

[2017] NZSSAA 068

Reference No. SSA 132/16

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

**AND**

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

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

**S Pezaro** - Deputy Chair

**K Williams** - Member

**Hearing** at Auckland on 27 July 2017

### **Appearances**

The appellant and XXXX, support person

P Siueva as agent for Ministry of Social Development

## **DECISION**

### **Background**

[1] XXXX (the appellant) appeals the decision of the Chief Executive made on 18 January 2016, upheld by a Benefits Review Committee, to deduct his partner's overseas pension from his entitlement to New Zealand Superannuation (NZS).

[2] The appellant lives in a de facto relationship with his Russian partner who was 65 years old at the date of hearing. She was granted New Zealand residence on 26 March 2014 but is not entitled to NZS as she does not meet the residence eligibility criteria. She receives an old age pension from Russia,

which was equivalent to NZ\$66.53 per week at the time the decision was made.

- [3] The appellant's partner was included as a non-qualifying spouse in his superannuation entitlement. However inclusion of a non-qualifying spouse is income tested. When the income test was applied, the appellant's income from work and rental properties meant that the income reduction from including his partner was greater than the benefit of including her.
- [4] The appellant therefore requested cancellation of his partner's payments and his NZS rate was reviewed and adjusted to the half-married rate. His partner's overseas pension was directly deducted from this entitlement with the result that the appellant now receives less than the full entitlement of the half-married rate.

#### **The case for the appellant**

- [5] The appellant accepts that the Russian pension is of the type that meets the criteria under s 70(1) of the Social Security Act 1964 (the Act) for deduction from NZS but argues that the discretion under s 70(2) should be exercised so that he receives at least his full entitlement. Section 70(2) of the Act gives the Chief Executive discretion to determine the date on which a deduction under s 70(1) takes effect.
- [6] The appellant made extensive submissions. He has written to Members of Parliament in an attempt to address a situation that he sees as very unfair. He also referred to the examples provided on the WINZ website of the effect of deduction of overseas pensions on NZS entitlement. He said these examples are not correct. However none of the examples describe a couple in the same situation as the appellant and his partner; that is where one partner is entitled to NZS and has no overseas pension entitlement and the other person has no entitlement to NZS but has an overseas pension. Example 4 which was the appellant's focus is therefore not relevant to his situation.
- [7] In summary, the appellant's submissions are that:
- (a) The decision to deduct his partner's overseas pension fails to consider the consequences of the deductions, which are unfair to him and his partner;

- (b) The intention of s 70 is to stop two people ending up with more than their entitlement, not to make their entitlement less than what they would be entitled to if the overseas pension was not deducted;
- (c) The resulting disadvantage has been noted in other decisions issued by the Authority;
- (d) The appellant and his partner are financially independent; they do not share bank accounts or finances and it is unfair to treat them as dependent and deduct her pension from his entitlement; and
- (e) Section 70(2) provides for a discretion which should be exercised to defer the deduction until the appellant's partner becomes entitled to NZS in her own right.

[8] At the hearing the appellant's daughter spoke on his behalf. She said he had a large mortgage and would suffer financial hardship if he included his partner as a non-qualifying spouse because inclusion is income-tested. She emphasised that the deduction from the appellant's NZS entitlement at the half-married rate put financial pressure on him and means that he must continue working to service his large mortgage. She argued that the purpose of s 70 is that the appellant and his partner receive the level of NZS entitlement between them at the equivalent rate of entitlement for a married couple.

[9] The appellant's daughter referred to decisions where the Authority observed that it may not be consistent with Parliament's intentions for the recipients of overseas pensions and their spouse or partners to be disadvantaged compared to those not eligible for an overseas pension. She referred to decisions which noted that there was an unfair consequence where the recipient is paid at the half-married or single rate and an overseas pension paid to a partner is deducted.

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

[10] The Ministry accepts that the discretion in s 70(2) has been applied in other cases to delay the date that deduction of an overseas pension takes effect. However it submits that the discretion has been exercised only in limited and very specific circumstances, such as where the spouse is not living in New Zealand or does not qualify for NZS and cannot be included as a non-qualifying spouse.

- [11] The Ministry submits that the discretion should not be exercised where the appellant's partner is eligible for inclusion as a non-qualifying spouse but the appellant decides not to include the partner due to the effect of the income test.

### **Discussion**

- [12] The issue that we are required to address is whether it is appropriate to exercise the discretion in s 70(2) of the Act to defer the date on which the deduction required by s 70(1) takes effect. The appellant seeks a deduction until his partner qualifies for NZS.
- [13] In [2016] NZSSAA 110 the Authority identified four scenarios where a person in receipt of NZS at the single or half married rate is adversely when their partner's overseas pension is deducted from their entitlement. The Authority observed that the direct deduction regime appears to disadvantage a beneficiary in this situation. The Authority exercised its discretion to defer deduction because it considered that to do so achieved the objective of s 70 of the Act to ensure that no person entitled to NZS was advantaged or disadvantaged by the receipt or deduction of an overseas pension.
- [14] However in that case the appellant's partner did not qualify for inclusion in the appellant's NZS, apparently as he did not meet the age requirement. The appellant in the case before us is in a different situation from any scenario considered by the Authority in [2016] NZSSAA 110 because his partner is entitled to be included in his NZS entitlement.
- [15] Including his partner in his NZS would be the best option for the appellant but for the level of his income. Inclusion of a non-qualifying spouse attracts an income test and the level of this couples' income means that the appellant's NZS, if she was included, would be reduced more than the current situation where the appellant is on the half-married rate and her overseas pension is deducted.
- [16] We accept that the effect of deduction of an overseas pension from the single or half-married rate of NZS produces a consequence which is likely to be unintended and that this outcome creates financial pressure for the appellant. We agree with the Authority's analysis of the purpose of s 70 at paragraph [24] of [2016] NZSSAA 110 and the manner in which this provision could be qualified to better reflect that purpose.

- [17] However we do not consider that the circumstances of this appellant are so extreme as to warrant us filling the gap in the legislation. Nor do we consider that this is an appropriate case in which to exercise the discretion under s 70(2) because this appellant may include his partner as a non-qualifying spouse. In circumstances where that option is unattractive because of the appellant's level of income, we are not satisfied that the discretion in s 70(2) should be exercised.
- [18] We consider that, if the discretion in s 70(2) is not exercised, the requirements of s 70(1) of the Act must be applied. While the effect on the appellant's NZS entitlement may not have been intended by Parliament, this Authority is bound to give effect to this provision in the Act.
- [19] The argument made by the appellant's daughter, that the rate of deduction should allow the appellant and his partner to retain the equivalent entitlement to a couple who are *both* entitled to NZS, is a different issue and not a matter for this Authority to determine. The establishment of criteria for benefit entitlement and applicable income tests are matters of policy.

### **Conclusion**

- [20] For reasons which the appellant clearly accepts, the only way in which his appeal could succeed was if we were satisfied that it is appropriate to exercise the discretion in s 70(2) of the Act. As we are not satisfied, this appeal fails.

### **Order**

- [21] The appeal is dismissed.

**Dated at Wellington** this 29<sup>th</sup> day of November 2017

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**S Pezaro**  
Deputy Chair

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**K Williams**  
Member