[2017] NZSSAA 005

Reference No. SSA 147/16

IN THE MATTER of the Social Security Act 1964

AND

IN THE MATTER of an appeal by **XXXX** of Tauranga, against a decision of a Benefits Review Committee

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Mr G Pearson - Chairperson

Mr K Williams - Member

Mr C Joe - Member

Hearing at Auckland on 15 February 2017

Appearances

For Chief Executive of the Ministry of Social Development: Nonita Jaura

For the Appellant: In person.

DECISION

Overview

[1] This case concerns entitlement to New Zealand Superannuation. The appellant is a man who would ordinarily qualify for New Zealand Superannuation. He is a New Zealand citizen by birth, and he worked in New Zealand as a teacher and guidance counsellor in New Zealand schools. He was in his early 50s before he spent time working out of New Zealand. Between 1 September 2003 and 30 June 2015 he spent various periods working overseas. To qualify for New Zealand Superannuation one of the requirements is that the person claiming the superannuation must for a period of five years

since attaining the age of 50 years have been both present and resident in New Zealand.

[2] The appellant and the Chief Executive of the Ministry of Social Development ("the Ministry") have agreed that there is only one issue in dispute:

(a) The period in issue is between 1 September 2003 and 4 June 2004.

(b) During this time the appellant was working in the United States of America. Clearly he was not present in New Zealand at that time.

(c) There is, however, a provision in the Act which provides that when calculating the amount of time that a person has been present in New Zealand, no account is taken of a period of absence for special medical or surgical treatment or vocational training, when there are good and sufficient reasons for the person leaving New Zealand to obtain that special treatment or training.

(d) The appellant has claimed that for the period he was in the United States of America he met both the "special medical" and the "vocational training" provisions.

(e) The question is whether he has met one or other of those requirements.

[3] The essential arguments raised by the appellant regarding these two matters are that due to pressures from his work as a guidance counsellor, he needed to spend time recuperating. Further, the work he was doing in the United States amounted to vocational training. In relation to the requirement that both were for good and sufficient reasons outside New Zealand, he points to particular conditions affecting his employment which precluded him from undertaking the equivalent experience in New Zealand.

[4] The first issue is essentially the factual question of whether what the appellant was doing amounted to "special medical" or "vocational training", and second, whether his reasons for doing so outside of New Zealand were "good and sufficient".

The legislation

[5] Section 8 of the New Zealand Superannuation and Retirement Income Act 2001 ("the Act") contains the residential qualification for New Zealand Superannuation. The relevant provision in this case is s 8(c) (there is no dispute over the other requirements). It provides that a person must be both "resident" and "present" in New Zealand for periods aggregating not less than five years since attaining the age of 50 years. In addition, s 9(1)(a) is also relevant in this case.

[6] The appellant accepts that he must establish that he remained "resident" during the period of time that he was in the United States. Plainly he was not "present" in New Zealand during that time. He relies on s 9(1) of the Act to effectively exempt him from that requirement. That part of s 9 provides:

> **Periods of absence that are not counted**
>
> (1) In determining the period an applicant has been present in New Zealand, no account is taken of, —
>
> (a) in the case of any applicant, any period of absence for the purpose of obtaining any special medical or surgical treatment or vocational training if the chief executive is satisfied that there were good and sufficient reasons for the person leaving New Zealand to obtain that special treatment or training:

Discussion

Facts

[7] The appellant provided extensive evidence regarding his circumstances leading up to his period of time teaching in the United States. We can, however, deal with the essential issues briefly. The appellant was a qualified teacher; he held registration as a teacher. Initially, he taught in primary schools. Later, he became a secondary school teacher and after some years teaching, received further training to become a guidance counsellor; to do so he obtained post-graduate qualifications. He worked as a guidance counsellor for some 14 years. At this point, he suffered a significant degree of psychological stress which he characterised as "burnout". He identified that it was important for his wellbeing to change his circumstances.

[8] The appellant faced some constraints at this point. He and his family lived in a provincial city in New Zealand. His children were at a point where the family did not wish to relocate; the children were at a point in their lives where they were likely to soon leave home to lead independent lives.

[9] During the years he had been a guidance counsellor, the appellant had undertaken only limited teaching duties. He had, however, maintained his teacher registration. The appellant was not in a position where he could simply abandon his employment and seek to return to teaching where he would suffer less pressure of a kind that had begun to distress him. Lack of opportunity in the area, and being unable to keep his position open if he temporarily relocated in New Zealand limited his options.

[10] The appellant identified an opportunity where he could reengage with teaching while not abandoning his employment, or moving his family. He applied through an international organisation for a teaching position in the United States, for a limited duration. The school where he was employed in New Zealand was willing to grant him special leave. That special leave however under the Collective Agreement was subject to the condition that he could not teach in any New Zealand State or Integrated school in New Zealand while on leave.

[11] This placement gave the appellant the opportunity of reengaging with teaching and gaining full-time current teaching experience. Significantly, it also gave him the opportunity of claiming international teaching experience. The appellant took up this work; he left only with clothes and personal effects and returned with the same. At his home in New Zealand, his wife and children remained there as did his belongings. The appellant had no ties to other persons in the United States, and he and his wife were still married. By all measures, the centre of the appellant's life was in New Zealand, though obviously he was physically present in the United States while working there. It was a short-term arrangement with the agreement of the appellant's family, and, as arranged, at the end of the United States' academic year the appellant returned to New Zealand. During this experience the Appellant received a substantially reduced income. He resumed his employment in the guidance counselling role. The appellant after some 14 months took

up a position in the Middle East in an international school. In the following years, he held positions in a number of international schools. That was the reason for this issue arising regarding his absence from New Zealand.

Applying the law to the facts

[12] The first issue to determine is whether the appellant remained resident in New Zealand during the time that he was teaching in the United States. In *Wilson v Social Security Commission* (1988) 7 NZAR 361 Justice Tomkins found at p 368:

> …It will be essentially a question of fact and degree, whether in any particular instance, a person who is out of New Zealand for one of these purposes, has remained ordinarily resident in New Zealand. Although in some cases other factors may predominate, in many the most important factor will be the person's intention during the period of absence. If during that period, the person has a firm, clear intention to return to New Zealand when the purpose of the period of absence has ended or has been achieved, then that person may well remain ordinarily resident in New Zealand.

[13] In our view, by a wide margin the appellant remained a resident of New Zealand while temporarily teaching in the United States. His home, his family and the temporary nature of his time in the United States all point unambiguously to that conclusion. The principles are evident in *S & K v Chief Executive of the Ministry of Social Development* [2011] NZAR 545; and *Greenfield v Chief Executive, Ministry of Social Development* [2015] NZSC 139.

[14] The remaining two questions are whether the appellant, as he claims, was absent from New Zealand for the purpose of attaining special medical treatment. In our view, the appellant's claim is unsustainable. He did not receive a medical diagnosis of any relevant kind. He claims he identified he was at a point of significant psychological need, self-diagnosed, and that his time in the United States was therapeutic. In our view, the words "special medical" and "special treatment" in s 9(1)(a) point unambiguously to something very different from the period of respite the appellant had through taking time out from his work as a guidance counsellor in New Zealand.

[15] However, we take quite a different view of his re-engaging with teaching in an international environment. The question is whether

this is “vocational training”. The words are not defined. The agent for the Chief Executive pointed to a decision of this Authority: [2008] NZSSAA 79. Paragraph [27] of that decision observes that this Authority thought the use of the term “vocational” is intended to apply to specific skills for a specific type of job. We agree. There can be no doubt that the appellant’s time in the United States was vocationally based. He was a registered teacher in New Zealand; he was required to deploy his professional skills to undertake teaching in that environment. The remaining question is whether it is correctly described as “training”. It would be artificial to regard “training” as limited to gaining a formal qualification. Today it is unusual for a professional person not to have ongoing requirements for professional development; a significant part of that ongoing training is often self-directed. The appellant had an underlying professional qualification as a teacher. If he undertook a refresher, or specialist training to focus on a particular branch of his profession, it would clearly be “vocational training”.

[16] In this case, the appellant had reached the point where he struggled to continue in his specialist branch of his profession, and sought to redirect his career. He accepted a lower income, went into another environment, engaged with students of a different background and he mastered a new curriculum. He found reengaging with teaching full-time gave him some insights that were valuable in terms of his work as a guidance counsellor, particularly in relation to guidance referrals of teachers. More significantly, it gave him the opportunity to redirect his teaching career into the international school environment. Within a relatively short period of time (particularly considering the limited annual recruiting season for international schools), the appellant had the opportunity of taking his career in a new direction. A direction that was entirely consistent with, and to a greater or lesser extent made possible due to the experience he gained in the United States. Accordingly, we are satisfied that the appellant embarked on vocational training and that was what he was undertaking during the time he remained in the United States of America in the period from 1 September 2003 to 4 June 2004. It was aligned with the appellant’s redirected career, it took him out of his usual work, it required the acquisition of new skills, and involved release from his existing employment to undertake this phase of career development. We consider in this case it was “training”.

[17] The remaining question is whether the appellant for "good and sufficient reasons" left New Zealand to obtain that training. The appellant's evidence is that due to his personal circumstances he could not forego the security of his employment as a guidance counsellor at the provincial school. We find those reasons entirely sound and understandable. That meant that the appellant was not in a position where he could keep the security of that position and work elsewhere in New Zealand full-time as a teacher to reengage with that aspect of his profession. There is, however, a further dimension. The appellant became a teacher in international schools. That was the new direction in which he took his career. We also consider that it was entirely reasonable that he should train for that specialist teaching role by obtaining experience outside New Zealand. It is not obvious the opportunity would have been available to him in New Zealand; credible training for teaching internationally reasonably involves actual experience of mastering the skills required to teach in a different country. Accordingly, we are satisfied that there good and sufficient reasons for the appellant leaving New Zealand to engage in the training required so he could develop his career in international teaching.

Our Conclusion

[18] We are satisfied that during the period from 1 September 2003 to 4 June 2004 the appellant remained resident in New Zealand, and s 9(1)(a) of the Act applied. During this period of time no account is taken of this period of absence because the appellant was pursuing vocational training and there are good and sufficient reasons for him leaving New Zealand to obtain that training.

Decision

[19] The appeal is allowed. We are satisfied that the Chief Executive has not correctly calculated the appellant's entitlement to New Zealand Superannuation.

[20] Leave is reserved for the parties to apply for further directions in the event there is any dispute in calculating the correct adjustment to the appellant's New Zealand Superannuation entitlement.

Dated at **Wellington** this 8th day of March 2017

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G Pearson
Chairperson

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K Williams
Member

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C Joe JP
Member