

[2018] NZSSAA 24

Reference No. SSAA
32/16

IN THE MATTER

of the Social Security Act
1964

AND

IN THE MATTER

of an appeal by **XXXX** of
XXXX 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 on the papers

Appearances

The Appellant by her agent Ms B Rogers, Community Legal Advice, XXXX.

For Chief Executive of the Ministry of Social Development: Ms E Kirkman

DECISION

Background

[1] XXXX (the appellant) appeals against the decision of the Chief Executive which was upheld by a Benefits Review Committee. She receives an overseas pension and her entitlement to New Zealand Superannuation is reduced due to that pension. She does not dispute that there is an adjustment on account of her overseas pension, but says the adjustment has not been administered correctly because:

- [1.1] The overseas pension was received in annual instalments (in arrears), but the deductions from New Zealand Superannuation were made fortnightly.
- [1.2] The quantum of the deduction was based on the exchange rate at the time of the monthly deduction, not the actual exchange rate when the annual instalment was paid later.
- [2] The appellant says that the Ministry has a discretion to only deduct against her New Zealand Superannuation at the time she receives her annual overseas pension payments. The Ministry says there is no discretion, rather an obligation to calculate deductions when each instalment of New Zealand Superannuation is paid.
- [3] The Authority is required to determine whether there is a discretion to only deduct when the appellant receives her overseas pension payments, and, if so, how that discretion should be exercised.
- [4] The issues and the facts

Facts

- [5] There is little scope to dispute the essential facts. It appears clear that:
- [5.1] The instalments of the overseas pension are paid annually to reduce the cost of remitting the payments.
- [5.2] The cost of remitting the relatively small sums of money more frequently than annually would substantially reduce the net amount received.
- [5.3] The exchange rate at the time of the annual remittance of the overseas pension and the actual transfer fee determines the net amount the appellant receives.

The Ministry's approach to the law

- [6] The Ministry traversed several legislative provisions, however it says the determinative provision is reg 4 of the Social Security (Overseas Pension Deduction) Regulations 2013 (the Deduction Regulations). That provision states "each instalment of the benefit ... must be reduced", the benefit being New Zealand Superannuation payments and the reduction being determined by a formula in the regulations. This, the Ministry says, is a mandatory requirement to make

deductions from each instalment of New Zealand Superannuation; it excludes the option of making deductions after overseas pension payments are received by the recipient.

The appellant's approach to the law

- [7] The appellant, however, says reg 4 of the Deduction Regulations is not determinative. Instead, it is s 70 of the Social Security Act 1964 (the Act) that governs the situation. Section 70(1) provides for deductions from New Zealand Superannuation due to overseas pensions where the person receiving New Zealand Superannuation “is entitled to receive or receives” an overseas pension. The appellant says the effect of that provision is to trigger the deduction, either when there is an entitlement to the overseas pension or when it is paid. She says it is only fair to make the deduction after she receives the funds.
- [8] The appellant says s 70(2) of the Act allows the Chief Executive to decide the date on which the deduction provisions apply.
- [9] The appellant also says s 70(3) is relevant as it provides for the Ministry to make an arrangement with a person receiving an overseas pension. The arrangement allows a person receiving both an overseas pension and New Zealand Superannuation to receive the full amount of New Zealand Superannuation, if they pay over any offshore pension payments. While s 70(3) says that the arrangement must be in accordance with “any regulations made under section 132C” of the Act,¹ the appellant says that is not an obstacle. She contends s 70(3) only requires compliance with any regulations that are made and none apply to her Swedish pension. She says excluding her would be discriminatory and it is not fair to make deductions from her New Zealand pension in advance (up to 11 months) of her receiving the overseas pension.
- [10] The appellant raised a number of issues regarding perceived deficiencies in the Benefits Review Committee process, and the Ministry’s decision-making and factual evaluations generally. We put that to one side as this appeal is a rehearing that addresses all material issues; it is not confined to an evaluation of the Ministry’s former positions. The Supreme Court in *Arbuthnot v Chief Executive of*

¹ Section 132C(g)(i) provides for regulations to identify the “categories of overseas pensioners with whom the chief executive may make such arrangements”.

the Department of Work and Income [2007] NZSC 55 discusses the functions of this Authority.

[11] The issues relating to the exchange rate are resolved if the appellant's contentions are correct. There would either be a deduction measured when the annual payment was received, or when that payment was transferred to the Ministry.

[12] The appellant also discussed principles relating to discretionary decision-making. For the reasons discussed below, we do not consider the outcome of the appeal turns on those considerations. If the legislation allows a discretionary decision focusing on equity for the appellant personally to:

[12.1] align deductions with the receipt of overseas pension payments; or

[12.2] an arrangement to pay the overseas pension to the Ministry and otherwise receive the full pension;

we would have little difficulty in being satisfied that was an appropriate approach.

The issues we are to determine

[13] The central issue to determine is whether there is a discretion we can exercise,² and, in particular, under s 70 as the appellant contends. If not, we must then consider the issues raised by the appellant in respect of the exchange rate.

Discussion

The facts

[14] We are satisfied that:

[14.1] The appellant is required to receive her overseas pension entitlement in annual instalments.

[14.2] The appellant is disadvantaged if deductions are made from her New Zealand Superannuation before she receives the

² The Authority has all the powers, duties, function and discretions that the Chief Executive had in respect of the subject-matter of the appeal. Section 12I of the Act makes provision to that effect.

annual instalments of her overseas pension payments. That is both due to cashflow reasons and the time value of money.

- [15] The appellant may or may not be disadvantaged by exchange rate measurements prior to her receiving the annual payments; it would certainly be fairer to measure the payments when she receives them.

How we would exercise discretions

- [16] Approaching the issues if we were simply to decide what is the fairest outcome for the appellant in her circumstances, and we had a discretion to do so:

[16.1] We would allow deductions from the appellant's pension when she receives her instalments of overseas pension.

[16.2] We would alternatively allow an arrangement through which the appellant receives instalments of New Zealand Superannuation without deductions, and pays her instalments of overseas pension receipts to the Ministry when she receives them.

- [17] However, for the reasons we discuss, in our view the outcome of this appeal is governed by legislation, not what we would regard as the most equitable outcome for the appellant. Administering adjustments for overseas pension entitlements is not simply a case of considering the fairest outcome for an individual. There is a substantial volume of such transactions and the cost of administering them also needs to be considered. In our view, the legislation governing this appeal is an unsurprising and clear regime that balances relevant policy considerations.

- [18] The issues relating to exchange rate measurement are also governed by the relevant legislative provisions.

Section 70(1) does not provide a material discretion

- [19] Section 70(1) materially provides that:

[19.1] If a person is "entitled to receive or receives" an overseas pension, their New Zealand Superannuation shall be reduced by the amount of the overseas pension.

[19.2] What amounts to an overseas pension for this purpose is specified as not all pensions have that effect.

[19.3] Overseas pension payments are excluded if they are in the nature of, or for similar purposes to, New Zealand ACC, a war pension or a disability allowance.

[20] The appellant says that the reference to “entitled to receive or receives” confers a discretion to give effect to the provision when one or the other status applies. We do not agree. The obvious purpose of the reference to the alternatives of being entitled to receive, or in fact receive, is not related to the timing of deductions. The purpose is to trigger the provision either when:

[20.1] a person is entitled to an overseas pension; or

[20.2] they actually receive one.

[21] It is a common occurrence for people to be required to apply for an offshore pension if they are potentially entitled. Many people would not wish to take the trouble to apply for an overseas pension when any pension they receive is fully deducted from their New Zealand Superannuation. Section 69G of the Act contains a requirement to take reasonable steps to obtain an overseas pension.

[22] It is entirely unsurprising that s 70(1) is triggered both where a person in fact receives a pension (without having to be satisfied they had a legal entitlement), and where a person is entitled to a pension even if they have not received it. There is nothing in the words that suggest their function or effect is to create a discretionary power as to when deductions will be made against New Zealand Superannuation. On the contrary, s 70(1) has the mandatory word “shall”; that demands that New Zealand Superannuation will be reduced if either condition exists.

Section 70(2) does not provide a material discretion

[23] Section 70(2) certainly provides a discretion for the Chief Executive, and accordingly this Authority. The discretion is to decide “the date on which” the decision to reduce New Zealand Superannuation shall take effect. That discretion may be exercised before or after making the decision to reduce. The obvious purpose of this power is to allow the Chief Executive to backdate the reduction of New Zealand

Superannuation in cases where there have been earlier receipts of, or entitlement to, an overseas pension; or to defer the reduction in appropriate cases.

- [24] We find nothing in the wording that suggests s 70(2) confers a discretion in relation to the timing of deductions to reduce the amount of New Zealand Superannuation paid; it concerns implementing the decision under s 70(1) that deductions are required.

The legislation mandates deductions from all instalments of New Zealand Superannuation

- [25] Section 132C of the Act provides for regulations concerning the amount to be deducted from a benefit under s 70(1) and the exchange rate to be used.
- [26] The Deduction Regulations 2013 have been made under that provision. Regulation 4 of those regulations states that where s 70(1) requires a benefit to be reduced, then “each instalment of the benefit” will be reduced. The language is mandatory.
- [27] The appellant contends that the Act overrides the regulations. However, there is no inconsistency between the Act and the Deduction Regulations. Section 70(1) of the Act provides for a reduction in New Zealand Superannuation payments, s 132C confers power to make regulations as to the amount to be deducted, and the Deduction Regulations specify the amount to be deducted from each instalment of New Zealand Superannuation. The Act and the Regulations are consistent. There is no justification for ignoring the plain requirements of the Deduction Regulations.
- [28] It follows that the Chief Executive, and this Authority, are required to determine that each payment of New Zealand Superannuation paid to the appellant must be subject to a deduction calculated under the Deduction Regulations.
- [29] Regulation 4 of the Deduction Regulations sets out a “reduction formula”. This requires factoring in “the rate per week of the overseas pension”. Regulation 5 determines which exchange rate is used.
- [30] The appellant has not identified any fault with the calculations under the Deduction Regulations. Her claim has been that they do not apply.

The application of s 70(3)

- [31] Section 70(3) of the Act allows the Chief Executive to make an arrangement where s 70(1) mandates that New Zealand Superannuation is to be reduced due to an overseas pension. Materially, the arrangement in this case would be to pay New Zealand Superannuation at the full rate, and the appellant would pay an amount equivalent to the overseas pension.
- [32] Section 70(3) states that the arrangement must be “in accordance with any regulations made under section 132C” of the Act. We accept the appellant’s proposition that if there are no regulations, an arrangement might be made with her. However, there are regulations, so any arrangement must be in accordance with them.
- [33] Section 123C provides that regulations may be made that prescribe “the categories of overseas pensioners with whom the chief executive may make such arrangements”.³
- [34] The regulations made regarding the application of s 70(3) are the Social Security (Alternative Arrangement for Overseas Pensions) Regulations 1996 (the Alternative Arrangement Regulations). Regulation 6 of the Alternative Arrangement Regulations provides that the Chief Executive may offer an arrangement to persons in receipt of certain overseas pensions. Swedish pensions are not among the categories listed.
- [35] The reasons for limiting the arrangements to recipients of pensions from particular countries is evident from the nature of the regime that the Alternative Arrangement Regulations establish. They contemplate arrangements that occur within the context of an administrative process agreed between the Government of the country paying the overseas pension and the Government of New Zealand. The paying country will appoint a “competent authority”, which is a common office where Nation States make bilateral fiscal agreements. The competent authority is then responsible for paying the overseas pension direct to a special bank account. The special nature of the bank account is that it is used to receive funds from the competent authority, and those funds are remitted to the Chief Executive.

³ Social Security Act 1964, s 132C(1)(g)(i).

[36] In short, the Alternative Arrangement Regulations set up a Government to Government structure that ensures all pension entitlements are paid under the supervision of a nominated official of the paying Government, and remitted to the Government of New Zealand. The Regulations exclude other types of arrangement. Accordingly, the only permitted arrangements do not rely on the beneficiary complying; that avoids creating a potentially costly audit obligation for the Ministry. A limitation of this kind is clearly contemplated by s 123C, when authorising regulations that prescribe “the categories of overseas pensioners” who may enter arrangements under s 70(3). We find nothing surprising in the restriction of the categories of persons set out in the Alternative Arrangement Regulations. Regardless, the Chief Executive and this Authority has no power to override the legislative policy settings.

Conclusion

[37] We are satisfied that:

[37.1] Section 70(1) and (2) do not provide a discretion to defer reducing New Zealand Superannuation until a beneficiary receives an overseas pension payment.

[37.2] The Deduction Regulations are authorised by the Act and expressly mandate a deduction on account of an overseas pension on every instalment of New Zealand Superannuation.

[37.3] The terms of the Alternative Arrangement Regulations are authorised by the Act. Those regulations limit the classes of persons who may receive New Zealand Superannuation without deductions in exchange for paying over their overseas pension. The appellant is not in the category of persons entitled to make such an arrangement.

[37.4] The Appellant raised no grounds to consider that the calculation of deductions against her New Zealand Superannuation were made in error, including the exchange rate values.

Decision

[38] We are satisfied that the appeal must be dismissed as the deductions from the Appellant's pension have been determined in accordance with the relevant legislation.

Dated at Wellington this 15th day of May 2018

G Pearson
Chairperson

K Williams
Member

C Joe JP
Member