

CPG
DGR/SH/21

RP - No Discretion Under which Pension
Not Increased As A Result of Decision

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40/93

Commissioner's File: CP/003/1991

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR RETIREMENT PENSION

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the social security appeal tribunal given on 3 August 1990 is erroneous in point of law, and accordingly I set it aside. As it is expedient that I give the decision the tribunal should have given, I further decide that the claimant is entitled to a Category A basic retirement pension from and including 5 June 1989 at the weekly rate of £26.20. None of the days between 5 June 1986 and 5 June 1989 (during which period the claimant's husband deferred his retirement) could be treated as days of increment because the claimant was then in receipt of a Category A retirement pension, and this is a benefit which excludes those days for incremental purposes.

2. This is an appeal by the claimant, brought with the leave of the tribunal chairman, against the decision of the social security appeal tribunal of 3 August 1990.

3. The facts of this case are simple and, as far as I am aware, not in dispute. The claimant's husband attained the age of 65 on 5 June 1986, but deferred his retirement until 5 June 1989. During that period the claimant was in receipt of a Category A retirement pension based on her own contributions. When her husband did retire, she received an addition to her Category A Pension to bring her up to a full Category B pension based on her husband's contributions. However, although her husband received an increase to reflect the deferment of his pension, her own pension was not similarly augmented. On 9 March 1990 the adjudication officer gave a decision to the above effect, and in due course the claimant appealed to the tribunal, who in the event upheld the adjudication officer.

4. At the hearing before the tribunal, the claimant did not challenge the operation of section 10(2) of the Social Security Pensions Act 1975, which entitled the claimant to have her basic Category A retirement pension topped up to the maximum weekly rate of a Category B retirement pension for a married woman, or the operation of regulation 4(1) of the Social Security (Widow's Benefit and Retirement Pensions) Regulations 1979 [SI 1979 No.642], which had the effect of depriving her of any increase of pension consequent upon her husband's period of deferment. She accepted that, if the regulations were applied without qualification, she was not entitled to any increase for the deferral. However, she took a fresh point, namely that she was being discriminated against by reason of her sex, and invoked the concept of natural justice and the European legislation.

5. The tribunal endeavoured to deal with this point in the following terms:-

" 4. It was also contended that the legislation in question discriminated against women, presumably contrary to the Sex Discrimination Act 1975 and the European Community Directives. Considering only the facts we do not consider that the effect of the legislation or the actions of the DSS were discriminatory in effect, for had the appellant elected to defer receipt of her Category A pension in 1986 she would have gained increments as did her husband, albeit for a shorter period as she is 4 years older than he. It is not necessary for us to decide, therefore, the question of law."

6. I am not sure that this approach on the part of the tribunal properly deals with the question of discrimination. It suggests that, by deferring receipt of her Category A pension, the claimant would have rendered herself entitled to increments. But it could be said that such an election only operated to prevent the consequences of discrimination, not to remove the discrimination itself, and that it should not be required of a woman to defer receipt of her Category A pension so as to secure the increments.

7. I think that the adjudication officer now concerned deals with the matter more successfully when he submits, on the basis that the claimant falls within Article 2 of Directive 79/7/EEC (something on which I express no view), as follows:-

"Regulation 4(1) of the Social Security (Widow's Benefit and Retirement Pensions) Regulations 1979 [S.I. 1979 No. 642], which denies entitlement to increments for any period during which a person received a benefit under Chapters I and II of Part II of the [Social Security Act 1975], applies on its face equally to both men and women. However, it should be pointed out that Regulation 4 in its application to increments to Category B pensions would apply only to women. This is because only a woman is entitled to a Category B retirement pension on the strength of her living spouse's contributions (section 29 of the Social Security Act 1975).

A man is entitled to a Category B pension on the strength of his widow's contributions (section 8 of the Social Security Pensions Act 1975).

Thus a woman can receive a Category B retirement pension while her husband is still alive but a man can receive a Category B retirement pension only when his wife has died. It is submitted that this situation does not involve any discrimination against women. If a benefit or advantage is given to one sex only, it cannot be discriminatory to take that benefit or advantage away (see Jones v. Chief Adjudication Officer [1990] IRLR 533)."

I accept that submission.

8. As I do not consider that the tribunal gave a sufficient explanation for their decision, I must set aside their decision. However it is unnecessary for me to remit the matter to the new tribunal for rehearing. I can conveniently substitute my own decision and dispose of the matter finally.

9. For the reasons set out above, the claimant is not entitled to any increments in respect of her husband's deferment of his retirement pension.

10. Accordingly, my decision is as set out in paragraph 1.

(Signed) D.G. Rice
Commissioner

(Date) 19 May 1993