

[2016] NZSSAA 071

Reference No. SSA 135/15

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

HEARING at WELLINGTON on 11 April 2016

APPEARANCES

Mr M O'Flaherty – for the appellant
Ms An 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 payment of a pension he receives from Taiwan from his entitlement to New Zealand Superannuation (NZS).

[2] The issue in this case is whether or not the pension the appellant receives meets the criteria of the Government Occupational Pension as defined in s 3 of the Social Security Act 1964 (the Act).

Background

[3] The appellant was a teacher in Taiwan before he immigrated to New Zealand in September 1996. He was employed as a teacher at the XXXX High School from 1971 to 1 August 1996. Having completed 25 years' employment he was able to elect to

retire and receive a pension. His application to retire was granted on 8 June 1996. It was open to the appellant to receive a lump sum payment or to elect to receive periodic payments in respect of his retirement pension. The appellant chose to receive periodic payments. He receives payments of his pension from Taiwan every six months.

[4] When the appellant attained the age of 65 years, he applied for New Zealand Superannuation which was initially granted. The appellant disclosed the receipt of his Taiwanese pension at the time of his application for NZS. A decision was made that the amount of the pension the appellant received from Taiwan would be directly deducted from his entitlement to NZS pursuant to the provisions of s 70 of the Act.

[5] In later years, the appellant discovered that other recipients of pensions from Taiwan were not having their Taiwanese pensions taken into account in calculating their entitlement to NZS. As a result, he sought a review of the decision to deduct his pension from Taiwan from his entitlement to NZS.

[6] 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] The appellant says that his pension is paid by virtue of his employment as a teacher in Taiwan. It is paid in accordance with the Statute Governing the Retirement of School Faculty staff and is administered by the Civil Servants Pension and Consolation Fund Administration Committee of the Ministry of Education. A letter from the Bureau of Labour Insurance confirms that there is no record of the appellant making contributions under the provisions of the Labour Insurance Old Age Pension Scheme or the National Pension Insurance Scheme.

[8] On behalf of the Chief Executive it is submitted that it is understood that the appellant receives his pension pursuant to the Government Employee and School Staff Insurance and Civil Servant Pension Scheme. The payments are not exempt from the s 70 deduction regime by reason of the exceptions contained in paragraphs (b) and (d) of the definition of "Government Occupational Pension" in s 3 of the Act.

Decision

[9] Section 70 of the Social Security Act 1964 provides for benefits, pensions and periodical allowances received from overseas to be deducted from entitlement to New

Zealand benefits in certain circumstances. The essential elements of s 70 are that where:

- a benefit, pension or periodical allowance granted overseas, which forms part of a programme providing benefits, pensions or periodical allowance, 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, 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, New Zealand Superannuation and Retirement Income Act 2001 or the Veteran's Support Act 2014.

[10] The provisions of s 70(1) are very wide. For example, 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 payable for any of the contingencies covered in the New Zealand income support legislation.¹

[11] Government occupational pensions are however exempt from this regime as the definition of 'overseas pension' in s 3 of the Act excludes them under subparagraph (c).

[12] The definition of "Government Occupational Pension" is contained in s 3 of the Act and provides 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

¹ See *Hogan v Chief Executive of the Department of Work and Income New Zealand* HC Wellington AP49/02, 26 August 2002; *Tetley-Jones v Chief Executive of the Department of Work and Income New Zealand* HC Auckland CIV-2004-485-1005, 3 December 2004.

- (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.

[13] It is submitted on behalf of the Chief Executive that two of the exceptions, (b) and (d) apply in this instance.

[14] It is apparent from the information available that there have been a number of changes and developments to the programme for social security in Taiwan over the years.

[15] In 1958, the Taiwanese government enacted the Labour Insurance Act which came into force in 1960. This Act covered employees in private firms employing more than five people. Commentary on the Taiwan social security system indicates that this particular scheme provided lump sum payments for those covered by the system on attaining a specified age. This scheme was very different from the pension arrangements in place for civil servants. It has been suggested that compared to old-age benefit for public servants, labour insurance for private employees was very meagre and was criticised for not providing any substantial support for Taiwan's employed population after their retirement.² Many people did not qualify for a pension under this system due to the incompatibility between the requirement for a long period of service in the same firm, and the short lifespan of small and medium sized enterprises and Taiwan's high rate of labour mobility. It is suggested by one writer that there was widespread evasion of pension payments by employers, with only about 10% of businesses abiding by the law to periodically pay premiums to the retirement fund for their employees.³ This writer estimated that by 1998 (after the appellant had retired), only 19% of persons were making contributions to the retirement fund and only 40% of private sector employees were covered by this pension system.

² Yei-Whei Lin "Faltering national pension reform and old-age security mix in Taiwan" (paper presented to 5th East Asian Social Policy Conference, Taipei, November 2008) at 15.

³ Yei-Whei Lin at 17.

[16] In 2003, the Labour Insurance Act/Standards Acts were replaced by a more comprehensive piece of legislation covering employees in the private sector known as the Statute of Labour Pension. We have no evidence confirming that persons who had obtained a pension or had entitlement to a lump sum payout under the earlier legislation had their entitlements replaced by this later legislation.

[17] In addition to the provisions of the Labour Insurance Act, the information available is that in 1980 the government made specific provision for teachers in private schools in Taiwan. Two sources note that the scheme for private school teachers provided for a lump sum payment on retirement rather than a periodic pension.⁴

[18] Provision for pensions for civil servants was first made in 1943, much earlier than for the general population. However, at about the same time that the government enacted the Labour Insurance Pension Scheme in 1958 for private sector employees, it also set up a separate scheme for civil servants – the Public Service Insurance Act.

[19] The appellant worked in a State-run technical college. We infer that he was covered by the Public Service Insurance Act. At its inception this was a non-contributory scheme; it was funded entirely by the government for civil servants. That situation continued until 1995 – 1996 when a new contributory scheme was introduced. The appellant noted that while he worked as a teacher, his wages were relatively low but it was well known that he could retire after 25 years' service and receive either a lump sum payment or a comparatively generous pension.

[20] In summary, the information available is that at least since the 1950s the Taiwanese Government has made provision for income support for its citizens by legislation providing for the contingencies of old age, disability and survivorship. The programme is contained in a number of different pieces of legislation with separate provision for different groups including teachers.

[21] We understand that the legislation which covers the collection of contributions and the funding of the various schemes is different from the legislation which governs retirement and the calculation of any pension payable.

[22] The term “government occupational pension” is defined in s 3 of the Act. In the first instance it covers a person whose benefit, pension or periodical allowance is paid by reason of their employment by or period of service to the government.

⁴ Chih-lung Huang “Rethinking the Old Age Income Security for All in Taiwan” (paper presented to 7th East Asian Social Policy Conference, Seoul, August 2010); Ai Ju Shao “Taiwan Old-Age Security Systems: Equity and Sustainability Implications” (paper presented to 4th Pensions, Benefits and Social Security Colloquium, Tokyo, October 2009) at 2.

[23] This criteria however is qualified by the exceptions in (b), (c) and (d) of the definition. The first question that must be asked is: whether the payment the appellant receives is paid by the Government of Taiwan for any reason other than his period of employment or service to the government? The information available is that the pension the appellant receives is paid solely because of the appellant's period of employment as a teacher in a government educational facility. His pension is paid solely because of this period of service.

[24] The second question then is: would the appellant have been entitled to receive a similar benefit or pension paid by or on behalf of the government of Taiwan under a scheme or other arrangement in respect of persons who are not employees or in the service of that government, had he not been eligible for the government teacher's pension.

[25] In our view, this issue must be considered at the time the appellant became entitled to his pension in 1996. The nature of his pension is not changed by subsequent legislation or a programme that did not exist at the time his entitlement to pension crystallised.

[26] It is apparent that Taiwan did not have universal social security coverage at the time the appellant gained his pension. Under the scheme set up by the Labour Insurance Act, if the appellant was an employee in a firm of more than five people he may have been entitled to a lump sum retirement payment. However, if he was working for an organisation of less than five employees or was self-employed or in a group not covered by the Labour Insurance Act of 1958 he would not have been entitled to receive a retirement payment of any type. If he had been employed as a teacher in a private school he may have received a lump sum payment on retirement. There is of course also the issue of the widespread evasion of the scheme for private sector employees previously referred to which cannot be ignored. There is no evidence that in 1996, had he spent the previous 25 years working in the private sector, either in a private school or otherwise, that the appellant would have had an entitlement to a periodic pension payment or similar payment to the payment he now receives.

[27] It is simply not possible to say on the balance of probabilities that the appellant would have been entitled to receive a similar benefit, pension or periodical allowance paid by or on behalf of the Government of Taiwan under a scheme or other arrangement in respect of persons who were not employees or in the service of that government, had he not received his government teachers pension.

[28] Much of the Ministry's submissions, made on behalf of the Chief Executive, are focused on developments in the social security system which have occurred in Taiwan since 1996. We do not consider that traversing subsequent developments is helpful in determining whether or not the particular pension the appellant receives constitutes a Government Occupational Pension.

[29] The reality is that at the time the appellant became entitled to his pension, pension arrangements for other parts of the population in Taiwan were neither universal in law or in fact. Moreover, the provisions in the private sector were for lump sum payments on retirement, not periodic payments of pension.

[30] We are satisfied that the appellant's pension falls within the definition of a Government Occupational Pension as defined in s 3 of the Social Security Act 1964 and therefore, should not be deducted from his entitlement to New Zealand Superannuation pursuant to s 70 of the Act.

[31] The appeal is allowed.

[32] The appellant is invited to make submissions on costs within 14 days of the date of this decision.

DATED at WELLINGTON this 18th day of July 2016

Ms M Wallace
Chairperson

Mr K Williams
Member