[2016] NZSSAA 106

Reference No. SSA 033/16

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 14 November 2016

APPEARANCES

The appellant in person
Patira Suieva 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 partner's overseas pensions from his entitlement to the half married rate of New Zealand Superannuation.

Background

[2] The appellant was born in the United Kingdom. He lived in New Zealand from 1965 to 1976 and from 2009 to the present time. He is a New Zealand citizen.

[3] The appellant lives in a de facto relationship. His partner was also born in the United Kingdom but is a New Zealand citizen. She has also lived in the United States of America. She is entitled to receive pensions from both the United Kingdom and the United States Social Security Administration.

[4] The appellant was granted New Zealand Superannuation from 9 August 2015 at the half married rate.

[5] A decision was made at the same time to deduct the appellant's partner's overseas pensions from the appellant's entitlement to New Zealand Superannuation. It was calculated that the appellant's partner's entitlement to overseas pensions was $699.73 per week. As this amount exceeded the appellant's half married rate of New Zealand Superannuation the rate of New Zealand Superannuation payable to the appellant was nil. The grant of New Zealand Superannuation to him was suspended from the same day that it was granted.

[6] The appellant has, since the original grant, established his own entitlement to United Kingdom and United States pensions. These amounts must also be deducted from his entitlement to New Zealand Superannuation.

[7] The appellant sought a review of the decision to deduct his partner's overseas pension entitlements from his entitlement to 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.

[8] The appellant submits the following:

(i) The payments received by his partner from the United Kingdom and the United States Social Security Administration are not analogous to New Zealand Superannuation and should not, therefore, be deducted.

(ii) His partner's United Kingdom pension has partly been funded by voluntary contributions.

(iii) The Ministry's decision has caused the appellant and his partner considerable economic and mental hardship.

(iv) There is inadequate publicity about the consequences of s 70 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 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 partner receives is part of a programme comparable to the programme for social security in New Zealand.[2] The programme is administered by or on behalf of the Government of the United Kingdom. As a result of the provisions of s 70 of the Act, any benefit received in New Zealand (including New Zealand

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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.

2 The Authority's position has been upheld by the High Court and Court of Appeal – see *Dunn v the Chief Executive of the Ministry of Social Development* [2008] NZAR 267 and [2009] NZAA 94.

Superannuation) must be reduced by the amount of the United Kingdom pension 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] In addition, Article 15 of New Zealand's Reciprocal Agreement with the United Kingdom[3] requires the amount of any pension payment from the United Kingdom to be deducted from the entitlement of any spouse or partner to a New Zealand benefit.

[13] The pension the appellant's partner receives from the United States has also been considered by the Authority on a number of occasions and in the High Court.[4] Again it has been accepted by the High Court that the pension which the appellant's partner receives from the United States of America 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 States of America. As a result the provisions of s 70 apply.

[14] The Chief Executive has now accepted that part of the appellant's partner's United Kingdom pension is derived from voluntary contributions. The United Kingdom Pension Service have assessed that without the voluntary contributions her United Kingdom State pension would have been £84.44 per week. As a result, the Chief Executive now accepts that the weekly total now to be deducted from the appellant's entitlement to a pension is $472.95.

[15] As this amount exceeds the appellant's entitlement to the half married rate of New Zealand Superannuation, the position of the Chief Executive is that it is still the case that no New Zealand Superannuation is payable to him.

[16] At the time relevant to this appeal, the total entitlement of a married couple to New Zealand Superannuation was $671.48 per week or $1,305.20 per fortnight. By deducting his partner's pension from the appellant's half rate of New Zealand Superannuation payable to the appellant, together with the United Kingdom pension payable to the appellant, the appellant and his partner in fact receive $176.02 per week less than the full married couple rate.

[17] In this particular scenario, the situation could be remedied by the appellant's partner applying for New Zealand Superannuation. If she were to apply for New Zealand Superannuation, the difference between the overseas pensions received by the appellant and his partner and the gross rate of New Zealand Superannuation paid to

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3 Social Welfare (Reciprocity with the United Kingdom) Order 1990.

4 *Roe v Social Security Commission* HC Wellington M270/86, 10 April 1987.

a married couple in New Zealand would be payable to the appellant. Possibly because she is under the misconception that the New Zealand Government would "take" her overseas pensions the appellant's partner has not applied for New Zealand Superannuation, although it appears that she would be eligible to do so. If necessary, the reciprocal agreement with the United Kingdom can be applied to enable her to meet the residence requirements.

[18] 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 who have lived overseas and are entitled to overseas pensions, be seriously disadvantaged by the application of s 70.

[19] It appears that the requirement that the overseas pension of a partner be deducted from the New Zealand benefit is having an unintended and unfair consequence where a recipient of the benefit is paid at the half married or single rate.

[20] The issue arises particularly in the context of New Zealand Superannuation, which is not income tested and which is paid without reference to the age or income of a partner.

[21] Where the overseas pensions of a couple are deducted against the married rate of New Zealand Superannuation payable, no anomaly arises.

[22] However, where the overseas pension of a spouse is deducted from the single or half married rate of New Zealand Superannuation paid to their spouse or partner, the direct deduction regime appears to disadvantage the beneficiary.

[23] There appear to be four groups of people affected by the deduction of a partner's overseas pension from the single or half married rate of New Zealand Superannuation:

(i) Those whose partners are likely to be able to obtain New Zealand Superannuation if they choose to apply.

(ii) Those with a partner who does not meet the age requirement and who are not included in their partner's New Zealand Superannuation.

(iii) Those whose partners are unlikely to qualify for New Zealand Superannuation in the near future.

(iv) Those whose partners are present in New Zealand by virtue of a temporary permit in which case the recipient of New Zealand Superannuation is entitled to receive only a single rate of benefit.

[24] Section 70 requires the rate of benefit that would otherwise be payable be reduced by the amount of such overseas benefit or pension. In effect, the deduction is to be made from the rate of benefit payable. No distinction is made between whether the person is receiving the married, half married or single rate of payment.

[25] Taking a purposive approach to the interpretation of s 70, that is one which would achieve the objective 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 amount received exceeds the married rate of benefit. An alternative would be to calculate the entitlement by deducting the total overseas pensions received from a notional married rate of pension.

[26] In this case, the appellant's partner is resident in New Zealand and apparently able to receive New Zealand Superannuation in her own right if she applies. In this circumstance s 70(2) of the Act provides some relief.

[27] 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.

[28] The Chief Executive has accepted that the discretion can be used in circumstances where the overseas pension of a partner is deducted against the half married rate or single rate of pension to ameliorate unfairness. However, it has been submitted on behalf of the Chief Executive that in this case, where the couple can take action to reduce any financial unfairness caused by the operation of s 70, it is reasonable to expect them to do so. In this case, there is a viable option for the appellant and his partner to minimise any financial unfairness arising from s 70(1). It is submitted that the Ministry has written to the appellant on at least two occasions inviting his partner to apply for New Zealand Superannuation and showing the advantages in his partner doing so. It is submitted that the exercise of the discretion contained in s 70(2) of the Act is not warranted in this case.

[29] In fact, the Chief Executive failed to have regard to the consequences of deducting the appellant's partner's pension at the time the decision was made in this case. Had proper consideration been given to the issue at the time, deferring deduction for a short period and arranging a meeting with the appellant to explain his partner's

options would have been appropriate. Due to the delay in resolving the matter, that option is no longer available. We are not able to discern any reason from the legislation as to why the appellant should be disadvantaged as a result of his partner's failure to apply.

[30] We direct that the Chief Executive defer deduction of the appellant's partner's overseas pensions from the appellant's entitlement to New Zealand Superannuation to the extent that the appellant's entitlement to New Zealand Superannuation is calculated with reference to the difference between his partner's overseas pensions and the married rate of New Zealand Superannuation. The appellant's entitlement to overseas pensions will also need to be deducted from that amount. The deferment is to occur from the date of the original grant until 1 March 2017. This will give the appellant's partner a reasonable opportunity to make an application for New Zealand Superannuation. Making such an application does not impact on her right to continue receiving her overseas pensions directly.

[31] The appeal is allowed to the extent indicated.

DATED at WELLINGTON this 20th day of December 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