

[2017] NZSSAA 069

Reference No. SSA 046/17

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

**AND**

**IN THE MATTER** of an appeal by **XXXX** of  
Paraparaumu 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 4 September 2017

### **Appearances**

The Appellant by his agent: Mr N Ellis

For Chief Executive of the Ministry of Social Development: E Kirkman

## **DECISION**

### **Background**

[1] XXXX (the appellant) appeals the decision of the Chief Executive, upheld by a Benefits Review Committee. He raises the commonly traversed issue as to whether a person who receives an overseas pension has their entitlement to New Zealand Superannuation reduced. A person entitled to New Zealand Superannuation will have that entitlement reduced to the extent of the overseas pension; but, only if the overseas pension has certain attributes. This appeal concerns whether the appellant's overseas pension falls within the category that is offset against New Zealand Superannuation.

- [2] The issue is governed by s 70 of the Social Security Act 1964 (the Act).
- [3] The essential principle behind s 70 of the Act is that New Zealand taxpayers should not pay New Zealand Superannuation to put a person who is entitled to an offshore pension into a better position than a person who has remained in New Zealand through the whole of their working life.
- [4] There are two considerations in cases dealing with this issue. The first step is to establish as a question of fact the nature of the scheme from which the appellant receives an overseas pension; and then as a second step the Authority must apply s 70.
- [5] The nature of the scheme providing the off-shore pension is a question of fact that must be decided in each case. Previous decisions can only determine questions of law for future cases. Of course, it is to be expected that the same factual conclusions about any particular offshore pension scheme are likely to be reached in different cases concerning the same scheme. Nonetheless, it will turn on the evidence in each case.
- [6] In the present case, the pension scheme in issue is the appellant's pension paid from the National Pension system in Japan. The appellant and the Ministry agree that in the present case the appellant receives a pension from Japan and there are two components. These are:
- [6.1] a Basic Pension; and
- [6.2] an Employees' Pension (a Japanese Employees' Pension Insurance Pension).

### **The issues and the facts**

#### *Pensions in Japan - background*

- [7] The attributes of the pension scheme in question in this case are not disputed, though, of course, there are differences in emphasis. It is important to set out what the parties agree those attributes are. The parties accept that the appellant is fully entitled to receive New Zealand Superannuation. Accordingly, the only matter in issue is the technical question of whether the pension that the appellant receives is affected by s 70.

- [8] The Ministry identified five social insurance schemes in Japan; these are:
- [8.1] the Public Pension Plan;
  - [8.2] Health Insurance;
  - [8.3] Long-term Care Insurance;
  - [8.4] Employment Insurance; and
  - [8.5] Work-related Accident Insurance.
- [9] Each of the schemes is financed by social insurance premiums, and supplemented by tax revenue. All Japanese residents are enrolled in the public pension and health insurance schemes. There are other schemes providing public assistance paid out of general government funds.
- [10] For present purposes, the focus is on the Public Pension Plan as both components the appellant receives are part of that scheme. The Public Pension Plan has three relevant components:
- [10.1] A basic national pension,
  - [10.2] Employees' Pension (private sector), and
  - [10.3] Mutual Aid Pension (government employee).
- [11] In this case the issue relates to the first two elements, the basic national pension, and an employee's pension for a former private sector employee.
- [12] The Public Pension Plan has what is essentially universal coverage; people are included regardless of occupation, income or other factors. The basic pension is provided as a pension when a person qualifies. It is calculated as a fixed amount based on their participation period in the scheme when of working age (though they are required to participate when not in paid work). The second component is paid to retired employees, who receive an earnings-related pension in addition to the basic pension. The employee component applies to both public and private sector employees, but there are different schemes for each sector. In principle, they would both be treated the same in New Zealand, but this present case only concerns an employee pension

where the appellant was employed in the private sector. Accordingly, it is not necessary to consider the Mutual Aid Pension, that relates only to public sector employees.

- [13] In addition to the basic and employee pensions discussed, there are other voluntary pension schemes that can provide entitlements beyond the Public Pension Plan. This appeal does not concern one of those schemes.

*How the Public Pension Plan gives an entitlement to the basic pension*

- [14] We now focus in some greater detail on the Public Pension Plan and its attributes, as presented by the Ministry and the appellant. It is a scheme that applies to all registered residents of Japan aged 20 to 59 years of age.

- [15] The basic pension is part of universal coverage that applies in this way, by putting people into three categories:

[15.1] **Category 1 insured persons** are all registered residents (that is registered as living in Japan) who are 20 to 59 years of age and not in Category 2 or 3. In short, this category gives the scheme universal coverage, by including all residents, whether or not they, or any partner they may have, works in paid employment.

[15.2] **Category 2 insured persons** are persons enrolled in either the Employees' Pension (private sector) or the Mutual Aid Pension (government employee).

[15.3] **Category 3 insured persons** are partners of category 2 persons.

- [16] Some category 1 persons are exempt from having to pay premiums (such as a person receiving a disability pension); otherwise, they pay a specified annual premium whether or not they are in paid work at the time.

- [17] Category 2 persons pay a percentage of their employee/employer contributions.

- [18] Category 3 persons are not required pay premiums, as their partner's contributions cover their participation.

[19] Having made contributions (or been exempted from making contributions), the persons required to participate are entitled to an old age basic pension, and other benefits. This was the way in which the appellant became entitled to his basic pension. The level of entitlement is determined by a formula where a full pension is paid on attaining 65 years of age, and 40 years of participation (with some advancement and deferral options). Reduced benefits will be paid when the person has not contributed or been exempt for the full 40 years.

*How the appellant became entitled to an employee pension*

[20] The Employee Pension scheme is for persons in the private sector, and funded by compulsory contributions made by the employee and employer. The rate of the pension is calculated by a formula, which includes the amount of contributions. Participation provides entitlement to qualify for an old-age employee pension, and other types of benefits. The age for entitlement to receive a pension is 65; the same as the basic pension. That is how the appellant's employee pension arose.

*Other social support*

[21] As noted, a person is entitled to make private provision for additional pension entitlements, and they will not have their basic or employee pension under the Public Pension Scheme abated. In addition, there is a programme of public assistance. It is essentially a welfare system which provides for a minimum standard of living; however, relief is only available when other resources have been exhausted. If a person does not qualify for a basic pension, or a basic pension of a sufficient amount, they may be entitled to support under that regime.

*Summary*

[22] The two elements of the appellant's pension are derived from a compulsory public scheme operated by the Government of Japan. The basic pension is a standard rate reflecting years of participation, and the employee component reflects the level of employee and employer contributions made during the appellant's years of contribution.

**The Ministry's position**

[23] The Ministry takes the view that both components of the pension the appellants receives from Japan are a straightforward public old-age pension scheme. Accordingly, it says that this is a programme which

makes provision for similar events and circumstances to the New Zealand social security legislation, including the provision of New Zealand Superannuation. Accordingly, this is a straightforward case where s 70 applies.

### **The Appellant's position**

- [24] The appellant said that there are differences between New Zealand Superannuation and his entitlements to a pension from Japan. The potentially material differences focus on the employee pension, which reflects contributions, unlike New Zealand superannuation. Emphasis was placed on the appellant's wife not being entitled to a pension, as she was not in the paid workforce and did not make employee contributions. However, it did not appear that the appellant disputed his wife would be a category 3 person in the Public Pension scheme.
- [25] After considering the Ministry's position, the appellant appeared to accept that the outline of the Japanese pension and social security regime was accurate.

### **Discussion**

- [26] Section 70 of the Act has a plain and obvious objective. It ensures that where persons qualify for a pension in another jurisdiction, and the pension is that jurisdiction's way of providing for the same contingencies as New Zealand benefits, the offshore entitlement will be offset against the entitlement in New Zealand.
- [27] The policy reasons are obvious. New Zealand taxpayers are not expected to expend money to provide a retirement superannuation that is greater than what a New Zealand taxpayer would receive if they lived and worked for their entire life in New Zealand.
- [28] Inevitably, there are a myriad number of ways in which different jurisdictions may provide support for persons past working age. Indeed, within New Zealand, the approach has changed over time, and whether it should change further remains a consistently live policy issue within New Zealand. For that reason, it is unsurprising that features such as having an individual account, or contributions based scheme, are not determinative.

[29] In terms of whether there ought to be an offset against New Zealand Superannuation in economic terms, it could not be justified to distinguish between:

[29.1] a regime where the social bargain is that tax rates are lower due to not having a broad entitlement to taxpayer funded superannuation, but individuals are required to contribute to individual funds by compulsion; and

[29.2] the regime in New Zealand where general taxation funds a broad entitlement to New Zealand Superannuation based on residence and a qualifying age.

[30] Against those considerations, the policy underlying s 70 becomes more obvious. The key provision in s 70 is contained in s 70(1)(b). It identifies offshore pensions that are offset against New Zealand superannuation by identifying a:

... 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 ... the New Zealand Superannuation and Retirement Income Act 2001 ... which is administered by or on behalf of the Government of the country from which the benefit, pension, or periodical allowance is received ...

[31] That requires that the receipts in this case are offset against New Zealand Superannuation. The key issues under the provision are whether or not the payments are for “the contingencies” for which New Zealand Superannuation (or other social welfare) is paid, and whether the payments are administered by, or made on behalf of, the government of the country in question.

[32] While the appellant only conceded that the basic pension was administered by the Government of Japan, the employee pension component is part of the same regime. They are both administered by the Government of Japan. There is simply no foundation for us to have any doubt that, as the Ministry submitted, the whole of the Japanese Public Pension scheme is administered by or on behalf of the Government of Japan.

[33] The pension (both the basic pension and the employee pension) in issue is paid as Japan's means of meeting retirement needs and, accordingly, it corresponds with the contingencies for which New Zealand Superannuation is paid under the New Zealand Superannuation and Retirement Income Act 2001.

*Appellant v Chief Executive of the Ministry of Social Development*

[34] A recent decision of the High Court, *Appellant v Chief Executive of the Ministry of Social Development* [2017] NZHC 711, (the Singapore pension case) reinforced the view that s 70 of the Act applies to the appellant. There are significant elements of commonality between the Singapore pensions case and the present case. However, the appellant is in a weaker position than the appellant in the Singapore pension case. A significant feature of the Singapore pension case was that the contributions from employees and employers are a fund that is the personal property of the employee. So, any contributions and earnings are distributed with the estate of a deceased member if not paid out in their entirety during the life of the deceased. In the present case, the essence of the argument for the appellant is that he made personal contributions and that distinguishes his pension from New Zealand superannuation. However, the High Court found no merit in that distinction for the purpose of deciding whether section 70 of the Social Security Act 1964 applies.

[35] In both the Singapore pension case and this case, the substance of the appellants' arguments is that the payments they received as pensions were simply disbursements of their own money and that could not affect their entitlement to New Zealand Superannuation. Factually, that was a much stronger argument in the Singapore pension case. In Singapore, any contributions were returned to the contributor or their deceased estate, whereas in Japan nothing is paid where a person does not contribute for 10 years (a recent reduction for a longer period to qualify for entitlements), and if they do not reach the age to qualify, they will not receive a pension. Furthermore, pension receipts will be affected by the length of time the recipient continues to receive a pension after reaching 65 years of age. The Singapore pension scheme is in fact exceptional as a public pension scheme that strictly allocates contributions to a personal fund that, subject to certain rules, is effectively the personal property of the participant.



- [36] In the Singapore pension case if the appellant in that case renounced his Singaporean citizenship, he could draw his funds out of his account and cease to receive a pension. The appellant in the present case did not establish he had personal property rights of that kind. The evidence is that his employee pension is an unexceptional compulsory public pension scheme, where funds are pooled, and participants are entitled to pensions that reflect their time of participation and contributions.
- [37] The first point considered by the High Court in the Singapore pensions case was a contention that the Singapore scheme is similar to the voluntary KiwiSaver pension scheme. The High Court concluded that regardless of elements of commonality with KiwiSaver, s 70 does apply:<sup>1</sup>

The Authority considered [the appellant's] arguments. It examined the [Singapore scheme] and concluded that it is a programme put in place by the government of Singapore for the support of its citizens. It provides for one or more of the contingencies in the New Zealand income support programme, including for retirement or old age. It is administered by or on behalf of the Government of Singapore.

With respect those conclusions are inescapable.

- [38] The judgment went on to note that the Singapore scheme is different from KiwiSaver in that the former is a compulsory scheme and the latter a voluntary scheme. However, the Court did not conclude that the compulsory nature of the scheme was critical.
- [39] In short, the High Court had little difficulty in reaching the view that s 70 applied. While the Singapore scheme is based on individual accounts, where funds were effectively the personal property of the account holder; none-the-less the scheme is the Singapore government's regime for providing for the contingency of retirement or old age and met the other attributes to bring it within s 70. In the present case, the material facts were substantially similar to those before the High Court in the Singapore pension case. To the extent they are different, it is because in Japan the scheme lacks the feature that all contributions are the personal property of the account holder. The appellant's case is weaker than that advanced in the Singapore pension case.

---

<sup>1</sup> *Appellant v Chief Executive of the Ministry of Social Development* [2017] NZHC 711 at [14] – [15].

[40] While the High Court did note the element of compulsion in relation to whether s 70 of the Act applied, it did not elaborate on why that may be important. It appears that without compulsion, it is more difficult to establish that a fund does cover the contingencies for which pensions are provided under the New Zealand Superannuation and Retirement Income Act 2001<sup>2</sup>. The case is more readily made that the contingency is to provide for something beyond the essential needs the social security regime in New Zealand provides.

[41] Compulsion may or may not be a determinative consideration. However, it is a feature that is present in this case. The Japanese pension in issue here is simply part of a compulsory scheme applying to a wide range of residents of Japan, to ensure residents have an income when they are of an age when they may not be in paid work.

[42] Accordingly, the Singapore pension case supports the views we have reached, and summarised in paragraphs [32] and [33] above.

#### **Decision**

[43] We are satisfied that the appeal must be dismissed as s 70 of the Act applies to the pension that the appellant receives from Japan.

**Dated at Wellington** this 5<sup>th</sup> day of December 2017

---

**G Pearson**  
Chairperson

---

**K Williams**  
Member

---

**C Joe JP**  
Member

---

<sup>2</sup> *Hogan v CE of Dept of WINZ* HC Wellington AP 49/02, 26 August 2002, at [24]-[26], contains a further review of the significance of compulsion.