

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
Lady Tureiti Moxon - Member

HEARING at AUCKLAND on 14 November 2016

APPEARANCES

Mr S van Schalkwyk for the appellant
Ms P Siueva 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 the amount of her husband's United Kingdom pension (UK pension) from her entitlement to the half married rate of New Zealand Superannuation.

Background

[2] The appellant is aged 66 years. She was born in New Zealand. She is married. Her husband, XXXX (Mr XXXX), was born in the United Kingdom. He resides in France. The couple spend part of each year living in each other's country of residence.

We understand that as a general rule, the appellant spends three months of every year in France. Her husband spends four months of every year in New Zealand. This has been the pattern of their living arrangements since they married in 2005. Each has commitments to their respective families in the countries in which they live.

[3] The appellant made application for New Zealand Superannuation on 30 October 2015. She was granted New Zealand Superannuation at the half married rate from 23 November 2015. However, it was also determined that the half married rate of New Zealand Superannuation she is entitled to should be reduced by the amount of her husband's United Kingdom pension. This has resulted in her New Zealand Superannuation being reduced by \$3,607.03 per annum.

[4] The appellant sought a review of this 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.

[5] On behalf of the appellant, it is submitted that:

- (i) if the appellant's pension and her husband's United Kingdom pension were added together they would receive half the married rate of New Zealand Superannuation.
- (ii) because her husband's pension is deducted from the appellant's half married rate of pension she now receives approximately \$69 per week less than the half married rate.
- (iii) Parliament would not have intended that a couple receive a combined pension, including New Zealand and overseas pensions, less than the married pension rate as a result of the application of s 70 of the Act.
- (iv) the section was inserted to stop recent migrants from double dipping on pensions not to ensure less than single dipping.
- (v) section 65 of the Social Security Act 1938 clearly stated the policy behind s 70. It clearly states that the person is not to receive less than their New Zealand pension entitlement in aggregate as a result of the application of the section. Although the former s 65 has not survived there is no indication of any underlying policy change.
- (vi) the policy of s 70 is to stop people from ending up with more than the entitlement of two people from government administered pension schemes.

- (vii) as Mr XXXX is not entitled to a New Zealand pension and because the couple are not better off than they would have been had they received only a New Zealand pension, Mr XXXX's United Kingdom pension entitlement should not be deducted from the appellant's New Zealand entitlement.

[6] On behalf of the Chief Executive, it is submitted that following the Authority's decision of 92 [NZSSAA] 16:

- (i) it is accepted that there is discretion under s 70(2) that might be used to defer the commencement date of deductions on a temporary basis, but where a couple can take action to remedy the financial unfairness caused by the operation of the Act, it is reasonable to expect them to do so before exercising that discretion.
- (ii) where it is not possible for a couple to redress any financial unfairness by their spouse applying for New Zealand Superannuation, unfairness may be indefinite until the couple's circumstances change.
- (iii) in its current terms, s 70(2) may not be used to defer deductions indefinitely. It is submitted that because the living arrangements of the appellant and her husband are indefinite, there is no basis for exercising the discretion under s 70(2) in this case.

Decision

[7] 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 from overseas must be deducted from the amount of any benefit payable under the Social Security Act 1964, the New Zealand Superannuation and Retirement Income Act 2001 or the Veteran's Support Act 2014.

[8] 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

[9] The appellant receives a benefit (New Zealand Superannuation). Her husband is paid a pension by the United Kingdom Pension Service. The Authority has held on many occasions that the United Kingdom pension which the appellant's husband 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 of 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 received by that person or their spouse. The Authority's position has been upheld in the High Court and Court of Appeal.² Section 70 specifically requires the overseas pension payments made to a spouse to be deducted from a New Zealand benefit entitlement.

[10] In addition, Article 15 of New Zealand's reciprocal agreement with the United Kingdom³ requires the amount of any pension payment from the United Kingdom to be deducted from the entitlement of any spouse to a New Zealand benefit.

[11] The entitlement to New Zealand Superannuation for a couple at the time relevant to the appeal was \$671.48 per week. Mr XXXX's United Kingdom pension amounts to approximately \$138.72 per fortnight. The appellant's entitlement to the half married rate at the relevant time was \$326.30 gross per week. Instead, she received \$256.93 gross.

[12] The Authority has considered a number of cases where the overseas pension of a partner who does not have entitlement to New Zealand Superannuation has been

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 See *Dunn v Chief Executive of the Ministry of Social Development* [2008] NZAR 267 and [2009] NZAR 94.

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

deducted from a single or half married rate of New Zealand Superannuation, resulting in an apparent disadvantage to the recipient of New Zealand Superannuation. It appears that the requirement that the overseas pension of a partner be deducted from a New Zealand Superannuation is having an unfair consequence where the recipient is paid at the half married or single rate – rather than the married rate. Changes in international mobility and marriage type relationships which could not have been imagined 50 years ago have resulted in s 70(1) having unintended consequences in some circumstances. The issue arises particularly in the context of New Zealand Superannuation, which is not at present income-tested and can be paid regardless of the age or income of a spouse or partner.

[13] 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 as follows:

- (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 therefore 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 benefit recipients are entitled to receive only a single rate of benefit.

[14] Where the overseas pensions of a couple are deducted from the married rate of benefit payable, no anomaly arises.

[15] Where, however, the overseas pension is deducted from the single or half married rate of New Zealand Superannuation, the direct deduction regime appears to actually disadvantage the beneficiary.

[16] Mr Van Schalkwyk has helpfully drawn attention to the original provision in the 1938 Act relating to the deduction of overseas pensions. He suggests that provision provided that a person should not receive less than would otherwise be payable.

[17] Section 70 of the Act enacted in 1964 took away the discretionary element in s 65 to deduct an overseas pension. It also provides more clearly for the type of

pension to be deducted. A significant addition is the provision enabling the deduction of any overseas pension from the benefit entitlement of a partner to a benefit.

[18] The purpose of s 70 is to ensure that persons who have spent all their working lives in New Zealand are not disadvantaged compared to people who have worked overseas and are entitled to pension payments from a scheme run by the government of an overseas country. We agree with the submission made on behalf of the appellant that, conversely, it is reasonable to infer that it was not Parliament's intention that beneficiaries who have spent time overseas or who have partners who are entitled to an overseas pension would be seriously disadvantaged by the application of s 70.

[19] In this case it appears that the appellant is subject to differential treatment because she is married and she is married to a non-New Zealand resident. This amounts to discrimination under s 23 of the Human Rights Act 1993 and as such appears to be a breach of s 19 of the Bill of Rights Act 1990.

[20] Section 6 of the New Zealand Bill of Rights Act provides that whenever any enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights that meaning shall be preferred to any other meaning.

[21] The importance of making an Act work as Parliament intended was emphasised in *Northland Milk Vendors Association v Northern Milk Limited*.⁴

[22] The Authority has considered the possibility of filling the gap necessary for the statute to work as we believe was intended. Burrows and Carter in *Statute Law in New Zealand*, 5th edition⁵, identify a number of approaches which may assist in this particular circumstance. The learned author's note that "in extreme cases where it is necessary to avoid absurdity or unworkability or the frustration of Parliament's purpose, the courts will sometimes go a considerable distance in reading qualifications into the words of the statute".

[23] In *Jones v Wrotham Park Settled Estates Limited*⁶ Lord Diplock indicates the circumstances that may justify the reading in of such qualifications:

First, it [must be] possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that it was the purpose of the Act to remedy; secondly, it [must be] apparent that the draftsmen and Parliament had by inadvertence overlooked, and so omitted to deal with an eventuality that required to be dealt with if the purpose of the Act was to be achieved, and, thirdly, it [must be] ... possible to state with certainty what were the additional words that would have been inserted by the draftsmen and approved by Parliament had their attention been drawn to the omission before the Bill passed into law.

⁴ [1988] 1 NZLR 530.

⁵ Chapter 10, page 319–325.

⁶ [1979] 1 All ER 286 at 289.

[24] Arguably, each of these criteria is met in this case:

- (i) It is clear that Parliament intended that overseas pensions be deducted from entitlements to New Zealand benefits to avoid recipients of overseas pensions being advantaged over those not entitled. It is a reasonable inference to draw that it was not intended that recipients of overseas pensions and their spouse or partner be disadvantaged by the legislation as compared to those not eligible for an overseas pension.
- (ii) The draftsmen and Parliament have overlooked the impact of deducting the overseas pension of a spouse or partner from the single or half married rate of New Zealand Superannuation.
- (iii) It is also possible to state with certainty what additional words would have been inserted by the draftsmen and approved by Parliament had their attention been drawn to the matter. A proviso could be added after the words in s 70(1) "in accordance with Regulations made under this Act:" as follows:

Provided that the deduction of the overseas pension of a spouse who does not receive New Zealand Superannuation from the entitlement of a partner shall be calculated with reference to a notional married rate and the benefit payable shall be either the difference between the overseas pension or pensions and the married rate, or the half married or single rate whichever is the lesser amount.

[25] However, we have concluded that there are potential policy issues in this matter which constitute more than simply filling a gap. It would not, therefore, be appropriate to fill the gap on this occasion. This is an issue which Parliament clearly needs to address.

Section 70(2)

[26] In the meantime, we consider that this is a situation where the provisions of s 70(2) of the Act should be applied. This section gives the Chief Executive a discretion to determine a 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.

[27] On behalf of the Chief Executive, it is submitted that because, in this case, there appears to be no way in which the apparent 'unfairness' will be resolved in the foreseeable future, and deduction cannot be deferred indefinitely, discretion should not be exercised to defer deduction in this case.

[28] We do not accept that this is a good reason for deferring deduction. The discretion should be used to achieve the objects of s 70. That is that no one should be

advantaged or disadvantaged by the receipt or deduction of an overseas pension. In exercising the discretion to commence deduction from 23 November 2015 we consider that the Chief Executive failed to give proper consideration to the consequences of the deduction, namely that it does not achieve the objects of the legislation and that it appears to discriminate against a person who is married, without justification.

[29] We direct the Chief Executive to defer deduction of Mr XXXX's pension from the appellant's entitlement to New Zealand Superannuation from 23 November 2015 until Mr XXXX dies, the couple separate, are divorced or the appellant and her husband became entitled to the married rate of New Zealand Superannuation

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

[31] Costs are reserved.

DATED at WELLINGTON this 22nd day of December 2016

Ms M Wallace
Chairperson

Mr K Williams
Member

Lady Tureiti Moxon
Member