

[2019] NZSSAA 38

Reference No. SSA 15/18

IN THE MATTER

of the Social Security Act
1964

AND

IN THE MATTER

of an appeal by **XXXX** of
Blenheim 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 24 May 2019

Appearances

XXXX in person

For Chief Executive of the Ministry of Social Development: Mr C J Hunt (counsel)

DECISION

Background

[1] XXXX appealed against the Chief Executive's decision to offset his Swiss pension against his New Zealand Superannuation. A person entitled to New Zealand Superannuation will have their entitlement reduced to the extent that they receive certain overseas pensions. In this appeal, we need to decide whether XXXX's foreign pension is in a category where the New Zealand legislation requires it is offset against New Zealand Superannuation.

- [2] Section 70 of the Social Security Act 1964 (the Act) governs the issue. The Social Security Act 2018 has replaced the Act, but it still applies for the period under consideration. Regardless, the respective Acts have a similar, or identical, effect for the issues in this appeal.
- [3] The essential principle behind s 70 of the Act is that New Zealand taxpayers should not provide New Zealand Superannuation at a level that puts a person who is entitled to a foreign pension into a better position than a person who has remained in New Zealand through the whole of their working life. However, that relates only to entitlements from other countries that have a functional similarity to New Zealand Superannuation. The similarity is functional only, as virtually all countries have schemes to provide income for older persons that are in some respects, unique. There is typically variation in features such as funding; which, may be a tax or a participant/employer base, an individual or a collective account to fund entitlements, and the conditions for benefit entitlements also vary. Section 70 accordingly has a broader focus than those attributes. Offshore pensions are generally offset if they have a similar purpose and function to New Zealand Superannuation, the details have little significance in the analysis.
- [4] There are two considerations in cases like the present case:
- [4.1] The first step is to establish as a question of fact the nature of the scheme from which XXXX receives an overseas pension.
- [4.2] Then as a second step, the Authority must apply s 70 and determine whether the scheme has the necessary elements of commonality with New Zealand Superannuation to require offsetting.
- [5] The nature of the scheme providing the off-shore pension is a question of fact,¹ which we must decide in each case. Previous decisions can only determine questions of New Zealand law for future cases. Of course, usually, the same factual conclusions about any offshore pension scheme are reached in different cases concerning the same scheme. Nonetheless, it will turn on the evidence in each case.

¹ That includes questions of foreign law.

An overview of the pension scheme in issue

- [6] As a preliminary matter, to give context to the positions taken by XXXX and the Chief Executive, we will first identify some of the essential characteristics of XXXX's pension scheme. Some of the details were contentious; to the extent they are relevant to our decision, we will consider them when evaluating XXXX's arguments. An interpreter was available to assist at the hearing. XXXX was concerned about the terminology; however, this decision does not turn on the nuances of language. There was little scope for disagreement on the essential attributes of the scheme from which XXXX receives pension payments.
- [7] Generally, there was some agreement that the relevant pension scheme and XXXX's participation has the following attributes:
- [7.1] XXXX receives payments of Swiss Old Age and Survivor's Insurance (Swiss OASI). It is a scheme operating in the Swiss Confederation (Switzerland), and it is subject to regulation in the three official languages of Switzerland.
- [7.2] XXXX's payments derive from a standard old-age pension, with a supplement for deferral. XXXX worked in Switzerland for part of his life, and, as a result, is entitled to the payments he receives from Swiss OASI.
- [7.3] Swiss OASI is a three-pillar system. XXXX's payments are from the first pillar, which provides basic assistance with living costs. The second pillar provides post-retirement income to maintain the standard of income participants had when working. The third pillar is a voluntary, private savings scheme with tax benefits.
- [7.4] Only the first pillar of the scheme applies to XXXX's payments. It applies to all persons residing or working in Switzerland; participation is mandatory. All people working in Switzerland are required to pay contributions while employed. The Central Compensation Office administers the scheme, which is the Swiss Government's central implementing body for Swiss OASI, and delivering a range of other social welfare services².

² XXXX seemed to accept those facts but considered "administration" was something different.

XXXX' case

[8] XXXX expressed concern that due to language barriers, the Authority could misunderstand the Swiss pension system. He said that the information provided to the Authority was not accurate in all respects and likely misunderstood due to translation issues. He contended:

[8.1] He received periodic payments under the Swiss OASI. They were monthly OASI Renter payments. He said the Authority should distinguish his payments from general or universal flat-rate granted pensions. They were not a standard old-age pension.

[8.2] He said his payments were an income from an asset and were not a pension or offshore pension. The payments were contingent on membership of the scheme and a history of making contributions.

[8.3] The true character of the payments was an employer/employee funded contributory insurance retirement scheme and paid only to individuals who contributed. The payments were not government funded. The government of Switzerland did not administer the programme.

[8.4] He did accept that the contingency for his Swiss OASI was loss of revenue linked to old age.

The Chief Executive's position

[9] It is sufficient to observe that the Chief Executive's position is that the payments from the Swiss OASI are an obvious example of a pension scheme to which s 70 of the Act applies.

Discussion*Applying the Act to the facts in this case*

[10] Section 70 of the Act has a plain 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 social security benefits, including New Zealand Superannuation, the offshore entitlement will be offset against an entitlement in New Zealand.

[11] The policy reasons are obvious. New Zealand taxpayers are not expected to expend money to provide 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. To achieve that, it is necessary to take account of pension entitlements persons may have due to spending some of their working life in other countries.

[12] Inevitably, different countries employ diverse schemes to support persons after working age. Indeed, within New Zealand, the approach has changed over time, and whether it should change further remains a recurring policy issue within New Zealand. For that reason, it is unsurprising that features such as having an individual account, or a contributions-based scheme, are not determinative when considering whether to offset foreign pensions.

[13] 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:

[13.1] 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

[13.2] the regime in New Zealand where general taxation funds entitlements to New Zealand Superannuation, based on residence and a qualifying age.

[14] Against those considerations, the policy underlying s 70 becomes 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 ...

[15] The key issues under the provision are whether a foreign pension scheme is 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.

[16] While XXXX asserted the Swiss OASI was not administered by the government of Switzerland, that was not consistent with the information published by the Swiss Federal Social Security Office. The Ministry of Social Development produced a publication that contains an overview of the Swiss OASI, and provides information showing the official schemes dealing with a range of social security measures in Switzerland. It is beyond argument the Swiss OASI is a compulsory scheme where all employees in Switzerland and their employers contribute, it is an official scheme administered by the government of Switzerland.³ The payments XXXX receives are old-age pension payments. The scheme is provided under the constitution of Switzerland, and it commenced in 1925. The Swiss Federal Social Insurance Office publication describes the pension XXXX receives as a "mandatory state-run old-age pension". It also makes it clear that there is no fund accumulated by individuals as:⁴

State-run old-age insurance is based on a pay-as-you-go system, with the money collected in contributions by OASI flowing straight to the current cohort of pensioners. The funds collected are not invested.

T v Chief Executive of the Ministry of Social Development

[17] A recent decision of the High Court, *T v Chief Executive of the Ministry of Social Development*,⁵ (the Singapore pension case) reinforced the view that s 70 of the Act applies to XXXX. There are elements of commonality between the Singapore pensions case and the present case. However, XXXX 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 XXXX 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 when deciding whether s 70 of the Social Security Act 1964 applies.

³ *Boljevic v Chief Executive of the Ministry of Social Development* HC Wellington CIV-2010-485-000206, Kós J at [34] identifies the only issue in this respect is state "administration", not state funding.

⁴ Federal Social Insurance Office *Switzerland's old-age insurance system* (January 2019) at 11.

⁵ *T v Chief Executive of the Ministry of Social Development* [2017] NZHC 711.

- [18] In both the Singapore pension case and this case, the substance of the arguments is that the payments the recipients received as pensions were simply disbursements of their own money and that could not affect their entitlement to New Zealand Superannuation. XXXX says he contributed to an insurance scheme. Factually, that was a much stronger argument in the Singapore pension case. In Singapore, any contributions are returned to the contributor or their deceased estate, whereas in Switzerland there is no personal fund, only rights to a pension that will be funded in the future by the contributions of others. 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.
- [19] In the Singapore pension case, if the appellant renounced his Singaporean citizenship, he could draw his funds out of his account and cease to receive a pension. In this case, XXXX did not have 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; it is funded out of current contributions, taxes and other sources at the time the pension is paid.
- [20] 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:⁶

The Authority considered [Mr T'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.

- [21] 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.

⁶ *T v Chief Executive of the Ministry of Social Development* [2017] NZHC 711 at [14] – [15].

- [22] 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, the scheme is nonetheless 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 the Swiss OASI lacks the feature that all contributions are the personal property of the account holder. XXXX's case is weaker than that advanced in the Singapore pension case.
- [23] While the High Court did note the element of compulsion concerning 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 2001.⁷ 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.
- [24] Compulsion may or may not be a determinative consideration. However, it is a feature that is present in this case. The Swiss OASI is simply part of a compulsory scheme applying to a wide range of workers in Switzerland, to ensure they have an income when they are of an age when they may not be in paid work. As noted, the Swiss OASI is not the only scheme.
- [25] Accordingly, the Singapore pension case supports the views we have reached and summarised above.

Decision

- [26] We are satisfied we must dismiss the appeal as s 70 of the Act applies to the pension XXXX receives from Switzerland.
- [27] No issues were raised regarding the quantum of the offset; for completeness, we reserve leave do so.

⁷ *Hogan v Chief Executive of Department of Work and Income New Zealand* HC Wellington AP 49/02, 26 August 2002, at [24]-[26], contains a further review of the significance of compulsion.

Dated at Wellington this 23rd day of July 2019

G Pearson
Chairperson

K Williams
Member

C Joe JP
Member