[2020] NZSSAA 9

Reference No. SSA 78/16 and 144/17

IN THE MATTER of the Social Security Act 1964 and the Social Security Act 2018

AND

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

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Mr G Pearson - Chairperson

Mr C Joe - Member

Hearing at AUCKLAND on 22 January 2020

Appearances

The Appellant in person

For Chief Executive of the Ministry of Social Development: Mr R Stainthorpe

DECISION

Previous hearings and decisions

[1] This matter has a lengthy procedural history.

[2] The Ministry of Social Development (Ministry) granted XXXX New Zealand Superannuation as from 7 October 2015. That decision was adverse for XXXX in that he qualified from 19 April 2012, but had not applied until the latter date, and the Ministry commenced payments only after the date of his application.

[3] XXXX challenged the Ministry's decision; however, the Ministry maintained its position, as did a Benefits Review Committee that reconsidered that decision.

XXXX appealed to this Authority. Instead of determining the appeal it became apparent the Authority had no power to alter the commencement date. That was because the decision subject to the appeal was a decision of the Chief Executive, made under delegation by a Ministry employee.

[4] Only the Minister could alter the commencement date to a time prior to XXXX's application, and there had been no request for the Minister's power to be exercised. The Minister's power is contained in s 80AA of the Social Security Act 1964 (the Act). The key effect of s 80AA was to restrict a benefit commencing prior to an application to the situation where:

[4.1] There was error on the part of the Ministry; and

[4.2] The Minister exercised her discretion to give consent.

[5] Accordingly, XXXX's request for an earlier commencement date had to be considered by the Minister before it could succeed. When XXXX made his request for Ministerial consideration, a Deputy Chief Executive of the Ministry holding a delegation from the Minister made the decision. The Deputy Chief Executive concluded the commencement date should remain 7 October 2015, the date XXXX applied not the earlier date when he qualified.

[6] XXXX applied for a review of the Ministerial decision made by the Deputy Chief Executive, and a Benefits Review Committee considered it. A Benefits Review Committee had to consider the decision, because that process applies to all decisions other than ones made by the Chief Executive personally, not under delegation[1].

[7] The Benefits Review Committee agreed with the Deputy Chief Executive's decision after a hearing on 13 October 2017.

[8] On 3 November 2017, XXXX appealed to the Authority against this second Benefits Review Committee decision. Accordingly, at this point the Authority had two appeals; the original decision regarding the commencement date and the Deputy Chief Executive's decision under s 80AA, also concerning the commencement date.

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1 Section 12J(16) of the Act.

[9] The Authority heard both appeals and issued a single decision for both appeals on 7 June 2018. The Authority concluded the correct commencement date was 19 April 2012, and therefore allowed the appeal in a decision dated 7 June 2018.

[10] The Chief Executive then lodged an appeal with the High Court, which it allowed by consent. The High Court quashed the decision of the Authority and remitted the matter to the Authority for "reconsideration, in the light of [that] judgment".

The High Court's Decision

[11] The High Court's decision is a consent judgment, so it is not reasoned fully as would be the case if it were a determination of contentious issues.

[12] Before the Authority the factual background was not in dispute. Ms Ji for the Ministry said the Ministry published a public brochure regarding New Zealand Superannuation entitlements and that in 2012, Inland Revenue sent out a letter to people turning 65 years of age regarding their entitlements. She said a joint letter came from Inland Revenue and the Ministry in more recent years. Ms Ji informed the Authority that she was not aware of the Ministry providing "better information to a class of people such as immigrants".

[13] The Authority understood that a letter from Inland Revenue sent to XXXX when he turned 65 (the letter) "did not state that people in paid employment were eligible for NZS". XXXX said that was the case, and the Ministry did not challenge his position in cross-examination. The Authority regarded that omission from the letter as an erroneous action or inaction, as defined under s 80AA(3)(b) of the Act, and accordingly there were grounds to allow XXXX's New Zealand Superannuation to commence from 19 April 2012. The Authority did not have a copy of the letter, the Chief Executive apparently claims "it was not within her power to request it"[2], and did not produce it to the Authority as part of her statutory reports.[3] In fact, as is now known, the letter was a letter to which the Ministry was a party, and a signatory.

[14] The Case Stated for the High Court was drafted by counsel for the Chief Executive, it stated the Authority found as a fact that letter from Inland Revenue to XXXX "did not state that people in paid employment were eligible for superannuation". The questions of law in the Case Stated did not raise an issue relating to the factual findings.

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2 High Court judgment in this appeal [2019] NZHC 3135 at [6]

3 Provided under s 12K of the Social Security Act 1964

[15] However, after filing the Case Stated with the High Court, it appears XXXX obtained a copy of the letter he received from Inland Revenue, which had not been provided to the Authority when it heard the appeal. Its contents were not consistent with what XXXX had said to the Authority, it makes specific reference to people who are working receiving New Zealand Superannuation. Given this development, XXXX and the Chief Executive agreed:

[15.1] To adduce a copy of the letter as new evidence to the High Court;

[15.2] Change the questions of law to the question of whether the factual finding regarding the contents of Inland Revenue's letter was erroneous;

[15.3] They also agreed the factual finding was erroneous, and the Authority's decision should be quashed, and the matter remitted to the Authority "for reconsideration in light of the judgment and newly admitted evidence."

Dealing with facts in the rehearing

The letter introduced into the evidence

[16] The key action of the High Court was to quash the Authority's decision. Potentially the parties might agree in a case of this kind that some of the previous factual findings might be agreed, and the scope of the factual matters confined.

[17] Initially the parties did not take any position on the scope of the factual issues. Later the Ministry contended the factual issues should be confined. Our view is that, given the existing decision of the Authority has been quashed in the absence of agreement, the facts must be at large. Furthermore, the previous hearing largely proceeded on the basis the facts were not contentious. For this hearing the key change is a letter introduced into the evidence, it was not a document produced in evidence during the previous hearing. However, XXXX did give oral evidence of its contents, his evidence was not challenged during the earlier hearing. His evidence is now challenged; indeed, it is clear his evidence as to the contents of the letter was mistaken.

[18] Accordingly, the Authority is now in a position where there is new information that was not available at the original hearing, it is material and the Authority must ensure the parties have a fair opportunity to address this information. In these circumstances the Authority gave the parties the opportunity to produce any additional evidence. It also reminded the Chief Executive of her duties to ensure that all material documentation is before the Authority. That arises under s 12K(4) of the Act (and the corresponding obligations under the Social Security Act 2018, and regulations under the Act). Furthermore, as the High Court has observed this

Authority is a forum exercising "a jurisdiction that deals as a matter of course with impecunious and vulnerable litigants".[4] The Court also observed "the focus of the Social Security Act is the needs of poor and/or vulnerable people who, for one reason or another, are unable to provide for themselves.[5] The Court then observed:

> Another of the Act's design elements is that the Ministry must facilitate the prosecution of the appeal. For example, s 12K requires the appellant to lodge a written notice of appeal with the Authority and to send or leave with the Chief Executive a copy of that notice of appeal. At that point it is the job of the Chief Executive to provide any necessary background information to the Authority to assist its assessment of the appeal including "a report setting out the considerations to which regard was had in making the decision or determination."

[19] The Authority emphasised those duties to counsel for the Ministry prior to the present hearing to ensure XXXX had a full and fair opportunity to respond to the new evidence. XXXX was not able to identify further evidence, other than explain why he considered the letter he received was not satisfactory. We have considered whether we should exercise our inquisitorial powers to seek additional evidence, that would only arise if we were not satisfied we had the appropriate information before us.

Specific concerns regarding the evidence

[20] The letter was sent to XXXX soon before he turned 65 and qualified for New Zealand Superannuation. The letter is on Inland Revenue letterhead, but it is signed by both Inland Revenue and Ministry of Social Development officials. It seems beyond argument the letter is a communication from Ministry of Social Development, and the Ministry should have produced it at the first hearing as part of its report filed under s 12K(4). That section is one of the provisions that creates the statutory duty on the part of the Ministry to "facilitate the prosecution of the appeal". However, why the letter was not produced is not relevant for the present hearing, the letter is now part of the record. The remaining issue is whether there is additional material we should have and consider.

[21] The Authority sought to understand why the letter came from Inland Revenue. If Inland Revenue was involved in the administration in this way, potentially there were other communications from Inland Revenue we should be aware of. We were concerned the Ministry was taking the view it would not make any inquiries regarding information that Inland Revenue may hold. If Inland Revenue was

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4 *Chief Executive of the Ministry of Social Development v Genet* [2016] NZHC 2541 at [8]

5 At [13]

involved in the administration of New Zealand Superannuation applications, it appears unlikely the Authority could not access all material information when making decisions regarding the applications. There was a potential indication that Inland Revenue did have a wider role, as s 16C(1)(c) of the Tax Administration Act 1994 provides the New Zealand Superannuation Act 1974 is a revenue law. However, it seems clear that status did not move from the New Zealand Superannuation Act 1974 (a compulsory contribution scheme) to the 1977 "universal entitlement" scheme that replaced it.

[22] Mr Stainthorpe assured us he has made inquiries, and the only role Inland Revenue had in this matter was issuing the co-signed letter we have before us. We have no reason to inquire further, XXXX could not point to any other actions on the part of Inland Revenue. It seems clear, as Mr Stainthorpe explained, the Ministry has contact details for people potentially eligible for New Zealand Superannuation if they are already receiving a benefit; however, many people will not be in the Ministry's records if they are not receiving a benefit. To increase the effectiveness of the Ministry's attempts to give notice of potential entitlement to New Zealand Superannuation it has Inland Revenue issue letters of the kind XXXX received. These letters are signed both by Inland Revenue and the Ministry. It appears to be an appropriate process, and we can see no justification for making further inquiries.

[23] XXXX did receive the letter in issue, he relied on his erroneous recollection of its contents in the previous hearing. He has not identified any other material Inland Revenue sent to him, and we cannot identify any further relevant material we can likely access.

Discussion

The law

[24] It is not necessary to explore the legal issues in any depth. The High Court in its consent decision did refer to various legal issues, however the analysis is not relevant to the facts as we find them after considering the evidence now before us.

[25] XXXX is entirely dependent on the Minister's power contained in s 80AA of the Social Security Act 1964 (the Act) if he is to have his New Zealand Superannuation paid earlier than the date he applied for it. He has been paid since he applied. The key effect of s 80AA was to allow payment for periods prior to application only where:

[25.1] There was error on the part of the Ministry; and

[25.2] The Minister gave consent.

[26] We cannot identify any error on the part of the Ministry, it follows there is no discretion to allow payment in a period prior to XXXX's application.

We find no error on the part of the Ministry

[27] We consider only the facts of this case. It should not be assumed that the type of information provided to one person should always be the same as another. XXXX is not a person who struggled with literacy, mental health issues that prevented normal function, intellectual disability or any of the myriad of situations that can make people vulnerable, and potentially entitled to additional support. On the contrary, XXXX had the capacity to understand and apply complex regulatory information. At the time he received the letter he was employed as an inspection and enforcement officer for the New Zealand Authority that governed workplace safety.

[28] We do not need to consider the position of people who did not receive a letter like the one XXXX received, or someone who could not understand and act on such a letter. We accordingly now turn to the adequacy of the information provided in the letter to XXXX.

[24] The key attributes and context of the letter are:

[24.1] It was issued on 27 February 2012, and XXXX would be 65 years of age on 19 April 2012.

[24.2] The letter was on standard Inland Revenue letterhead, signed (in an automated process) by an Inland Revenue "Manager", and the Ministry's "National Manager Service Delivery – Senior Services".

[24.3] The letter said to receive New Zealand Superannuation a person must be 65 years of age and have lived in New Zealand for 10 years since turning 20 years of age, and for five of those years since turning 50 years of age.

[24.4] The letter noted there were some exceptions to the residence requirements, and more details were available on the Ministry's website.

[24.5] The letter said it was important to apply before turning 65 years of age, as the payments "will only start from the date you applied".

[24.6] The letter said how to apply, and it gave website and telephone numbers to make further inquiries.

[24.7] The letter offered further assistance from Inland Revenue to find the appropriate tax code.

[24.8] The letter says: "You can still receive NZ Super if you are working."

[25] Viewed objectively we can only regard this letter as an exemplar for providing concise and accurate information, and reference to further resources. If XXXX read the letter he would have been aware he was likely entitled to New Zealand Superannuation, and was entitled while he was still employed.

[26] We accept XXXX did not read the letter thoroughly, there can be little doubt if he had done so, he would have applied. However, the error was his error, not the Ministry's error. We explored the issue in evidence, XXXX claimed the letter might have been a scam, so he threw it away. We do not doubt he put it aside without reading it properly. However, that was not due to any error on the part of the Ministry. We find the explanation that XXXX thought the letter might be a scam implausible. Any person who read the letter and understood it in XXXX's position had enough information to know they should make inquiries and could do so in person if necessary. The letter appears to be a perfectly regular communication with a person who was managing their tax affairs, and there was no reason to think it was other than the important official communication it clearly appears to be.

[27] XXXX also raised the fact the letter had Inland Revenue letterhead, and he thought that Inland Revenue took money rather than gave it away. We find nothing of significance in Inland Revenue issuing the letter, its purpose and the involvement of the Ministry is very clear on the face of the letter. Furthermore, communications from Inland Revenue contain important information regarding financial matters. The fact a letter is from Inland Revenue does not make it any more justifiable for a person to ignore it, there was no error in Inland Revenue issuing the letter on behalf of it and the Ministry.

[28] We have also considered whether the Ministry had an obligation to follow up when XXXX did not respond. Again, we approach this matter based on XXXX's personal circumstances, as a person well placed whether to decide to make an application or not. There are many people in the population who meet the 65 years of age criterion, but do not qualify or choose not to apply. The reasons include non-qualification due to past, current or intended residence, that their New

Zealand Superannuation would be offset by an offshore pension, or that they have a philosophical aversion to applying (such as privacy concerns). We consider there was no error on the part of the Ministry in allowing XXXX to make his own decision as to whether he would apply for New Zealand Superannuation, and if so when he would apply.

Conclusion

[29] We have examined all the material before us and considered if there is other material we should seek out. We can only conclude on the information we have, there are no further inquiries we can or should make; and, there is no evidence of any error on the part of the Ministry relating to the commencement of XXXX's New Zealand Superannuation.

[30] It follows the Minister had no legal authority to allow a date of commencement earlier than the time XXXX applied for New Zealand Superannuation; and we cannot reach a different conclusion.

Decision

[31] The Authority dismisses the appeal.

Dated at **Wellington** this 5 day of May 2020

G Pearson
Chairperson

C Joe JP
Member