

[2018] NZSSAA 034

Reference No. SSAA 069/17
and SSA 140/17

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, 17 May 2018

Appearances

The appellant in person

P Siueva, agent for the Chief Executive

DECISION

Background

[1] XXXX (the appellant) filed two appeals against decisions by the Chief Executive to deduct lump sum back payments of his United Kingdom Pension (UKP) from his New Zealand Superannuation (NZS) entitlement. These decisions were upheld by Benefit Review Committees. We heard these appeals together because they raise the issue of how the discretion in s 70(2) of the Social Security Act 1964 (the Act) should be exercised.

[2] The appellant accepts that the Ministry is entitled to deduct payments of UKP from his NZS pursuant to s 70(1) of the Act; it is the date of deduction and the treatment of lump sum back payments of UKP which are in issue. He submits that the discretion in s 70(2) to set the date on which any deduction from NZS takes effect should be exercised so that back payments of his UKP are

deducted from his NZS from the date he applied for UKP, not the earlier date when he became eligible for UKP.

- [3] The appellant was granted NZS from 28 June 2010 when he turned 65. When he applied for NZS he declared that he had worked in the United Kingdom. He did not know he was entitled to a UKP and did not discover his entitlement until September 2014 when the Ministry sent him an application to apply for a UKP. On his application form, the appellant elected to have UKP paid by the Special Banking Option (SBO) which meant that payment was made directly to the Ministry.
- [4] The appellant was surprised to find that his work in the UK between 1985 and 1989, mostly in temporary positions, entitled him to a UKP. The reason for his entitlement is that for a brief period between 2010 and 2013 the United Kingdom lowered its minimum working years requirement for UKP to one year. The result was that people who reached the age of eligibility between 2010 and 2013, like the appellant, had a lower threshold for entitlement to UKP than those who reached the required age before or after this three-year window.

Appeal SSA 140/17

- [5] In December 2014/January 2015, the appellant received letters from the United Kingdom Pension Service (UKPS) and WINZ stating that he was entitled to a UKP of £18.34 per week. The letter from the UKPS also raised the possibility of a backdated sum for the year prior to his application, from 14 September 2013 to 14 September 2014. However, the appellant was not aware until November 2016, after he applied for a review, that the Ministry received a lump sum payment of \$2,421.57 for this period by SBO on 19 December 2014.
- [6] In October 2015, the UKPS advised the appellant that he was entitled to an increased amount per week and that a lump sum based on the increase would be paid for the period from 14 September 2013 to 18 September 2015. The Ministry received \$1,746.43 by SBO to cover this period on 15 October 2015. These two payments are the subject of the appeal SSA 140/17.
- [7] Prior to the BRC review, the Ministry reviewed the payments it had received by SBO and realised that it was not entitled to retain any amount received before the date on which the appellant signed the SBO acceptance form, 14 September 2014. The Ministry therefore decided that arrears of \$2779.06

were due to the appellant. However, the Ministry claimed an overpayment of NZS of \$2291.32 for the period to 14 September 2014. As the appellant declined to allow the Ministry to recover this overpayment from the arrears, they were refunded to his account.

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[8] In November 2015, the UKPS told the appellant that he could choose how his deferred entitlement to UKP for the period from 28 June 2010 to 11 September 2013 was paid. He chose the lump sum payment option. The Ministry's policy at that time was to deduct any lump sum payment from one instalment of NZS. It therefore deducted the payment of \$9,047.58¹ from one instalment of the appellant's NZS for the period from 10 February 2016 to 23 February 2016 and established an overpayment of NZS for that instalment period of \$600.50 (the amount of NZS paid to the appellant for that instalment period).

[9] This overpayment was the subject of the appeal SSA 069/17. However, the appellant withdrew this appeal on the second day of the hearing, with the consent of the Ministry.

The issues

[10] The appellant contends that the Ministry failed to exercise the discretion in s 70(2) in relation to the two lump sum payments that are the subject of the appeal SSA 140/17. He submits that the date of deduction should be no earlier than 10 September 2014 and only UKP received after this date should be deducted from his NZS entitlement. He accepts that he received UKP before this date but argues that the Ministry should treat these lump sum payments in the same way as the lump sum payment in the appeal SSA 069/17, which was deducted from one instalment of his NZS.

[11] The issues for the Authority are:

- a) whether the s 70(2) discretion must be exercised in each case, as the appellant submits, and, if so, what the date of deduction should be in the appellant's case.

¹ This is the sum estimated by the Ministry to be the equivalent of the UK payment. The appellant did not disclose the amount credited to his bank account.

- b) If s 70(2) is not mandatory, whether the discretion to set the date of deduction should be exercised in this case and, if so, what is the appropriate date of deduction.

Relevant law

- [12] Section 70(2) of the Act provides that:

70 Rate of benefits if overseas pension payable

- (2) Nothing in subsection (1) shall preclude the chief executive from deciding the date on which the chief executive's determination under paragraph (b) of, or the proviso to, the said subsection (1) shall take effect, which date may be a date before, on, or after the date of such determination.

- [13] This provision has been considered by the Authority but not by the High Court. In [2005] NZSSAA 113 the Authority stated that the Ministry had exercised the discretion in s 70(2) twice; once when it decided to deduct a UKP and then when it established an overpayment. We do not consider this decision correctly reflects the provision in s 70(2). In subsequent appeals the Authority has taken a different approach which is correct in our view.
- [14] In [2010] NZSSAA 83, the Authority considered that s 70(2) provides a limited mechanism to ensure that injustices inconsistent with the purpose and intention of s 70 are avoided. In that case, the appellant received NZS and a survivor's pension from the United States. She paid tax at the rate of 30 per cent in the United States on the survivor's pension but the gross sum of her United States pension was deducted from her NZS. The result was that the appellant received less than her NZS entitlement. The Authority exercised the s 70(2) discretion to defer deduction of the appellant's overseas pension for over six years.
- [15] In [2010] NZSSAA 84, the Authority considered the case of an appellant who disclosed her payments from a Canadian Pension Plan when she was granted NZS but the Ministry did not deduct her Canadian pension for over nine years. The Authority considered that the appellant had conducted her financial affairs based on what she believed to be her retirement income and was entitled to some warning that her NZS entitlement would be reduced. The Authority concluded that six months' notice was reasonable and deferred deduction accordingly.

The case for the appellant

- [16] The appellant says he is not liable for the overpayment of \$2,291.32 of NZS prior to 14 September 2014. He argues that s 70(2) requires the Ministry to make a decision in every case on the appropriate date of deduction of any overseas pension from an NZS entitlement. He says the discretion in s 70(2) must be exercised and, if s 70(2) is not invoked, the default position is that deduction commences from the date of the eligibility decision, not from the date of entitlement.
- [17] The appellant argues that blanket use of the date that a person's overseas pension entitlement starts is not a credible exercise of the discretion in s 70(2). He submits that the norm should be either the date on which the overseas government decided the overseas pension was payable or the earlier date of application for the overseas pension. He says the second option should only apply where the Ministry has fully disclosed the implication of backdating and the SBO option.
- [18] The appellant has produced documentation to show that in the 2013 budget, the Ministry received additional resources to allow it to test more applicants for NZS for their eligibility for an overseas pension entitlement. He argues that the Ministry targeted people in his situation as a revenue gathering exercise.
- [19] He says he felt pressure to choose the SBO option before he understood it. He believes he was disadvantaged by it because the sum was not released immediately and, when it was, he did not know if he would have to pay it back. He says that if he had elected direct payments they would have immediately reduced his mortgage and saved him at least \$380.

The case for the Chief Executive

- [20] The Ministry submits that the date of deduction should be the date from which a person's entitlement to an overseas pension is calculated, not the date of the application. The Ministry argues that this approach is consistent with the intent and purpose of s 70(1).
- [21] The Ministry accepts that there are cases where it is appropriate to exercise the discretion in s 70(2) to defer the date of deduction but submits that the discretion

should only be exercised to prevent an injustice that is inconsistent with the purpose and intention of s 70.

- [22] In the Ministry's view, the exercise of the s 70(2) discretion is not warranted in the appellant's case.

Discussion

- [23] The purpose of the discretion in s 70(2) is to allow the Chief Executive to set a date for deduction which is before or after the date of the determination, the norm being the date of determination. We do not accept the appellant's submission that s 70(2) provides for a discretion to be exercised in every case where an overseas pension must be deducted from an NZS entitlement. A discretionary power cannot be mandatory.

- [24] We are not satisfied that any injustice is caused to the appellant by the deduction of his UKP from his NZS from the date on which he became entitled to UKP. Nor do we consider that there is any unfairness arising from the back payments of his entitlement in lump sums. While the appellant may regret his election of the SBO payment option, that was his choice at the time. The outcome, that his UKP must be deducted from his NZS, is consistent with the purpose and intent of s 70(1).

Orders

- [25] The appeal in SSA 140/17 is dismissed.

- [26] The Chief Executive is entitled to recover the overpayment of \$2,291.32 from the appellant.

Dated at Wellington this 18th day of July 2018

S Pezaro
Deputy Chair

C Joe
Member