Crime Mr Rec. Emer. — March 96
Amendments

PLH *Commissioner's Files: CI 094/94 & CI 600/94*

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992
SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

(CI 094/94)	*Claimant's Name:*	Margaret Alice Plummer
	Claim for:	Reduced Earnings Allowance
	Appeal Tribunal:	Manchester SSAT
	Tribunal Case Ref:	614/27613/4
(CI 600/94)	*Claimant's Name:*	Margaret Hammond
	Claim for:	Reduced Earnings Allowance
	Appeal Tribunal:	Walthamstow SSAT
	Tribunal Case Ref:	2/16/93/21899

[ORAL HEARING]

Introduction: scope of this decision

1. In each of these cases the decision of the social security appeal tribunal has already been set aside by the decision of Mr Commissioner Heald QC made by consent on 13 December 1996, it being common ground that each tribunal had erred in point of law by regarding the case before it as raising an issue of discrimination contrary to Council Directive 79/7 EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security. It is also common ground, as recorded in the Commissioner's decision, that each of the present claimants has been entitled to reduced earnings allowance under provisions now in para 11 Sch 7 Social Security Contributions and Benefits Act 1992 at all material times down to 24 March 1996 when new subordinate legislation came into force. This present decision concerns only the period from that date onwards, as regards which the appeals were adjourned by consent for further argument.

2. My decision as regards that period is that each claimant remained entitled to reduced earnings allowance down to the end of the week containing 24 March 1996 in accordance with Mr Commissioner Heald's decision, but from the first day of the next week, 31 March 1996, that entitlement ceased permanently and was replaced by retirement allowance for life under para 13(2) Sch 7 Social Security Contributions and Benefits Act 1992. As each lady was over 65 on that date, the condition linked to pensionable age in para 13(1) has had no discriminatory effect and it is not necessary to consider any possible application of the EU directive in either of these cases.

3. I held a combined oral hearing of the adjourned appeals on the reserved issue. The two claimants appeared by Richard Drabble QC and Paul Stagg, instructed by Richard Poynter, solicitor, and the adjudication officers by Christopher Vajda QC, instructed by the solicitor to the Department of Social Security. I am grateful to all of them for their helpful written and oral submissions; and in particular for their assistance in tracing how the legislation got into its present state, an understanding of which is in my view essential to its proper interpretation. I have found it a strange and at times baffling path, including false trails and more than one dead end, and I am only sorry that so much brainpower and effort should have had to be devoted to an exercise that should have never have been needed, if those responsible for introducing the many changes in the law from 1986 onwards had thought more clearly about what they meant them to do.

The facts

4. In each of these cases, the claimant is a lady who formerly worked but has for many years been unable to do so because of an industrial accident. Neither of them ever had any real prospect of returning to work after her accident, and neither has ever done so. In all normal uses of language each had to retire from work and give up regular employment years ago, by reason of her incapacity.

5. The claimant in **case CI 094/94** was born on 12 August 1926 and suffered the accident which gives rise to this appeal on 19 October 1982, when she was 56. She is entitled to disablement benefit under the industrial injuries scheme now in s. 94 et seq. Social Security Contributions and Benefits Act 1992, based on a final assessment that she will remain 10% disabled for life. By reason of her disability she was also entitled to invalidity benefit, which in accordance with the normal rules remained payable down to the date of her 65th birthday because she exercised the option available to her under s. 30(3) of the Social Security Act 1975 not to take her retirement pension until that date.

6. The claimant in **case CI 600/94** was born on 16 September 1928 and suffered her accident on 21 January 1972 at the age of 43. She is entitled to a disablement pension for life under the industrial injuries scheme, based in her case on a final assessment of 20% made in 1978, though this I am told has been increased since then on the ground of unforeseen aggravation of her condition. She too was entitled to invalidity benefit, which continued to be paid down to her 65th birthday as she did not elect to go on to retirement pension as soon as she reached pensionable age.

7. (Under the provisions relating to invalidity benefit, it remained possible for a person to go on drawing that benefit for the first five years after attaining pensionable age instead of taking the retirement pension. The purpose in doing so was that although the rates for a person past pensionable age were identical, invalidity benefit was, unlike a retirement pension, not taxable to income tax. Since invalidity benefit, like sickness and unemployment benefit, was expressed to be payable only during a "period of interruption of employment" this involved the fiction that for these and many thousands of similar claimants their regular employment was and remained subject merely to an "interruption" that continued even after the normal pensionable age).

Earnings-related supplements to disablement benefit: special hardship allowance

8. The present appeals are entirely concerned with the earnings-related supplements provided as an addition to the basic disablement benefit payable under the industrial injuries scheme. For these two claimants, the supplement was originally in the form of a "special hardship allowance" payable under Ch. IV of Part II Social Security Act 1975 as an increase to the standard rate disablement benefit: see s. 60. That section (re-enacting provisions essentially unaltered for the forty years from their original introduction in s. 14 National Insurance (Industrial Injuries) Act 1946) followed a provision for an "unemployability supplement" payable for cases of total incapacity, and provided a lower rate of supplement for less severe cases short of total incapacity where the beneficiary had lost earning power by being left unable to carry on his own regular occupation, for example one in which he had been a skilled craftsman.

9. Although the side note refers only to "cases of special hardship", it is clear that the purpose of the allowance was always to compensate for the probable loss in the claimant's standard of remuneration: cf. ss. 14(2), 60(2). The nature of the allowance appears clearly from s. 60(6):

> "(6) ... an increase of pension under this section shall be payable for such period as may be determined at the time it is granted, but may be renewed from time to time, and the amount of the increase shall be determined by reference to the beneficiary's probable standard of remuneration during the period for which it is granted in the employed earner's employments, if any, which are suitable in his case and which he is likely to be capable of following as compared with that in his regular occupation ..."

10. The "regular occupation" referred to is the more highly paid one for which the accident has incapacitated the beneficiary. It is plainly contemplated that the fixed period awards on which entitlement to the increase depends may be shorter and subject to more frequent reassessment than the underlying disablement benefit itself; and that what is to be assessed is the probable loss compared with whatever earnings could have expected in the original more skilled occupation *over the period of the award.* I cannnot for my part see anything in any of these provisions to provide arguable support for any form of right to the renewal of awards indefinitely. This point is of significance to an argument raised in these appeals that the existence of previous awards of special hardship or reduced earnings allowances gave rise to an "accrued right" to have them continued.

Reduced earnings allowance

11. The Social Security Act 1986 changed the earnings-related supplement from special hardship allowance under s. 60, which ceased to exist, to a free-standing benefit labelled "reduced earnings allowance" under a new s.59A. This included provisions that:

> "(6) Reduced earnings allowance shall be awarded -
>
> (a) for such period as may be determined at the time of the award; and
>
> (b) if at the end of that period the beneficiary submits a fresh claim for the allowance, for such further period as may be determined.

(7) The award may not be for a period longer than ... [the period for which the claimant had been assessed as suffering a loss of faculty by reason of the accident]...

(8) Reduced earnings allowance shall be payable at a rate determined by reference to the beneficiary's probable standard of remuneration during the period for which it is granted in any employed earner's employments which are suitable in his case and which he is likely to be capable of following as compared with that in the relevant [i.e. his original or similar] occupation ..."

12. The use of "shall" in the first line of s. 59A(6) appears to give a rather firmer right to the renewal of an award than had been the case with special hardship allowance; but again the allowance depends on a comparison of probable earnings *during the period of any award* and the wording does not appear to me to provide arguable support for any idea of an entitlement to indefinite renewal.

13. The main provisions for reduced earnings allowance were brought into force on 1 October 1986 as the new ss. 59A(1)-(9) inclusive, at the same time as the repeal of the old s. 60, by SI 1986 No. 1609. Those with current awards of special hardship allowance for periods spanning 1 October 1986, including these two claimants, had them converted into awards of reduced earnings allowance by a transitional provision: SI 1986 No. 1561 reg. 10. Each of the present claimants later received one or more further fixed period awards of reduced earnings allowance, continuing her entitlement down to or beyond her 65th birthday. Nothing turns on the exact dates but it is plain from the details supplied to me from departmental records that each award was, as required by s. 59A(6), for a defined period of months or years: none was or purported to be indefinite, or for life.

The adjudication officers' decisions and the tribunal appeals

14. The tribunal appeals arose in each case from the decision of an adjudication officer terminating the claimant's current award of reduced earnings allowance, or declining to renew it, for periods from her 65th birthday onwards: 12 August 1991 in case CI 094/94, 16 September 1993 in case CI 600/94.

15. The provision under which this action was said to be required now appears in para 13 of Sch. 7 to the Contributions and Benefits Act 1992. It is derived from a further change made to the Social Security Act 1975 by an amending Act in 1988, inserting a new s. 59B which came into effect from 10 April 1989: ss. 2(1), 18(3) Social Security Act 1988; SI 1988 No. 1857. Under this provision as in force at the material dates:

"[59B] 13 - (1) Subject to the provisions of this Part of this [Act] Schedule, a person who -

(a) has attained pensionable age; and

(b) gives up regular employment on or after [the date on which this section comes into force] 10th April 1989; and

(c) was entitled to reduced earnings allowance (by virtue of either one award or a number of awards) on the day immediately before he gave up such employment,

shall cease to be entitled to reduced earnings allowance as from the day on which he gives up regular employment.

(2) If on the day before a person ceases under [subsection] sub-paragraph (1) above to be entitled to reduced earnings allowance he is entitled ... at a weekly rate ... of not less than £2.00, he shall be entitled to a benefit, to be known as "retirement allowance".

(3) [...] Retirement allowance shall be payable to him ... for life."

16. Thus as soon as a person over pensionable age and receiving reduced earnings allowance "gives up regular employment" in terms of para 13(1), he or she must lose that allowance and from then on can get only a "retirement allowance" (or nothing at all if on less than £2 a week). Though retirement allowance is payable as of right for life under (3), it is at a considerably lower rate than reduced earnings allowance: currently about £9-£10 a week at the top of the scale, instead of £39-£40.

17. The adjudication officers contended that this provision applied to each claimant from her 65th birthday because this was the day from which her fictional "interruption of employment" ceased. Before the tribunal, each lady objected to this treatment as it depended on her pensionable age, and so resulted in discrimination against her contrary to the EU directive cited in para 1 above. For reasons which will become apparent, it is now common ground that no issue of discrimination can arise in either of these cases: as on its true construction the domestic legislation did not operate to terminate reduced earnings allowance for either of them at the age of 65, and the timing of the later changes has meant that they can now be treated no worse and no better than a man of similar age.

18. The principal issue in the present appeals has now emerged as that of the effect of regulations purportedly made under powers contained in later provisions of s. 59B and para 13 of Sch. 7, purporting to fix an artificial date on which the claimants are to be regarded as "giving up regular employment" for the purposes of para 13(1). But before considering those regulations themselves it is necessary to go back and look at the primary legislation they are intended to supplement.

The primary legislation from 1988: provisions as to "retirement"

19. The provision for a person's reduced earnings allowance to cease "as from the day on which he gives up regular employment" was not the original form of s. 59B. When first introduced on 10 April 1989, s. 59B(1) provided that it was to cease "as from the day on which he retires or is deemed to have retired".

20. This expression had a special and well established meaning in the social insurance scheme of which the industrial injury provisions formed part. Its most important function was in relation to the retirement pension which for anyone still within five years of the minimum pension age remained in 1989, as it had been since the inception of the scheme over forty years before, a true retirement pension. During that five years, an insured person could start to draw the pension only if substantially retired from work so that he or she no longer had the earnings to pay for normal living expenses. Those who laid down the scheme wisely did not attempt a universally

applicable definition of when a person "retires". Instead they allowed insured people to to determine the question for themselves by giving a notice at any time in the five years from pension age, so long as no longer engaged in work to any real extent. Anyone who did not give a notice during the five year period was deemed to retire automatically at the end of it. This system of a flexible period of retirement subject to a minimum age was laid down in s. 20(2) National Insurance Act 1946 and reappeared unaltered in its essential features in s. 27(3)-(5) Social Security Act 1975.

21. So far as material these provisions laid down that:

(i) a person might be treated as having retired from regular employment at any time after attaining the pensionable age of 65 for a man or 60 for a woman, whether or not having actually been an earner in work before that time and even though still continuing to work and earn in a small way after it;

(ii) a person was not to be treated as having retired from regular employment until the date he himself set by giving a notice; and

(iii) a person who had not previously retired in that sense was deemed to do so automatically at the end of five years after pensionable age.

22. These provisions were expressed to apply "for the purposes of this Act", that is the whole of the Social Security Act 1975 which contained all the social insurance benefits; and s. 27(5) said expressly that "references in this Part of this Act to the date of a person's retirement shall be construed in accordance with this section". "This Part of this Act" is Part II, which it will be recalled also includes the industrial injury benefits scheme, where the new provisions dealing with reduced earnings allowance and retirement allowance were introduced into Ch. IV as ss. 59A and 59B. Any reference to "retirement" in those provisions was thus automatically a reference to the special meaning of retirement in s. 27, and not to the date when a person had *de facto* to give up regular work or retire from the employment market because of his or her disability.

23. There can therefore be no doubt that in s. 59B as originally enacted, the triggering event for the end of reduced earnings allowance and the start of retirement allowance in its place was the giving of a notice to fix the date of retirement for pension purposes or the attaining of the five year long stop age, whichever first happened on or after 10 April 1989. This was so even though the person concerned might in the ordinary colloquial sense have retired from, or had to give up, the world of work by reason of his or her incapacity many years before that.

Transitional preserved benefit for certain pensioners

24. By further provisions enacted at the same time as s. 59B and set out in s. 2(4) Social Security Act 1988, a defined class of existing recipients of reduced earnings allowance already past retirement was given a preserved right to continue getting it, though frozen at the existing weekly rates. A practice had apparently grown up of making continued or repeating awards of the allowance even after the recipients had

started drawing retirement pension, and thus beyond the point where the earnings comparison required by the provisions cited in paras 9-12 above might at first sight have been thought to yield a nil result. This practice had been given approval by a tribunal of Commissioners in decision R(I) 14/62, albeit with some hesitation and without having heard any contrary argument. The preserved right given by s. 2(4) of the 1988 Act froze, but also shielded, the existing rates of benefit for those who had already got the benefit of this treatment when the 1988 changes came into effect. It superseded some virtually impenetrable provisions set out in paras 5(1) and (3) Sch. 3 Social Security Act 1986 which were never brought into effect in their entirety.

25. The saving provision which originated in s. 2(4) Social Security Act 1988 now appears as para 12(1) Sch 7 Social Security Contributions and Benefits Act 1992:

> "12.- (1) A person who on 10th April 1988 or 9th April 1989 satisfies the conditions-
>
> (a) that he has attained pensionable age;
>
> (b) that he has retired from regular employment; and
>
> (c) that he is entitled to reduced earnings allowance,
>
> shall be entitled to that allowance for life."

The only significance of the two dates now is to determine the rate of weekly benefit preserved: cf. para 12(3). 10 April 1988 was the day before s. 2(4) of the 1988 Act first came into effect and 9 April 1989 was the day before the new s.59B was brought into force, by which time another annual uprating of benefits had taken place. The general provisions as to "retirement" in Part II of the 1975 Act remained in force on both dates.

26. Although this and other transitional provisions set out in s. 2(3), (4) and (8) Social Security Act 1988 did not themselves fall into Part II of the 1975 Act, they follow directly on from s. 2(1) setting out the new s. 59B which did, and also makes use of the same expression, "retired from regular employment". In my judgment it is clear beyond doubt from the context that the expression is used throughout s. 2 of the 1988 Act in the same sense. Therefore, in s. 2(4) and the other transitional provisions so far as material, "retired from regular employment" not only *includes* the extended meanings in s. 27(3) and (5) of the 1975 Act as s. 2(9) expressly says, but also bears *only* the special meaning in Part II of the 1975 Act, by which a person "retired from regular employment" by giving a notice after attaining pensionable age or being deemed to retire at the end of five years from that age, but not otherwise.

27. The consequence of the changes in force under the 1988 Act from 10 April 1989 was thus that a person so "retiring" *on or after* that date was thereupon to be switched to retirement allowance by the new s. 59B(1): a person *already* so retired at that date had his existing rate of benefit preserved by s. 2(4). There was no third way: as was emphasised by s. 2(8), which said expressly that after s. 59B came into force no person over pensionable age and retired from regular employment should be entitled to reduced earnings allowance otherwise than under s. 2(4). It is also in my judgment quite clear that whatever else the abortive provisions in para 5(1) (s.59A(11)) and para 5(3) Sch 3 Social Security Act 1986 had done or were intended to do, they were never

effective to create at any time any more extensive continuing right to reduced earnings allowance than the preserved rights given by s. 2(4) of the 1988 Act to all recipients of the allowance who had already "retired" by 10 April 1989.

28. Therefore following the introduction of the 1988 provisions on 10 April 1989:

(1) all REA recipients who had *not* yet retired in terms of Part II of the 1975 Act were certain to lose their reduced earnings allowance and be put on to retirement allowance (if applicable) under the new s. 59B as soon as they did so, which would be bound to happen five years after pensionable age if not before;

(2) all REA recipients who *had* already so retired on 10 April 1989 stayed on the reduced earnings allowance and were now given it for life rather than depending on fixed period awards, but were frozen at the rates currently being paid; and

(3) in no other way was there any prospect of a retired person over pensionable age getting any benefit at all under either s. 59A or s. 59B: in particular, the primary legislation left no room for any possible entitlement for anyone to get an *unfrozen* rate of reduced earnings allowance for more than five years past pensionable age.

29. I was initially attracted by the possibility that para 12 of Sch 7 might have some direct application in the present cases if the reference to retirement could be read in an ordinary sense. However the submissions of both sides (united on this issue if nothing else) have convinced me that this cannot be so. For the reasons given above "retired from regular employment" in para 12(1)(b) of Sch. 7 must bear the same sense as in Part II of the 1975 Act, from which it follows that the two present claimants can have no entitlement to reduced earnings allowance for life, as neither had retired from regular employment in that sense by 10 April 1988 or 10 April 1989. The claimant in case CI 600/94 had attained 60 on 16 September 1988, but had not given any notice to retire before 10 April 1989; and although the claimant in case CI 094/94 had initially given a notice and drawn pension for a short period after attaining 60 on 12 August 1986, she had exercised her right of countermand shortly afterwards so that Part II of the Act had to be given effect as if she had not retired at all: s. 30(3) Social Security Act 1975. That remained so at 10 April 1989, when each claimant was still under the age of 65 and so had not yet been deemed to retire under s. 27(5).

30. Following the introduction of s. 59B therefore, each claimant was in the position described in para 28(1) above. Her reduced earnings allowance was bound to stop as soon as she reached 65, or sooner if she gave notice to start her pension. She had no possible entitlement to or expectation of further reduced earnings allowance, though as soon as it ceased she would be entitled to retirement allowance for the rest of her life.

The 1989 and 1990 changes

31. The Social Security Act 1988 thus left the legislative provisions in a watertight and understandable state, apart only from any overriding effect the EC directive might have; but even without this complication they did not remain so for long. On 1 October 1989 the so-called "earnings rule" for retirement pension was abolished by s. 7 Social

Security Act 1989, turning the pension into an old-age pension for everyone. This was achieved by removing the words "and has retired from regular employment" from the primary condition for entitlement to retirement pension under ss. 28-29 Social Security Act 1975, and repealing the provisions in s. 27(3)-(5) identifying the point when a person's retirement took place: para 1 Sch. 1 Social Security Act 1989, brought into force from 1 October 1989 by SI 1989 No. 1238.

32. That the abolition of the concept of "retirement" used throughout Part II of the 1975 Act would have some effect on the industrial injury provisions does appear to have been recognised: but whether that recognition extended to the full implications of what had been done may be doubted. By para 8(1) Sch. 1 Social Security Act 1989 the condition that a claimant for sickness benefit in the early period following an industrial injury "has not retired from regular employment" (s. 50A Social Security Act 1975) was altered to one that he or she should not for the time being be on retirement pension, so as to achieve the same practical effect as before. But by para 8(2) ibid, the condition in s. 59B was altered in a different way so that for people still receiving reduced earnings allowance over pensionable age, the change to retirement allowance was now to depend on a fresh triggering event, that of "giving up regular employment" after 10 April 1989.

33. No definition of this general expression, and no provisions to mirror the careful rules formerly in s. 27(3)-(5) of the 1975 Act, were included in the new primary legislation. The immediate effect of the new general words on their own was thus to create a class of people for whom the trigger could never fire, because in all ordinary senses they had given up regular employment long *before* 10 April 1989, and were never going to resume it. But instead of making clear what was to happen to such people, who immediately before then had been in the clear and unambiguous position described in para 28 above, the Act of 1989 left the meanings of the crucial expressions "regular employment" and "gives up" to be filled in by regulations.

34. The regulation making powers, whose extent is important to the present cases, were inserted into s. 59B by para 8(6) Sch. 1 Social Security Act 1989 and came into force together with the change in s. 59B(1) to "gives up regular employment" on 1 October 1989. To complete the trail of the primary legislation before looking at their wording, para 8(7) of Sch. 1 replaced s. 2(8) of the 1988 Act with a provision (later itself repealed) about people who resumed regular employment after giving it up; and para 8(8) purported to provide for the definitions in s. 2(9) of the 1988 Act (which dealt exclusively with retirements by then already in the past) to "cease to have effect", but this must have been thought otiose and was never brought into force at all. In the following year s. 3 Social Security Act 1990 provided that with effect from 1 October 1990 (SI 1990 No. 1446) nobody at all should be entitled to reduced earnings allowance by virtue of an industrial accident or disease sustained after that date, and that provisions in the 1988 and 1989 legislation allowing for a person resuming regular employment after giving it up should cease to have effect, repealing s. 2(8) of the 1988 Act in both its original and amended forms. Lastly by s. 3(6) of the 1990 Act, the definition of a "day of interruption of employment" used in the 1975 Act for unemployment, sickness and invalidity benefit was expressly imported into s. 59B to be used as regards reduced

earnings and retirement allowance from 1 January 1990 onwards. The expression "days of interruption of employment" is used in the regulation making powers set out in para 13 of Sch. 7 to the 1992 Act, to which it is now necessary to turn.

Regulation making powers in para 13 Sch 7 SSCBA 1992

35. By Sch. 7 para 13(8) and (9) as they now stand:

> " (8) Regulations may -
>
> (a) make provision with respect to the meaning of 'regular employment' for the purposes of this paragraph; and
>
> (b) prescribe circumstances in which, and periods for which, a person is or is not to be regarded for those purposes as having given up such employment.
>
> (9) Regulations under sub-paragraph (8) above may, in particular -
>
> (a) provide for a person to be regarded -
>
> (i) as having given up regular employment, notwithstanding that he is or intends to be an earner; or
>
> (ii) as not having given up regular employment, notwithstanding that he has or may have one or more days of interruption of employment; and
>
> (b) prescribe circumstances in which a person is or is not to be regarded as having given up regular employment by reference to -
>
> (i) the level or frequency of his earnings during a prescribed period; or
>
> (ii) the number of hours for which he works during a prescribed period calculated in a prescribed manner."

36. No regulations were made at all from 1 October 1989, when the new wording in s. 59B(1) to which these provisions related took effect, until 1 April 1990. On that day, the Social Security (Industrial Injuries) (Regular Employment) Regulations SI 1990 No. 256 came into force in their original form. By reg. 2(1)-(2) "regular employment" was defined as (broadly) gainful employment for an average of 10 hours or more a week; and a person was to be regarded for the purposes of s. 59B as *not having given up regular employment in* any week when he was over the prescribed average. Reg 2(3) then provided that "A person shall be regarded for those purposes as *not having given up regular employment in* any week in which he has one or more days of interruption of employment." (Emphasis added.) Those were the only material provisions to help define whether or when the condition "gives up regular employment" was to be taken as met from 1 April 1990 onwards.

37. Under the legislation in this form, there was nothing to transfer the present claimants from reduced earnings allowance to retirement allowance on what would have been their "retirement" in the old sense, or at all. Even though they might give notice to go on retirement pension, or reach five years after pensionable age, they still would not have given up regular employment on 10 April 1989 or on any subsequent day, for the simple reason that they were not in it. Nor was there any provision to make such events count as a "giving up" for the purposes of causing the trigger to fire, as they would formerly have done by counting as a "retirement". Their reduced earnings allowance

thus continued unaffected by s. 59B or para 13(1) of Sch.7. It remained unaffected when they attained 65 and stopped drawing invalidity benefit, because reg. 2(3) said only that they did *not* "give up" in any week when they had "days of interruption of employment". It did not go on and say that they *did* "give up" in any other week after the regulation itself took effect on 1 April 1990. Nor did it say that they were to be regarded for any purpose, then or later, as having done so on or after 10 April 1989.

38. That was the state in which the legislation remained until almost six years later. It did so despite the decisions of Mr Commissioner Hoolahan QC on 7 October 1992 and of Mr Commissioner Skinner QC on 7 December 1992 in cases R(I) 2/93 and R(I) 3/93, confirming that the expression "gives up" when used without amplification must bear its ordinary natural meaning, and that para 13(1) of Sch. 7 as supplemented by the 1990 regulations did not touch a person who (whether because still working, or because long out of work) did not in fact give up regular employment on any day on or after 10 April 1989. That this was the effect of the legislation from 1 October 1989 onwards was confirmed by two other Commissioners' decisions, CI 294/94 given on 26 April 1995 and CI 11015/95 given on 1 April 1996. It is not, and in my judgment never was, open to any reasonable doubt.

39. Whether repeated fixed period awards of reduced earnings allowance *should* ever have continued to be made to people well past pensionable age, despite the terms of s. 59A(8) SSA 1975 and para 11(10) of Sch. 7 SSCBA 1992 which link the benefit to likely earnings apart from the accident, seems to me open to much more doubt. However it is a question unnecessary to explore in these cases, as entitlement to continuing reduced earnings allowance at unfrozen rates for all material periods from 10 April 1989 to 24 March 1996 (when the 1990 Regulations were again altered) has been conceded, and made final by the decision of Mr Commissioner Heald given on 13 December 1996.

The 1996 changes to the regulations

40. I come at last to the regulations most directly at issue in these cases. They are the altered regs. 2 and 3 of the 1990 regulations cited above, introduced by SI 1996 No. 425 with effect from 24 March 1996 (that is a week before the date of the decision in case CI 11015/95, but I think after the case had come before the Commissioner at an oral hearing.) The amending regulations, expressed to be made in exercise of the powers in para 13(8) and (9) of Sch 7 among others, substitute a revised definition of "regular employment" on which nothing turns in these cases, and then a new reg. 3:

> **"Circumstances in which a person over pensionable age is to be regarded as having given up regular employment**
>
> 3. Unless he is entitled to reduced earnings allowance for life by virtue of paragraph 12(1) of Schedule 7 to the Social Security Contributions and Benefits Act 1992, a person who has attained pensionable age shall be regarded as having given up regular employment at the start of the first week in which he is not in regular employment after the later of -
>
> (a) the week during which this regulation comes into force; or
>
> (b) the week during which he attains pensionable age."

41. If effective according to its terms, the new reg. 3 thus required each of the present claimants to be regarded for the purposes of para 13 as having given up regular employment on the first day of the week following 24 March 1996, which for this purpose was Palm Sunday, 31 March 1996. On that day, para 13(1) of Sch 7 would therefore have operated to terminate her reduced earnings allowance and substitute retirement allowance for life. Both the terms of the revised regulation and the timing of its introduction make clear beyond doubt that this was the result it intended to achieve, for these and all other claimants in a similar position well past pension age and out of regular employment for many years, who were still receiving reduced earnings allowances they had been certain to lose earlier under s. 59(B) as previously in force.

42. Mr Drabble however argues that this was not the effect, and that neither in its primary form nor as supplemented by the regulations does Sch. 7 para 13(1) catch a person who in normal parlance had already given up regular employment by reason of incapacity long before either 10 April 1989 or 24 March 1996. Such people, it is argued, have by the changes introduced from 1 October 1989 been given an indefinite right which they did not possess before, to continued awards of reduced earnings allowance at unfrozen rates. They are thus in a better position even than those people who had already retired on 10 April 1988 or 10 April 1989 for whom it was considered necessary to provide the special preserved right limited to their existing levels of benefit, now in Sch. 7 para 12. (For comparison, the preserved rates of benefit for those pensioners given protected rights under para 12 are between £25 and £27 a week, whereas the indefinite benefit Mr Drabble claims by virtue of the alteration of "retires from" to "gives up" on 1 October 1989 is at present at the rate of about £40 a week, and will increase further.)

43. In my judgment, it is inconceivable that Parliament intended to produce this result when it enacted s. 7 Social Security Act 1989 to abolish the earnings rule for retirement pensions, and provided in s. 7(6) for what were plainly seen as consequential amendments to other enactments set out in Sch. 1. Before 1989 the legislation about reduced earnings allowance had as I have indicated pursued a slightly bumpy path, but following the 1988 Act was at last clear and consistent. From 10 April 1989, pensioners already drawing reduced earnings allowance as well as pension were not to have the allowance taken away altogether, but were preserved at their present rate: while all other recipients of the allowance were to be changed over to retirement allowance for life as soon as pension started to be drawn. This embodied what seems to me the perfectly sound and fair principle that the main allowance was to compensate for a reduction of earnings so long as earnings might reasonably have been expected to continue; while the reduced rate of benefit from then on provided some approximate compensation for the extra retirement savings that might have been made out of the lost earnings.

44. I can find nothing in s. 7 Social Security Act 1989 or the changes it introduced to support any inference that Parliament intended to make a further fundamental alteration from 1 October 1989 by conferring a new indefinite right on people who did not possess it before that date. Whether or not the full implications of substituting the two words "gives up" for "retires from" on 1 October 1989 were as immediately apparent as they should have been, it was part of that change that there should be the

power now found in Sch 7 para 13(8) to prescribe *for the purposes of the trigger provision in para 13(1)* when a person is or is not to be regarded as having given up employment. I can see no reason to read this restrictively so that regulations could not be made to prevent the result described in para 42 above, and every reason why it should be read as intended to permit regulations to cause para 13(1) still to operate in such cases.

45. In my judgment, the terms of the power are wide enough to permit such regulations, and the context in which it was created means that this must have been intended. Mr Drabble was I think prepared to accept that properly worded regulations to achieve this effect would be within the powers expressed to be conferred by what is now para 13(8). I so hold, and insofar as his argument rested on the propositions that "giving up regular employment" is something a person can do only once in a lifetime, or that "giving up" always connotes a conscious exercise of volition I reject it, as to restrict the meaning in these ways here would deprive para 13(8) of a large part of its useful effect. (The original form actually allowed expressly for a person "giving up" and resuming regular employment more than once: see para 8(6) Sch. 1 Social Security Act 1989.)

46. Mr Drabble's main attack on the regulations therefore focused on the wording of reg. 3 as introduced in 1996. He pointed out that all reg. 3 purports to do is to define the moment a person is to be regarded as giving up something, and submitted that a provision in such terms can have no logical application to a person not currently doing it at all: such a person has nothing to give up. To a person never remotely near any regular employment for many years, a provision about when people are to be regarded as giving up such employment is on this view simply irrelevant. The regulations could have a bearing only if there was some extra deeming provision saying expressly that such people are also to be treated as *in* employment down to the moment they are supposed to be giving it up: and there is no such provision. Again I think he was prepared to concede that if such a deeming provision *had* appeared in the 1996 regulations it could have been within the powers conferred by para 13(8); but on his argument that was an academic question. The fact was that even since 24 March 1996 the regulations were incomplete to have any adverse effect on his clients. Consequently they continued to be entitled to reduced earnings allowance though both now well over 65, pursuant to what he said was an accrued right arising from what had been conceded to be their entitlement to the allowance under the legislation in force from 1 October 1989 to 24 March 1996.

47. In my judgment this submission is not well founded. For the reasons given above para 13(8) must in my view extend to permit regulations that would make the trigger of "giving up regular employment on or after 10 April 1989" operate at some point from 1 October 1989 onwards as regards people still receiving reduced earnings allowance who, under the provisions in force down to that date, had been certain to lose it sooner or later by operation of a no less artificial trigger of "retirement" from a regular employment that in truth had long been out of the question. Mr Vajda must, it seems to me, be right in arguing on behalf of the adjudication officers that it has to follow that this result can be achieved by prescribing some final date on which such beneficiaries should at last cease to be treated in the same way as people still in regular employment, and are for this limited purpose to be regarded (albeit artificially) as having given it up.

48. I can therefore see nothing inconsistent or incomplete in a regulation which prescribes, as reg 3 in its present form does, that a person is for this purpose to be regarded as having "given up regular employment" so as to cause the trigger in para 13(1) to fire on a stipulated day after the introduction of the regulation, without delving into whether he or she was in fact in regular employment down to then or had already given it up in the normal sense on one or more occasions before. Insofar as any hypothesis of the person having to be in some deemed employment immediately beforehand is needed to make the words "gives up" meaningful, it must in my judgment be there by necessary implication in reg 3 as it stands, to give it the practical effect it is plainly intended to have; but in my judgment no such hypothesis is really needed.

49. Nor is there any room for an application of the principle against infringement of accrued rights to prevent the result for which Mr Vajda argued. All that the primary and secondary legislation has at any point purported to do is to bring to an end running or potentially renewable entitlements as regards amounts that otherwise would (or might) have accrued due for payment in periods *after* the changes to the legislation came into effect. The intention of the primary legislation plainly extended to achieving this result as regards future periods, and no presumption or rule of interpretation could have effect to override such an intention in any event. For the reasons already given, the subordinate legislation was in my view within the scope of the enabling power, and could not be said to have infringed any prior indefinite or lifelong rights to continue receiving special hardship or reduced earnings allowance, because the only such rights were those preserved under Sch. 7 para 12. A contention in the claimants' written submissions that they became entitled to indefinite awards of reduced earnings allowance by virtue of a general provision in reg. 17(1) Social Security (Claims and Payments) Regulations SI 1987 No. 1968 is plainly incorrect in view of the express provisions of the primary legislation about awards of this benefit: cf. paras 11-13 above, and reg. 17(3) ibid.

50. For those reasons, the results in these two cases as regards periods from 24 March 1996 onwards are as set out in para 2 above, and tribunals and adjudication officers should in my view determine questions of entitlement to reduced earnings and retirement allowances for people over pensionable age under the present domestic law in force in Great Britain in accordance with the table annexed to this decision.

(Signed)

P L Howell
Commissioner
28 May 1997

Annex to decision CI 094/94 & CI 600/94: position under national law

I: Frozen rate Reduced Earnings Allowance for life under para 12 Sch 7 SSCBA 1992

applies to all REA recipients who ***before 10 April 1989*** had reached

either

age 70 (if a man) or 65 (if a woman);

or

the date of retirement fixed by a notice, at age 65+ (man) or 60+ (woman);

but to nobody else.

II: For all other Reduced Earnings Allowance recipients

Reduced Earnings Allowance stops, and Retirement Allowance for life begins*

on whichever *first* happens of

(a) *reaching*

age 70 (if a man) or 65 (if a woman),

or

the date of retirement fixed by a notice, at age 65+ (man) or 60+ (woman)

on any date from 10 April 1989 to 30 September 1989;

(b) *giving up* (in the ordinary sense)

regular employment (in the ordinary sense)

if engaged in it immediately before then,

at or after age 65 (if a man) or 60 (if a woman)

on any date from 1 October 1989 to 31 March 1990;

(c) *giving up* (in the ordinary sense)

regular employment (10-hour average in the original 1990 regulations)

if engaged in it immediately before then,

at or after age 65 (if a man) or 60 (if a woman)

on any date from 1 April 1990 to 23 March 1996;

(d) failing any of the above, ***the first day of any week after 24 March 1996 when the recipient is***

over age 65 (man), or over 60 or later pension age under PA 1995 (woman)

and

not in *regular employment* (10-hour average as revised by 1996 regulations).

*[Notes: *(i) no retirement allowance is payable where REA was less than £2 per week;*
(ii) in cases II(b)-(d), there is no automatic cut-off at 70/65;
(iii) all cases involve potential sex discrimination: in cases where it actually arises the answers may be affected by EC Council Directive 79/7.]