

[2016] NZSSAA 092

Reference No. SSA 036/16

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

HEARING at WELLINGTON on 19 October 2016

APPEARANCES

The appellant in person

E Kirkman for 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 his wife's United Kingdom pension from his entitlement to New Zealand Superannuation.

Background

[2] The appellant was born in New Zealand and worked in New Zealand for much of his working life. He has been in receipt of New Zealand Superannuation since 28 November 2000.

[3] In XXXX 2009, he married XXXX. Mrs XXXX is a citizen of, and was at the time of their marriage resident in, the United Kingdom. She receives a pension from the United Kingdom Pension Service. Mrs XXXX was granted residence in New Zealand in November 2013 but continues to spend part of each year in the United Kingdom.

[4] Initially, we understand the couple adopted a pattern of each spending part of the year in the United Kingdom and part of the year in New Zealand. Recently as a result of health problems the appellant has remained in New Zealand. The appellant has a home in New Zealand. Mrs XXXX has a house in the United Kingdom which is owned by herself and her daughter. Mrs XXXX intends to continue spending periods in the United Kingdom without the appellant.

[5] Following the appellant's advice that Mrs XXXX had been granted a visa to live in New Zealand, the payment of New Zealand Superannuation to the appellant was changed from the single rate to the half married rate.

[6] In July 2015, a decision was made by the Chief Executive to commence deducting the pension Mrs XXXX receives from the United Kingdom Pension Service from the appellant's entitlement to New Zealand Superannuation. Mrs XXXX's overseas pension of £117.14 was calculated to be worth \$246.18 in New Zealand dollars. This amount was deducted from the gross weekly rate of New Zealand Superannuation payable to the appellant with the result that his pension entitlement was calculated as follows:

Appellant's entitlement to NZS	
Gross weekly NZS (half married rate)	= \$326.30
Less gross weekly overseas pension	= <u>\$246.18</u>
New gross weekly NZS	= \$ 80.12
Less tax	= \$ 24.00
Net weekly NZS	= \$ 56.12

[7] The appellant sought a review of 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.

[8] The appellant submitted that as a result of the deduction imposed by the Ministry, he and his wife receive substantially less in government administered pensions than a married couple in New Zealand. The appellant demonstrated with figures, which were not disputed by the Ministry, that he and his wife receive less than a married couple receiving New Zealand Superannuation.

Legislation Relevant to this Appeal

[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 or 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 or 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 or the 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. 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.¹

[11] The Authority has held on many occasions that the United Kingdom Pension which the appellant's wife receives is part of a programme comparable to the programme for social security in New Zealand. The programme is administered by or on behalf of the government of the United Kingdom. As a result, the provisions of s 70 of the Act, any benefit received in New Zealand (including New Zealand Superannuation) must be reduced by the amount of the United Kingdom pension

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.

received by the person or their spouse. In this case, s 70 specifically requires the overseas pension payments made to a spouse to be deducted from the New Zealand benefit entitlement.

[12] The total fortnightly entitlement to New Zealand Superannuation for a couple is \$1,305.20. Mrs XXXX receives \$479.39 per fortnight and after deduction of this amount from his entitlement to New Zealand Superannuation the appellant receives \$173.21 per fortnight. This results in them receiving a total of \$652.60 per fortnight or, in effect, \$677 less than a New Zealand couple receiving New Zealand Superannuation.

[13] Even if the appellant were to receive the full half married rate of New Zealand Superannuation without deduction, the combined amount he and Mrs XXXX would receive would be \$652.60 plus \$479.39 being a total of \$1,131.99; in effect, \$173.21 less than the amount that a couple receiving New Zealand Superannuation at the married rate would normally receive.

[14] The purpose of s 70 is to ensure that persons who have spent all of their working life in New Zealand are not disadvantaged as compared to people who have worked overseas and are entitled to pension payments from a scheme run by the government of an overseas country. It is reasonable to infer that it was not Parliament's intention that New Zealand pensioners and their non New Zealand partners be seriously disadvantaged by the application of s 70, as compared to New Zealanders who have never lived outside New Zealand.

[15] Although the text of s 70(1)(a) is relatively clear (that the overseas pension of a person's spouse or partner must be deducted from a person's benefit entitlement in New Zealand), taking a purposive approach to the interpretation of s 70 – that is one which would achieve the object of the legislation, the inference might be drawn that the overseas pension of a person's spouse or partner should be deducted only where the couple are receiving the married rate of benefit in New Zealand and/or the total received exceeds the married rate of New Zealand Superannuation.

[16] The appellant and his wife of course have options. They could solve the problem by taking advantage of the reciprocal agreement between the United Kingdom and New Zealand in relation to benefits to receive a married rate of benefit. The appellant's assertion that Mrs XXXX could not receive New Zealand

Superannuation until she had resided here for ten years is simply incorrect. It is difficult to know why the appellant and his wife have not properly explored this option. We also have reservations about Mrs XXXX's claim that she needs to remain resident in the United Kingdom for purposes relating to the mortgage and insurance on her property there.

[17] Nevertheless, it is difficult to see that the purpose of the legislation is served by deducting Mrs XXXX's single rate of her United Kingdom pension from the half married rate of the appellant's New Zealand Superannuation. The result is nonsensical.

[18] Section 70(2) of the Act gives the Chief Executive a discretion to determine the date that deduction of any overseas pension is to take effect. This date may be a date before, on or after the date of determination to deduct the pension.

[19] Ms Kirkman, on behalf of the Chief Executive, argued that this discretion had already been used to a degree in the failure to deduct Mrs XXXX's pension from the appellant's entitlement until 2015. In fact, it appears that the Ministry had simply failed to make any check about Mrs XXXX's entitlement to United Kingdom pension prior to June 2015. No decision about deducting or not deducting was made prior to June 2015.

[20] In exercising the discretion to commence deduction from July 2015 we consider that the Chief Executive has failed to give proper consideration to the consequences of the deduction, namely, that it results in the combined income of the appellant and Mrs XXXX from the pension schemes concerned being substantially less than the married rate of New Zealand Superannuation and that such a result does not achieve the objects of the legislation.

[21] We direct the Chief Executive to defer deduction of Mrs XXXX's pension from the appellant's entitlement to New Zealand Superannuation from 15 July 2015 to 15 July 2017. This will give the appellant and Mrs XXXX time to explore the option of Mrs XXXX's eligibility for New Zealand Superannuation in the first instance. It may be the case that the Chief Executive will need to extend this period in the future.

[22] This is not the first occasion on which the Authority has been required to rule on a case involving an older couple living in different countries for part of each year.

[23] In our view, the Chief Executive needs to give more careful consideration to whether or not to commence deduction of an overseas pension where:

- [a] The overseas pension of a spouse is being deducted from a rate of benefit in New Zealand which is less than the full married rate e.g. such as the single or half married rate; and
- [b] The result is that the person in New Zealand and their spouse or partner receive a total amount of less than the married rate of New Zealand Superannuation from their respective schemes.

[24] The appeal is allowed.

DATED at WELLINGTON this 31st day of October 2016

Ms M Wallace
Chairperson

Mr K Williams
Member