

[2017] NZSSAA 042

Reference No. SSA 091/15

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

**AND**

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

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

**S Pezaro** - Deputy Chair

**C Joe** - Member

### **DECISION**

- [1] XXXX appeals the decision to deduct the amount of her husband's United States Social Security Disability pension payments (US\$1591.00 per month) from her New Zealand Superannuation (NZS) entitlement. As Mr XXXX's payments exceed NZS, Ms XXXX is left with a nil entitlement.
- [2] This decision was upheld by a Benefits Review Committee on 24 June 2015 and Ms XXXX filed her appeal on 26 July 2015. Her appeal originally included the Ministry's decision to establish an overpayment of NZS of \$1,658.14 however the Ministry reversed its decision and wrote off this overpayment under s 86(9A) of the Social Security Act 1964 (the Act).
- [3] Ms XXXX then applied for costs of \$2,000 in respect of the legal fees relating to her appeal against the overpayment however this application was dismissed by the Authority on 17 June 2016.
- [4] On 27 October 2016 the Authority directed that this appeal be dealt with on the papers. This direction followed a number of adjournments which the Authority recorded were caused by the appellant's absence overseas. The Authority directed the appellant to file written submissions by 9 November 2016 in response to the Ministry's Section 12K Report and supplementary report filed on 5 August 2016.

- [5] On 22 November 2016 the case manager wrote to Ms XXXX noting that she had not provided the submissions requested by the Authority and advised Ms XXXX that if her submissions were not filed by Tuesday 29 November 2016 the matter would be determined.
- [6] On 29 November 2016 the Authority received an e-mail from Peter Eastgate, counsel for Ms XXXX.

#### **Case for the appellant**

- [7] Mr Eastgate's email addressed three issues. The first two emails related to Ms XXXX's legal costs. As the question of costs has already been determined by the Authority we have considered only the comments under item 3 of Mr Eastgate's email which relates to the substance of this appeal. However these comments are not submissions which address the relevant legislative provisions or authorities.
- [8] Mr Eastgate contends that:
  - (a) The suspension of Ms XXXX's superannuation on 21 May 2015 has effectively misrepresented her circumstances.
  - (b) Relevant documentation submitted by Ms XXXX to the Ministry has clearly identified that her husband receives compensation from the United States Government for war injuries. It is not in the form of a social security payment. Mr XXXX is a Vietnam war veteran who has now been residing in the United States of America since 22 August 2015.
  - (c) Ms XXXX is a full-time caregiver for her husband and lives with him. Mr XXXX does not receive any assistance from the New Zealand Government and suffers stress as a result of his obligation to meet the living costs for himself and Ms XXXX in the United States. Ms XXXX does not receive any assistance from the United States Government.
  - (d) The United States war pension that Mr XXXX receives is tax exempt and has no garnishments or levies. It is not matrimonial property and Ms XXXX has no right or claim against this income.
  - (e) Mr Eastgate asks that consideration be given to Ms XXXX's New Zealand superannuation being reinstated as of 21 May 2015 and

classified as portable as a result of her residency in the United States of America as of 22 August 2015.

- [9] On 16 December 2016 Ms XXXX emailed the case manager making further comments in support of her appeal. She expressed dissatisfaction with the process of the Benefits Review Committee hearing and the manner in which it dealt with her report. These are not matters which this Authority can address.
- [10] She also referred to the overpayment and her legal fees which, as recorded, have already been considered and determined by the Authority.
- [11] She repeated the submissions of her lawyer that the suspension of her superannuation on 21 May 2015 was an error. She asserted that s 70 of the Act does not apply and requested backpayments from 21 May 2015. She confirmed that she has been resident in the United States of America since 22 August 2015 in order to care for her husband. She stated that the Ministry should have been aware that she was entitled to portable superannuation.

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

- [12] The Ministry contends that the US social security benefit which Mr XXXX receives meets the criteria for deduction from NZS under s 70(1) of the Act. The Ministry argues that the documentation it has provided shows that Mr XXXX is receiving a social security benefit which is administered by the Social Security Administration, International Operations in the United States of America. As the benefit paid to Mr XXXX is a disability benefit it is therefore a payment for one of the contingencies for which benefits, pensions or allowances are paid under the Act.
- [13] The Ministry describes the United States social security system and the way in which it provides for disability insurance benefit payments.<sup>1</sup> Payments are administered through the Social Security Administration, an independent agency of the US government. The relevant legislation provides that it shall be the duty of the administration to administer the old age, survivors, and disability insurance programme.<sup>2</sup> People in paid employment pay social security taxes which are used by the Administration to pay benefits to people who are retired, disabled, or survivors and dependents of beneficiaries.

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<sup>1</sup> Submissions of the Ministry of Social Development, 5 August 2016.

<sup>2</sup> Ch 7 of Title 42 of the United States Code.

- [14] People who have a disability and meet medical criteria may qualify for Social Security and Supplemental Security income however the information provided to the Ministry shows that this was not what Mr XXXX was granted. His benefit is a Social Security disability benefit.
- [15] The Ministry refers to the Social Security Administration website which states that when people receiving Social Security disability benefits reach full retirement age, their disability benefit automatically converts to a retirement benefit payable at the same rate.
- [16] The Ministry submits that there is no evidence that the US disability benefit paid to Mr XXXX is a form of compensation. The Service Connected Disability Compensation payment he receives is accepted by the Ministry as being paid for a similar purpose to a war pension and therefore is not deductible from any NZS entitlement. However the Ministry submits that as the disability benefit is not reliant on military service, it is not compensatory.

#### **Relevant law**

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

- [18] The Act provides that certain benefits or pensions payable for injury, disability, death or war pensions are exempt from these deduction provisions.
- [19] In *Boljevic v the Chief Executive of the Ministry of Social Development*<sup>3</sup> the High Court observed that the focus of the inquiry in s 70(1)(b) 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. 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>4</sup>
- [20] It is not necessary to distinguish between contributory and non-contributory schemes; all funds are contributory whether the contribution is funded directly by a person or indirectly through income taxation.<sup>5</sup> In *Boljevic*, Kós J concluded that whether the programme is administered by the state is the crucial determinant, not state funding.

## Discussion

- [21] The requirement in s 70(1)(b) 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 financial support available under the Act.<sup>6</sup>
- [22] We are satisfied that this benefit constitutes a benefit, pension or allowance providing for the same contingencies of disability and subsequently old age that NZ social security laws provide for. The US disability benefit is part of a government programme providing a benefit for the contingency of disability. It

<sup>3</sup> *Boljevic v the Chief Executive of the Ministry of Social Development* [2012] NZAR 280.

<sup>4</sup> *Dunn v Chief Executive of the Ministry of Social Development* [2008] NZAR 267.

<sup>5</sup> *Dunn v Chief Executive of the Ministry of Social Development* [2008] NZAR 267 at [38]-[39].

<sup>6</sup> Social Security Act 1964, s 1A(c).

is administered by the government of the United States of America through the Social Security Administration. The provision for the US disability benefit to convert to an age benefit at retirement age reinforces the conclusion that it provides for the contingencies which NZ social security laws provide for.

[23] The fact that this benefit is not taxed in the US does not affect or limit the provision of s 70(1) of the Act. Nor does the fact that Ms XXXX has no claim to Mr XXXX's disability benefit under US law. Equally the provisions under US law that the disability benefit cannot be transferred or assigned or subject to any order for attachment or the operation of bankruptcy or insolvency law do not restrict the operation of the Act in that way.

[24] Accordingly we are satisfied that the payments that Mr XXXX receives from the US government as a disability benefit are payments which must be deducted from Ms XXXX's entitlement to NZS.

#### **Order**

[25] The US Social Security Pension payments received by Mr XXXX are deductible from the appellant's NZ Superannuation entitlement.

[26] The appeal is dismissed.

**Dated at Wellington** this 24<sup>th</sup> day of July 2017

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**S Pezaro**  
Deputy chair

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**C Joe JP**  
Member