

[2018] NZSSAA 035

Reference No. SSaA 157/17

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 Whangarei on 23 May 2018

Appearances

The appellant in person

P Siueva, agent for the Chief Executive

DECISION

Background

- [1] XXXX (the appellant) appeals the decision of the Chief Executive to deduct his Canada Pension Plan (CPP) payments from his entitlement to New Zealand Superannuation (NZS). This decision was upheld by a Benefits Review Committee.
- [2] The appellant was born in New Zealand but lived in Canada between 1967 and 1990. He was granted NZS at half the married rate from 23 April 2012 when he turned 65 years. He receives CPP payments which are deducted from his NZS entitlement.
- [3] The issue for the Authority to determine is whether the appellant's CPP should be deducted from his NZS entitlement.

Relevant legislation

- [4] 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

(1) For the purposes of this Act, if—

- (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

- [5] 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 rejected the argument that any distinction can be made between state administration and state funding and concluded that it is state administration which is required for the s 70 threshold. The Court also rejected the proposition that s 70 does not apply where a person is simply recouping their own or their employer's contributions.
- [6] The CPP was considered by the High Court in *Latimer v The Chief Executive of the Ministry of Social Development*² and *Fountain v The Chief Executive of the Ministry of Social Development*.³ In *Fountain* the High Court confirmed the finding in *Latimer* that the CPP is administered by or on behalf of the Government of Canada. Although the CPP is a benefit for employed persons who have retired and NZS is a universal benefit, they both protect against the contingency of loss of income following retirement.
- [7] For these reasons, the High Court concluded in *Fountain* that the CPP is in the nature of a payment which forms part of a programme providing pensions for the contingency of loss of income following retirement, which is also a contingency for which NZS is paid.
- [8] In *T v Chief Executive of the Ministry of Social Development*, the High Court 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.⁴

The case for the appellant

- [9] The appellant states that the application of s 70(1) of the Social Security Act 1964 (the Act) is fundamentally unfair and does not meet a reasonable test of natural justice.

¹ *Boljevic v Chief Executive of the Ministry of Social Development* [2012] NZAR 280.

² *Latimer v The Chief Executive of the Ministry of Social Development* [2015] NZHC 2779.

³ *Fountain v The Chief Executive of the Ministry of Social Development* [2017] NZHC 2144.

⁴ *T v Chief Executive of the Ministry of Social Development* [2017] NZHC 711.

- [10] The appellant argues that the CPP is not State funded, being fully funded by employers and employees. He says that although the CPP is administered by an arm of the Canadian Government, the funds are contributed by individuals and their employers and are separate from general Government accounts.
- [11] He submits that the CPP is comparable to Kiwisaver, and therefore should not be caught by s 70(1). The appellant relies on a document entitled *New Zealand Superannuation Policy and Overseas State Pensions*.⁵
- [12] At the hearing, the appellant stated that who administers the funds should not be relevant. He accepted that the Canadian Old Age Pension met the s 70(1) criteria but not the CPP. He conceded at the hearing that his argument that the CPP is comparable to Kiwisaver was unsustainable. However, he contended that the CPP is a second-tier pension and, because it is only paid to those who make contributions, it should not be caught by s 70(1).

The case for the Ministry

- [13] The Ministry submits that the Authority and the High Court have considered the CPP and found that it meets both the contingency and administration requirements set out in s 70(1)(b). The Ministry submits that the decisions in *Latimer* and *Fountain* are binding on the Authority and there is nothing in the appellant's case which distinguishes his situation.
- [14] The Ministry submits that policy papers such as that relied on by the appellant, which include suggestions for change in a statutory provision, are not relevant to the interpretation of the existing statute.

Discussion

- [15] The appellant is in the same situation as Mr Fountain who also received the Canadian Old Age Security pension and the CPP. Our factual findings regarding the material attributes of those schemes are the same as the findings in *Latimer* and *Fountain*. As the High Court has consistently found, and confirmed in *Fountain*, the source of the contribution to the overseas pension fund is irrelevant. It is the contingency provided for by the scheme and the administration that are relevant to the tests in s 70. We are bound by the findings in *Latimer* and *Fountain* that the CPP meets these tests.

⁵ Dr M Claire Dale and Susan St John *New Zealand Superannuation Policy and Overseas State Pensions* (University of Auckland Business School, September 2016).

[16] Accordingly, we have no hesitation in concluding that the CPP payments to the appellant must be deducted from his NZS entitlement.

Order

[17] The appeal is dismissed.

Dated at Wellington this 18th day of July 2018

S Pezaro
Deputy Chair

C Joe
Member