

[2017] NZSSAA 071

Reference No. SSA 015/17

IN THE MATTER

of the Social Security Act
1964

AND

IN THE MATTER

of an appeal by **XXXX** of
Wellington 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 5 December 2017

Appearances

The Appellant in person

Ms R Shaw for Chief Executive of the Ministry of Social Development:

DECISION

Background

[1] This appeal concerns the application of s 70 of the Social Security Act 1964. The provision provides for offsetting an overseas pension against New Zealand Superannuation. The parties have largely resolved the issues subject to one factual determination. It is not necessary to discuss the wider context and, accordingly, the Authority will only deal with the necessary factual finding.

[2] The factual question is whether the appellant participated voluntarily in a pension scheme between 30 June 1980 and 21 August 1985.

- [3] The starting point is that official records for the scheme show the appellant's pension entitlements derived from this particular period arise from compulsory participation in the pension scheme.
- [4] At the hearing, the appellant explained his circumstances. The Ministry did not challenge the veracity of what the appellant said. Simply, the Authority must weigh the balance of the evidence to determine the issue.
- [5] The pension scheme in question is a German public scheme. The first strand of the evidence provided by the appellant was that during the period in question he was a citizen of the Netherlands and not a citizen of Germany. He was employed by a German company; however, during the contentious period of time, he was working outside Germany.
- [6] At earlier times in his life, the appellant had lived and worked in Germany though always as a citizen of the Netherlands.
- [7] The next strand of the evidence is a document dated in June 1980. The appellant found the document amongst his personal records. There is no dispute that this document was completed by his employer during the relevant period of time. On its face, it indicates that there are four conditions under which a person might complete the form:
- [7.1] They were an employee who compulsorily participated in the pension scheme.
- [7.2] They were an employee who voluntary participated in the scheme.
- [7.3] They were a self-employed person who participated in the scheme.
- [7.4] A final category for persons who are not insured under the scheme (they apparently need to identify their status as a non-participant).
- [8] The form clearly identifies the appellant as a person who is a voluntary employee participant in the scheme.

- [9] The final element of the evidence is that the appellant clearly has a sound knowledge of the voluntary nature of his participation at the time, and his reasons for electing to participate. This evidence was persuasive and not insignificant.
- [10] There was some brief evidence relating to possible changes in the law relating to the compulsory nature of participation in the scheme in issue. However, that information lacked certainty.
- [11] Our starting point to evaluate this evidence are the written records provided by the administrator of the scheme—we give them weight. However, given that the records in question relate to a period many decades ago, we accept that there can be no certainty the records are correct, and there is an inherent difficulty in locating source documents that have been transposed into the summary now in the records of the administrator. Diligent inquiries have failed to produce contemporaneous records from the administrator of the scheme.
- [12] We now turn to the evidence pointing to the administrator's summary being incorrect. First, we find it inherently implausible that as a citizen of the Netherlands, employed by a German company and working outside Germany, he would have been required by compulsion to participate in a German pension scheme. Typically, compulsory participation in a public pension scheme would require either that a person was a citizen of that country, or working in the country. It would be rare or unknown to mandate compulsory participation in a public pension scheme for non-nationals working outside the country operating the scheme. However, given that the appellant did have a history of living and working in Germany, and the limited evidence as to the then terms of the scheme, we have not taken that factor as determinative.
- [13] The written record produced by the appellant showing that his participation was voluntary is a compelling document. On the face of it, to the extent that the records produced are inconsistent with that original document, it appears that the original document is likely to be more reliable. Of course, it is possible that the original document was inaccurate and corrected.

- [14] We consider that any ambiguity is resolved on the balance of probabilities. When we consider the appellant's own personal recollection, we find the appellant was a credible witness; indeed, that was not a matter in dispute with the Ministry. We are satisfied that the appellant had a clear recollection that his participation was voluntary. He explained his participation was an election he made, and his employer suggested that it would be sensible for him to participate on that basis. The appellant explained that at the time his employer's suggestion prompted him to consider his plans for the future, before making the decision. We accept the evidence that the voluntary nature of the participation was discussed with his employer, and that is consistent with the contemporaneous document produced.
- [15] Weighing the documentation produced by the appellant and his personal recollection we are satisfied that the administrator's record that the participation was compulsory is probably erroneous. The implausibility of a non-national working outside Germany being required to participate adds to that evidence. The matter is to be determined on the balance of probabilities and we are satisfied that standard is amply met in favour of the appellant. Accordingly, we find that the appellant's participation in the pension scheme between 30 June 1980 and 21 August 1985 was on a voluntary basis.
- [16] We understand that the appellant and the Ministry are likely to be able to resolve any other issues. We reserve leave for either party to apply to the Authority to determine any further issues should that be necessary.

Dated at Wellington this 15th day of December 2017

G Pearson
Chairperson

K Williams
Member

C Joe JP
Member

