

**IN THE MATTER** of the Social Security Act 1964

**AND**

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

## **BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY**

**S Pezaro** - Deputy Chair

**K Williams** - Member

**C Joe** - Member

**Hearing at Wellington** on 13 March 2017

### **Appearances**

The appellants in person

P Siueva for the Ministry of Social Development

## **DECISION**

### **Background**

[1] XXXX and XXXX are entitled to payments from two Canadian pension plans, the Canadian Pension Plan and the Canadian Old Age Security Pension (OASP). They appeal the decision to deduct from their New Zealand superannuation (NZS) entitlement the payments they receive from the Canadian Old Age Security Pension (OASP). They each receive NZS at the half-married rate and their Canadian Pension Plan payments are directly deducted from their NZS entitlement.

[2] When Mr XXXX was granted NZS in May 2010 the Ministry recorded that an overseas pension, the Canadian Pension Plan, was directly deducted from his NZS entitlement. Mr XXXX was asked to test his entitlement to a United Kingdom pension because he was born there. However when he told the Ministry that he left the UK when he was 17 years old the Ministry asked him

to check his entitlement to Canadian pension. On 4 December 2013 the Ministry noted that Mr XXXX had advised that he was receiving a Canadian pension when he applied for NZS and that it was being directly deducted from his NZS.

- [3] On 9 July 2014 the Ministry sought details of Mr and Mrs XXXX's Canadian pension payments from Service Canada, a Canadian government department. On 17 July 2014 the Ministry wrote to Mrs XXXX thanking her for advising that she receives the Canadian Pension Plan payments and asking her to check her eligibility for the Canadian OASP.
- [4] On 22 January 2016 Service Canada confirmed that in addition to the Canada Pension Plan payments Mr XXXX received payments of OASP of CAN\$301.42 gross per month from 1 April 2011 and Mrs XXXX received CAD\$285.26 gross per month from 1 April 2013.
- [5] In both cases the Ministry concluded that the Old Age Security pension to which both appellants are entitled should be deducted from each appellant's entitlement to NZS and established an overpayment. In respect of Mr XXXX the overpayment is \$19,770.52 for the period 1 March 2011 to 23 February 2016. The overpayment sought from Mrs XXXX is \$6,829.76 for the period 4 March 2013 to 27 September 2014.

#### **Relevant law**

- [6] Section 70(1)(b) of the Social Security Act 1964 (the Act) provides that:

#### **70 Rate of benefits if overseas pension payable**

- (1) For the purposes of this Act, if—
  - (a) any person qualified to receive a benefit under this Act or Part 6 of the Veterans' Support Act 2014 or under the New Zealand Superannuation and Retirement Income Act 2001 is entitled to receive or receives, in respect of that person or of that person's spouse or partner or of that person's dependants, or if that person's spouse or partner or any of that person's dependants is entitled to receive or receives, a benefit, pension, or periodical allowance granted elsewhere than in New Zealand; and
  - (b) the benefit, pension, or periodical allowance, or any part of it, is in the nature of a payment which, in the opinion of the chief executive, forms part of a programme providing benefits, pensions, or periodical allowances for any of the contingencies for which benefits, pensions, or allowances may be paid under this Act or under the New Zealand

Superannuation and Retirement Income Act 2001 or under the Veterans' Support Act 2014 which is administered by or on behalf of the Government of the country from which the benefit, pension, or periodical allowance is received—

the rate of the benefit or benefits that would otherwise be payable under this Act or Part 6 of the Veterans' Support Act 2014 or under the New Zealand Superannuation and Retirement Income Act 2001 shall, subject to subsection (3), be reduced by the amount of such overseas benefit, pension, or periodical allowance, or part thereof, as the case may be, being an amount determined by the chief executive in accordance with regulations made under this Act:

- [7] The Act provides that certain benefits or pensions payable for injury, disability, death or war pensions are exempt but these exemptions are not applicable to the appellants.
  
- [8] In *Boljevic v the Chief Executive of the Ministry of Social Development*<sup>1</sup> the High Court observed that the focus of the inquiry in s 70(1)(b) of the Act is whether the overseas programme includes payments for any of the same contingencies as the New Zealand scheme. In *Boljevic* the contingency was attaining a certain age.
  
- [9] It is sufficient that the entitlements in each country are payable in similar circumstances; it is not necessary to conduct a close comparative analysis between the New Zealand and overseas entitlement.<sup>2</sup> Nor is it necessary to distinguish between contributory and non-contributory schemes government-administered schemes; all of these funds are contributory whether the contribution is direct or indirect through income taxation.<sup>3</sup> In *Boljevic*, Kós J concluded that the crucial criterion is whether the programme is administered by the state, not whether it is funded by the state.
  
- [10] Section 80A of the Act requires every beneficiary to advise the Ministry of any change in circumstances which affects the right of that beneficiary to receive the benefit currently provided to that person or any change in circumstances which affects the rate of the benefit; this includes New Zealand superannuation.
  
- [11] Sections 86(9A) and 86(9B) of the Act provide as follows:

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<sup>1</sup> *Boljevic v Chief Executive of the Ministry of Social Development* [2012] NZAR 280.

<sup>2</sup> *Dunn v Chief Executive of the Ministry of Social Development* [2008] NZAR 267.

<sup>3</sup> *Dunn* at [38]-[39].

*Debts caused wholly or partly by errors to which debtors did not intentionally contribute*

- (9A) The chief executive may not recover any sum comprising that part of a debt that was caused wholly or partly by an error to which the debtor did not intentionally contribute if—
- (a) the debtor—
    - (i) received that sum in good faith; and
    - (ii) changed his or her position in the belief that he or she was entitled to that sum and would not have to pay or repay that sum to the chief executive; and
  - (b) it would be inequitable in all the circumstances, including the debtor's financial circumstances, to permit recovery.
- (9B) In subsection (9A), **error**—
- (a) means—
    - (i) the provision of incorrect information by an officer of the department;
    - (ii) any erroneous act or omission of an officer of the department that occurs during an investigation under section 12;
    - (iii) any other erroneous act or omission of an officer of the department; but
  - (b) does not include the simple act of making a payment to which the recipient is not entitled if that act is not caused, wholly or partly, by any erroneous act or omission of an officer of the department.

## Issues

[12] The issues that we need to address are:

- (a) Does the OASP payment meet the criteria for deduction under s 70(1) of the Act?
- (b) If so, are the amounts calculated as overpayments correct?
- (c) If there is any overpayment, may the chief executive recover it?

## The case for the appellants

[13] Mr and Mrs XXXX dispute the amount of the overpayment that the Ministry says they have received and claim that they meet the criteria for writing off the debt under s 86(9A) of the Act. In their notice of appeal they sought a detailed breakdown of all superannuation payments to show how the overpayments

are calculated as well as copies of all correspondence relating to the issues in dispute.

- [14] At the hearing Mr and Mrs XXXX said that they did not contribute to the error because they provided all required information about the income through annual IRD returns, they were not aware that they were being paid more than they were entitled, and it would be unfair to expect them to repay the amount. They stated that they were unaware that there was any discrepancy between what they were receiving and what they were entitled to until the Ministry advised them in April 2016.
- [15] They also say it would be unfair if they had to repay the amount because the Canada Pension Plan payments and NZS are their only source of income because their home-based company is “in serious decline”. They produced profit and loss statements of their company and statements of their tax position.
- [16] The hearing was adjourned part-heard for the parties to provide further documents.<sup>4</sup> In particular Mr and Mrs XXXX were to provide evidence showing the commencement date of their OASP payments, the amount paid to them per month in Canadian dollars, and a statement of their assets and liabilities.
- [17] They subsequently confirmed by email that they were unable to provide any additional details of their OASP payments and relied on the statement of financial position for 2011 to 2016 and the updated statement to March 2017 that they provided at the hearing. The appellants asked that this appeal now be determined on the basis of the information and submissions before the Authority.

#### **The case for the Ministry**

- [18] The Ministry contends that both the Canadian Pension Plan payments and the Canadian OASP payments meet the criteria for deduction from NZS under s 70(1) of the Act. As the appellants do not challenge the deduction of the Canadian Pension Plan payments we have considered the Ministry’s submissions in relation to OASP only.

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<sup>4</sup> Direction of Social Security Appeal Authority dated 7 April 2017.

- [19] In relation to Mr XXXX the Ministry acknowledged in its report that when he was advised of the overpayment he was not provided with a detailed breakdown. This was provided with the s 12K report.
- [20] In relation to Mrs XXXX the Benefits Review Committee accepted that Mrs XXXX confirmed her OASP payments on 28 September 2014 and that the Ministry should have taken steps at that time to review her direct deductions from NZS. As a result of this review the Ministry accepted that it contributed to the overpayment for the period between 28 September 2014 to 9 February 2016 and wrote off that portion of the debt under s 86(9A) of the Act.
- [21] The Ministry seeks overpayment for the period 4 March 2013 to 27 September 2014 from Mrs XXXX on the basis that she failed to advise it that she was receiving OASP until 28 September 2014. The Ministry refers to an interview with her on 22 February 2013 where she was asked to sign a statement confirming that she would tell the Ministry immediately if there was any change that may affect either of their NZS.
- [22] On 29 June 2013 Mrs XXXX completed a form for OASP and three weeks later received a letter from the Ministry asking her to test her entitlement to a Canadian Old Age Security/Retirement Plan. The Ministry contends that this should have alerted Ms XXXX to the need to contact the Ministry. However it was Mr XXXX who replied to this letter.
- [23] The Ministry argues that s 86(9A) requires all criteria in (a) to (e) to be fulfilled before the threshold for consideration of non-recovery of a debt is met. The Ministry contends that the first criterion, that the debt was caused wholly or partly by an error of the Ministry, is not met in the case of either appellant.

## Discussion

*Does the OASP payment meet the criteria for deduction under s 70(1) of the Act?*

- [24] The requirement in s 70(1)(b) of the Act for the Ministry to deduct any overseas payments that fall within the criteria of that section is consistent with the purpose of the Act, which is to provide financial support to people, taking into account that they use the resources available to them before seeking the financial support available under the Act.<sup>5</sup>

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<sup>5</sup> Social Security Act 1964 Section 1A(c).

- [25] The appellants do not dispute that the Canada Old Age Security Pension payments which they each receive meet the criteria in s 70(1)(a) and (b) of the Act. We are satisfied that the OASP payments provide benefits, pensions and periodical allowances for the contingency, old age, for which NZS provides. The OASP payments are made from taxes and the scheme is administered by Service Canada which is a department of the Canadian Government. Accordingly we find that these payments must be deducted from the appellants' NZS entitlement.

*If so are the amounts calculated as overpayments correct?*

- [26] We gave the appellants an opportunity after the hearing to provide any further information they had in relation to the calculation of overpayments. Although they indicated they would do so they subsequently confirmed that they wished their appeals to be determined on the basis of the information and submissions before the Authority at the hearing. As there is no challenge to the Ministry's calculations we accept that these are correct for each appellant.

*Is it fair and equitable for the Ministry to recover the overpayments?*

- [27] Mr XXXX states that he understood that he was required to report his income but says he met his obligations by filing his tax returns with IRD because there is information sharing between IRD and the Ministry. He referred to media statements by the Minister for Social Development and the Minister of Revenue on information sharing with MSD in November 2016 and a press release in 2012.
- [28] Given the information provided to the appellants on their obligations and the type of information, including payment of overseas pensions, that they were expected to provide to the Ministry, we do not accept that it was reasonable for the appellants to consider that their tax returns met this requirement. Even if we accept that they misunderstood their reporting obligations, we are not satisfied that this misunderstanding was caused by the Ministry such that the resulting overpayments were caused by the Ministry's error.
- [29] We also note that the appellants accepted that their payments under the Canada Pension Plan were deductible from NZS. Neither of them has identified any reasonable basis for believing that their OASP payments should not be treated in a similar manner.

[30] As the appellants have not pointed to any error by the Ministry they fail to meet the first requirement for a finding that the chief executive may not recover the overpayment pursuant to s 86(9A) of the Act.

**Decision**

[31] For the reasons given we find that:

- (a) The OASP payments made to the appellants are deductible from their NZS entitlement.
- (b) The amount overpaid to Mr XXXX is \$19,770.52.
- (c) The amount overpaid to Mrs XXXX is \$6,829.76.
- (d) The Ministry is entitled to recover the above overpayments.

**Dated at Wellington** this 4<sup>th</sup> day of July 2017

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**S Pezaro**  
Deputy Chair

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**K Williams**  
Member

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**C Joe JP**  
Member