

[2018] NZSSAA 61

Reference No. SSA 71/18

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

**AND**

**IN THE MATTER** of an appeal by **XXXX and 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 26 November 2018

### **Appearances**

The appellants by telephone

A Katona for the Ministry of Social Development

## **DECISION**

### **Background**

- [1] XXXX and XXXX (the appellants) appeal the decisions by the Ministry of Social Development to establish and seek recovery of an overpayment of New Zealand Superannuation (NZS) for NZ\$14,191.74 for the female appellant and NZ\$14,455.42 for the male appellant. After the appeal was filed, the Ministry found that the overpayments for both appellants should be the higher amount of NZ\$14,455.42. However, the Ministry decided not to increase the lower amount as it was due to an error it had made.
- [2] Both appellants became eligible for NZS in 2006. The overpayments occurred in the period from 10 June 2016 to 16 May 2017 after the appellants left New Zealand on 9 June 2016 to live in Australia.
- [3] There is no dispute about the relevant chronology. The male appellant accepts that on 20 October 2015 he contacted the Ministry's Centralised Services

International department (CSI) to enquire about possibly moving permanently to Australia.

- [4] The same day the Ministry sent a letter to him, which he received, explaining the social security agreement between New Zealand and Australia and the requirements for continuing to receive NZS after moving to Australia. The information included instructions to apply for the Australian Age Pension through Centrelink within 26 weeks of arriving in Australia and stated that, if the application was not made within this time and the appellants did not return to New Zealand within 30 weeks, they would need to pay back all payments made since the day they left New Zealand.
- [5] The unchallenged Customs records show that the appellants left New Zealand on 9 June 2016 to live in Australia. After that time, the male appellant returned in April 2017 for two days and in August 2017 both appellants returned for 10 days.
- [6] On 14 October 2016, the male appellant again contacted CSI. He said that he had sold his house and been travelling more frequently between Australia and New Zealand. He said he planned to move permanently to Australia in November 2016.
- [7] On 3 May 2017, he made contact again with CSI, providing his email address and requesting a breakdown of his NZS payments because he said he was moving to Australia. He stated that the permanent move would be in a couple of weeks' time. He was warned again to apply for Australian Age Pension within 26 weeks after departure from New Zealand and another letter was sent to him advising the process of moving to Australia and receiving NZS there.
- [8] After several unsuccessful attempts to contact the appellants, the Ministry suspended their NZS payments from 17 May 2017.
- [9] On 23 May 2017, the male appellant contacted the Ministry. He said that he and his wife had been living in Australia since 23 December 2016.
- [10] In August 2017, the appellants individually completed forms confirming that they had lived in Australia since 9 June 2016.
- [11] On 26 September 2017, CSI received the appellants' application for portable NZS. This was granted effective from 22 May 2017, the date that Centrelink granted the appellants the Australian Age Pension.

## Relevant Law

[12] The New Zealand Superannuation Retirement Income Act 2001 (“NZSRI”) ss 21 and 22 provide that:

### **21 Effect of absence from New Zealand on New Zealand superannuation**

A person is not entitled to New Zealand superannuation while that person is absent from New Zealand except as provided in sections 22 to 35 or in any agreement or convention adopted under section 19 of the Social Welfare (Reciprocity Agreements, and New Zealand Artificial Limb Service) Act 1990.

### **22 First 26 weeks of certain temporary absences**

New Zealand superannuation that would otherwise be payable to a person (other than a person who is receiving New Zealand superannuation overseas under section 26) is payable in respect of the first 26 weeks of any absence from New Zealand if—

- (a) the person’s absence does not exceed 30 weeks; or
- (b) the person’s absence exceeds 30 weeks and the chief executive is satisfied that the absence beyond 30 weeks is due to circumstances beyond that person’s control that he or she could not reasonably have foreseen before departure.

[13] Pursuant to s 19 of the Social Welfare (Reciprocity Agreements, and New Zealand Artificial Limb Service) Act 1990, the New Zealand Government has entered into a reciprocal agreement with the Government of Australia in relation to social welfare. The agreement is contained in the Social Welfare (Reciprocity with Australia) Order 2017. As a result of the reciprocal agreement, a person entitled to NZS who is residing in Australia is entitled to receive NZS at an amount not exceeding the rate of the Australian Age Pension. The person is obliged to apply for an Australian Age Pension and must not receive NZS until they have done so.

[14] A person who leaves New Zealand to reside in Australia can continue to receive NZS for the first 26 weeks after departure provided they apply for the Australian Age Pension and NZS within 26 weeks of their arrival in Australia.

## The case for the appellants

[15] The appellants accept that they received the correct information from the Ministry and letters setting out the requirements for entitlement to NZS when they emigrated to Australia. The appellants also accept that they did not apply for the Australian Age Pension within the 26-week period.

[16] However, the appellants contend that the Ministry should have noticed that they were receiving NZS after they left New Zealand. The female appellant said they

understood that they had obligations but the Ministry should have notified them when they did not apply for the Australian Age Pension. She said they did not get any reminder from the Ministry to apply and they were “so full on with the move” that they did not do it. She said they thought they were entitled to NZS because they were receiving it.

[17] She said that when they did apply to Centrelink for the Australian Age Pension their application was delayed because she needed to get information about her shareholding. In evidence, the appellants accepted that this application was not made within the 26-week period.

[18] The appellants believe that they are being unfairly penalised for errors made by the Ministry which they say has caused them stress, anguish, and financial hardship.

#### **The case for the Ministry**

[19] Ms Katona said that the Ministry does not accept it has made any error because the appellants did not tell the Ministry that they were leaving New Zealand. She said as the appellants left New Zealand on 9 June 2016 they were obliged to apply for the Australian Age Pension within 26 weeks of that date, in December 2016.

[20] Ms Katona reiterated that each time the appellants indicated that they might move to Australia they were sent letters setting out their obligations. This information included the fact that they would need to repay any overpayment if they did not make their application for the Australian Age Pension within the correct time.

[21] She also referred to the file note made in October 2015 after the male appellant contacted the Ministry. This file note confirms that he was told to let the Ministry know when they left New Zealand. Ms Katona said that there was no further contact until 14 October 2016 by which time the appellants had been living in Australia for some four months.

[22] Ms Katona said that when the appellants told the Ministry in November 2016 that they would be staying in Australia, the Ministry accepted this statement ‘at face value’ because it was not aware that they had moved to Australia some months earlier.

[23] The Ministry submits that the exception to recovery of an overpayment provided for in reg 201(1) of the Social Security Regulations 2018 (the Act) does not

apply in this case. This provision of the Act prohibits the Ministry from recovering a debt that has been caused by its own error, provided that certain other criteria are met. It is submitted that, as the overpayment is not the result of any error by the Ministry, it has a duty to recover the debt.

### **Discussion**

- [24] Each time the appellants contacted the Ministry about their entitlement to NZS if they moved to Australia, they were advised that it was important to apply for the Australian Age Pension within 26 weeks from the date they departed New Zealand with the intention to live in Australia.
- [25] We do not accept the appellants' suggestion that the onus was on the Ministry to know when they left New Zealand to reside in Australia. Any social assistance, NZS included, comes with certain obligations to disclose any change in circumstances. In this case, the obligations were clear and were repeatedly set out in writing to the appellants.
- [26] We are satisfied that the appellants understood these obligations and the likely consequences of failing to meet them.
- [27] As is clear from the undisputed Ministry records, the appellants not only failed to carry out their obligation to apply for the Australian Age Pension within the required time but also misled the Ministry repeatedly about the date on which they had moved permanently to Australia.
- [28] On at least two occasions, the male appellant contacted the Ministry purporting to inquire about what would happen to their NZS entitlement if they left New Zealand permanently when, at the time of his phone call, they were already living in Australia. Then, on 23 May 2017, when he did disclose that they had moved to Australia, he again misled the Ministry by saying that they had moved on 23 December 2016. The Customs records and the appellants' application for NZS in August 2017 make it clear that they had lived in Australia since 9 June 2016. The inevitable conclusion is that, as the appellants misled the Ministry, there is no merit in their claim that the Ministry made an error by either failing to notice that they had left New Zealand or continuing to pay them their NZS entitlement.
- [29] For these reasons, we conclude that the Ministry is obliged to recover the full amount of the overpayments, the amount of which was not challenged, NZ\$14,191.74 for the female appellant and NZ\$14,455.42 for the male appellant.

**Orders**

[30] The appeal is dismissed.

[31] Costs are reserved. The Ministry may apply for costs within 10 working days. If the Ministry applies for costs, the appellants are to file any response within 10 working days from the date of the Ministry's application. The costs application will then be decided on the basis of the written submissions. We do not intend to indicate what the outcome of any application would be.

**Dated at Wellington** this 3<sup>rd</sup> day of December 2018

**S Pezaro**  
Deputy Chair

**C Joe**  
Member