[2018] NZSSAA 32

Reference No. SSA 016/2018

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

K Williams - Member

C Joe - Member

Hearing at Tauranga on 28 June 2018

Appearances

The appellant in person; XXXX, her husband, and Michelle Urquhart, counsel

R Stainthorpe, counsel, and D Veal, agent for the Chief Executive of the Ministry of Social Development

DECISION

Background

[1] XXXX (the appellant) appeals the decision of the Chief Executive on 18 September 2017, upheld by a Benefits Review Committee, to deduct her husband's entitlement to two French pensions from her New Zealand Superannuation (NZS) entitlement. The pensions are paid under two schemes which are: Association générale des institutions de retraite des cadres (AGIRC) and Association pour le régime de retraite complémentaire des salariés (ARRCO) (the French pensions). The appellant accepts the Ministry's decision to deduct her husband's general old age pension but disputes the decision to deduct these two supplementary pensions.

[2] The appellant became entitled to NZS on 11 January 2017. Following the Ministry's decision on 18 September 2017, the Ministry established an overpayment of $6,501.16. However, the Ministry then deferred the date of deduction to 17 May 2017 which reduced the overpayment to $3,320.72.

[3] Ms Urquhart confirmed at the hearing that the sole issue on appeal is whether the French pensions are administered on behalf of the French Government, as the Ministry submits. Ms Urquhart accepts that these pensions meet the contingency limb of the test in s 70(1) of the Social Security Act 1964 (the Act). She also confirmed that, although she describes the French pensions as occupational pensions, the appellant is not contending that they are Government Occupational Pensions which are excluded from the definition of an overseas pension.

[4] Accordingly, the two issues for the Authority to decide are whether the French pensions are caught by the second limb of the test in s 70(1)(b) of the Act and whether the appellant is liable for the overpayment.

Relevant legislation

[5] 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
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> (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—
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> 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

[6] 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*[1] 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.

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

[8] Kós J in *Boljevic* concurred with the decision in *Hogan v Chief Executive of the Department of Work and Income New Zealand*[2] and rejected the proposition

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[1] *Boljevic v Chief Executive of the Ministry of Social Development* [2012] NZAR 280.
[2] *Hogan v Chief Executive of the Department of Work and Income New Zealand* HC Wellington AP 49/02, 26 August 2002.

that s 70 did not apply where a person was simply recouping their own or their employer's contributions.

[9] His Honour also noted the decision of the High Court in *Dunn v Chief Executive of the Ministry of Social Development*[3] 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.

[10] 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.[4] 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.

[11] 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 Kiwisaver is a particular creation of New Zealand statute, it stands apart from the regime created by s 70 of the Act.[5]

The case for the appellant

[12] The parties agree that the French pensions are administered by the Humanis Group, a provident institution, which conducts two main activities — managing the AGIRC and ARRCO pension schemes and providing health and disability insurance.[6] Ms Urquhart argues that Humanis is a private company acting as social partner with the pension schemes. She does not accept that Humanis administers the French pensions on behalf of the French Government because, she says, there was no involvement by the French Government when the French pensions were established as a collaboration between unions and employers; any investment decisions, changes to the rules and other managerial functions are made by agreement between the unions and the

[3] *Dunn v Chief Executive of the Ministry of Social Development* HC Auckland CIV-2006-485-2588, 29 November 2007; aff'd [2008] NZCA 436, [2009] NZAR 94.
[4] *T v Chief Executive of the Ministry of Social Development* [2017] NZHC 711.
[5] At [13]–[15].
[6] Humanis Prospectus (20 October 2015) at 60.

employers, not Government Ministers. Ms Urquhart says the French Government regulation and oversight is comparable to the role performed by the New Zealand Financial Markets Authority in relation to Kiwisaver and other private superannuation schemes. She does not appear to have considered the fact that the Financial Markets Authority is a government agency.

[13] Ms Urquhart submits that the French pensions are private law legal entities, legally independent of the French State. She considers it relevant that the Boards that govern them are equally representative of unions and employers, in contrast to the French general pension schemes where the board members are appointed by the Government. She also argues that the fact that pension payments are calculated on a points system which, she says, is not in accordance with any regulation of the French Government indicates a scheme independent of the government.

[14] To illustrate her submissions, Ms Urquhart compiled a chart entitled *Comparison Table of Schemes in Case Law*. Ms Urquhart says this table summarises the seven criteria that, she says, were applied in three High Court cases to ascertain whether the pension schemes in each case were administered on behalf of the relevant government.

[15] The three cases, which the Ministry relies on for its submissions are *Fountain v Chief Executive of the Ministry of Social Development*,[7] *T v Chief Executive of the Ministry of Social Development*[8] and *Boljevic v Chief Executive of the Ministry of Social Development*.[9] Ms Urquhart's table compares the French pensions with the Canadian, Singaporean, and Croatian pensions considered in these three cases, and Kiwisaver.

[16] However, the Singaporean scheme considered in *T v Chief Executive of the Ministry of Social Development* is not relevant. The administration of this scheme was not an issue for Mr T. He argued his pension scheme was comparable to Kiwisaver and therefore exempt. He also challenged the Ministry's decision to suspend his NZS payment.

[17] Both grounds failed in *T* and, as recorded above, the High Court observed that the appellant's comparison of his pension scheme with Kiwisaver was flawed

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[7] *Fountain v Chief Executive of the Ministry of Social Development* [2017] NZHC 2144.
[8] *T v Chief Executive of the Ministry of Social Development*, above n 4.
[9] *Boljevic v Chief Executive of the Ministry of Social Development*, above n 1.

because Kiwisaver is a creature of New Zealand statute, stands apart from the regime created by s 70 of the Act, and is voluntary.

[18] Accordingly, Ms Urquhart's comparison of the Singaporean scheme with the French pensions does not assist the appellant. Nor do her extensive submissions that the French pensions are similar to Kiwisaver.

[19] In *Boljevic*, Kós J observed that it was unfortunate that the Boljevics did not grapple with previous High Court authorities on this issue. Ms Urquhart's submission that "just as Kiwisaver payments do not affect any Government pension benefits, overseas funds that are similar to Kiwisaver should also not affect any New Zealand Government pension payments" demonstrates that she has also failed to do so. However, the Boljevics were represented by a lay advocate. Counsel are expected to be familiar with well settled areas of law and not pursue arguments that clearly have no merit.

[20] The seven criteria which Ms Urquhart says are relevant to the question of how the French pensions are administered are whether:

a) the contribution is compulsory;

b) the contribution is collected by the tax department;

c) the scheme is established by legislation;

d) the board is appointed by government;

e) there is ministerial control or influence;

f) the scheme is audited by a government body; and

g) the government contributes to the fund.

[21] Ms Urquhart seems to consider that these criteria constitute the test for whether a pension scheme is administered on behalf of the government. However, in *Dunn v Chief Executive of the Ministry of Social Development*[10] the High Court said that it would be unworkable if s 70 required a close comparative analysis

[10] *Dunn v Chief Executive of the Ministry of Social Development* HC Auckland CIV-2006-485-2588, 29 November 2007.

between the New Zealand and overseas entitlements and there is nothing in the Act to indicate that such an approach is intended. Nor is there anything to mandate a distinction between contributory and non-contributory schemes. All funds are contributory, either directly or indirectly via income taxation. The High Court has repeatedly stated that the source of the funds is irrelevant.

[22] In *Latimer v Chief Executive of the Ministry of Social Development*[11] Edwards J considered the second limb of the s 70 test and rejected Mr Latimer's argument that, because the contributions were collected by agents of the Canadian pension scheme and not the scheme itself, the administration test was not met.

[23] We do not accept Ms Urquhart's submission that her criteria are relevant, although we do accept that without compulsion it appears more difficult to establish that a fund meets the s 70 tests.

[24] Ms Urquhart states that the two French pensions have been underperforming for years but "the Government has been powerless to do anything about it". She submits that "if this was a scheme administered by or on behalf of the Government, there would be more executive control over the performance and management of the funds". The foundation for these submissions is not apparent and they appear to be contradicted by her subsequent submission that:

> [46] …The French Government was made responsible for any deficits in the French Funds to the EU under the Maastricht Treaty *because the French Government made the contributions to the French Fund compulsory*. Yet the only control that the Government has been able to use to date is to "constrain the social partner levers" (like Humanis) to "balance complementary pension schemes" rather than make any changes to the French Funds themselves. (emphasis added)

[25] We found it difficult to comprehend the meaning of the appellant's submission that the occupational nature of the French pension funds means that the compulsory nature of the contributions is not akin to taxation and therefore should not be taken into account. As we have noted, the way in which the funds are collected and whether they are from taxation or another type of compulsory acquisition is irrelevant.

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[11] *Latimer v Chief Executive of the Ministry of Social Development* [2015] NZHC 2779.

[26] In evidence, the appellant's husband confirmed that he had no option as to which scheme he joined and that his contributions were compulsory. He had no choice about the amount he contributed which was set as a percentage of his income. He stated that the pension funds are required to comply with the rules of social security.

[27] Ms Urquhart's final submission is that the only features of the French pensions which match the criteria on her table are that contributions are compulsory and made on an occupational basis and that these factors are not enough for the funds to be caught by s 70.

The case for the Chief Executive

[28] The Ministry submits that the French pensions received by the appellant's husband are administered by Humanis on behalf of the French Government. The underlying structure for these pensions is the French Social Security Code. The Ministry included in its section 12K report a diagram of the French Pension System. Although the source of this diagram is not clear, counsel for the appellant referred to it and raised no issue with its accuracy.

[29] The diagram shows a scheme within the overarching provision of the Social Security Code. The General Social Security Scheme is one of three schemes within the code; outside the code is a fourth scheme described as "optional schemes". The General Social Security Scheme is administered by the Central Agency of Social Security (ACOSS). Three funds fall within its ambit and one of these funds, the National Old-Age Insurance Fund, has two tiers. The second tier is the Supplementary Scheme. ARRCO and AGIRC fall within this tier.

[30] Further information on the French pension system is contained in Exhibit 26 of the Ministry's section 12K report. This document is entitled "The French Social Protection System". It describes AGIRC and ARRCO as mandatory supplementary schemes (supplementary pensions) and at page 25 it describes the manner in which these schemes were established. Initially, they were organised through inter-professional agreements by social partners in the late 1940s. Since the Supplementary Pension Act 1972 was passed, every person covered by the social security basic pension plan is enrolled in a mandatory supplementary scheme. The mandatory schemes are pay-as-you-go schemes with defined contributions deducted from wages for employees and managerial and professional staff. Pension entitlements are based on a points system.

[31] All employees covered by the general social security scheme must also be affiliated to a complementary pension plan. Exhibit 18 of the Ministry's report is a translation of a letter to the appellant's husband from Humanis. It concludes with the statement that complementary retirement pension institutions are not-for-profit private law legal entities performing a function of public utility, administered on equal representation basis by employer members and employee members or their representatives. Their operation is authorised by order of the Minister for Social Security.

Discussion

[32] The appellant accepts that contributions are compulsory and that the level of contribution and distribution of entitlement is proscribed but could not explain how the pensions are regulated, if not by government regulation. The appellant has failed to provide any factual alternative to the Ministry's evidence that the French pensions are compulsory because they are governed by the Supplementary Pension Act 1972.

[33] We accept the evidence of the Ministry as to the structure of the French pension scheme and the legislation that governs it. While the French pension funds in issue were established in the 1940s by arrangement between unions and employers, since 1972 they have been regulated by the French Government. We are satisfied that Humanis is one of many organisations managing the mandatory supplementary French pension funds on behalf of the government.

[34] Accordingly, we conclude that the French pensions received by the appellant's husband are administered on behalf of the French Government. They therefore meet the criteria in s 70(1) of the Act for deduction from New Zealand Superannuation.

Orders

[35] The decision by the Ministry to deduct the appellant's husband's French pension payments from her New Zealand Superannuation entitlement is correct.

[36] The appeal is dismissed.

Dated at **Wellington** this 11th day of July 2018

S Pezaro
Deputy Chair

K Williams
Member

C Joe JP
Member