

IN THE MATTER of the Social Security Act 2018

AND

IN THE MATTER of an Appeal by **XXXX** against a decision of the Chief Executive that has been confirmed or varied by a Benefits Review Committee

DATE OF MINUTE Friday, 30 July 2021

DECISION

Background

[1] The appellant has applied to lodge an appeal out of time. It concerns a Benefits Review Committee decision sent to XXXX on 25 July 2016. It should have been lodged within 3 months of XXXX receiving the decision. The Authority has power to receive late appeals, but only when the circumstances justify do so. The time allowed is set by s 400 of the Social Security Act 2018, and regulation 248 of the Social Security Regulations 2018. The time is 60 working days after notice of the Benefits Review Committee decision. The Authority may allow further time under s 400(3)(c) of the Act, if there is a good and sufficient reason for the delay.

[2] This decision considers whether the Authority should exercise the power to extend time for a late appeal.

XXXX's reasons for seeking an extension of time

[3] XXXX's grounds for seeking an extension of time are in essence:

[3.1] She came to New Zealand as a migrant of mature years, has limited English language skills, and devotes herself to family and spiritual matters.

- [3.2] She receives only a small portion of New Zealand Superannuation due to her income from a Taiwanese Labour Insurance pension.
- [3.3] She went through the Benefits Review Committee process and trusted the process. She did not understand the “rule of s 70(2)”. She would have appealed if she understood that rule.
- [3.4] In June 2020 XXXX was informed of a case where the Ministry exercised the power in reg 121 of the Social Security Regulations 2018 (formerly s 70(2) of the Social Security Act 1964) to defer the commencement date for implementing a deduction for a spousal pension.
- [3.5] XXXX says she is treated inconsistently by the Ministry, did not know that at the time her right of appeal expired, and has brought this appeal at the first opportunity given those circumstances.

The Ministry’s Response

- [4] The key points of the Ministry’s response are:
- [4.1] There is no reason to suppose that XXXX was not informed of the Benefits Review Committee decision when it was issued, and there has been a lapse of some three and a half years since the time expired for her appeal.
- [4.2] The decision XXXX claims is inconsistent is *SSAA Appeal* [2016] NZSSAA 110.
- [4.3] The Ministry addressed s 70 (of the Social Security Act 1964 that applied at the time) in its report to the Benefits Review Committee, noted it allowed a discretion to delay making deductions from New Zealand Superannuation when there is an offshore pension.
- [4.4] Considering s 70, including the discretion in s 70(2) is an intrinsic part of a case like XXXX’s appeal.
- [4.5] The Ministry would oppose the exercise of the discretion in s 70(2) in XXXX’s favour, if the Authority allowed a late appeal.

XXXX’s response to the Ministry’s reply

- [5] XXXX responded to the Ministry’s position saying:

[5.1] The most applicable decision is *SSAA Appeal* [2017] NZSSAA 68, as in this case the impact of the spousal deduction is extreme financially and mentally. The exercise of the discretion in *SSAA Appeal* [2015] NZSSAA 012, [2016] NZSSAA 106 and [2016] NZSSA 110 are relevant.

[5.2] In *SSAA Appeal* [2018] NZSSAA 34 the Ministry accepted the discretion in s 70(2) could be used to prevent an injustice, and the Appellant is suffering an injustice.

Discussion

[6] There is an element of unreality in XXXX's position. She had the assistance to pursue a review before the Benefits Review Committee. She received a reasoned decision, the decision considered s 70(2) of the Social Security Act 1964. However, she says in June this year for the first time she became aware of the discretion in that subsection to defer deductions.

[7] On the face of the matter there is nothing in XXXX's circumstances that distinguish her from other people who decide not to appeal. The legislation does have a time limit for bringing an appeal; in most cases it will bring an end to the proceedings. There are exceptions, but only when there is "good and sufficient reason for the delay" in bringing the appeal. Typically, in cases of this kind, some regard is had to the merits of the late appeal. Where there is little delay and accordingly prejudice, the merits may not be closely scrutinised. In a case such as this the delay is egregious, we can find little merit in XXXX's choices relating to deciding not to appeal in time. If we could be satisfied XXXX had strong grounds to contend there was an obvious injustice, which the appeal could rectify we would have regard to that when considering whether the reasons for the delay are "sufficient".

[8] We can see no merit in XXXX's claim she has suffered an injustice:

[8.1] Her claim she (or her advisers) was not aware of s 70(2) until this year can only be true if they ignored the Benefits Review Committee's decision; and

[8.2] No grounds have been identified for exercising the discretion in s 70(2) if the late appeal were allowed.

[9] The Benefits Review Committee decision considered s 70, including express reference to the discretion relating to the start date of deductions. Accordingly, we cannot find the basis XXXX relies on to bring this application for a late appeal is grounded in fact. If she and

her advisers were not aware of that, it must be due to a failure to consider what the Benefits Review Committee said in its decision.

- [10] There is no injustice in deducting offshore pensions against New Zealand Superannuation entitlements. As the Benefits Review Committee observed, New Zealand has a very generous set of eligibility rules for New Zealand Superannuation. The key factor being only 10 years residence in New Zealand is required, whereas most countries have entitlements that are proportional to payments based on residence and financial contributions. The key policy in s 70 is to ensure that the generous entitlements do not have the effect of allowing a person who migrated to New Zealand after qualifying for a pension in another country being better off than a New Zealand citizen who lived and worked in New Zealand all their life.
- [11] The background policy relating to XXXX's circumstances was fully considered by the Benefits Review Committee, and XXXX has not identified any reason why we should take a different view.
- [12] The discretion in s 70(2) relates to the date from which the amount of an overseas benefit or pension will reduce the amount of New Zealand Superannuation. XXXX has not given reasons for s 70 not to apply from the date she first received New Zealand Superannuation. Her partner was receiving New Zealand Superannuation exceeding her New Zealand Superannuation entitlements, and accordingly on 29 September 2015 the Ministry stopped payments to her. The outcome appears to have been inevitable and appropriate. If there are changes of circumstances after that time, then a further review is necessary; not, a late appeal.
- [13] *SSAA Appeal [2017] NZSSAA 68* reviews some of the circumstances relating to inequities that can arise in respect of a partner's offshore pension entitlements. It makes it clear the discretion should not be used to alter the effect of the legislation.
- [14] *SSAA Appeal [2015] NZSSAA 12*, illustrates the sort of circumstances where the discretion in s 70(2) might apply. In that case the appellant and his wife lived alternately in New Zealand and the United Kingdom. His wife did not have a New Zealand residence visa. The set of circumstances resulted in the appellant receiving New Zealand Superannuation at the single rate, with deductions of both his and his wife's United Kingdom pensions. The key element of complaint was the deduction of a spouse's pension from New Zealand Superannuation paid on the lower single rate.

- [15] The Authority considered the discretion to defer deductions should apply, until the Appellant's wife was able to obtain a New Zealand residence visa. When that was possible it was up to them to "investigate whether their desire to live six months in each year in each country is in fact feasible in terms of the pension arrangements in New Zealand and the United Kingdom."
- [16] XXXX came to New Zealand and the law in New Zealand appropriately required deductions of her partner's offshore pension. XXXX needed to investigate what her entitlement were, given her and her partner's circumstances in 2015. The Benefits Review Committee's decision identified no reason for failing to apply the law; and we can see no reason for reaching a different conclusion on the material XXXX presented.

Decision

- [17] We dismiss the application to bring a late appeal for the reasons given.

DATED at Wellington 30 July 2021

Grant Pearson
Chairperson

C Joe JP
Member