

[2018] NZSSAA 49

Reference No. SSA 002/2018

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

Final submissions filed 17 September 2018

Appearances

The appellant in person; XXXX, the appellant's wife

R. Stainthorpe, counsel, and D Veal 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 French Civilian Retirement Pension — Pension Civilian De Retraite (the French pension) from his entitlement to New Zealand Superannuation (NZS). This decision was upheld by a Benefits Review Committee on 3 October 2017.

- [2] The appellant applied for NZS on 26 September 2016 and declared that he received a French Civilian Retirement Pension. He subsequently provided the Ministry with two verification documents in French. Translations of these documents are in the section 12K report.
- [3] On 4 November 2016, the Ministry advised the appellant that his entitlement to NZS was nil because it was required to deduct his French pension from NZS. However, on 15 November 2016 the Ministry made a NZS payment of \$591.94 in error. The Ministry apologised and the appellant has not challenged the Ministry's ability to recover this overpayment if his appeal fails.

Relevant legislation

- [4] Section 70 of Social Security Act 1964 (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:

[5] Section 3 of the Act defines a Government occupational pension (GOP):

Government occupational pension—

- (a) means a benefit, pension, or periodical allowance paid by or on behalf of the Government of any country to a person by reason of—
 - (i) a period of employment, direct or indirect, by that Government of that person or that person's deceased spouse or partner or that person's deceased parent; or
 - (ii) a period of service to that Government (including, without limitation, service in the armed forces, service in the Police, and service as a judicial officer or other person acting judicially) by that person or that person's deceased spouse or partner or that person's deceased parent; but
- (b) does not include any part of that benefit, pension, or periodical allowance that is paid by the Government of that country by reason of anything other than that period of employment or service; and
- (c) does not include any part of that benefit, pension, or periodical allowance to which the Government of that country contributes by reason of anything other than that period of employment or service; but
- (d) does not include a benefit, pension, or periodical allowance of the kind set out in paragraph (a) if the person would have been entitled to receive a similar benefit, pension, or periodical allowance paid by, or on behalf of, the Government of that country under a scheme or other arrangement in respect of persons who were not employees or in the service of that Government

Relevant case law

Section 70 — deduction of overseas pension

- [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 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. Kós J concurred with the decision in *Hogan v Chief Executive of the Department of Work and Income New Zealand*² and rejected the proposition that s 70 did not apply where a person was simply recouping their own or their employer's contributions.
- [8] His Honour in *Hogan* 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.
- [9] 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

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.

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.

held by the Government for defined purposes and disbursed incrementally to the plaintiff to provide for his retirement or old age.

Section 3 — Government Occupational Pension

- [10] The term “overseas pension” in s 70 of the Act excludes a GOP as defined in s 3 of the Act.
- [11] The question of what constitutes a GOP for the purposes of s 70 was considered to a limited extent by the High Court in *Latimer v Chief Executive of the Ministry of Social Development*.⁵ In *Latimer* the pension fund in issue was the Canadian Pension Plan (CPP) paid to Mr Latimer’s wife which, unlike the appellant’s French pension, is funded by worker and employer contributions only. The High Court was satisfied that what was intended to be covered by the definition of a GOP was government funded or subsidised pensions. Justice Edwards observed that it was a coincidence that the employer paying the CPP was a government employer, it was not because Mrs Latimer was a government employee who received the CPP. The CPP did not meet the first test in the definition of a GOP and therefore was deductible from Mr Latimer’s NZS.
- [12] The Authority considered the criteria of the GOP in [2016] NZSSAA 071.⁶ In that case, the appellant was a teacher in Taiwan. Upon retirement, he was entitled to a pension fully funded by the government. His wages were low but the pension was comparatively generous. The Authority accepted that the Taiwanese pension met the first criteria in paragraph (a) of the definition for a GOP; it then considered the exceptions in (b), (c) and (d).
- [13] The Authority was satisfied that the fact that the appellant’s pension was paid solely for his service as a teacher satisfied the criteria in paragraphs (b) and (c) of the definition. As Taiwan did not provide any universal social security cover at the time the appellant qualified for his pension, the Authority accepted that the exclusion in paragraph (d) did not apply. Therefore, the Authority found that the appellant’s Taiwanese pension was a GOP and not subject to deduction under s 70 of the Act.

⁵ *Latimer v Chief Executive of the Ministry of Social Development* [2015] NZHC 2779.

⁶ [2016] NZSSAA 071 (18 July 2016).

The case for the appellant

- [14] The appellant's notice of appeal did not provide specific grounds for challenging the Ministry's decision to deduct his French pension. In the hearing, the appellant agreed that the French pension generally met the s 70 criteria for deduction and focussed his submissions on the question of whether this pension was a GOP.
- [15] The appellant stated that he had completed one year of compulsory military service, in addition to his years of employment as a teacher. He was not clear whether any component of his French pension was specifically related to this service. Therefore, after hearing from the parties, we adjourned the hearing for the appellant to produce further evidence in support of his claim that his French pension, or a component of it, is a GOP. As the appellant and his wife had found it difficult to interpret the definition of GOPs in the Act, the adjournment gave them a further opportunity to consider their submissions.
- [16] The parties filed written submissions and confirmed that they did not require another oral hearing.
- [17] In his written submissions following the hearing the appellant stated: "My understanding is that it was agreed that the pension (the appellant) receives is a GOP according to the definition in Section 3 a, b and c – the part under question is 3 d."
- [18] As this perception of an agreement indicated a misunderstanding, a direction was issued as follows:

... The Authority did not reach a conclusion at the hearing as to the type of pension. It is not correct, therefore, that there was any agreement on this issue, unless it was an agreement between the parties.

The definition of a Government Occupational Pension in s 3 of the Social Security Act 1964 (the Act) must be read as a whole before any conclusion can be reached. The fact that a pension is paid by a government does not mean the pension meets the criteria of a Government Occupational Pension which is excluded from the deduction regime under s 70 of the Act.

XXXX needs to demonstrate that his pension meets all the criteria in the definition for his pension to be found to be a Government Occupational Pension. He also needs to provide any evidence that supports his description

of his pension. If that evidence has already been presented and is on the file, he should refer to it in his submissions.

[19] The timetable for submissions was extended. The appellant did not file anything further; the respondent filed submissions on 17 September 2018.

[20] We have considered the submissions in the appellant's notice of appeal and his further submissions. He did not produce any documentary evidence in addition to the documents he had provided to the Ministry which were produced in its report.

[21] The appellant submitted that:

- (a) His French pension is not a pension available to all French citizens. It is related to the nature of his work and his qualifications and calculated on the number of years he has worked. The appellant became entitled to his French pension at age 56.
- (b) Because he chose to contribute to the French pension at the start of his working life and because of the conditions necessary to benefit from this scheme, it is not caught by s 70 of the Act.
- (c) The French Government makes other provisions for those who have not paid into a retirement fund, including Allocation de solidarité aux personnes âgées (ASPA). ASPA is unrelated to years of service or contribution, is means tested, only available after age 65, not paid only to employees of the government, and is significantly less than the French pension.
- (d) ASPA is not payable to people living outside France whereas the French pension is portable.
- (e) The fact that ASPA is different to the French pension the appellant receives demonstrates that the appellant's pension is a GOP.

The case for the Chief Executive

[22] The Ministry submits that as the appellant's French pension is administered by or on behalf of the French Government and provides for the same contingencies that are provided for by NZS it falls within the deduction regime of s 70. The

Ministry does not accept that, if the appellant was not entitled to his French pension, he would not be entitled to a comparable pension provided by the French Government. Therefore, it submits that the French pension is not a GOP and the exemption to “overseas pension” provided under s 3 of the Act does not apply.

- [23] The Ministry described the French pension system as complex, including a variety of schemes which are divided into three categories. The first category is for employees in the private sector and has two components, both of which are mandatory. The second category provides for people who are not employees but are in independent occupations.
- [24] The third category contains pension schemes for civil servants and those in public sector corporations. The schemes in this category constitute a compulsory civil service pension and provide full protection and income replacement of up to 80 per cent. The third category distinguishes non-tenured civil servants and public employees who belong to the general system from permanent civil servants and public employees. The Ministry states that the French pension is in the third category and is “pay as you go” and compulsory.
- [25] The Ministry refers to the two pension verification documents produced by the appellant. The pension certificate from the French Pension Service states that the appellant received a civilian retirement pension. This document shows the amount of the appellant’s pension, based on his period of employment. It states that the pension is administered by the Ministry of National Education and gives the rate of the pension based on his employment period.
- [26] The second document provides confirmation that the appellant receives a State pension and that the monthly payment is subject to deduction of social security contribution, voluntary insurance, tax and mutual contribution.
- [27] The Ministry contends that the appellant’s French pension is not a GOP because, if the appellant had not been a tenured employee of the French Government, he would have been entitled to the alternative general scheme pension and the complementary occupational pension. The Ministry contends that the French pension is only one part of a complex system and that, if the appellant had been employed privately as a teacher and as a tenured government employee, he and his employer would have been required to make

similar compulsory contributions during his working life to a basic old age pension scheme and a supplementary scheme.

Discussion

Is the appellant's French pension a GOP?

[28] A GOP is defined in s 3 of the Act. Paragraph (a) is the primary definition and paragraphs (b) (c) and (d) are the exclusions to this definition. The result is a series of tests. We appreciate why the appellant and his wife found it difficult to understand whether the definition applies to his French pension.

[29] Paragraph (a) of the definition requires employment by a government and a benefit, pension, or allowance paid by or on behalf of that government. The appellant's French pension meets this first test.

[30] Paragraphs (b) and (c) exclude any benefit, pension or allowance which is not paid solely by reason of the period of government employment or service.

[31] Paragraph (d) of the definition of GOP excludes a benefit, pension or periodical allowance described under paragraph (a) where the government provides a similar benefit, pension or allowance to people who are not employed by the government or in its service.

[32] In a letter dated 28 May 2017, the appellant accepted that, if not employed by the government, he would have been entitled to ASPA:

In terms of (d), if I had not been employed by the government and contributed monthly all of my working life to this superannuation scheme and had made no other provisions for my retirement I would have been entitled to ASPA.

[33] In answer to a question from the Authority, the appellant stated that if he had not contributed to the French pension scheme, he would have been required to pay into another scheme.

[34] While the appellant accepts that he would have been entitled to ASPA if he was not employed by the government, he contends that ASPA is different to the French Pension and therefore the exclusion contained in paragraph (d) of the definition of GOP does not apply.

[35] We have considered the appellant's argument that ASPA is not a similar pension to the French pension, as required by paragraph (d). Although we accept that ASPA does not provide as high a pension as the French pension, we consider it similar to the extent required by the Act. As the High Court has observed, a close comparative analysis of pension schemes would be unworkable. We also accept the Ministry's unchallenged description of the French system of providing for retirement and old age. This description includes a compulsory supplement to the general scheme. Therefore, we do not accept the appellant's argument that he would not have been entitled to a similar pension if he had not contributed to the one available to him as a tenured government employee.

Is the appellant's French pension subject to the deduction regime in s 70?

[36] Based on the translated documents and the information produced by the Ministry on the nature of the French pension schemes, we are satisfied that the pension the appellant receives is administered either by or on behalf of the French Government and provides for the same contingencies as NZS. The source of the contributions to the fund is not relevant. We therefore conclude that there is no basis for excluding the French pension received by the appellant from the s 70(1) deduction requirements.

Order

[37] The appeal is dismissed.

Dated at Wellington this 4TH day of October 2018

S Pezaro
Deputy Chair

K Williams
Member

C Joe
Member