

**IN THE MATTER** of the Social Security Act 2018

**AND**

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

**BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY**

**G Pearson** (Chairperson)

**R Palu** (Deputy Chairperson)

**M Dodd** (Member)

**R Aston** (Member)

**Hearing:** Auckland, 17 March 2023.

**Decision:** Thursday, 15 June 2023

**Representation:** XXXX (in person, supported by his wife)  
Ms D Veal, appeals officer, for the Chief Executive

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**DECISION**

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**Preliminary**

[1] We must resolve this appeal by determining one very precise question of fact. XXXX was qualified for New Zealand Superannuation based on being resident and present in New Zealand for a total of 10 years on 1 March 2020, other than being one day short of 10 years.

[2] In ordinary circumstances the day would make little difference. In this case the issue has very significant consequences for XXXX and his wife. XXXX lodged an application for New Zealand Superannuation on 18 February

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**Representatives:** XXXX in person.

Ministry of Social Development for the Chief Executive

2020. He planned to travel to India for family reasons on 1 March 2020 and expected to return on 26 March 2020. However, due to COVID-19 restrictions instead of being away for less than a month, XXXX could not return to New Zealand for more than a year (returning on 4 March 2021).

- [3] The Ministry of Social Development (Ministry) considered XXXX's application for New Zealand Superannuation. It calculated that when he would leave New Zealand on 1 March 2020 XXXX needed one additional day of being "resident and present" in New Zealand to qualify when he returned.
- [4] However, because XXXX could not return for over a year, if the Ministry is correct, the consequences are that:
  - [4.1] XXXX loses about a year of New Zealand Superannuation payments; and
  - [4.2] His wife does not qualify for a joint New Zealand Superannuation entitlement as a younger spouse as the law changed before XXXX returned to New Zealand.
- [5] The COVID-19 New Zealanders Stranded Overseas Support Programme did not help XXXX, as it applied to people who received a benefit, rather than giving rights to people who had not qualified due to pandemic restrictions.
- [6] It follows, in this case we must consider with great care whether XXXX did in fact require an additional day to qualify. We reviewed the Ministry's calculations. They are based on XXXX needing to be resident and present in New Zealand for 3,650 days (10 years divided into days). We are satisfied the Ministry's calculations appear accurate, allowing for leap years and the like.
- [7] The Ministry explained that under its methodology if XXXX was present for part of any additional day beyond what it calculated he met the 10 year requirement, before leaving New Zealand. It follows we only need to make a factual finding as to whether that was the case, or whether the Ministry is correct that XXXX was one day short of the requirements.

#### **The issue to determine**

- [8] It became apparent that potentially XXXX returned to New Zealand after an overseas trip on 26 February 2015, not 27 February 2015, as the Ministry reckoned the day count. The Ministry agreed that if that were the case, then the appeal must be resolved in XXXX's favour. Accordingly, we will confine our determination to that single factual point.

- [9] We are satisfied it must be decided in XXXX's favour; on the balance of probabilities, he did return to New Zealand on 26 February 2015 not 27 February as the Ministry calculated.

## Discussion

### *The facts*

- [10] The Ministry understandably relies on Immigration New Zealand's border records and produced them for the hearing. It produced two documents relating to XXXX's movements in and out of New Zealand. However, we have no evidence as to how the information in those records was gathered, recorded, stored and recalled for printing out as a record of XXXX's movements in and out of New Zealand. Accordingly, we must evaluate the records based on what they appear to be, and treat them as official/business records. It is not uncommon for records of this kind to be evidence, and the makers of the records to be unknown, unavailable or an automated process.
- [11] The records are inconsistent in what they say regarding XXXX entering New Zealand on 27 February 2015. The records on their face appear to be produced from the same source but contain different information.
- [12] One document records:
- [12.1] XXXX arrived from Kuala Lumpur Airport, the flight date and time being 27 February 2015 at five minutes after midnight; and the other document records,
- [12.2] XXXX arrived on the same flight and date, but the time was 45 minutes after midnight.
- [13] Accordingly, there is a discrepancy of 40 minutes. The only direct evidence was from XXXX. He said he recalled this arrival. He raised the issue before the hearing. He said he was sure that his flight arrived before midnight, and it took some time to disembark and undergo processing. He said that one of the officials at the airport told him there was a delay as it was necessary to change over to the next day (the official did not give details whether it was a change of staff at the end of a shift, or something else).
- [14] Given the lack of direct evidence regarding the way the records were created we would be very reluctant to rely on the apparently inconsistent records as accurate down to a matter of minutes. No doubt there would have been flight records where precise information was gathered at the time. Whether those records are the source of Immigration New Zealand's border records can only be speculation. On the face of it there was likely some manual process where human frailty may affect the precision of the

records. It is a highly plausible explanation for the inconsistencies in the record. If it is a manual record, then it is more probable that officials could have been tardy in recording information, rather than recording information in advance of the event. Accordingly, we find it likely that the records, in as much as they record flight landing times (as we suppose they do), are not precise records. Accordingly, they do not justify us doubting XXXX's recollection of the event.

[15] We accept that XXXX did have a reliable recall of the event. We have no basis for doubting it, and he is clear that he believes that the flight landed before midnight not after midnight.

[16] Furthermore, New Zealand territorial limits extend 12 nautical miles beyond the coast of New Zealand.<sup>1</sup> Accordingly, the aircraft carrying XXXX probably entered the territory of New Zealand at least several minutes before landing, and potentially for an extended period if on a flight path from a northerly direction.

### **Conclusion**

[17] We are satisfied on the balance of probabilities XXXX entered New Zealand territory late on 26 February 2015, because:

[17.1] The records we have are not reliable to a level of precision that is determinative for the decision in this case;

[17.2] We are entitled to rely on XXXX's direct evidence his flight landed prior to midnight and decided he landed on 26 February 2015; and

[17.3] Further determine XXXX's flight entered New Zealand territory some time prior to landing. Accordingly if the more favourable official record is fully accurate, it too is indicative of him being in New Zealand territory on 26 February 2015.

[18] It necessarily follows that we must allow the appeal. On the grounds the appeal was pursued and argued, this finding resolves the appeal in XXXX's favour.

[19] Potentially there could be contentious issues regarding the application of the COVID-19 New Zealanders Stranded Overseas Support Programme, and calculation of XXXX's entitlements. We anticipate they will be resolved without further determinations from the Authority but will reserve the points.

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<sup>1</sup> Legislation Act 2019, section 13, definition of "New Zealand"; and Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977 Part 1.

**Decision**

[20] The appeal is allowed, XXXX qualified for New Zealand Superannuation on 1 March 2020, and is entitled to have his New Zealand Superannuation entitlement quantified on that basis.

[21] We reserve leave for either party to seek to have the Authority determine any issues as to quantification, or other matters arising out of XXXX's circumstances after 1 March 2020.

**DATED** at Wellington 15 June 2023

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**G Pearson**  
Chairperson

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**R Palu**  
Deputy Chairperson

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**M Dodd**  
Member

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**R Aston**  
Member