[2016] NZSSAA 070

Reference No. SSA 167/15

IN THE MATTER of the Social Security Act 1964

AND

IN THE MATTER of an appeal by **XXXX** of the Netherlands 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 decisions of the Chief Executive confirmed by a Benefits Review Committee to:

(i) Suspend payment of the appellant's New Zealand Superannuation from April 2015.

(ii) Establish an overpayment of New Zealand Superannuation paid in the period 9 March 2015 to 7 April 2015 amounting to $1,056.50 on the basis that the appellant began residing in the Netherlands on 9 March 2015.

[2] The appellant also raises an issue about the four uncounted qualifying years in Australia in the assessment of his entitlement to payment of New Zealand Superannuation in the Netherlands.

Background

[3] The appellant is aged 66 years.

[4] He was born in the United Kingdom in 1949 and lived there until he emigrated to New Zealand as a child in 1961. He lived primarily in New Zealand until 2003, when he moved to Australia. He was aged 53 years when he moved to Australia. He lived in Australia from July 2003 until 8 March 2015 when he moved to the Netherlands.

[5] The appellant attained the age of 65 years on 25 December 2014. He was granted New Zealand Superannuation payable in Australia pursuant to the provisions of the reciprocal agreement with Australia from 25 December 2014.

[6] On 10 March 2015, Centrelink advised the Ministry that the appellant had moved to the Netherlands on 8 March 2015. Following a delay while the Ministry sought further information including the appellant's address in the Netherlands, a decision was made to suspend the appellant's New Zealand Superannuation from 8 April 2015.

[7] The appellant's entitlement to New Zealand Superannuation was reviewed in respect of the period 9 March 2015 to 7 April 2015. An overpayment of $1,056.50 was established.

[8] On 16 July 2015, the Ministry advised the appellant that he was not entitled to continue receiving New Zealand Superannuation pursuant to the reciprocal agreement with Australia as he was now residing in a third country. He was also advised of the overpayment.

[9] The appellant sought a review of decision. The matter was reviewed internally and by a Benefits Review Committee. The Benefits Review Committee confirmed the decision of the Chief Executive. The appellant then appealed to this Authority.

Decision

[10] New Zealand Superannuation cannot be paid overseas unless the recipient can bring themselves within one of the exceptions contained in ss 22 to 35 of the New Zealand Superannuation and Retirement Income Act 2001, or there is an agreement or convention adopted under s 19 of the Social Welfare (Reciprocity Agreements and New Zealand Artificial Limb Service) Act 1990.

[11] The New Zealand Government has a reciprocal agreement on social welfare with the Government of Australia.[1] This agreement governs the way in which New

[1] Social Welfare (Reciprocity with Australia) Order 2002.

Zealand Superannuation can be paid in Australia. It was this agreement which allowed for the appellant to be paid New Zealand Superannuation in Australia.

[12] The basic residence requirements for entitlement to New Zealand Superannuation are that the person has attained the age of 65 years, lived in New Zealand for 10 years since attaining the age of 20 and for five years since attaining the age of 50. The appellant does not meet the criteria of having lived in New Zealand for five years after attaining 50 years of age. For the appellant to be paid New Zealand Superannuation in Australia he was obliged to rely on Article 8 of the reciprocal agreement to meet the residence requirements.

[13] Article 6.4 of the reciprocal agreement with Australia provides that where a person is receiving a benefit by virtue of this agreement and that person departs for a third country:

> (a) a New Zealand benefit shall continue to be payable in accordance with the provisions for temporary absences under the social security law of New Zealand if the person was a New Zealand resident at the time he or she departed for the third country; and
>
> (b) in all other cases the benefit shall continue to be payable for a period of 26 weeks.

[14] The appellant relies on this provision and says he should be entitled to receive New Zealand Superannuation for a period of 26 weeks.

[15] On behalf of the Chief Executive, it is submitted that Article 6.4 does not apply to the appellant. The provisions of Article 6 are qualified by the provisions of Article 14 which provides as follows:

> Residence in Third Countries
>
> 1. A person who:
>
> (a) is entitled to receive a benefit solely through the application of the totalising provisions of Article 8; and
>
> (b) either:
>
> (i) departs New Zealand with the intention of residing in a third country for a period which exceeds 26 weeks; or
>
> (ii) resides in a third country for a period which exceeds 26 weeks;
>
> shall only be entitled to receive a benefit while outside Australia or New Zealand if he or she is entitled to receive that benefit under a reciprocal

> social security agreement that the Party paying that benefit has entered into with that third country.
>
> 2. Where a person, who is in receipt of an Australian benefit by virtue of this Agreement, goes to a third country that benefit shall continue to be payable for 26 weeks.

[16] It is submitted on behalf of the Chief Executive that as the appellant is a person who receives New Zealand Superannuation solely through the application of the totalisation provisions of Article 8, the appellant can only continue to receive a benefit in a third country for the first 26 weeks, if he or she is entitled to receive that benefit under a reciprocal social security agreement that the party paying that benefit (in this case New Zealand) has entered into with the third country.

[17] In short, because the appellant did not automatically meet the residence criteria to be paid New Zealand Superannuation and was obliged to rely on the totalisation provisions of the reciprocal agreement with Australia to receive New Zealand Superannuation, he can only be paid New Zealand Superannuation for the first 26 weeks in the Netherlands if he is entitled to receive a benefit under New Zealand's reciprocal agreement with the Netherlands.

[18] New Zealand also has a reciprocal agreement with the Netherlands, published in the Social Welfare (Reciprocity with the Netherlands) Order 2003.

[19] On behalf of the Chief Executive, it is submitted that Article 7 of that agreement covers the appellant's situation. It provides as follows:

> Totalisation
>
> 1. In determining whether a person meets the residential qualifications for a benefit specified in the legislation of New Zealand, the Institution of New Zealand shall:
>
> (a) In the case of New Zealand superannuation or a veteran's pension, for a person who is over the age of 65 years, deem a Netherlands period of insurance accumulated by that person after attaining the age of 20 years to be a period during which that person was both resident and present in New Zealand, but only periods of insurance relating to periods over the age of 50 years shall be taken into account to meet the residential requirements for New Zealand superannuation which state that a person must be resident in New Zealand for 5 years over age 50;
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> …

[20] As with his situation while living in Australia, because the appellant had not lived in New Zealand for five years after attaining the age of 50, he must rely on the terms of the reciprocal agreement with the Netherlands to meet the eligibility criteria for payment of New Zealand Superannuation in the Netherlands. He has three years'

residence in New Zealand after attaining the age of 50. At the time of his arrival in the Netherlands, he required a further 14 months' residence in either New Zealand or the Netherlands to meet the residence criteria. Because the appellant did not meet the residence criteria he was not entitled to a benefit under the reciprocal agreement with the Netherlands when he arrived there.

[21] As a result, Article 14 of the reciprocal agreement with Australia means that he was not entitled to continue receiving New Zealand Superannuation payable in Australia for the first 26 weeks following his departure from Australia.

[22] The appellant makes the following points:

(i) He had worked in New Zealand from the age of 18 years and worked in Australia after attaining the age of 50 years. He appears to lose 18 months of qualifying employment at both ends of his working life in New Zealand.

Response

The eligibility criteria for entitlement to New Zealand Superannuation, namely residence in New Zealand for 10 years after the age of 20 years and five years after the age of 50 years are the qualifying criteria laid down by Parliament. There is no discretion around the qualifying criteria.

(ii) Calculation of the appellant's residence takes no account of a period of four-and-a-half years from July 2003 to the approval of his Australian residence in 2007/2008. During that time he was working in Australia as a New Zealand citizen on a Special Category Visa. This period is not counted by either the New Zealand or the Australian authorities for qualifying purposes. The appellant believes this is a breach of his rights which appear to have been overlooked in the arrangements leading to the current social security agreement. He may have reconsidered his move to Australia had he known about it.

Response

The current reciprocal agreement with Australia was in place at the time the appellant moved to Australia. It was the responsibility of the appellant to clarify what effect a move to Australia would have on his entitlement to New Zealand Superannuation on moving to a third

country. We further note that the appellant was not paying tax in New Zealand in the period from 2003 until he obtained Australian residence.

(iii) The appellant is a citizen of both New Zealand and Australia. Both New Zealand and Australia have reciprocal agreements with the Netherlands. It is unfair that as a retiree he fulfils the residence criteria in both New Zealand and Australia but he cannot immediately access the Netherlands pension.

Response

As with his move to Australia, it appears that the appellant had not thoroughly researched his pension entitlements before moving to the Netherlands. There is no provision for periods of residence in Australia to be taken into account in the reciprocal agreement between New Zealand and the Netherlands.

[23] We are not satisfied that the appellant was entitled to receive New Zealand Superannuation for a further 26 weeks following his departure from Australia.

Payment of New Zealand Superannuation in the Netherlands

[24] As previously outlined, the appellant does not have five years' residence since attaining the age of 50 years, in New Zealand and therefore, he must rely on the terms of the reciprocal agreement with the Netherlands to meet the residence criteria.

[25] Before he can be paid New Zealand Superannuation in the Netherlands the combination of his residence in New Zealand and the Netherlands, over the age of 50 years, must amount to five years. He does not meet that criteria.

[26] The Chief Executive was correct to suspend the appellant's entitlement to New Zealand Superannuation from 9 March 2015.

Overpayment

[27] The appellant says that he first advised Centrelink on 16 January 2015 that he intended to leave Australia on 8 March. On 10 and 16 February 2015, Centrelink sent him advice about claiming a pension in the Netherlands. The appellant says that any payments he received from Work and Income were received in good faith knowing that he had informed Centrelink of his intentions in a timely manner. The appellant has repaid the $1,056.50 owing but he requests that it be refunded to him. He says

that he was not informed of the provisions of s 86(9A) of the Act which would have enabled him to contest the decision to recover the debt. The appellant says that he has been losing entitlement of approximately $1,150 a month in New Zealand Superannuation payments and he has had to meet his costs out of his savings. He says that his current savings amount to AU$4,000. The appellant says that he did not have employment at the time of writing his submission. He did not provide any advice about the financial circumstances of his partner or whether he owned a home.

[28] Generally speaking, overpayments of benefit are debts due to the Crown and must be recovered. There is a limited exception to this rule contained in s 86(9A) of the Social Security Act 1964. This provision directs that the Chief Executive may not recover a debt in circumstances where:

(a) the debt was wholly or partly caused as a result of an error by an officer of the Ministry;

(b) the beneficiary did not intentionally contribute to the error;

(c) the beneficiary received the payments of benefit in good faith;

(d) the beneficiary changed his position believing he was entitled to receive the money and would not have to repay it; and

(e) it would be inequitable in all the circumstances, including the debtor's financial circumstances, to permit recovery.

[29] Pursuant to s 86(9B) of the Act, the term "error" means:

(a) the provision of incorrect information by an officer of the Ministry;

(b) an erroneous act or omission occurring during an investigation of benefit entitlement under s 12; and

(c) any erroneous act or omission of an officer of the Ministry.

[30] The requirements of s 86(9A) are cumulative. If one of the criteria cannot be made out, it is not necessary to consider subsequent criteria.

[31] The first question we must ask is whether or not the debt was caused by an error on the part of the Ministry. The appellant points out that he first advised Centrelink of his impending departure in January 2015. The appellant also points out

that he had been advised to conduct communications through Centrelink, not directly with Work and Income New Zealand.

[32] The Ministry were advised by Centrelink of the appellant's departure from Australia on 10 March 2015 but did not suspend payments to the appellant until action was taken on 1 April to suspend payment from 7 April.

[33] It seems most unfortunate that this delay occurred, particularly in the light of the appellant advising Centrelink of his plans in January.

[34] It appears that the Ministry took action on the appellant's file on 16 March and 20 March but did not suspend the appellant's benefit until 1 April.

[35] We accept the Ministry may not always be able to immediately action advice which affects a benefit but there has been no explanation about why the Ministry did not suspend his benefit on 20 March. We consider that the failure to take action to suspend the appellant's benefit on 20 March was an error on the part of Ministry staff which in part caused the overpayment. We accept that the appellant did not intentionally contribute to the error and received the payments from 20 March to 7 April in good faith. We infer the money was spent meeting the appellant's living costs.

[36] We are then required to consider whether in all the circumstances, including the appellant's financial circumstances, it would be inequitable to recover the debt in respect of the period 20 March to 7 April. We take into account that the appellant was able to repay the debt and it has effectively been recovered. We also take into account that the appellant was unaware of the provisions of s 86(9A). It is unfortunate that the appellant did not research his Superannuation rights more carefully when he moved; nevertheless, the consequences for him have been significant.

[37] Taking into account all of the circumstances, including the appellant's financial circumstances, we direct that the debt in respect of the period 20 March to 7 April should not be recovered.

[38] We are not satisfied that there was any error by the Ministry in the period 8 March to 20 March because that was not an unreasonable timeframe for the Ministry to take action. We are not therefore able to direct that the debt should not be recovered in relation to that period, pursuant to the provisions of s 86(9A).

Settlement of disputes

[39] Finally, the appellant raises the issue of the failure of the Ministry to invoke Article 24 of the reciprocal agreement with Australia. Article 24 relates to settlement of disputes between the competent authorities of New Zealand and Australia. It does not relate to individual disputes between beneficiaries and the competent authorities of either country.

[40] The appeal as it relates to the overpayment in respect of the period 20 March to 7 April 2015 is allowed. In all other respects, the appeal is dismissed.

DATED at WELLINGTON this 11th day of July 2016

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Ms M Wallace
Chairperson

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Mr K Williams
Member

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Lady Tureiti Moxon
Member