

[2016] NZSSAA 078

Reference No. SSA 120/15

IN THE MATTER

of the Social Security Act 1964

AND

IN THE MATTER

of an appeal by **XXXX** of
Auckland 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 AUCKLAND on 29 July 2016

APPEARANCES

No appearance by or on behalf of the appellant
A Singh for the Chief Executive of the Ministry of Social Development

DECISION

Introduction

[1] The appellant appealed to the Authority in respect of decisions of the Chief Executive, upheld by a Benefits Review Committee, to:

- (a) suspend payment of New Zealand Superannuation to the appellant and his partner from February 2015; and
- (b) establish overpayments of New Zealand Superannuation amounting to \$344.91 for each of the appellant and his wife, and an overpayment of Accommodation Supplement of \$37.29 for payment made in respect of

the period 16 February 2015 to 24 February 2015. These overpayments have since been written off.

[2] The sole issue for the Authority in this case is whether or not the Chief Executive was correct to suspend payment of New Zealand Superannuation to the appellant from 16 February 2015.

Background

[3] The appellant was granted New Zealand Superannuation from 14 July 2014. His partner was included as a non-qualifying spouse.

[4] The appellant advised of his intention to leave New Zealand on XX August 2014. There was no suggestion that the appellant was leaving on a long-term basis. His partner left New Zealand in November 2014.

[5] In February 2015, as a result of a data match, it was determined that the appellant had not returned to New Zealand within 26 weeks of his departure.

[6] On the basis that the appellant had been absent from New Zealand for more than 26 weeks, the superannuation payments to the appellant and his partner were suspended from 16 February 2015, and the overpayments previously referred to established.

[7] Custom Service records indicate the appellant eventually returned to New Zealand on XX July 2015.

[8] The appellant requested a review of the decision to suspend his New Zealand Superannuation. 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.

Decision

[9] The appellant did not attend the hearing and has not communicated with the Authority to respond to the Section 12K Report.

[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 an agreement or convention adopted under the Social Welfare (Reciprocity Agreements and New Zealand Artificial Limb Service) Act 1990.

Temporary absence

[11] The appellant has not applied to be paid New Zealand Superannuation overseas under any of the provisions of the Act which provide for payment overseas on a long-term basis. His situation must therefore be dealt with on the basis that he was temporarily absent from New Zealand.

[12] In the case of temporary absences, s 22 provides that where a person is absent from New Zealand for no more than 30 weeks they may be paid New Zealand Superannuation for the first 26 weeks. There is an exception to this rule in s 22(b) in the circumstances where the person's absence exceeds 30 weeks and the Chief Executive is satisfied that the absence beyond 30 weeks is due to circumstances beyond the person's control that he or she could not reasonably have foreseen before departure. This exception allows a person to be paid if their absence is longer than 30 weeks but it does not allow for payment to be made for more than 26 weeks. 26 weeks is the maximum that can be paid.

[13] The appellant says that his stay overseas was due to reasons beyond his control in that he needed to care for his very ill mother. Even if we were satisfied that the appellant was detained overseas to care for his sick mother there is no basis on which the Chief Executive could continue to make payments to the appellant while he remained overseas because of the provision that a person can only be paid for the first 26 weeks of any temporary absence.

[14] The Chief Executive was therefore correct to suspend payment of New Zealand Superannuation to the appellant.

Ordinarily resident in New Zealand

[15] In addition, it was submitted on behalf of the Chief Executive that since copies of the appellant's movement records have been obtained from Customs, an issue arises as to whether or not he was ordinarily resident in New Zealand in any event. To receive New Zealand Superannuation, at the time of his application he needed to be ordinarily resident in New Zealand.¹ The Chief Executive has a discretion to cancel a grant of New Zealand Superannuation where a recipient has ceased to be ordinarily resident in New Zealand.

[16] The travel movement records show that in 2012, the appellant spent 38 days in New Zealand. In 2013, he spent 42 days in New Zealand. In 2014, he spent 37 days

¹ Section 74(1)(a) of the Social Security Act 1964.

in New Zealand and in 2015 he spent 42 days in New Zealand. With the exception of a period in 2011 a similar pattern occurred from 2007 to 2011. In 2011 he spent a longer period in New Zealand.

[17] We have no explanation about the appellant's long-term absence overseas from the appellant, but in any event the information available suggests that the appellant ceased to be ordinarily resident in New Zealand, probably as long ago as 2007.

[18] What is meant by the term "ordinarily resident in New Zealand" has been considered by the Court of Appeal and the Supreme Court in New Zealand in recent times in *Greenfield v Chief Executive of Ministry of Social Development*.² The Court of Appeal defined the term "ordinary residence" in the following way:

[26] The New Zealand Oxford Dictionary gives the following relevant definitions:

"ordinarily" – normally; customarily, usually

"resident" – a permanent inhabitant

[27] When the two definitions are read together, the expression refers simply to the place where a person usually lives. The concept of permanence is reinforced by the definition of "reside" which includes "to dwell permanently".

[19] The Supreme Court describes the inquiry into whether a person is ordinarily resident in New Zealand in the following way:

[36] ... the inquiry into ordinary residence should logically address where the subject person's home had been up until the critical date, where the person was living at the critical date and that person's then intentions as to the future.

[20] We are not aware of what connections the appellant now has in New Zealand, although we understand that his son remains living here. In any event, the periods he has spent in New Zealand have been very limited since 2007.

[21] It appears that over the past nine years, the appellant has primarily lived outside New Zealand and his permanent home is now overseas.

[22] As the Chief Executive is not now satisfied that the appellant remains ordinarily resident in New Zealand, the appellant will need to establish that he is ordinarily resident in New Zealand, before his entitlement to New Zealand Superannuation can be reinstated.

² [2016] 1 NZLR 261, [2015] NZSC 139.

[23] The appeal is dismissed.

DATED at WELLINGTON this 22nd day of August 2016

Ms M Wallace
Chairperson

Mr K Williams
Member

Lady Tureiti Moxon
Member