[2020] NZSSAA 24

Reference no: NZSSAA 003/20

IN THE MATTER of the Social Security Act 2018.

AND

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

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

G Pearson (Chairperson)

C Joe (Member)

XXXX presented her own case

Ms A He presented the Chief Executive's case

Decision: Tuesday, 01 December 2020

DECISION

The Indicative Decision

[1] The Authority issued an indicative view of the decision it would make on the information on 15 September 2020. It provided XXXX an opportunity to provide further information. She has not done so. Accordingly, this decision is in substantially the form the Authority has already indicated to her. The reasons for issuing the indicative decision are set out in that decision.

The issues

[2] XXXX's appeal concerns two points:

[2.1] A decision of the Ministry of Social Development (Ministry), to reduce the rate of New Zealand Superannuation payable to her. It arises from the calculation of the amount due, because XXXX does not live in New Zealand and receives a Canadian pension (she is a national of Canada and lives there).

[2.2] A decision to establish an overpayment of $1,268.08.

[3] XXXX's grounds for her appeal were expressed in her notice of appeal. She says:

> My case is not about the law. It is about JUSTICE. It is about redressing the errors, contradictions, delays, character assassination and refusal to accept the evidence provided.

[4] She has directed other criticism at officials and expressed the view that official error or misconduct provides her with an entitlement to New Zealand Superannuation at the same rate as person who lived all their life in New Zealand.

The basis for the Authority's decision

[5] The Ministry and this Authority are required to apply the law, not personal or subjective perceptions of fairness or justice. This Authority must determine facts on the evidence, apply the law to those facts, and do so in a written and reasoned decision.

[6] XXXX says she accepts the legislation the Ministry referred to in its reports "is applicable in the majority of cases with which the MSD deals, but my assertion is that the Ministry and its CEO have discretion to address a case on an individual basis and they should do so in this instance." However, XXXX neither describes a legal power for the Ministry to exempt her from the legislation, nor a reason to do so. This decision must be in accordance with the law.

[7] The Authority sits as a judicial authority and when hearing appeals, it exercises all the duties and functions of the Chief Executive under the Social Security Act 2018 (the Act).[1] The Authority is deemed to be a commission of inquiry under the Commissions of Inquiry Act 1908, which includes powers of investigation.[2] Throughout the process, from the Chief Executive's initial decisions (usually made under delegation), to appeals on points of law in the courts, there is a focus on reaching a correct view on the facts. In *Arbuthnot v Chief Executive of the Department of Work and Income*[3] the Supreme

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1 Social Security Act 2018, s 401

2 Commissions of Inquiry Act 1908, s 4C

3 *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55 [2008] NZ LR 13

Court was resolute in this view, where earlier processes do not limit the scope of the analysis:[4]

> There is nothing in s 12M to prevent the Chief Executive from then asking the Authority to consider any matter which may support the decision which is under appeal. Indeed, the thrust of the section is quite the other way: that the Authority is to consider all relevant matters.
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> ..
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> In short, there is no right of appeal against the reasons for a judgment, only against the judgment itself.
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> …
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> The duty of the Authority was to reach the legally correct conclusion on the question before it, applying the law to the facts as it found them upon the rehearing without concerning itself about the conclusion reached by the BRC …

[8] The High Court's decision in *Chief Executive of the Ministry of Social Development v Genet*,[5] provides some important analysis of the duties of the Ministry and this Authority, having regard to the integrity of the welfare regime and the vulnerabilities of many appellants.[6]

[9] It is clear from those statutory provisions, and authorities that this Authority must be conscious of its inquisitorial powers, and the obligation to "get it right", it is not limited to adjudicating between the arguments of the parties.

[10] Potentially the Authority could take a view regarding XXXX's entitlement that is inconsistent with both her and the Ministry's respective positions. Given XXXX's reluctance to engage with the Authority, we took a more inquisitorial approach than might otherwise be the case.

Background facts

[11] XXXX applied for New Zealand Superannuation on 10 December 2012. She said on the form she completed that she was born in Canada and lived in New Zealand from 12 September 1968 and was in New Zealand except between 31 October 1992 and 31 August 1994 when she lived in Bermuda. XXXX signed the form declaring what she said was true and was granted New Zealand

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4 At [20]– [26].

5 *Chief Executive of the Ministry of Social Development v Genet* [2016] NZHC 2541

6 At [26]

Superannuation at $400.07 per week, being the single living alone rate.

[12] XXXX left New Zealand a week after applying for New Zealand Superannuation. She did not give notice of her intention to leave when applying for New Zealand Superannuation, or give notice when she left after being granted New Zealand Superannuation so soon after that[7]. When it ascertained XXXX had left New Zealand, the Ministry suspended her payments from 3 July 2013. She was not entitled to New Zealand Superannuation from the time she left New Zealand. She would have needed to get permission to receive New Zealand Superannuation while out of New Zealand, and it would have been at a lower rate reflecting the limited time she had been in New Zealand if approved. The Ministry calculated there was an overpayment of $9,932.54 as she was not entitled to New Zealand Superannuation from 17 December 2012 when she left New Zealand.

[13] The Ministry reduced the overpayment to $714.84 effectively allowing the first 26 weeks of absence. However, there were no apparent legal grounds to make a concession giving XXXX an entitlement to the payments. We assume the Ministry may have exercised a discretionary power not to recover the debt. That discretion is no longer open to the Ministry as the law changed with effect from 2015.

[14] XXXX returned to New Zealand and made a new application for New Zealand Superannuation on 3 October 2017. In this application she said she had lived in New Zealand from 12 September 1968, and was absent:

[14.1] From 24 September 2013 until 31 December 2015 in the United Kingdom;

[14.2] From 3 January 2016 until 13 December 2017.

[15] She did not report the two-year absence in Bermuda, as she had in 2012. She was granted New Zealand Superannuation at the single sharing rate from 3 October 2017. The Ministry made inquiries with the Canadian authorities about her entitlement to a Canadian pension.

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7 Section 127 of the Social Security Act 1964 included obligations of frankness.

[16] On 8 December 2017 XXXX notified the Ministry she was returning to Canada, and it asked her to apply for New Zealand Superannuation at the portable rate while she was living in Canada. She did that, and in response to the question as to how long she had lived in New Zealand since she was 20 years of age, she said "see NZ Super file".

[17] XXXX received New Zealand Superannuation, the Ministry made inquiries with both Canadian authorities and XXXX, and ascertained she received a Canadian pension. The Ministry also made inquiries regarding where XXXX lived between 2012 and 2016.

[18] The Ministry after a process of gathering information calculated XXXX's New Zealand Superannuation on the basis she lived in New Zealand for 14 years and 7 months since 1968 when she first came to New Zealand. She had lived in Canada, Rhodesia, Australia, Bermuda and England for periods since first coming to New Zealand in 1968. Some of the time out of New Zealand was very lengthy such as more than 10 years living in Canada in the years from 1981 to 1992.

[19] Using XXXX's own figures as the base, the Ministry calculated her entitlement to New Zealand Superannuation, offsetting for her Canadian pension. The Ministry concluded:

[19.1] There was no overpayment based on the rate of entitlement down to 8 January 2019;

[19.2] There was an overpayment due to failure to offset Canadian pension receipts in full against XXXX's in the periods from 10 December 2012 to 18 June 2013, and 3 October 2017 to 26 December 2017. The total was $1,268.08.

The law

[20] The Ministry provided a review of the relevant law, and how it considers it applies to XXXX. She had the benefit of that material, and it is not necessary to reproduce it in full, and XXXX has already indicated she does not challenge that aspect. Nonetheless we will provide a short review of the principles that appear to apply to our analysis.

[21] The key points that affect XXXX's entitlement are apparently:

Calculation under the reciprocal agreement

[21.1] XXXX qualified for New Zealand Superannuation under s 8 of the New Zealand Superannuation and Income Retirement Act 2001 as she had been resident in New Zealand between 2006 and 2012 when she applied for it. While she left New Zealand only days later, she appears to have been resident in New Zealand at the time. We need not consider that further if the Ministry does not dispute her status. Similarly, she met the requirements of 10 years residence, five of them being since she attained 50 years of age.

[21.2] During the contentious period of entitlement, XXXX has been resident in Canada. In these circumstances her entitlement to New Zealand Superannuation is under the Social Welfare (Reciprocity with Canada) Order 1996 (the Reciprocal Agreement).

[21.3] Article VII of the Reciprocal Agreement provides a formula to calculate entitlement. The formula for XXXX is the number of whole months she has been resident in New Zealand since attaining 20 years of age, divided by 540.[8] The result is multiplied by the maximum benefit rate of New Zealand Superannuation.

[21.4] Accordingly, the key element in the calculation is the number of whole months XXXX has been resident in New Zealand since attaining 20 years of age. The Ministry in its final calculations:[9]

[21.4.1] Accepted XXXX's claim she has spent 14 years and 7 months (175 months in total) resident in New Zealand since attaining the age of 20.

[21.4.2] It conceded an additional three months for the period XXXX visited New Zealand between 2 October 2017 and 2 January 2018.

[21.4.3] Accordingly, the Ministry has applied the formula on the basis XXXX was resident in New Zealand for 178 months in the formula.

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8 That applies to everyone born after 31 March 1936.

9 There was an interim error, where the Ministry mistakenly calculated XXXX was resident in New Zealand for 513 months.

[21.5] Using XXXX's information regarding the time she was resident in New Zealand would have produced an overpayment, but the Ministry did not establish any overpayment down to 8 January 2019.

Deduction of Canadian Pension payments

[21.6] New Zealand Superannuation is reduced by some overseas pension payments under s 70 the Social Security Act 1964, and s 189 of the Social Security Act 2018, and reg 119 of the Social Security Regulations 2018, since the 2018 legislation came into effect.

[21.7] The Appellant received Canadian pension payments (Canadian Pension Payments (CPP) and Old Age Security Pension (OAS)), and it appears she does not dispute they should be deducted as a general principle.

[21.8] It is not clear from the material XXXX has provided what, if any, dispute she has with either the principle of deducting CPP or OAS or with the calculations.

Duty to establish and recover overpayments

[22] We also take account of the obligations on the Chief Executive to establish and recover overpayments. The repayments in this case relate to the periods 10 December 2012 to 18 June 2013, and 3 October 2017 to 26 December 2017. There was a discretion relating to recovery of overpaid benefits until the Social Security (Fraud Measures and Debt Recovery) Amendment Act 2014 amended the Social Security Act 1964. From that point s 86(1) of that Act imposed a duty to take all reasonably practicable steps to recover a debt; the exception was official error. The same applies under the current legislation[10].

[23] Accordingly, there is a discretion relating to the period from 10 December 2012 to 18 June 2013, but not the later period. Official error would bar recovery; if, XXXX received funds in good faith, changed her position in reliance, and it is inequitable to recover the funds overpayment.

[24] It is potentially open to the Authority to question whether XXXX was resident in New Zealand when she first applied for New Zealand Superannuation given she was in the process of leaving, whether the Ministry was correct to pay the first 26 weeks of absence,

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10 s 362 of the Social Security Act 2018

whether the overpayment due to miscalculation under the Reciprocal Agreement should be established and recovered; and whether the three-month visit amounted to residence for the calculation. The Ministry did not pursue those issues with the Authority, they are all favourable to XXXX, and the view is open that they are the correct legal outcome in the circumstances. In that regard, we do take into account of the wider scope not to establish and recover debts in earlier years than the legislation now allows.

Our conclusion

[25] The Ministry has applied the Reciprocal Agreement to XXXX's own information and the formula is not subject to any discretion. The only change the Ministry made from what XXXX said was to allow her the benefit of an additional three months when calculating her entitlement. The basic issue that affects XXXX is she spent less than 15 years of her life in New Zealand, she does not live in New Zealand now. Canada and New Zealand have an agreement where New Zealand pays an amount of superannuation proportionate to the time spent living in New Zealand.

[26] The same applies to the offsetting of Canadian pension payments. New Zealand pension entitlements XXXX received when in New Zealand were properly offset by payments of Canadian pension she received.

[27] We have identified one error where the Ministry erroneously calculated XXXX's entitlement on the basis she had been in New Zealand longer than she was. However, that has not contributed to any overpayment the Ministry seeks to recover.

[28] In other respects, it appears any errors are not caused by the Ministry but by XXXX providing inaccurate information and failing to give notice of her circumstances. That includes:

[28.1] She failed to give accurate information regarding the time she spent in New Zealand (refer [11] to [19] above).

[28.2] She applied for full New Zealand Superannuation, received it and left New Zealand in a matter of days without reporting she left and was no longer entitled to receive New Zealand Superannuation. The Ministry allowed her to keep 26 weeks of the payments, when in law she was apparently not entitled to do so.

Fairness

[29] For the reasons we have discussed this decision must be made under the law that applies to XXXX's circumstances, including any discretions that apply. She says that is not the basis on which we should approach the case, the outcome is unfair to her. It is sufficient to observe that there is no apparent merit in XXXX's position, for these reasons:

[29.1] She lived in New Zealand for less than 15 years of her life, she is now more than 70 years of age.

[29.2] In this appeal she says she wants "New Zealand Superannuation at the rate that is the entitlement of every single [New Zealander] living in New Zealand."

[29.3] She says that would be just compensation for errors on the part of the Ministry of Social Development.

[29.4] As a Canadian national living in Canada who spent a relatively limited period of her life in New Zealand, the Governments of Canada and New Zealand agree on how New Zealand should contribute to XXXX's old age pension entitlement.

[29.5] The Ministry of Social Development has determined what the correct contribution of New Zealand taxpayers should be, having regard to the agreement. XXXX has been unable to fault it.

[29.6] The reasons for any difficulties have largely been XXXX's failure to provide accurate information to the Ministry of Social Development. She failed to provide accurate information regarding how long she lived in New Zealand. She applied for full New Zealand Superannuation, potentially knowing she was leaving New Zealand a week later; and clearly did not disclose the fact she left New Zealand and lost her entitlement to any New Zealand Superannuation. Nonetheless the Ministry allowed her to keep 26 weeks of payments she was not in law entitled to have.

[30] Rather than being entitled to payment of New Zealand Superannuation as though XXXX lived in New Zealand for all her working life, she has been the recipient of generous concessions where overpayments have occurred due to her own failures. We see no issues of fairness that assist XXXX with her claim.

Decision

[31] We accordingly:

[31.1] Dismiss the appeal, and

[31.2] Find the overpayment of $1,268.08 is established, and recoverable immediately and in default by deduction from payments of New Zealand Superannuation.

DATED at Wellington 1 December 2020

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Grant Pearson
Chairperson

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Charles Joe JP
Member