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Counsel.

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2003-485-002615

UNDER the Social Security Act 1964
IN THE MATTER OF an appeal from the decision of the Social
Security Appeal Authority
BETWEEN **THE CHIEF EXECUTIVE OF THE
MINISTRY OF SOCIAL
DEVELOPMENT**
Appellant
AND **SANT RAJ RAI**
Respondent

Hearing: 25 August 2004

Appearances: J S McHerron for Appellant
A Crabb for Respondent

Judgment: 2 September 2004

JUDGMENT OF DOOGUE J

Solicitors

Crown Law Office, Wellington for Appellant

THE CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT V SANT RAJ RAI HC AK
CIV 2003-485-002615 [25 August 2004]

Introduction

[1] Mr Rai has for many years been the recipient of New Zealand Superannuation under the Social Security Act 1964 (the Act). He has for many more years been the recipient of a Fiji Government Service Pension (FGSP) in respect of his service for that Government while in its employ. As long ago as 1966 Mr Rai, when still in the employ of the Fijian civil service, could have elected to move from the FGSP Scheme to the Fiji National Provident Fund (FNPF), a contributory superannuation scheme for employed persons in Fiji. He chose not to do so. Until 2002 those responsible for the administration of the Act accepted that Mr Rai was entitled to both his New Zealand Superannuation and his FGSP.

[2] On 22 April 2002 there was an amendment to the Act. It effectively provided that if Mr Rai "would have been entitled to receive a similar ... pension" to his FGSP from the Fijian Government "under a scheme or other arrangement in respect of persons who are not employees or in the service of that Government" it was to be deducted from his New Zealand Superannuation. The appellant chose to rely upon the amendment to deduct from Mr Rai's New Zealand Superannuation his FGSP.

[3] Mr Rai appealed that decision to the Social Security Appeal Authority (the Authority).

[4] The Authority upheld Mr Rai's appeal. Effectively it held that Mr Rai was not a person who would have been entitled to receive a similar pension to his FGSP from the Fijian Government under a scheme or other arrangement in respect of persons who are not employees or in the service of that Government. It went on to hold that even if Mr Rai was entitled to the FNPF Pension, that it was not a pension paid by or on behalf of the Fijian Government.

[5] The appellant now appeals by way of case stated from the decision of the Authority.

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Factual background

[6] The Authority accepted or determined the following facts:

[7] At the date of hearing before it Mr Rai was aged 72 years.

[8] He joined the Civil Service in Fiji when about 20 in 1951. From the time he commenced that employment he was required to contribute to the Fiji Government Employees' Fund. In 1966 the FNPF came into existence. This is a fund providing a contributory superannuation scheme for all persons employed in Fiji. It is set up by statute. A board, appointed by a Government Minister, manages the fund. The board is the trustee of the fund but is obliged to comply with the directions of the Minister. The fund consists of contributions by employers and employees. The amount of contributions is determined by legislation. At present the employer and the employee pay the contributions equally. Contributors to the fund become eligible for a pension when they attain the age of 55 years. Members can then withdraw their contributions, withdraw part of their contributions as a lump sum and take a lesser pension or simply take a pension. Members can continue to contribute to the fund after the age of 55 on a voluntary basis. Withdrawals can be made from the scheme in certain specified situations prior to a member reaching 55 years. Amendments to the fund must be made by statute. The board makes the payments from the fund. The Fijian Government can make loans to the fund, and in certain circumstances is obliged to do so, but it does not fund the scheme.

[9] When the FNPF came into existence Mr Rai had an election as to whether to continue contributing to the FGSP fund or to join the FNPF. He elected to remain within the FGSP fund and never at any time joined the FNPF. There is nothing to suggest that he had any right to change that election either during his service with the Fijian Government or subsequently.

[10] Mr Rai retired from the Fijian civil service at the age of 45 years in 1976. He moved to New Zealand where he was employed for many years.

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[11] On 4 April 1990, at the age of 60 years, Mr Rai applied for and was granted what is now known as New Zealand Superannuation.

[12] He continues to receive his FGSP. There was never any suggestion until after the Act was amended in 2002 that it was deductible from his New Zealand Superannuation. It clearly came within an exclusion that prevented that.

[13] At the time of hearing before the Authority Mr Rai's FGSP was worth \$367 per fortnight after tax. That has been deducted by the appellant from Mr Rai's New Zealand Superannuation from 22 May 2002. That has resulted in a major reduction in his income.

Legislative framework

[14] Section 70 of the Social Security Act 1964 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 Social Welfare (Transitional Provisions) Act 1990 or under Part 6 of the War Pensions Act 1954 or under the New Zealand Superannuation Act 2001 is entitled to receive or receives, in respect of that person or of that person's spouse or of that person's dependants, or if that person's spouse 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 Social Welfare (Transitional Provisions) Act 1990 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 Social Welfare (Transitional Provisions) Act 1990 or under Part 6 of the War Pensions Act 1954 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.....

- (2) Nothing in subsection (1) of this section shall preclude the chief executive from deciding the date on which the chief executive's determination under paragraph (b) of, or the proviso to, the said subsection (1) shall take effect, which date may be a date before, on, or after the date of such determination.
- (3) In any case where paragraph (a) and paragraph (b) of subsection (1) of this section apply and the proviso to subsection (1) of this section does not apply, the chief executive may—
 - (a) Make an arrangement with an overseas pensioner, in accordance with any regulations made under section 132C of this Act, to pay to the overseas pensioner the rate of the benefit or benefits that is payable under this Act or the Social Welfare (Transitional Provisions) Act 1990 or under Part 6 of the War Pensions Act 1954 or under the New Zealand Superannuation Act 2001 and to receive from the overseas pensioner an amount equivalent to the amount of the overseas pension that the overseas pensioner receives, if—

[15] Section 70 gives rise to what is known as the direct deduction regime in respect of overseas benefits.

[16] Overseas pension is defined in s3 of the Act:

- (a) means a benefit, pension, or periodical allowance of a kind described in section 70(1) of this Act; but
- (b) does not include a benefit, pension, or periodical allowance of a kind referred to in the proviso to section 70(1) of this Act; and
- (c) does not include a Government occupational pension:

[17] Government occupational pension is also defined in s3:

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 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 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.

[18] These definitions are the result in part of a 1996 amendment to the Act to make it clear that the direct deduction regime in s70 did not apply to Government occupational pensions, as, I might add, it did not and does not apply to private occupational pensions. It was made clear by the Minister on the third reading of the Bill the direct deduction regime was intended to apply only to "social security pensions".

[19] It is subs (d) of the definition of Government occupational pensions which creates an exception to the exclusion from the s70 direct deduction regime of Government occupational pensions that gives rise to the present dispute. That subsection was introduced by the Social Welfare (Transitional Provisions) Amendment Act 2002 and came into force on 22 April 2002. One of the purposes of the provision of the Amendment Act was "(c) to make a minor amendment to the Social Security Act 1964 relating to overseas pensions".

The Authority's findings

[20] The Authority found:

- [17] At the time the FNPF came into existence the appellant was already a member of the Fiji Government Employment Scheme. He elected not to join the Fiji National Provident Fund and as a result has never been entitled to receive a pension from that fund.

- [18] Accordingly (d) of the definition of Government Occupational Pension in s.3 of the Act was not satisfied.
- [19] Further the Authority found that the Board of the FNPF is not part of the Government of Fiji whether the term Government in paragraph (d) of the definition of Government Occupational Pension includes the bureaucracy or not. Payments from the FNPF are not made by the Government of Fiji.
- [20] Whilst the Authority found in decision number 046/02 that the FNPF is a programme administered on behalf of the Government of Fiji, the term '*paid on behalf of the Government*' involved direct involvement by Government in the funding of a particular pension scheme. The Authority did not consider this was the situation in the case of the FNPF.
- [21] The Authority concluded that the pension received by Mr Rai came within the definition of Government Occupational Pension and should not therefore be deducted from his entitlement to New Zealand Superannuation.

Questions of law before the Court

[21] The opinion of this Court is sought by the Authority on the following questions of law:

- [i] Did the Authority err in law in determining that its finding of fact that Mr Rai had '*never been entitled to receive a pension from the Fijian National Provident Fund*' mean that paragraph (d) of the definition of the '*Government Occupational Pension*' in s.3 of the Act was not satisfied:
- [ii] If the Authority did so err, on the facts as found by the Authority did the Authority also err in concluding Mr Rai would not have been entitled to receive a '*similar benefit, pension or periodic allowance*' within the meaning of paragraph (d) of the definition of Government Occupational Pension in s.3 of the Act?
- [iii] Did the Authority err in law in finding in the alternative that payments by the Fiji National Provident Fund Board were not payments '*paid by or on behalf of the Government of Fiji*' as those words are used in paragraph (d) of the definition of Government Occupational Pension in s.3 of the Act?
- [iv] If the Authority did err do the facts as found by the Authority mean that the payments by the Fijian National Provident Fund Board are '*paid by or on behalf of the Government of Fiji*' as those words are used in paragraph (d) of the definition of '*Government Occupational Pension*' in s.3 of the Act?

Appellant's case

[22] The case for the appellant is that this Court should answer all the questions yes for the following reasons.

[23] In respect of questions one and two, the appellant submits that the Authority erred in its finding that because Mr Rai had not elected to join the FNPF he "would not have been entitled" to receive a pension from the FNPF. The appellant says that the words "would have been entitled" require a condition to be read in before the definition can be interpreted, and the obvious condition to be read in is "If Mr Rai was a non-Government employee". If so, he would have been entitled to an FNPF pension.

[24] The appellant submits that if Mr Rai had elected to contribute to the FNPF he would have been paid that instead of the FGSP. Therefore, the only reason he would not have been paid out of the FGSP fund would have been because he had been contributing to the FNPF fund. If he had been contributing to the FNPF he "would have been entitled" to receive payment of that.

[25] The FNPF was available "in respect of persons who are not employees or in the service of [the Fiji] Government".

[26] The appellant says the Authority incorrectly based its reasoning on the fact that Mr Rai "has never been entitled to receive a pension". However, the test is not actual entitlement but whether the person "would have been entitled". If Mr Rai were not paid out under the FGSP that would only have been because he had elected to contribute to the FNPF. If he had so elected he would have been entitled to payment under that scheme.

[27] In developing these submissions Mr McHerron submits that the 2002 amendment to the Act was made because the 1996 amendment had gone too far as it excluded situations where pensions corresponding to the Government occupational pensions were paid to the general population. He submits the intention of the 2002 amendment was to make clear that where a government pension was instead of a

general pension it was deductible. He submits that where a government pension was **additional to** a general pension it remained non-deductible. Here, he says, the position was the FGSP was instead of the general FNPF pension and that it was accordingly caught by (d) and was deductible.

[28] He further submits that the Authority was wrong in looking at whether Mr Rai was entitled to the FNPF pension and that the only issue was whether he "would have been entitled" to it. The hypothetical right did not need to crystallise so long as there was a hypothetical right and he submitted it was clear that Mr Rai had had that. He says no temporal question arose.

[29] Sub-clause (d) of the definition of "Government occupational pension" provides in part "under a scheme or other arrangement in respect of persons who were not employees or in the service of that Government". Mr McHerron submits that these latter words had to be read in the context of sub-clause (a)(i) and (ii) and could not refer to persons who were not employees.

[30] He submits that (d) was not addressing general or universal pensions as they were caught directly by s70.

[31] In respect of questions three and four, the appellant submits that although a board manages the FNPF, a Government Minister appoints it. The Fijian Government contributed to the funding of the FNPF scheme to the extent that it was the employer of some of the members of that scheme. The FNPF is Government controlled in respect of its administration, as its rules are governed by legislation and as its Board has to comply with directions of the Minister. The appellant submits that it follows that payments from the FNPF were made by or on behalf of the Government of Fiji. It is a Government controlled scheme for the benefit of all employees in Fiji and at the very least payments had to be made on behalf of the Government.

[32] It is also submitted that the decision of the Authority to the contrary was in conflict with its decision in 046/02 where it held the FNPF was administered on

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behalf of the Fijian Government. However, it is accepted the Authority was there dealing with a different provision of the Act.

Respondent's case

[33] The respondent supports the determinations of the Authority.

[34] The respondent submits that s70 of the Act establishes that where a person can access a pension from the Government of another country, they must utilise that assistance before turning to relief under the Act. However, it is noted that a Government occupational pension is not an overseas pension for that purpose and does not get caught by the s70 direct deduction regime. It is submitted that the principle lying behind that is that private occupational pensions are not subject to the direct deduction regime and that it accordingly follows that the fact that someone is the recipient of a Government occupational pension should be treated no differently.

[35] The respondent submits that the 2002 amendment to the definition of Government occupational pension reflects the very principles underlying the s70 direct deduction regime. Where a person in receipt of a Government occupational pension is also eligible to receive a pension provided by the overseas Government to the general population then the position should be no different than if the recipient were receiving the general pension applicable in the overseas country. That ensures that a person who is entitled to a universal pension from an overseas Government is in no better position because they might also be entitled in the alternative to a Government occupational pension from that Government. However, before the exception in (d) can arise the person must be entitled to receive a general or universal pension from the foreign Government.

[36] The respondent submits that he has never at any time been entitled to a general or universal pension from the Fijian Government. There is no suggestion by the appellant that Fiji has a general retirement or old age pension. Mr Rai retired in 1976. He would not have been entitled at that time to any general pension from the Fijian Government, nor indeed to any provision from the FNPF. In any event, when the amendment to the Act came into effect on 22 April 2002, it could not possibly be

said that Mr Rai would have been entitled to a general pension from the Fijian Government in substitution for his FGSP. It is submitted that the use of the word "entitled" in (d) makes plain that a person must be able to actually access the other benefit or pension as opposed to having at some stage the ability to join a scheme.

[37] In respect of questions one and two it is submitted that the Authority did not err. Mr Rai had a single opportunity to join the FNPF scheme upon its inception in 1966 when he was a Government employee. He elected not to do so and as a consequence has never been entitled to the FNPF since its inception.

[38] The FNPF pension is in any event not a general or a universal pension. The FNPS is a scheme where to qualify for a pension upon retirement one must be a member of it and have been contributing to the fund during employment. Mr Rai was never a member of it, nor had he contributed to it.

[39] Mr Rai has never had a choice between a government pension and either an FNPF pension upon retirement or in 2002, nor has he had a choice of any general universal pension offered by the Fijian Government. Unlike New Zealand Superannuation, an FNPF pension is not available to the general population of Fiji. It requires the individual to be a member of it and a contributory. The respondent was an employee of the Fijian Government and had no right to any general or universal benefit from it.

[40] The respondent submits that the appellant's approach requires the 2002 amendment to be applied retrospectively to Mr Rai's exercise of his election in 1966. It is submitted that that is contrary to the provisions of s7 of the Interpretation Act 1999 and case law. There is nothing in the 2002 amendment to suggest that it should have retrospective effect. It is submitted that the appellant's approach to the matter has resulted in Mr Rai losing approximately half of his income. It is suggested that this is an indicator that the 2002 amendment was to have prospective effect, that is only to new claimants, and that (d) cannot be read in the way the appellant now contends. It is submitted that Parliament could not have intended, by virtue of what it described as a "minor" amendment, to strip a small group of elderly pensioners of half their current incomes overnight.

[41] In terms of principle, it is submitted that the intention was that when new applicants applied for New Zealand benefit assistance they would be aware from the start of the effects if they were caught by (d) of the Government occupational pension definition. If the intention had been otherwise, then it is submitted that Parliament would have repealed the provisions of paragraph (c) of the definition of "overseas pension" in the Act.

[42] In respect of questions three and four, the respondent submits that the FNPF was funded wholly by employer and employee sources on an equal basis. The Government only contributes to the extent to which it is an employer. The FNPF is purely contributory and not a general universal pension. It is not comparable to New Zealand Superannuation. It has qualifying factors before one can receive it. The Fijian Government does not fund it.

[43] It is accordingly submitted that FNPF payments are not paid or on behalf of the Fijian Government and are not caught in any event by the provisions of (d) of the definition of Government occupational pension.

[44] The respondent therefore submits that all the questions should be answered no.

Discussion

[45] For the appellant to succeed on this appeal in reliance on (d) it has to establish that Mr Rai would have been entitled to receive a similar pension to his FGSP "paid by, or on behalf of, the Government of [Fiji] under a scheme or other arrangement in respect of persons who were not employees or in the service of that Government". For (d) to apply the scheme must be Government funded as if it is not the pension cannot be paid by or on behalf of the Government.

[46] The only scheme to which the appellant points is the FNPF. But that is not a Government funded scheme. It is a contributory scheme. The funds for a non-government employee's pension come from the contributions of the employee and the employer and not from the Government. The Government does not contribute to

the FNPF except as an employer or lender. In no sense can payments from the FNPF be said to be by or on behalf of the Government. The payments from the FNPF are exactly that. They are not payments by the Government. If they are paid on anyone's behalf, other than the FNPF, it is on behalf of the contributing employers and employees, not the Government as such.

[47] The appellant seeks to rely on the role of the Government in relation to the FNPF and its role as a principal employer contributor. None of those matters can convert the FNPF into a Government funded scheme of the kind envisaged by (d), where payments are made by or on behalf of a Government and not by and on behalf of a contributory superannuation scheme.

[48] However the FNPF and the Government's role in respect of it are analysed it remains a contributory superannuation scheme and not a Government funded one. That is so even although the Government may be obligated to lend to it if additional funds are needed.

[49] The FNPF is effectively an amalgam of a both a private contributory superannuation scheme and a Government contributory superannuation scheme. It has never been suggested before now that either of those types of scheme is caught by the s70 direct debit regime. Private schemes fall outside the contemplation of s70. Government schemes are excluded by the Government occupational pension exception. There is nothing in (d) that requires it to be read in a way that would convert the FNPF occupational pension scheme into a Government funded social security pension scheme. The FNPF is not a Government funded social security pension scheme.

[50] That is enough in itself to dispose of the appeal.

[51] In any event to succeed the appellant would further have to show that on 22 May 2002 and subsequently Mr Rai would be entitled to a similar pension to his FGSP pension from the FNPF if he were a non-governmental employee. It is clear that unless he was a member of and contributory to the FNPF he would not. Mr McHerron argued that the FNPF was a compulsory scheme, binding on all

employees and employers. There is no finding of that nature in the Case Stated, or indeed in the Authority's decision. Mr McHerron said it was an issue of law but it is an issue of foreign law, not New Zealand law, and cannot be resolved on this appeal. I am not prepared to imply and certainly cannot infer from the Case Stated that the position is as asserted for the appellant. I do not know whether all private employees are obligated to belong to the FNPF or whether it is voluntary or whether it is part compulsory and part voluntary. Hence the appellant cannot succeed on this point.

[52] Nevertheless I think there is force in Mr McHerron's submission that if the FNPF came within (d) then Mr Rai's status vis-à-vis the FNPF is not the issue. The issue is whether after the passing of the 2002 Amendment and the addition of (d) Mr Rai would be entitled to a similar pension to his FGSP pension from the FNPF if he were a non-governmental employee. To that extent I am satisfied the Authority erred. Sub-clause (d) concerns itself not with the governmental employee's rights in respect of any Government funded alternative scheme but with a non-governmental employee's rights in respect of such a scheme. Because of the inadequacies in drafting of (d) it is capable of the interpretation that it is dealing with non-employees rather than non-governmental employees. However, I accept the argument of Mr McHerron that in context it is the latter category that is the touchstone for whether Mr Rai would have had entitlement under the FNPF.

[53] I do not accept of course that the FNPF came within (d) as I have held to the contrary. However approached, the 2002 Amendment required an entitlement to a pension payable by the Fijian Government independent of membership of any contributory superannuation fund.

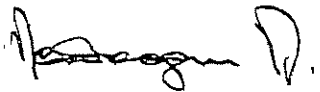
[54] Although I disagree in part with the reasoning of the Authority I am satisfied that the outcome was correct and that the appeal cannot succeed.

Result

[55] I answer question 1 in the case stated "yes" and questions 2, 3 and 4 "no".

[56] The respondent is entitled to his costs. The case is a test case. The respondent is entitled in the unusual circumstances of this case to his reasonable solicitor and client costs and any reasonable disbursements. If these cannot be agreed, they are to be fixed by the Registrar. .

Signed and dated at 10:30am/pen this 2nd day of September 2004



Doogue J