

[2017] NZSSAA 006

Reference No. SSA 94/15

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 13 February 2017

Appearances

For Chief Executive of the Ministry of Social Development: Patira Siueva

For the Appellant: In person.

DECISION

Overview

- [1] This appeal concerns a man (“the appellant”) who was receiving New Zealand Superannuation. The legislation dealing with superannuation has certain rules relating to entitlement when the person receiving it is outside New Zealand. In this case, the appellant travelled. His trip was to purchase a yacht in the Caribbean, sail it back to New Zealand, and after returning, he planned to sell the yacht.
- [2] If well informed, the appellant would have told the Ministry of Social Development (“the Ministry”) of his trip before he left. The general rules are that a person can as of right leave New Zealand for up to 26 weeks and continue to receive New Zealand Superannuation. With permission,

the person may be absent from New Zealand for longer periods and still continue to receive superannuation (subject to certain rules).

- [3] However, the appellant says that he did not understand the rules at the time he left and, accordingly, he did not tell the Ministry he was leaving or apply for the right to continue to receive New Zealand Superannuation if he was away for longer than 26 weeks. He was away for more than 26 weeks.
- [4] Essentially, the regime (assuming that the recipient has not been given permission to leave and continue to receive superannuation) provides that:
- (a) the recipient may receive New Zealand Superannuation for 26 weeks after leaving as of right.
 - (b) the recipient, for up to 30 weeks' absence, may keep the first 26 weeks of superannuation that has been paid but may not receive superannuation for the period after the first 26 weeks.
 - (c) beyond 30 weeks' absence from New Zealand, the recipient will be required to repay the 26 weeks' New Zealand Superannuation that has already been paid, and is not paid for the period until their return.
- [5] The Chief Executive, in addition to having the right to allow a person to remain away for more than 26 weeks and continue to receive New Zealand Superannuation, may give discretionary relief. There is power to allow a person not to have to repay the 26 weeks of New Zealand Superannuation even if they remain away for more than 30 weeks. That turns on whether or not there were circumstances that the person could not foresee before they left New Zealand that were beyond their control, and caused them to remain outside New Zealand for the extended period of time.
- [6] The appellant's case is that while he did not think about the issues in specific terms at the time he left, he did not plan to be away for more than 26 weeks and events that he could not foresee prevented him returning earlier.

Legislation

- [7] The first provision to consider is s 26 of New Zealand Superannuation and Retirement Income Act 2001 (“the Act”). It would have potentially allowed the appellant to apply to have his superannuation continue without abatement, if before leaving he was intending to be away for more than 26 weeks. To access that entitlement after leaving, it is necessary to meet the requirements of section 27. The relevant part of s 27 is s 27(2) which provides:

The chief executive may accept an application for payment in accordance with section 26 if satisfied that the absence for more than 26 weeks is or was due to circumstances beyond the applicant’s control that could not reasonably have been foreseen before leaving New Zealand.

- [8] The other provision in issue is s 22 of the Act. The section states:

First 26 weeks of certain temporary absences

New Zealand superannuation that would otherwise be payable to a person (other than a person who is receiving New Zealand superannuation overseas under section 26) is payable in respect of the first 26 weeks of any absence from New Zealand if —

- (a) the person’s absence does not exceed 30 weeks; or
- (b) the person’s absence exceeds 30 weeks and the chief executive is satisfied that the absence beyond 30 weeks is due to circumstances beyond that person’s control that he or she could not reasonably have foreseen before departure.

- [9] Under section 22:

- (a) If the person’s absence does not exceed 30 weeks; or
- (b) It exceeds 30 weeks and the absence beyond 30 weeks is due to circumstances beyond that person’s control that he or she could not reasonably have foreseen before departure;

then the first 26 weeks is not repayable, but there are no payments beyond 26 weeks until the person returns to New Zealand.

- [10] There are, accordingly, two regimes. One regime is contained in ss 26, 26A and 26B. Significantly, that regime requires the rate of New Zealand

superannuation to be calculated differently from when the person is in New Zealand (refer: section 26(6) of the Act). The section 26 regime applies if the recipient was intending to be absent from New Zealand for more than 26 weeks at the time they left. It is constructed in such a way that while absent a person cannot make an application under s 26. However, materially in this case, section 27(2) does provide an exception allowing applications under section 26 after leaving New Zealand if the “beyond control and unforeseen” delay test is met.

- [11] If the appellant was intending to be absent for more than 26 weeks at the time he left, then he was potentially entitled to take advantage of that regime in section 26 before leaving. The appellant’s case is that he did not intend to be away for more than 26 weeks, so he must rely on section 27.
- [12] Accordingly, the appellant’s case turns on the alternatives of section 22 and 27. The practical results are:
- (a) If section 22(b) applies, then the appellant is not obliged to pay back the first 26 weeks of superannuation he received;
 - (b) If section 27 applies, then the appellant’s application for payment throughout the time he was absent from New Zealand can be assessed under section 26.
- [13] The pivotal provision in each of the provisions is that circumstances beyond the applicant’s control, which he could not reasonably have foreseen, delayed his return to New Zealand.
- [14] Accordingly, if we find that the test is met, we have the further assessment of whether the appellant should have been paid superannuation throughout the period of his absence under section 26. The requirements applicable to the appellant are relatively uncomplicated.
- [15] Section 26(1)(b)(ii) provides that the section applies to a person who has left New Zealand for travel without intending to reside in another country. There was no dispute that this was the case; the conventional concepts of residence apply (*Greenfield v Chief Executive, Ministry of Social Development* [2015] NZSC 139). The appellant left temporarily and intended to return to his home in New Zealand and did not establish a home elsewhere. The other requirement is that the person intends to travel for longer than 26 weeks. If so, then section 26(2) allows such a

person to receive superannuation until they return to New Zealand. However, section 27(2) for the reasons discussed below appears to provide an alternative qualification for applying section 26 if the “beyond control and unforeseen” delay test is met.

Discussion

Facts

- [16] This appeal turns on its facts. Our first observation is that the Chief Executive’s approach to this appeal is surprising. Given the facts that we will shortly describe, as the Chief Executive claims, the appellant intended to be away for more than 26 weeks to travel, and he could have taken advantage of section 26. The agent representing the Chief Executive in this appeal accepted she could identify no reasons why the appellant would not have been entitled to have his superannuation continued had he applied to do so before leaving. However, she would not concede that point.
- [17] The Chief Executive’s agent cross-examined the appellant on the basis that he had failed to report his absence from New Zealand and implicit was the suggestion that he was seeking to gain some kind of advantage. In reality, the reverse is the case; it would have been to his advantage had he intended to remain outside New Zealand for 26 weeks to have made an application before leaving, if he understood that was his right. That is subject to the different rate of calculation.
- [18] The appellant has been adamant that he did not intend to remain outside New Zealand for more than 26 weeks. Underlying his reasons is that his wife was in temporary remission from cancer. She has since succumbed to the disease. It is appropriate to describe some of the appellant’s family circumstances that led to this trip. The appellant and his wife lost their son to a transport accident; their son-in-law was also badly and permanently injured in the same accident. The appellant explained that after the loss of his son, and his son-in-law’s injury and his wife’s cancer he felt he had been unable to acknowledge his son’s life fully in the time after his death. He and his son had both sailed extensively, and he intended that this trip would be something of a personal memorial to his son. His son had achieved international recognition for his maritime achievements, aside from the yachting experiences he shared with the appellant.

- [19] It was evident that the appellant was committed to supporting his wife, whose health was fragile. It appears that they both felt the trip was an appropriate endeavour in the context of their family circumstances at the time.
- [20] In terms of the time required for the trip, his wife's health was plainly an important factor, however, before embarking on the expedition the appellant consulted with friends who had undertaken similar expeditions. They had returned, after purchasing vessels and sailing back to New Zealand in less than six months. The sailing time in ordinary circumstances would have been approximately two months from the Caribbean to New Zealand. Those trips were essentially the same as the appellant's trip. Before leaving on the trip the appellant through email and telephone consulted with brokers and was given to understand that there was a wide range of suitable vessels for sale in the Caribbean, which was consistent with his friend's experiences. The yachts were ex-charter vessels. For a short period of time during the trip the appellant visited his daughter who lives in the United States, his daughter and son-in-law helped him prepare the yacht when he purchased it. That made no material difference to the length of the trip.
- [21] The first set of difficulties to arise after the appellant left on his trip was that the range of available yachts was not as had been represented in the course of emails and telephone conversations. The vessels the appellant expected to select from were not suitable for single-handed sailing back to New Zealand. The appellant was close to giving up on the endeavour but did ultimately, after a significant delay, find a suitable vessel. There were then unexpected problems with fitting out the vessel to offshore standards. One of those difficulties was that he had to change the registration of the vessel, and could not do so without meeting some survey requirements. That became very problematic because the only place where the work could be carried out was in another jurisdiction, and the vessel could not travel into another jurisdiction without registration. The next problem was that after the start of the trip back to New Zealand, there were various gear failures. At around this point, still within the 26 week period, it appears that the appellant's wife became aware of the issues relating to superannuation. It can only be speculation as to whether a friend had alerted her, or what other circumstances alerted her to it. The best evidence is that she made contact with the Ministry and explained her husband's circumstances.

[22] The point where this occurred, as best the appellant can recall, was in the course of travelling towards the Panama Canal (on the Atlantic side). He intended to then break his journey and return to New Zealand. Had he done so he could potentially have made an application under s 26 in New Zealand. The planning for the return trip went as far as making enquiries about air fares and bookings. However, a further gear failure made that option very problematic. It became necessary for the appellant to travel to the United States to obtain electronic parts which were necessary for the trip across the Pacific. An additional factor was that security in the Panama region was highly problematic. To add to the appellant's difficulties, he suffered a significant bacterial infection and developed sepsis. He was unable to return to New Zealand on the basis of any sensible evaluation of his circumstances. The trip back to New Zealand took longer due to a further gear failure in the yacht; a significant part of the trip was made without having a mainsail.

Applying the law to the facts

Unforeseen delay beyond 26 weeks

[23] We are satisfied that the appellant did not intend to be away for more than 26 weeks initially. However, within the first 26 weeks the appellant realised he would have to travel for longer than 26 weeks before returning to New Zealand. We find the appellant is frank and honest in his account of his circumstances. It is true that he did not have any definite time to return; regardless, he had researched the experience of others and anticipated returning in less than six months. Before he left he had also made reasonable evaluations as to the availability of vessels, and anticipated a reasonably efficient and quick fitout of the vessel. The experience of his friends had been that they had essentially undertaken identical trips. They travelled to the Caribbean, promptly purchased a vessel, fitted it out in three weeks and had approximately two to two and a half months sailing to return. We are satisfied that the appellant, at the time he left New Zealand, expected to return within 26 weeks.

[24] The appellant is an experienced international sailor; he had evaluated the circumstances in a sensible and appropriate manner. We are satisfied that the circumstances that delayed his return beyond 26 weeks were both beyond his control and ones that he could not reasonably have foreseen before leaving New Zealand.

[25] Accordingly, we are satisfied that the appellant met the tests in section 22(b) and 27(2). He is entitled to the most advantageous treatment of the two regimes opened by the respective provisions.

No requirement to repay the first 26 weeks

[26] As we are satisfied that the appellant met the requirements of s 22(b), he cannot be required to repay the first 26 weeks of superannuation.

Entitlement to payment for the full period of absence

[27] As the appellant met the conditions of 27(2) we are required to consider section 26 and apply it to the appellant's circumstances.

[28] Section 26(1)(a)(ii) has the effect of limiting the section to a person who "left New Zealand at a time when he or she was ... intending to travel for a period longer than 26 weeks". Our finding that the appellant did not intend to do so when he left means that provision does not apply. However, that is not the end of the matter. Section 27(2) allows an application under section 26 "if satisfied that the absence for more than 26 weeks is or was due to circumstances beyond the applicant's control that could not reasonably have been foreseen". It must follow that if a person meets that test, they are not limited by their intentions at the time of leaving under section 26(1)(a)(ii) and 26(2)(b); otherwise section 27(2) is deprived of any effect. Section 27 also appears to override section 26B, though in the present case the appellant was both resident and present in New Zealand after he returned and took up the issues relating to his superannuation.

[29] The appellant clearly met the other elements of the test in section 26(2)(b), due to circumstances he changed his original intentions and did intend to be, and was, away for more than 26 weeks; he did not take up residence in any other country. His home remained in New Zealand. Accordingly, he is entitled to receive New Zealand superannuation at the rate specified in s 26(6) pursuant to s 26(2).

Decision

[30] The appeal is allowed:

- (a) The decision to stop New Zealand Superannuation from 2 December 2011 is wrong;
- (b) The appellant was entitled to the greater of:
 - (i) Payment of the first 26 weeks of New Zealand Superannuation during his absence from New Zealand pursuant to s 22(b) of the Act; **or**
 - (ii) Payment of New Zealand superannuation throughout the period he was absent from New Zealand at the appropriate rate specified in section 26(6) of the Act.
- (c) The decision to seek recovery of an (amended) overpayment of \$6,896.74 for the period 2 December 2011 to 1 June 2012 is wrong.

[31] Leave is reserved to deal with any issues arising relating to the quantum of the appellant's entitlement.

Dated at **Wellington** this 9th day of March 2017

G Pearson
Chairperson

K Williams
Member

C Joe JP
Member