

[2017] NZSSAA 037

Reference No. SSA 151/16

**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**

**Mr G Pearson** - Chairperson

**Mr K Williams** Member

**Mr C Joe** - Member

**Hearing** at Wellington on 20 June 2017

### **Appearances**

The Appellant in person

For Chief Executive of the Ministry of Social Development:

## **DECISION**

### **Background**

- [1] This appeal concerns the familiar question of whether a foreign pension is deductible against a New Zealand Superannuation entitlement. In this case, the pension in issue is a particular Finnish pension. While the general principles are well established, the Authority and the Courts have not previously had to address the same type of pension.
- [2] Mr XXXX is obviously thoroughly familiar with the relevant principles and previous decisions of this Authority and the Courts. He was critical of the Benefits Review Committee's decision; his concern is that the Committee failed to listen to him and simply applied the existing principles. He

considered that they failed to analyse his more novel perspective of how s 70 of the Social Security 1964 (the Act), which governs this issue, should be applied. Mr XXXX is of course familiar with the circumstances relating to the relevant pension scheme. Mr XXXX frankly acknowledged:

A decision in the appellant's favour will invariably involve contradicting one or more of the earlier decisions of the Tribunal or the High Court.

This must not be a deterrent to the Tribunal. This is how case law evolves.

The fact that someone has sometime decided in a particular way is not binding in this context, and by no means an absolute confirmation that the earlier decision was correct and just. Even if it was, then, it may no longer be.

- [3] The Authority does have a duty to enquire into matters, not to simply confine itself to evaluating Mr XXXX's contentions. In these circumstances, we will review the situation in two parts. First, we will set out and consider the Ministry's position. Then we will turn to Mr XXXX's submissions.

### **The Ministry's position**

#### *The issue*

- [4] It is common ground that the issue to be determined is whether the Ministry correctly deducted Mr XXXX's Finnish pension from his and his wife's New Zealand Superannuation entitlement.
- [5] Section 70 of the Act provides that in order to be deductible, the benefit or pension or periodic allowance received by the appellant must:
- a. be granted outside New Zealand,
  - b. be paid to a person qualified to receive a benefit under New Zealand social security legislation;
  - c. form part of a programme providing benefits, pensions and periodical allowances for any of the contingencies for which benefits, pensions and periodical allowances are paid under New Zealand social security legislation; and

- d. be administered by or on behalf of the government of the country from which the pension is received.

- [6] The Ministry and Mr XXXX disagree only on the question of whether or not this Finnish pension and the New Zealand superannuation scheme both provide payments for sufficiently similar contingencies. We are satisfied the other criteria are met, on the evidence we have. Accordingly, we only need to discuss the Ministry's position on the issue of similarity between the two schemes. This is the point Mr XXXX wishes to challenge.
- [7] We observe that foreign law, and how a pension scheme operate are both questions of fact when determined by a New Zealand tribunal. It is Mr XXXX who is likely to have the best knowledge of how his pension works, but that is not a matter he wishes to pursue. Accordingly, our conclusions regarding this Finnish pension scheme is simply our factual findings, on the evidence before us in this case. We make those observations not due to any deficiency in the evidence the Ministry produced, but to ensure it is clear this decision is no more and no less than a decision on the facts before us.

*The attributes of the Finnish pension scheme in issue*

- [8] The Ministry contends that the Finnish social security system is divided into a residence-based social security and employment-based earnings related social security. The residence-based social insurance is financed by tax and administered by Kela, the Social Insurance Institution of Finland. The employment/earnings based social insurance is financed by contributions to private insurance companies, and administered by the Finnish Centre for Pensions.
- [9] The Ministry identified various features of the two pension insurance schemes.
- [10] In addition to the two pension insurance schemes, Kela also provides other forms of assistance such as health insurance, accident insurance and unemployment allowance. The Ministry said it understood that the Finnish pension is paid in accordance with the Employees Pension Act 2006 (Finland), and under that Act private sector employers are obliged to arrange and pay for pension insurance for their employees.

- [11] In the private sector, statutory earnings related pension insurance is handled by pension insurance companies, but they must hold a licence granted by the government of Finland. Six pension insurance companies hold such a licence. In the appellant's case, his pension is paid by Varma Mutual Pension Insurance Company, which is one of the licensed companies.
- [12] The Finnish Centre for Pensions operates as a liaison body for all pension providers. It carries out a number of statutory functions to facilitate the implementation of the pension scheme. The Finnish Centre for Pensions comes under the administrative branch of the Ministry of Social Affairs and Health, which is part of the Finnish Government.
- [13] The Ministry of Social Affairs and Health deals with planning, steering and implementing social and health policy. Its responsibilities include developing statutory insurance and drafting the legislation on both social and private insurance, thereby having an overarching responsibility for the Finnish social security scheme.

*Contention that the Finnish and New Zealand superannuation provide for sufficiently similar contingencies*

- [14] As previously noted s 70(1) of the Act requires that the off-shore pension must form part of a programme providing benefits, pensions and periodical allowances for the contingencies for which such payments are made under New Zealand social security legislation. The Ministry pointed to decision SSA142/01 of this Authority which considered the Canadian Pension Plan, and *Tetley-Jones v Department of Work and Income*<sup>1</sup>, which considered an Irish pension.
- [15] The Ministry says that the relevant principles to be drawn from the Authorities are:
- [14.1] The comparison to be made is between schemes of social assistance and not individual benefits.

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<sup>1</sup> *Tetley-Jones v Department of Work and Income* HC Auckland CIV-204-485-1005, 3 December 2004.

[14.2] It is not necessary for the Finnish pension to be paid for the same contingencies as the New Zealand benefit, pension or periodical allowance.

[14.3] However, section 70 will only apply to allow a deduction if the Finnish pension is part of a programme in which benefits are provided for similar contingencies to those provided under New Zealand social security legislation.

[16] The Ministry also referred to *Boljevic v Chief Executive of the Ministry of Social Development*<sup>2</sup> and *T v Chief Executive of the Ministry of Social Development* [2017] NZHC 711.

[17] The Ministry's position is that Mr XXXX received an old age pension paid in accordance with the Finnish Act. That Act also provided for a number of other benefits including pensions paid on the contingencies of disability and survivorship and, accordingly, the scheme provided benefits on the occurrence of similar events in similar circumstances to the New Zealand social security legislation.

*The Ministry's conclusion*

[18] The Ministry concluded that the Finnish pension to which Mr XXXX is entitled was paid for sufficiently similar contingencies to New Zealand superannuation.

**Mr XXXX's submissions**

[19] As noted, while Mr XXXX is plainly able to understand the relevant issues, he chose not to engage with the principles raised by the Ministry in the conventional manner of challenging facts, and addressing legal principles.

[20] Mr XXXX's approach was to accept s 70 applied in that:

- a. The Finnish pension was granted outside New Zealand,

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<sup>2</sup> *Boljevic v Chief Executive of the Ministry of Social Development* HC Wellington CIV-2010-485-000206, 10 November 2011.

- b. Paid to a person qualified to receive a benefit under New Zealand social security legislation, and
- c. It was administered by or on behalf of the Government of Finland.

[21] However, he said the Finnish pension was not paid as part of a programme providing benefits, pensions and periodical allowances for contingencies for which such payments are paid under New Zealand social security legislation.

[22] The foundation for Mr XXXX's approach to that issue was to contend there ought to be a departure from previous authorities. He said:

The appellant provides a more useful, socially acceptable and just purpose in his case. The Ministry appears not to find any counter-arguments, and retreats to using old arguments that may have been appropriate in the early days of this legislation (about the same time as the German Nazis started confiscating property from the Jews), perhaps quite acceptable in the atmosphere of the times then.

Those attitudes do not provide a decent foundation for interpreting the law in the 21<sup>st</sup> Century.

However we need not argue the matter of human rights or discriminatory law in this Tribunal hearing; the Ministry's case falls apart elsewhere.

Going on ahead, it is necessary to lay out some overarching principles, so that the appellant and the Tribunal do not have to go back to every previous Tribunal decision and High Court case deemed relevant. Instead, we can identify a pattern, disprove it, and thereby take care of them all in one pass.

This is where we need to make a little journey into the world of science.

[23] Mr XXXX purported to reason by analogy. The application of the analogies was difficult to follow. However, as best as we could discern, ultimately, Mr XXXX's argument came down to contending that he could identify differences between the Finnish pension he received and the payments available under the New Zealand social security legislation. Mr XXXX said:

Where establishing similarity may be difficult, establishing dissimilarity is always much easier.

Difficulty to establish similarity must not be used as justification to declare similarity without proof. Quite the

contrary; a payment should be deemed undeductible for the purposes of s 70, until sufficient similarity has proven beyond reasonable doubt. A comparison must be a fair comparison. Calling anything that the Ministry is currently doing in this space a 'comparison' is either an indication of complete lack of understanding of the most basic scientific requirements of a 'comparison', or a deliberate act of deception.

Unfortunately, the Ministry is adamant in pursuing these cases without the slightest intention to acknowledge dissimilarity. And obviously, being repeatedly allowed to teleport the argument to a parallel universe, where gravity doesn't apply, must have been quite encouraging.

[24] Mr XXXX did not engage in any detailed analysis of similarity and dissimilarity with reference to the attributes of the contingencies addressed by the programme providing his Finnish pension and those under the New Zealand social security legislation. He instead observed that the persecution of Jews by Nazis, apartheid in South Africa, and segregation in the United States of America were "based on law". He, accordingly, said that the Tribunal should "think for itself" and reach the following conclusion:

- a. "The Act defines a "benefit"; "benefit" and "income" are mutually exclusive in the Act.
- b. If an overseas payment does not match the definition of "benefit", it automatically becomes "income", New Zealand Superannuation is not income tested.
- c. Therefore, "income" is never in the scope of s 70 in relation to New Zealand Superannuation.
- d. The condition for deductibility in s 70 is not met.

[25] Accordingly, it follows from Mr XXXX's submission that s 70 does not apply to deductions in the way that the Act has previously been understood; this Authority and the Courts have applied the wrong principles in the past.

### **Discussion**

[26] We have set out the Ministry's position in relation to the contested facts and the principles to be applied at some length. We have done so as it is

our duty to satisfy ourselves, notwithstanding the way Mr XXXX has presented his case, that the appeal lacks merit before dismissing it.

- [27] The matters raised by the Ministry provide a complete answer to the appeal when approaching the appeal by applying the law to the facts established. Accordingly, we are satisfied that viewed in that way, this appeal lacks merit.
- [28] We have considered Mr XXXX's submissions. In our view, they are entirely without merit. The policy underlying the deduction of off-shore pensions is neither obscure nor unreasonable. The provision is intended to prevent a form of "double-dipping", however, it permits persons who have an entitlement to a pension through a personal pension scheme which they elected to enter to retain the benefit of that scheme whether it is a New Zealand or an offshore scheme.
- [29] To implement the policy the law requires a comparison between the attributes of an offshore pension scheme and social welfare support available in New Zealand. A comparison will never be exact, and relies on a consideration of a range of attributes. Mr XXXX has been unable to identify any part of the comparison process that is wrong, in principle or in fact. Instead, he has retreated to the flawed logic that the proper test is to identify whether there is any dissimilarity, and if so, the deductions should not be made. His approach would deprive the deduction regime in s 70 of any effect, or leave it with only residual effect.
- [30] We note Mr XXXX's attempt to distinguish "benefit" and "income". It is difficult to ascertain any foundation for the submission in statutory terms. Ultimately, it is no more than an example of Mr XXXX's proposition that any difference prevents section 70 applying. In this case, we find no substance in the difference he claims.
- [31] Nothing Mr XXXX has said meaningfully addresses the key words in section 70(1)(b) of the Act, where the issue is whether:
- a. The foreign pension payments come from "a programme providing benefits, pensions, or periodical allowances for any of the contingencies",

- b. For which such payments “may be paid under this Act or under the New Zealand Superannuation and Retirement Income Act 2001 ...”

[32] The Ministry's position set out above at paragraph [17] establishes that Mr XXXX's Finnish pension does come from a programme providing for the contingencies the New Zealand legislation covers, and any differences are well within those contemplated. The decisions of this Authority and the High Court establish any differences are immaterial in the present case.

[33] The effect of Mr XXXX's claims would be to allow him to “double dip” in the way the regime in s 70 is intended to prevent.

[34] Accordingly, we have been unable to identify any merit in Mr XXXX's appeal and dismiss it.

#### **Decision**

[35] The appeal is dismissed.

**Dated at Wellington** this 17<sup>th</sup> day of July 2017

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**G Pearson**  
Chairperson

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**K Williams**  
Member

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**C Joe JP**  
Member