MINISTRY OF SOCIAL DEVELOPMENT
Te Manatū Whakahiato Ora

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29 JUL 2014

Mr Robert Latimer
fyi-request-1761-8e764ec2@requests.fyi.org.nz

Dear Mr Latimer

Thank you for your email of 25 June 2014 requesting, under the Official Information Act 1982, the following information:

- *A copy of the written policy document that indicates that the Chief Executive of the Ministry has determined that Canada Pension Plan payments are to be deducted from New Zealand Superannuation payments under Section 70 of the Social Security Act 1964.*

Before addressing your specific requests, I thought it might be useful to set out some contextual information about entitlement to New Zealand Superannuation.

Basic qualifications

New Zealand provides a universal retirement payment that has quite different characteristics to those provided by most other countries. An applicant needs only to be 65 years of age, a permanent resident of New Zealand, and to have lived here for a minimum of ten years, with five of those years since age 50. A person must normally live in New Zealand at the time of application.

Residence qualifications

The underlying assumption for New Zealand's residence-based system is that people who are resident and present in New Zealand make contributions to New Zealand society in their daily lives. People who are absent from New Zealand would find it difficult to match the contributions that New Zealand residents make to New Zealand society.

The "5 years after 50" provision was introduced in 1990. The reason for this requirement is to ensure that there is some connection with New Zealand close to a person's age of retirement.

Rate of New Zealand Superannuation

The rate of New Zealand Superannuation is not based on contributions made or taxes paid and, unlike pensions in many other countries; payment is not means-tested for income or assets.

Direct Deduction

Section 70 of the Social Security Act 1964 provides that where a person receives a retirement type overseas pension that is administered by or on behalf of the government

of the overseas country paying the pension, that person's New Zealand Superannuation will be reduced by the amount of the overseas pension, as calculated in accordance with regulations. Section 70 also requires that where an overseas pension is in excess of that person's New Zealand Superannuation entitlement, the amount of that excess must be deducted from their spouse's New Zealand Superannuation.

The policy intent of section 70 is to ensure that those entitled to New Zealand Superannuation are treated equitably and get the same level of government retirement support whether solely through New Zealand Superannuation, or through a combination of overseas pension and New Zealand Superannuation or through just the overseas pension.

Were it not for section 70, those who have lived, and worked, in overseas countries may be entitled to a greater overall level of government retirement support than those who had solely resided, and worked, in New Zealand.

Overseas Pension Applications

Section 69G of the Social Security Act 1964 requires recipients of a New Zealand benefit or pension to take reasonable steps to apply for any overseas pension that they may be entitled to receive.

Should a person with an overseas pension entitlement not access their overseas entitlement, the New Zealand social security system would end up paying a disproportionate amount of pension whereas the full cost of the pension should actually be shared with another country. Currently overseas pensions save the New Zealand taxpayer around $270m per annum.

If the retirement payment is from a source other than that provided publicly to the citizens of the country, the direct deduction does not apply. This is consistent with the way private pension payments from insurance and other superannuation companies are treated in New Zealand. They do not affect entitlement to New Zealand Superannuation.

Canada Pension Plan Payments

There is no written policy document that indicates the deduction of Canadian Pension Plan payments from New Zealand Superannuation.

The current approach to the treatment of Canada Pension Plan payments as being deducted from New Zealand Superannuation payments under Section 70 of the Social Security Act 1964, is upheld in the High Court decision, *Hogan v Chief Executive Department of Work and Income New Zealand High Court*, Wellington AP 49/02, France J, dated 26 August 2002. The High Court determined that the Chief Executive is required to reduce New Zealand Superannuation by the amount of the Canada Pension Plan, in accordance with section 70 of the Social Security Act 1964.

Please find attached a copy of the High Court decision {*Hogan v Chief Executive Department of Work and Income New Zealand.* High Court, Wellington AP 49/02, France J} dated 26 August 2002.

I hope you find this information helpful. You have the right to seek an investigation and review of my response by the Ombudsman, whose address for contact purposes is:

The Ombudsman
Office of the Ombudsman
PO Box 10-152
WELLINGTON 6143

Yours sincerely

Sacha O'Dea
General Manager - Older Peoples and International Policy

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP 49/02

UNDER the Social Security Act 1964

IN THE MATTER of an appeal by way of case stated from the decision of the Society Security Appeal Authority under s 12Q of the Social Security Act 1964

BETWEEN **JOHN EDGAR HOGAN**

Appellant

AND **THE CHIEF EXECUTIVE OF THE DEPARTMENT OF WORK AND INCOME NEW ZEALAND**

Respondent

Hearing: 20 August 2002

Counsel: Appellant in Person
J H Black for the Respondent

Judgment: 26 August 2002

JUDGMENT OF FRANCE J

Solicitors/Parties:
Crown Law Office, Wellington, for the Appellant
J E Hogan, 410 Albert Street, Palmerston North

[1] This is an appeal by way of case stated from a decision of the Social Security Appeal Authority ("the Authority"). The appeal concerns the approach to be taken when a New Zealand resident receives superannuation paid by the New Zealand Government and at the same time is in receipt of a pension or benefit administered by a foreign Government, in this case Canada.

[2] The Authority dismissed the appeal in respect of a decision of the Chief Executive of the Department of Work and Income (upheld by a Benefits Review Committee), to deduct payments received by the appellant from the Canada Pension Plan from payments of New Zealand superannuation due to him.

Background

[3] The background to that matter is helpfully set out in the facts as found by the Authority.

[4] The Authority found that the appellant has been in receipt of New Zealand superannuation since 15 May 1996. The appellant has been in receipt of the Canadian Old Age Security Pension ("OAS") since 1 May 1997 and a pension under the Canada Pension Plan ("CPP") from 1 July 1997.

[5] On 10 July 2000, the Department reviewed the appellant's entitlement to New Zealand superannuation and decided to deduct payments received from the OAS and the CPP from the gross rate of New Zealand superannuation payable to him.

[6] The Authority also found that Canada's retirement income system has three levels:

> [a] OAS is the first level. OAS provides a modest monthly pension for all persons attaining the age of 65 years provided they meet certain residential requirements.

[b] The second level of the system is the CPP. The CPP is paid over and above the OAS to people who have worked and contributed to the CPP.

[c] The third level is private pensions and savings. The Canadian Government offers a range of incentives to encourage this form of saving for retirement.

[7] The Authority also found that generally all workers in Canada over the age of 18 pay into the CPP and qualify for benefits. The CPP is set up pursuant to a statute and matters such as the pensions and supplementary benefits payable are determined by statute. Contributions to the scheme are compulsory and are deducted from employees' wages by their employer. The employer makes an equal contribution. A self-employed person pays both portions. The Authority found that contributions to the CPP are collected by Canada Customs and Revenue Agency and are kept separate from general tax revenues. The system is administered by Human Resources Development Canada which, it is said, is the Department of Work of Income's counterpart in Canada. A division of Human Resources Development Canada called Income Security Programmes administers both the OAS and the CPP.

[8] The Authority found that the CPP is administered by or on behalf of the Government of Canada. Further, that the CPP is part of a programme administered by that Government for the purpose of making provision for contributors in their old age or in the event of disability. Accordingly, the Authority found that the programme provides for similar contingencies to the New Zealand Government's programme in relation to New Zealand superannuation and invalids benefits as provided for in the Social Security Act 1964 ("the 1964 Act") and the Social Security (Transitional Provisions) Act 1990 ("the 1990 Act"). Section 70 of the 1964 Act accordingly applied.

Relevant statutory provisions

[9] There are three relevant statutory provisions, namely:

[a] Section 70(1) of the 1964 Act;

[b] Section 19(1) of the 1990 Act; and

[c] The Social Welfare (Reciprocity with Canada) Order 1996.

Section 70 of Social Security Act 1964

[10] At the time of both the decision of the Director-General and of the Authority, New Zealand superannuation was paid pursuant to s 3 of the 1990 Act (subsequently repealed by s 77 of the New Zealand Superannuation Act 2001).

[11] Section 70(1) of the 1964 Act relevantly provides:

> "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 under the 1990 Act] [or under the New Zealand Superannuation Act 2001] is entitled to receive or receives, in respect of that person . . a benefit, a 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 1990 Act] [or under the New Zealand Superannuation Act 2001] or under the War Pensions Act 1954 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 under the 1990 Act [or under the New Zealand Superannuation Act 2001] shall, subject to subsection (3) of this section, 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:"

Social Welfare (Transitional Provisions) Act 1990

[12] Section 19(1) of this Act provides for Orders in Council to be made to give effect to reciprocity agreements with other countries on social security benefits.

Social Welfare (Reciprocity with Canada) Order 1996 (SR 1996/178)

[13] The Social Welfare (Reciprocity with Canada) Order 1996 gives effect in New Zealand to the Agreement on social security between the Governments of New Zealand and Canada. That Agreement is set out in Schedule I to the 1996 Order ("the Agreement").

[14] Clause 3(2)(b) of the Order provides that the 1964 Act shall have effect subject to such modifications as may be required for the purpose of giving effect to the Agreement.

[15] Essentially, the Agreement is concerned with entitlement to benefits in the party countries based on a period of residence in each. In doing this it is concerned with what payments the Government of one country will pay to the citizens of the other. Further reference is made to the terms of the Agreement below.

Issues

[16] The issues become apparent from a consideration of the appellant's argument. The appellant argues first for a purposive approach to s 70. The effect of that, the appellant submits, is that reduction in New Zealand superannuation to reflect his entitlements under OAS is all that is required. In that respect, the appellant argues that contingencies in s 70 should be interpreted to mean the same contingencies in each instance such that the payments that may be made arise from the same conditions and circumstances. The appellant argues that CPP is not analogous with OAS and therefore cannot be a provision for the same contingency as required by s 70. In this respect, the appellant helpfully described the background to the introduction of CPP to Canada. His submission was that CPP was a means of

ensuring compulsory personal savings without increasing federal taxes and that the contingency provided for by CPP was loss of earnings, not "old age".

[17] Second, the appellant argues that CPP payments meet the definition of "income" in s 3 of the Social Security Act and so the application of s 70 is inappropriate.

[18] Third, the appellant argues that the reduction to reflect CPP entitlements is inconsistent with the Agreement.

[19] The issues can accordingly be set out as follows:

[a] What is the contingency for which CPP provides? And is that a contingency for which benefits are also payable in the New Zealand context?

[b] Is the CPP part of a programme administered by or on behalf of the Canadian Government?

[c] Is the application of s 70 affected by the Agreement?

Provision for an analogous contingency?

[20] The appellant advances various reasons why, he submits, CPP is closer to the third tier of benefits administered by employers in Canada than to the OAS. He focuses in this respect on the different conditions and circumstances under which CPP is paid and states that they are different from those under which social welfare benefits and pensions are paid. He emphasises that CPP is a programme designed to meet the loss of earnings on retirement which is funded by employees' (and employers') contributions. He states that there are accordingly different purposes between OAS and CPP, the former dealing with what he describes as "old age" and the latter with relevant income needs to maintain accustomed standards of living on retirement.

[21] The test to be applied is that set out in *Roe v Social Security Commission* (High Court, Wellington, M 270/86, 10 April 1987, Davison CJ) and in *Ruifrok v Attorney-General: Van Lindt v Attorney-General* (High Court, Wellington, AP 199/97, 27 October 1999, Gendall and Durie JJ).

[22] In *Roe,* Davison CJ stated (at pages 7-8):

> "The words "for any of the contingencies for which benefits and pensions are paid in New Zealand" trouble the appellant. But if I substitute for those words, the words "of the same type as benefits payable" then I think the appellant may understand the section more readily. The U.S. retirement benefit is clearly on the evidence a benefit paid by the U.S. Government of the same type as a N.Z. national superannuation benefit. Both are paid by the respective Governments and both are paid as part and parcel of programmes for assistance to age-related beneficiaries. There can be no room for argument that the U.S. benefit is not paid for any of the contingencies out in Part I of the Act."

[23] Davison CJ rejected the suggestion that the source of funds was relevant in an inquiry under s 70(1). Davison CJ said:

> "The reason why the receipt of a private fund does not result in a deduction is that the Act, s 70(1), applies only to Government administered funds. It is only Government administered funds – such as the U.S. retirement benefit is – which are required to be deducted. The policy behind that is no doubt that Governments of countries do not consider it their obligation to pay retirement benefits to a person when another Government is also doing so. If a person, however, wishes to provide for additional retirement benefits by paying into a private fund for such purpose, he is entitled to follow that course.
>
> The U.S. retirement fund is not a private fund. It is a Government administered fund and results in the deduction provided for in s 70(1)." (page 8).

[24] The effect of *Ruifrok* is that the analogy between the pensions or benefits must relate to the contingency for which the pension or benefit is paid. The rate or amount is not an issue. It is also irrelevant that the rate of CPP varies according to the payments made.

[25] The appellant takes issue with *Roe.* However, s 70(1) is very broad. The limiting factors are the nature of the contingency and the requirement that the programme be administered by the Government.

[26] Perhaps the strongest argument for the appellant that *Roe* is wrong as to the effect. of the source of funds is in his submission as to the purpose of s 70. Namely, he says that the intention of s 70 is to prevent an individual from collecting twice from government funds, whereas under the CPP the appellant is simply recouping his/his employer's own contribution. In the end, however, I accept the respondent's submission that it is not necessary in terms of s 70 to conduct an inquiry as to how the relevant Government collects the funds and particularly whether they are from taxation or from another type of compulsory acquisition from a person's income which the Government chooses not to call taxation. True private savings schemes will not be caught by s 70 as a programme administered by the Government will not pay them.

[27] The appellant also argues that s 70 does not now reflect the varied arrangements in modern social security systems. The history of s 70 is however instructive in this respect. In particular, s 70 as initially enacted made no reference to the concept of an analogous contingency. Section 70 at that stage applied solely where an overseas pension was payable to someone in receipt of a benefit under the relevant part of the 1964 Act. The Act was amended in 1972 to give the then Social Security Commission power to determine whether the pension or part of it was analogous to a New Zealand benefit (Social Security Amendment Act 1972, s 23). In 1975, s 70 was amended to give the Commission the broad power available under the present s 70 (Social Security Amendment Act 1975, s 13) so changes have been made as social security systems have changed.

[28] The issue then is whether the contingency is provision for support in old age, as the Authority found, or loss of earnings on retirement as the appellant contends.

[29] In my view, the Authority was correct in determining that the contingency in both cases was the same, namely, provision for the contributors in their old age or in the event of disability. That is clear from the relevant statute, the Canada Pension Plan Act RS 1985 c.C.-5. That Act is described as an Act to establish a comprehensive programme of "old age pensions and supplementary benefits in Canada payable to and in respect of contributors". In terms of s 44 the benefits payable are a retirement pension payable to a contributor who has reached 60 years

of age, or a disability pension payable to those persons who are disabled. (There are special rules for pensions payable before 1 January 1987.) A person may choose not to receive the pension at age 60 but must do so before age 70. There is provision for assigning the pension.

[30] I accept the argument for the respondent that the CPP is, in the end, a scheme to make provision for the fact that at a certain age the legislature has said it is reasonable for individuals not to have to work and so support should be provided at that age, be it 60 or 70.

Administered on behalf of the Government?

[31] No real issue is taken by the appellant under this head. However, the argument for the appellant that the payments made to him under the CPP are "income" as defined in s 3(1) of the 1964 Act can be addressed at this point. This is a different way of raising the same argument because the definition of income in s 3 does not include any benefits received from the Government of any Commonwealth country which the Director-General determines are analogous to benefits under the 1964 or 1990 Acts. In any event, the definition of "income" is not relevant to a determination of whether a payment is one to which s 70(1) applies.

[32] The programme is one administered by the Canadian Government. This point need not be taken any further.

impact of the Agreement?

[33] The appellant argues that the effect of the Agreement is that the Department cannot charge or attach the appellant's CPP entitlements against the New Zealand superannuation payable under the Agreement. Various Articles in the Agreement are referred to including Article 4 which provides that all persons to whom the Agreement applies shall be treated equally "by a Party in regard to rights and obligations which arise under the legislation of that Party or as a result of this Agreement."

[34] Reference is also made to Article 7, which sets out the means of calculating the entitlement to the benefit for a person ordinarily resident in Canada who is entitled to receive New Zealand superannuation as a result of Article 5. That Article ends with sub-paragraph (f) which states:

> "no account shall be taken of any benefit which is also payable under the (OAS] .., the [CPP] or any benefit or pension payable under the social security laws of a third party."

[35] Reference is also made to Article 8, which has a provision to similar effect to Article 7(f). Article 8 deals with the rates of other benefits paid to persons ordinarily resident in Canada and the calculation of those benefits.

[36] Article 2 of the Agreement defines the legislation in each country to which the Agreement applies. The Canadian legislation includes both the Old Age Security Act and the CPP.

[37] The Agreement is concerned with the payments from the Government of one country to residents of the other based on the system of residence it establishes (see Laws of New Zealand "Social Welfare" Reissue 1 Ken Mackinnon, para 176). I agree with the respondent that the Agreement is not concerned with how the payments are taxed, abated or dealt with under the law of the country the person receiving it normally resides.

[38] Article 3 states:

> "Persons to Whom the Agreement applies
>
> This Agreement shall apply to any person who has completed a creditable period or a period of residence under the legislation of either Party, and to the dependants and survivors of such a person within the meaning of the applicable legislation of either Party."

[39] There is nothing in the Agreement that applies to how and if the national superannuation payments should be reduced by payment of a Canadian pension. That matter is dealt with in s 70(1) of the 1964 Act. There is therefore no inconsistency between the Agreement and s 70 and no requirement to modify s 70 in that respect.

[40] The equality of treatment referred to in Article 4 relied on by the appellant relates to equality with other persons entitled under the laws of the particular country. The Article does not necessitate an exercise to determine what amount the person would be entitled to in Canada and New Zealand respectively and making sure that those payments are the same. In terms of Article 7(f), Article 7 is concerned with a formula which determines how much the New Zealand Government need pay the Canadian resident. Article 7(f) simply clarifies that the benefit rate referred to is the New Zealand benefit and not the Canadian.

[41] Accordingly, I conclude that the Order and Agreement have no direct application to the questions before this Court. If anything, the Agreement assists to the extent that it suggests that the Canadian Government considers both the OAS and the CPP to be part of its benefit system.

[42] Finally, I deal with the suggestion made by the appellant that there is some unfairness to the appellant in the decision of the Director-General. Any private savings the appellant has under the third tier of the Canadian retirement income system are not caught. There is accordingly no unfairness.

Answers to case stated

[43] Accordingly, the questions stated by the Authority are answered as follows:

[a] As a matter of law, was the Authority correct in determining that the Canada Pension Plan payments received by the appellant are payments forming part of a programme providing benefits, pensions or periodic allowances for the contingencies for which benefits, pensions or allowances may be paid under the Social Security Act 1964 or the Social Welfare (Transitional Provisions) Act 1990, and that it is administered by or on behalf of the Government of Canada'? Yes.

[b] Is the Chief Executive for the Department of Work and Income required to reduce the payments received by the appellant in respect

of New Zealand superannuation by the amount of the payments received by the appellant from the Canada Pension Plan? Yes.

[c] Was the Authority correct in determining that the lack of any reference to the Canada Pension Plan in the reciprocal agreement with Canada did not limit the New Zealand Government's ability to legislate for the way in which payments under the Canada Pension Plan are to be dealt with in the hands of a recipient living in New Zealand? Yes.

[44] As the respondent noted, the last question is not worded very clearly. The Agreement does refer to the CPP. I have therefore treated the question as referring to the fact that the Agreement does not provide how and if the CPP is to be used to abate New Zealand superannuation.

[45] The appeal is dismissed. There is no order as to costs.

F. Thomas J.

Delivered at 4:15 ~~am~~ / pm on 26 August 2002.