[2018] NZSSAA

Reference No. SSA 169/17

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

S Pezaro - Deputy Chair

C Joe - Member

Hearing at Pukekohe on 17 May 2018

Appearances

The appellant in person; and XXXX, his wife.

P Siueva, agent for the Chief Executive of the Ministry of Social Development

DECISION

Background

[1] XXXX (the appellant) appeals the decision of the Chief Executive to deduct his German Old Age Pension (OAP) from his entitlement to New Zealand Superannuation (NZS). The Ministry accepts that the voluntary component of the appellant's German OAP is not subject to deduction from NZS.

[2] The appellant is married and is entitled to NZS at the half-married rate, however his entitlement is extinguished because the German OAP exceeds his NZS entitlement. The excess of German OAP is deducted from his wife's entitlement to NZS.

[3] The appellant was granted NZS from 3 March 2016, the date on which he turned 65. On 21 September 2016, he provided the Ministry with a copy of a letter

dated 1 September 2016 from the Deutsche Rentenversicherung Bund (DRB) confirming that payment of his German OAP would be made at the rate of €1,078.30 per month from 1 September 2016.

[4] When this amount was converted to New Zealand dollars, the German OAP equated to $375.65 per week, which exceeded the appellant's gross entitlement to NZS of $335.74 per week. Although the Ministry subsequently accepted that the voluntary portion of the German OAP should be excluded from the amount deducted from NZS, the remaining balance still exceeded NZS.

[5] The overpayment established for the period prior to the assessment of the appellant's German OAP was subsequently reduced when the voluntary contribution was excluded. The overpayment, arising from payments of NZS and accommodation supplement (AS), was originally $959.66, but has reduced to $844.63 after deduction of arrears due to the appellant for the AS.

[6] The issues for the Authority to determine are whether the non-voluntary component of the appellant's German OAP should be deducted from his NZS entitlement and, if so, whether the Ministry is entitled to recover the overpayment.

Case for the appellant

[7] The appellant submits that there is a distinction between benefits and pensions. In his view, benefits are payments received without the beneficiary having made any contribution, and pensions are payments which reflect a personal contribution without any contribution from the government. The appellant argues that the payment he receives is a pension because the funds derive from contributions made solely by him and his employer, and the fund is not administered on behalf of the German Government. Therefore, he submits the German OAP does not meet the requirements of s 70 of the Social Security Act 1964 (the Act) for deduction of NZS.

[8] He also argues that if he had elected to have his German OAP paid in one lump sum before he reached the age of entitlement for NZS, no deduction could have been made by the Ministry. Whether or not this is the case, it is a hypothetical situation and not the issue we are required to determine in this appeal.

[9] The appellant referred to the High Court decision of *Chief Executive of the Ministry of Social Development v Rai*[1] as supporting his submission that the German OAP should not be deducted under s 70 as it is not government funded. However, *Rai* concerned the interpretation of the exclusion in s 70 of Government occupational pensions. The definition of overseas pension in the Act excludes a Government occupational pension. Both terms are defined in s 3 of the Act.

[10] In *Rai*, the appellant's Fiji pension, which he had received in addition to his full NZS entitlement for many years, was not deducted as it was considered to be a Government occupation pension and therefore outside of the scope of s 70. After he issued the decision in *Rai*, Doogue J was asked to recall it by the Chief Executive[2] as he had not referred to the Court's decisions in *Roe v The Social Security Commission*[3] and *Hogan v The Chief Executive of the Department of Work and Income New Zealand*.[4] The Chief Executive was concerned that *Rai* could be relied on as precedent for finding that contributory superannuation schemes are not subject to s 70. The decision was not recalled but, in declining the application for recall, his Honour stated that he accepted the reasoning in *Roe* and *Hogan* and that nothing in his judgment was intended to conflict with those decisions.

[11] The High Court has consistently applied the reasoning in *Hogan*,[5] and in *Malster v The Chief Executive of the Ministry of Social Development*[6] rejected the contention that *Rai* had any wider application. For these reasons, *Rai* does not assist the appellant.

Translations

[12] At the hearing, the appellant questioned the accuracy of letters relied on by the Ministry. The letter of 1 September 2016 and two other letters were translated

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[1] *Chief Executive of the Ministry of Social Development v Rai* HC Auckland CIV-2003-485-2615, 2 September 2004.
[2] See *Chief Executive of the Ministry of Social Development v Rai* HC Auckland CIV-2003-485-2615, 24 November 2004.
[3] *Roe v The Social Security Commission* HC Wellington M270/86, 10 April 1987.
[4] *Hogan v The Chief Executive of the Department of Work and Income New Zealand* HC Wellington AP49/02, 26 August 2002.
[5] See *Boljevic v Chief Executive of the Ministry of Social Development* HC Wellington CIV-2010-485-206, 10 November 2011.
[6] *Malster v The Chief Executive of the Ministry of Social Development* [2014] NZHC 1368 [19 June 2014].

into English by the New Zealand Translation Centre. These translations were included in the Ministry's Section 12K report issued on 12 March 2018.

[13] At the telephone conference convened on 11 April 2018 the appellant confirmed that he did not want to produce any further documents. However, at the hearing he disagreed with the translation of the letter dated 29 March 2017, in particular the translator's use of the word "mandatory".

[14] We are satisfied that since the appellant received the Ministry's report, he had an adequate opportunity to obtain an alternative translation of any of the letters on which the Ministry relied for its decision. The same letters were considered by the Benefit Review Committee in November 2017.

[15] In these circumstances, we accept the translations produced by the Ministry as accurate and have determined this appeal on that basis.

Case for the Chief Executive

[16] Ms Siueva relied on the submissions in the Ministry's report. She emphasised the fact that to meet the s 70 requirement for deduction, a benefit needs to only to be comparable to NZS and be state administered. It is not required to be state funded.

Relevant legislation

[17] Section 70 of the Act provides that where an overseas pension is a payment which forms part of a programme providing pensions for any one of the contingencies for which pensions may be paid under NZS, and is administered by or on behalf of the government of the overseas country from which the benefit is received, the overseas pension must be deducted from NZS:

> **70 Rate of benefits if overseas pension payable**
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> (1) For the purposes of this Act, if—
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> (a) any person qualified to receive a benefit under this Act or Part 6 of the Veterans' Support Act 2014 or under the New Zealand Superannuation and Retirement Income Act 2001 is entitled to receive or receives, in respect of that person or of that person's spouse or partner or of that person's dependants, or if that person's spouse or partner or any of that person's dependants is entitled to receive or

receives, a benefit, pension, or periodical allowance granted elsewhere than in New Zealand; and

(b) the 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 this Act or under the New Zealand Superannuation and Retirement Income Act 2001 or under the Veterans' Support Act 2014 which is administered by or on behalf of the Government of the country from which the benefit, pension, or periodical allowance is received—

the rate of the benefit or benefits that would otherwise be payable under this Act or Part 6 of the Veterans' Support Act 2014 or under the New Zealand Superannuation and Retirement Income Act 2001 shall, subject to subsection (3), be reduced by the amount of such overseas benefit, pension, or periodical allowance, or part thereof, as the case may be, being an amount determined by the chief executive in accordance with regulations made under this Act:

Relevant case law

[18] The question of what type of overseas pension falls within the ambit of s 70 was considered by the High Court in *Boljevic v Chief Executive of the Ministry of Social Development*[7] where Kós J reviewed previous decisions of the High Court on appeal from this Authority. The Court considered the Croatian pension scheme, noting that the fact that it was a direct contribution scheme was not a relevant factor under s 70.

[19] The argument that any distinction can be made between state administration and state funding was rejected in *Boljevic* as the Court concluded that it is state administration which is required for the s 70 threshold. The Croatian pension programme considered was not administered by the Croatian Government directly, but the Court was satisfied that the programme was administered on behalf of the government and that it was not truly private. For these reasons,

[7] *Boljevic v Chief Executive of the Ministry of Social Development*, above n 5.

the Court concluded that the Boljevics' Croatian Government pension was to be deducted from the NZS entitlement.

[20] Kós J in *Boljevic* concurred with the decision in *Hogan v Chief Executive of the Department of Work and Income New Zealand*[8] and rejected the proposition that s 70 did not apply where a person was simply recouping their own or their employer's contributions.

[21] His Honour also noted the decision of the High Court in *Dunn v Chief Executive of the Ministry of Social Development*[9] where Cooper J observed that it would be unworkable if s 70 required a close comparative analysis between New Zealand and overseas entitlement. Cooper J noted that there was nothing in the language of s 70 which mandated a distinction between contributory and non-contributory schemes. All funds are essentially contributory, either directly or indirectly, via taxation of income.

[22] It was not necessary to ask how the relevant government collects the funds as specific contributions to a compulsory state scheme are analogous to taxation. The focus of the enquiry in s 70(1)(b) is whether the overseas programme includes payments for any of the same contingencies that are provided for by the New Zealand scheme. In *Boljevic* the contingency was attaining a certain age. It is sufficient that the entitlements in each country are payable in similar circumstances; it is not necessary to conduct a close comparative analysis between the New Zealand and overseas entitlement.[10]

[23] Recently, in *T v Chief Executive of the Ministry of Social Development* the High Court considered the nature of payments from a Singaporean fund to which the plaintiff and his employers contributed as required by Singaporean law.[11] The Court concluded that these payments were a pension because the fund was held by the Government for defined purposes and disbursed incrementally to the plaintiff to provide for his retirement or old age.

[24] The Court also considered whether an overseas pension in the nature of Kiwisaver fell within the provision of s 70(1)(b). Brewer J concluded that as

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[8] *Hogan v Chief Executive of the Department of Work and Income New Zealand*, above n 4.
[9] *Dunn v Chief Executive of the Ministry of Social Development* HC Auckland CIV-2006-485-2588; aff'd [2008] NZCA 436, [2009] NZAR 94.
[10] *Dunn v Chief Executive of the Ministry of Social Development* [2008] NZAR 267.
[11] *T v Chief Executive of the Ministry of Social Development* [2017] NZHC 711.

Kiwisaver is a particular creation of New Zealand statute, it stands apart from the regime created by s 70 of the Act.[12]

Discussion

[25] For the reasons given, we do not accept that any distinction can be made between the German OAP received by the appellant and other overseas pensions or benefits that have been held to meet the criteria for deduction from NZS. We are satisfied that the German OAP is intended to provide for one of the contingencies on NZS (age) and is administered on behalf of the German government. The source of contributions to the fund is not relevant. There is no basis for excluding the payments received by the appellant under the German OAP scheme from the application of s 70.

Decision

[26] For these reasons, this appeal is dismissed.

Dated at **Wellington** this 31st day of May 2018

S Pezaro
Deputy Chair

C Joe JP
Member

12 Ibid at [13]–[15].