

[2018] NZSSAA 29

Reference No. SSA 078/16
SSA 144/17

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 Auckland on 16 May 2018

Appearances

The appellant in person

I Ji, agent for the Chief Executive of the Ministry of Social Development

DECISION

Background

[1] XXXX (the appellant) appeals the Ministry's decision to grant his New Zealand Superannuation (NZS) from 7 October 2015, the date on which he lodged his application, rather than 19 April 2012 when he turned 65. This decision was upheld by a Benefits Review Committee (BRC).

[2] When the appellant first sought a review of this decision it was considered and declined by the Deputy Chief Executive. The appellant then filed a Notice of Appeal (SSA 78/16). However, as recorded in a minute issued on 21 July 2017 by the Chair of the Authority, a decision by the Deputy Chief Executive does not

lead to a right of appeal to the Authority unless that decision has been reviewed by a Benefit Review Committee.

- [3] The appellant therefore sought a review by a BRC which upheld the decision. The then filed this appeal, SSA 144/17.
- [4] The factual background to this appeal is not in dispute. The appellant submitted his application on 7 October 2015 and attended an appointment on 16 October 2015. His NZS was granted at the half-married rate from 7 October 2015. On 4 November 2015, he emailed the Ministry requesting a review of the decision not to backdate his payment to the date he turned 65. The appellant states that the reason he did not apply for NZS on the date he turned 65 was that he was not aware that he was entitled to NZS while he was in paid employment.
- [5] The issue for the Authority to determine is whether the appellant is entitled to NZS from 19 April 2012.

The case for the appellant

- [6] The appellant is Indian and says that in India there is no benefit such as NZS. He came to New Zealand in 1994, after working in Kuwait. In New Zealand, he was a permanent Government employee and was simply not aware that he was entitled to NZS when he turned 65. He also said that he thought NZS was only for people who had contributed to a fund. The appellant worked mainly with people younger than himself and did not know of anyone who was working and receiving NZS. His wife and children were students and were not eligible for any financial assistance due to his income. This reinforced his belief that his income disentitled him to any assistance.
- [7] The appellant confirmed that when he turned 65 he got a letter from the Inland Revenue Department (IRD). However, he said that when he turned 65 he received several letters and the IRD letter contained nothing to indicate he would be eligible for NZS while working, nor did it require him to complete an application. He said that "IRD take money from you; I did not expect they would be sending information relating to some benefit or that they were giving me anything".
- [8] When he was made redundant in October 2015, the appellant said that he had an idea that people who are retired get an allowance. It was not until this time that he became aware that he was entitled to NZS from the date he turned 65.

- [9] The appellant produced a NZ Herald article dated 14 September 2017 by a researcher from the University of Auckland which states that \$200 million in benefits remain unclaimed each year largely because beneficiaries are unaware of their entitlements.¹
- [10] The appellant points out that since he became eligible for NZS, the Ministry has amended the information it provides to potential applicants for NZS and now advises that they are eligible, even if they are in paid employment.

The case for the Chief Executive

- [11] The Ministry's position is that s 80AA of the Social Security Act 1964 (the Act) does not assist the appellant because there is no error or inaction by the Ministry. It relies on *I A M v The Chief Executive of the Ministry of Social Development*² for its submission that the Ministry has no obligation to correct any misapprehension a person has about their entitlement.
- [12] Ms Ji said that the Ministry met its obligation to advise persons generally of their entitlement by providing a public brochure called *Services to Seniors* which provides information on NZS. She was unable to confirm the date that this brochure was introduced. She confirmed that people turning 65 now receive a joint letter from the Ministry and IRD whereas, at the time that the appellant turned 65, the only information sent to non-beneficiaries came from IRD.

Relevant law

- [13] Section 11(1) and (2) of the New Zealand Superannuation and Retirement Income Act 2001 (NZSRI) provides that:

11 Commencement of New Zealand superannuation

- (1) New Zealand superannuation commences on the date on which the applicant becomes entitled to receive it or the date on which the application for it is received by the department, whichever is the later date.
- (2) This section is subject to section 80AA of the Social Security Act 1964.
- [14] Section 80AA of the Social Security Act 1964 (the Act) allows the Chief Executive to retrospectively pay a benefit in certain circumstances.

¹ Dr Tom Baker "Want the benefit you're entitled to? Call your lawyer" *NZ Herald* (Auckland, 14 September 2017).

² *I A M v The Chief Executive of the Ministry of Social Development* [2013] NZHC 762.

80AA Minister may allow back-dating of benefit where earlier failure to grant it based on error

- (1) With the consent of the Minister (given in relation to a particular applicant or applicants of a stated kind or description) a benefit (or a benefit of a stated kind) may commence at a time earlier than the time an application for it was made.
- (2) The Minister must not give consent unless satisfied that—
 - (a) in the case of a particular applicant, the particular applicant—
 - (i) could not reasonably have been expected to apply at the earlier time because of some erroneous action or inaction on the part of the department; or ...
 - (b) in the case of applicants of a stated kind or description,—
 - (i) applicants of that kind or description could not reasonably have been expected to apply at earlier times because of some erroneous action or inaction on the part of the department in relation to applicants of that kind or description; or
 - (ii) at earlier times, some applicants of that kind or description tried to apply or applied incompletely, and did not proceed because of some erroneous action or inaction on the part of the department.
- (3) For the purposes of subsection (2), examples of erroneous action or inaction are—
 - (a) giving wrong advice:
 - (b) erroneously failing or refusing to provide information, help, or some document or form.

[15] The Authority has previously declined to allow backdating for a person who believed he was not eligible for NZS while in paid employment.³ The appellant in that case argued that the Ministry ought to have taken steps to ensure that he was aware of his entitlement and appealed the Authority's decision to the High Court.⁴ The High Court agreed with the Authority that there was no obligation on the Ministry to personally inform the appellant of his entitlement prior to him attaining the age of 65.

[16] The Court defined the issue for determination as the extent of the Ministry's obligation to advise persons generally of their entitlement. The Court was satisfied that the Ministry is under no legal obligation to advise any person of his or her eligibility for NZS unless and until that person contacted the Ministry.⁵

³ *Re SSA 131/11* [2012] NZSSAA 20.

⁴ *I A M v The Chief Executive of the Ministry of Social Development*, above n 2.

⁵ *Ibid* at [25].

- [17] The High Court considered that ss 7 and 11 of NZSRI must be read together. Section 7 provides that every person is entitled to receive NZS who attains the age of 65. Section 11 provides that NZS commences on the date on which the applicant becomes entitled to receive it or the date on which the application for it is received by the Department, whichever is the later date. The Court concluded that when an application is made after the person has attained the age of entitlement, entitlement arises on the date on which that application is received by the Ministry.
- [18] The Court then considered the application of s 80AA of the Act which allows backdating. The Court noted that the appellant's argument was that because he was in contact with the Ministry during the year that he turned 65, the Ministry should have told him about his forthcoming eligibility for NZS, and the fact that it omitted to give this advice constituted an error on the part of the Ministry. The Court concluded that, as this interaction was eight months prior to the appellant's 65th birthday, it would have been premature to notify him at that time of his forthcoming eligibility.

Discussion

- [19] We asked Ms Ji whether the Ministry had considered whether s 80AA(2)(b) imposed any obligation on it to provide better information to a class of people such as immigrants, however she was not aware of any situation where the Ministry had done so. In our view, this is the purpose of s 80AA(2)(b) of the Act. It imposes on the Ministry a duty to provide people of a certain kind or description with more extensive, targeted information and/or services than it generally provides.
- [20] The High Court decision in *I A M* can be distinguished from the case before us as the appellant in *I A M* had received various benefits for some 12 years before reaching the age of entitlement for NZS and there is no suggestion that he was unfamiliar with the social welfare system. The issue the High Court considered in that case was the extent of the Ministry's obligation to advise persons generally of their entitlement; the Court was not addressing the provision in s 80AA(3) of the Act.
- [21] We consider that, at the time the appellant reached the age of 65, the information generally provided by the Ministry did not adequately explain the criteria for NZS entitlement to people who emigrated to New Zealand from countries which did not have similar provisions for social welfare. The question

is whether the failure to do so constitutes an error as defined by s 80AA(3) of the Act.

- [22] Providing information only through the IRD, which did not state that people in paid employment were eligible for NZS, and failing to make the universal application of NZS clear to immigrants who had not engaged with the social welfare system was an omission to provide the information necessary for an application for NZS by a person in the appellant's situation. We are satisfied that this omission by the Ministry meets the definition of an erroneous action under s 80AA(3)(b) and that, as a result of the error by the Ministry, the appellant failed to apply for NZS when he turned 65.

Decision

- [23] For these reasons, the appeal is upheld.
- [24] The appellant is entitled to NZS from 19 April 2012. The Ministry is liable to pay arrears to the appellant for the period from 19 April 2012 to 7 October 2015.
- [25] If the parties are unable to agree on the sum of arrears payable, they may seek an order as to quantum.

Dated at Wellington this 7th day of June 2018

S Pezaro
Deputy Chair

C Joe JP
Member