

[2020] NZSSAA 11

Reference No. SSA 104/19

IN THE MATTER of the Social Security Act 2018

AND

IN THE MATTER of an appeal by **XXXX** against a decision of the Chief Executive that has been confirmed or varied by a Benefits Review Committee.

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

S Pezaro - Deputy Chair

C Joe - Member

Hearing at WELLINGTON on 11 March 2020

Appearances

The appellant via audio-visual link

N. Palmer, agent for the Ministry of Social Development

DECISION

Background

[1] XXXX (the appellant) appeals the Ministry's decision to establish an overpayment of New Zealand Superannuation (NZS) of \$8,378.71 from 23 January 2016 to 9 August 2016 because he left New Zealand and did not return. The appellant considers that he is entitled to NZS for the first 26 weeks of his absence from New Zealand.

[2] The appellant applied for NZS on 11 April 2014 and it was granted from 24 June 2014 after he went to a local office and completed his application. From September 2014 when the appellant wrote to the Ministry confirming he was not eligible for a German pension until 27 July 2016 when the Ministry wrote to the appellant advising him that it was aware he had left New Zealand on 22 January 2016 the appellant had no contact with the Ministry and did not advise a change of address. Therefore, the Ministry continued to use the address provided by the appellant in 2014.

The letter that the Ministry sent to the appellant in July 2016 which asked him to confirm if he had left New Zealand was not returned to the Ministry.

- [3] On 4 August 2016 the appellant posted a letter dated 18 July 2016 on the Ministry's web portal. This letter had his New Zealand address on it. The appellant said he had an unexpected opportunity to travel the world extensively and was not sure how long he would be away. He said that he understood he was not entitled to NZS after 26 weeks absence and asked the Ministry to stop his NZS payments. The Ministry suspended the NZS payments from 10 August 2016 and wrote to the appellant, at the New Zealand address, telling him that it had established an overpayment.
- [4] As the appellant did not respond to this letter, his NZS entitlement was cancelled on 15 August 2018, after the suspension had been in place for two years. The Ministry then wrote to him at his New Zealand address and posted copies of the letters on his MyMSD account.
- [5] On 16 January 2019 the Ministry received a letter dated 6 December 2018 from the appellant which it treated as an application for a Review of Decision in relation to the overpayment. On 29 July 2019 a Benefits Review Committee upheld the Ministry's decision to establish the overpayment.

Issues

- [6] The issues for the Authority to decide are whether the appellant is entitled to NZS payments for the first 26 weeks of his absence from New Zealand and, if not, whether the Ministry is entitled to recover the amount of \$8,378.71 of NZS paid to him between 23 January 2016 to 9 August 2016. The appellant does not dispute the Ministry's calculation of the overpayment.

Relevant law

- [7] Section 77(1) of the Social Security Act 1964 (the Act)¹ provides that a benefit is not payable when a beneficiary is absent from New Zealand unless payable under certain provisions including ss 21 to 35 of the New Zealand Superannuation and Retirement Income Act 2001 (NZSRI).
- [8] Section 77(6) of the Act imposes a duty on a beneficiary to notify the Ministry of a forthcoming absence before they leave New Zealand and provides that a beneficiary who fails to do so has no entitlement to be paid a benefit while overseas. However, as s 77(9)(a) excludes NZS from the provisions in s 77(2) to (8), a recipient of NZS is not required to notify the Ministry of an intended absence.

¹ Replaced by the 2018 Act which contains the same provision in s 114.

- [9] The relevant legislative provision for the appellant is s 21 of the NZSRI which provides that a person is not entitled to payment of NZS while they are absent from New Zealand unless they can bring themselves within one of the exceptions contained in ss 22 to 29 of the NZSRI. Section 22 provides that a person may be paid NZS for the first 26 weeks of any temporary absence if their absence does not exceed 30 weeks or the Chief Executive is satisfied that that the absence beyond 30 weeks is due to circumstances beyond that person's control or that he or she could not reasonably have foreseen before departure.
- [10] Section 26 to 35 of the NZSRI provide for payment of NZS overseas to a country whose government does not have a reciprocal agreement with New Zealand or specified Pacific Countries. As Australia does have a reciprocal agreement with New Zealand, these provisions are not relevant.
- [11] In its report, the Ministry said it considered whether Article 6, cl 5 of the Social Welfare (Reciprocity Agreement with Australia) Order 2017 entitled Mr Nicholson to payment of New Zealand Superannuation for the period 23 January 2016 to 9 August 2016 while he was in Australia. However, after the hearing, we noted that the 2017 Order did not apply to the appellant because it came into force after the relevant time and that Article 6, cl 5 of the 2017 order was not relevant as it related to entitlement to Supported Living Payment. Therefore, we provided the parties with a further opportunity to make submissions on the relevance of the Social Welfare (Reciprocity Agreement with Australia) Order 2002 (the 2002 agreement) which was in force in 2016.
- [12] Articles 6, cl 1 and cl 2 of the 2002 agreement allowed presence in Australia to be deemed presence in New Zealand for the purpose of assessing entitlement to benefits. Article 6, cl 1 applies only at the date of application for a benefit and therefore does not assist the appellant. Article 6, cl 2 provides that:
- Subject to this Agreement, where a person is entitled to receive a benefit under the social security law of New Zealand (including a person who is entitled under paragraph 1, or Article 7, or both) but payment of that benefit is conditional on presence in New Zealand, that person shall be deemed, for the purpose of the payment of that benefit, to be present in New Zealand, if he or she is an Australian resident, and present either in Australia or New Zealand.
- [13] Under the 2002 agreement a New Zealand citizen who is lawfully residing in Australia is an Australian resident. Article 9, cl 4 of the 2002 agreement requires any entitlement to NZS under Article 6 to be paid at the rate of entitlement under the Australian Age Pension.

The case for the appellant

- [14] The appellant acknowledged that he failed to advise the Ministry that he was leaving New Zealand or notify the Ministry of a change of address. The appellant said when he left New Zealand in January 2016 he intended to be away about four to six weeks to find tenants for the rental property. However, he did not book a return ticket.
- [15] In his letter of 6 December 2018, the appellant said that he purchased a property in Australia in 2015 as an investment but was unable to find suitable tenants. Therefore, he and his wife decided to move temporarily into this property in January 2016 while they looked for tenants. He said that it was difficult to find tenants because the garden was not appealing due to the dry summer and the air conditioning system needed to be replaced. He said the maintenance took longer than expected and continued into the second half of 2016. By that time the property market had declined, and the appellant said that he had no choice but to 'wait and sit things out' before he could find suitable tenants and return to New Zealand.
- [16] At the hearing, the appellant said that the property market and the condition of the property which made it difficult to find tenants were circumstances beyond his control that prevented him from returning to New Zealand within 26 weeks. The appellant was adamant that when he left New Zealand he did not intend to relocate to Australia; he said the move was temporary. He said that before leaving New Zealand he sold a section here which freed funds to purchase the property in Australia.
- [17] The appellant said he read on line that NZS would be paid for 26 weeks after a person left New Zealand. He accepted that there was a delay between the date on his letter, 18 July 2016, and the date on which he posted it on the Ministry's portal. He said if there had not been a delay he would have met the 26-week requirement. However, he submits that pursuant to Article 6, cl 2 of the 2002 agreement he is entitled to NZS for the first 26 weeks of his absence from New Zealand.

The case for the Ministry

- [18] The Ministry does not accept that the appellant's absence for the 26 weeks in question was temporary or that the circumstances relied on by the appellant were beyond his control. The Ministry says that the appellant purchased the Australian property in late 2015 and moved there in January 2016 and that there is no evidence that this property was ever listed for sale or let to tenants. It is submitted that the fact that the appellant has not returned to New Zealand since 22 January 2016 indicates that the decision to relocate to Australia was planned.

[19] The Ministry contends that a decline in the property market and the condition of the appellant's Australian property do not meet the criteria for circumstances that were beyond his control and unforeseeable as required by s 22 of the NZSRI.

[20] Mr Palmer submitted that Article 6 of the 2002 agreement provides the residential criteria for payment of NZS in Australia and that this provision requires an application for the Australian Age Pension. The Ministry relied on the Court of Appeal decision in *Bredmeyer v The Chief Executive of the Ministry of Social Development*, where the Court held that Article 9 of the 2002 agreement required an application to be made for the Australian Age Pension to assess entitlement.² A person who fails the means test for the Australian pension is not entitled to payment of NZS in Australia.

Discussion

[21] As noted s 77(1) of the Act and s 21 of the NZSRI disentitles a person who is absent from New Zealand from receiving NZS unless allowed under sections 22 to 35 of that Act. Those provisions do not assist the appellant. Notably s 22 did not apply as the appellant was away from New Zealand for more than 30 weeks, and section 26 did not apply as he was in Australia which has a reciprocity agreement. None of the other provisions applied on the evidence before us.

[22] To gain relief from s 77 of the Act and s 21 of the NZSRI, potentially the appellant could rely on Article 6, cl 2 of the 2002 agreement. It provides that a person such as the appellant, if they are an Australian resident, is treated as being present in New Zealand. The effect is to avoid the limitation in s 77 of the Act and s 21 of the NZSRI. If the appellant was not an Australian resident and unable to take advantage of Article 6, cl 2, then he was outside New Zealand and those sections prevented him receiving NZS.

[23] However, if the appellant could rely on Article 6, cl 2, he was limited by Article 9, cl 4 of the reciprocity agreement. He could not claim more NZS than the amount of Australian Age Pension if he were entitled to that. The Australian Age Pension is means tested, and we have no basis to conclude he would qualify for any payment under it. Accordingly, we cannot be satisfied there is any relief:

- a. Under the NZSRI from disentitlement from the point of absence; or
- b. Any entitlement due to the deeming provision in the reciprocity agreement, as the appellant's New Zealand Superannuation could not be more than what he would get if applying for a means tested Australian Age Pension.

² *Bredmeyer v The Chief Executive of the Ministry of Social Development* [2008] NZCA 557.

[24] These limitations are well settled. The limitation to the means tested amount of the Australian Age Pension is clearly explained by the Court of Appeal in *Bredmeyer v The Chief Executive of the Ministry of Social Development*.³

[25] Accordingly, we find that the appellant was not entitled to payment of NZS for the first 26 weeks of his absence from New Zealand, the period 23 January 2016 to 9 August 2016, and the Ministry is entitled to recover the payments made during this time.

Order

[26] The appeal is dismissed.

Dated at Wellington this 17th day of July 2020

S Pezaro
Deputy Chair

C Joe
Member

³ Above.