of that country contributes by reason of anything other than that period of employment or service; but
- (d) does not include a benefit, pension, or periodical allowance of the kind set out in paragraph (a) if the person would have been entitled to receive a similar benefit, pension, or periodical allowance paid by, or on behalf of, the Government of that country under a scheme or other arrangement in respect of persons who were not employees or in the service of that Government

[41] In the first instance, for a pension to be a Government Occupational Pension we must be satisfied that the pension is paid as a result of a period of government service.

[42] It is useful to consider why the Social Security Act 1964 makes an exception for Government Occupational Pensions in respect of the s 70 deduction regime.

[43] The exception is aimed at schemes that are akin to private employment-related pension schemes. It is difficult to imagine any other reason why the New Zealand Government should make an across-the-board exception to the overseas pension deduction regime to all government employees from any country. The pension scheme of an employer in the private sector in an overseas country would not be caught by s 70. From this it might be inferred that the intention of the provision is to accord a similar status to workplace-related schemes for government employees. Without a specific exception, it is arguable that, a Government Occupational Pension would be caught by the terms of s 70.

[44] The issue is whether or not the pension received by the appellant meets the criteria in subparagraph (a); namely, is it a pension paid by reason of a period of employment or service to the government? The appellant was in employment. The pre-1991 period for income support applied only to those in employment. All persons employed (other than those on collective farms) were covered by the 1956 State Pension law regardless of whether they worked for the government. The appellant receives the pension she receives, not because her employer was the government, but simply because she was employed. We are not satisfied that the pension the appellant receives can be characterised as a Government Occupational Pension.

[45] We are satisfied that s 70(1)(a) requires that the pension received by the appellant from the Russian Federation must be deducted from her entitlement to New Zealand Superannuation.

[46] The appeal is dismissed.

DATED at WELLINGTON this 30th day of November 2015

Ms M Wallace
Chairperson

Mr K Williams
Member

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