

*Increase in retirement pension payable to claimant in respect of wife subject to a reduction for her occupational pension.*



22/91

MJG/SH/4

Commissioner's File: CP/33/1989

SOCIAL SECURITY ACTS 1975 TO 1986  
CLAIM FOR RETIREMENT PENSION  
DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Ernest Frederick Sydney Geary

Appeal Tribunal: Bedford

Case No: 03:1202

1. I allow the claimant's appeal (but only to the extent indicated in paragraph 8 below) against the decision of the social security appeal tribunal dated 28 November 1988, as that decision is erroneous in law and I set it aside. My decision is that the Commissioner's decision of 10 August 1987 that an increase of retirement pension for the claimant's wife was payable to the claimant subject to a reduction for her occupational pension from 26 August 1985 to 15 September 1985 but not subject to any such reduction from 16 September 1985 was properly revised on review by the adjudication officer in his decision dated 26 April 1988 so as to make the increase of retirement pension payable at a reduced weekly rate (therein specified) from 21 March 1988 onwards: Social Security Act 1975, sections 101 and 102.

2. This is an appeal to the Commissioner by the claimant, a man resident with his wife. The appeal concerns the extent to which the claimant can be awarded an increase of retirement pension in respect of his wife in view of her occupational pension on retirement from the Civil Service, she having after retirement no other employment. The appeal was the subject of oral hearings before me on 2 March 1990, 19 June 1990, 5 November 1990 and 20 March 1991. At all of those hearings the claimant was present (with his wife) and was represented at all of those hearings by Mr R Poynter, Solicitor. The adjudication officer was represented at all of those hearings by Mr N Butt, of the Office of the Solicitor to the Departments of Health and Social Security. I am indebted to Mr Poynter and to Mr Butt for their assistance to me at the hearings.

3. The appeal is against the unanimous decision of the social security appeal tribunal, dated 28 November 1988, in the following terms:-

"The Adjudication Officer's decision [dated 29 April 1988] confirmed. Increase of Retirement Pension [for the claimant's wife] is payable at the reduced weekly rate of £22.90 from 21 March 1988 to 27 March 1988, at £5.35 from 28 March 1988 to 10 April 1988 and at £6.35 from 12 April 1988 (all dates included). This is because her Occupational Pension counts as earnings."

4. In fact the adjudication officer's decision of 29 April 1988 was a decision reviewing a decision of a Commissioner dated 10 August 1987, in which the Commissioner held,

"My decision is that the increase of retirement pension to which the claimant is entitled for his dependent wife is subject to reduction in respect of his wife's occupational pension from 26 August 1985 to 15 September 1985 but is not subject to any such reduction from 16 September 1985. This decision is made with the consent of the parties."

That decision was given because of a decision of Commissioner Monroe on file CP/07/1987 (Cottingham), to which detailed reference is made below.

5. Shortly, the history of this case is as follows. The claimant's husband was accepted as retired on 22 August 1985 and Category A retirement pension became payable to him from 26 August 1985. From that date until 15 September 1985 (see the above-cited Commissioner's decision of 10 August 1987) the claimant's increase of retirement pension for his wife was reduced in accordance with the 'tapering' provisions of subsections (3) and (4) of section 45 of the 1975 Act. However, as from 16 September 1985 those subsections were repealed by section 29(2) of and Schedule 6 to the Social Security Act 1985 which substituted other provisions (see below). In the Cottingham decision, Commissioner Monroe had held that those (1985) substituted provisions did not enable a reduction or extinction of increase of retirement pension for a wife on account of the wife's occupational pension unless she was, as well as receiving the pension, also contemporaneously in employment (see below). That is why the Commissioner in the consent decision of 10 August 1987 in the claimant's case held that there could be no reduction for the wife's occupational pension as from 16 September 1985.

6. However, on 15 March 1988, there came into force further amendments to the law, made by Schedule 4 to the Social Security Act 1988 (cited in detail below) the object of which can clearly be deduced to be to restore the legal position as to extinction or reduction for a wife's occupational pension (even though she had no contemporaneous employment) to what that position had been thought by the Department to be before Commissioner Monroe gave his decision in the Cottingham case. As a result of those 1988 amendments, an adjudication officer gave a decision on 26 April 1988 which, although not entirely felicitously expressed for the purpose, undoubtedly had in my view the effect of reviewing and revising the consent decision of the Commissioner

dated 10 August 1987, on the ground that there had been a relevant change of circumstances (Social Security Act 1975, section 104(1)(b)), i.e. the changes in the law by the Social Security Act 1988 as from 15 March 1988.

7. It is against that decision of the adjudication officer that appeal was made in the present case in the present case to the social security appeal tribunal and thence to the Commissioner. At the social security appeal tribunal the case was largely, if not entirely, conducted on the basis that the changes in the law effected by the 1988 Act constituted unlawful sex discrimination and were thus invalidated by European Economic Communities legislation. The tribunal decided that this was not so. That particular argument was expressly stated by Mr Poynter at the first oral hearing before me not to be pursued before the Commissioner, whatever might be the position if the case went further. I will therefore say no more about it, except that on my reading of the relevant EEC legislation I would have thought it a difficult argument to maintain.

8. The reason I have set the tribunal's decision aside as being erroneous in law is simply because I accept the written submission dated 20 July 1989 of the adjudication officer now concerned (paragraph 3) that the tribunal overlooked the fact that they were dealing with a review decision of an adjudication officer and treated that officer's decision as if it were a simple decision 'at first instance'. They did not therefore consider for example, whether a review was justified by section 104 of the Social Security Act 1975. That is undoubtedly so and as a result I must set the tribunal's decision aside as being erroneous in law.

9. However, the issues on which the appeal has been maintained before the Commissioner have in fact been raised only since the decision of the social security appeal tribunal and were not before that tribunal. I nevertheless indicated that I was prepared to deal with them under the power in section 102(1) of the Social Security Act 1975. Those issues can conveniently be summarised as follows. First, it is contended by Mr Poynter on behalf of the claimant that the amendments made by the Social Security Act 1988 were not apt to 'reverse' the Cottingham decision and that the law is today still the same as stated by Commissioner Monroe in that decision. Secondly, it is contended by Mr. Poynter that, even if that is not so, the repeals effected by the Social Security Act 1988 do not affect the "right" of the claimant to have a full increase of retirement pension for his wife which it is said he acquired under the repealed legislation as interpreted in Cottingham. That is a reference to section 16(1)(c) of the Interpretation Act 1978 (cited below). I deal with both those arguments in turn.

10. First, the contention that the 1988 amendments did not in fact 'reverse' the Cottingham decision. The relevant amendments by the Social Security Act 1988 (Schedule 4, paragraph 7 and Schedule 5) were made to sections 45 and 47B of the Social Security Act 1975, by the repeal of certain words in those

sections which are indicated in square brackets and are also underlined, in the following citation of those sections.

11. "45. (1) This section applies to -

(a) a Category A .. retirement pension;

(b) .....

(2) Subject to the following provisions, the weekly rate of a pension to which this section applies, when payable to a man, shall be increased ...

(a) for any period during which the pensioner is residing with his wife; or

(b) .....

(2A) Regulations may provide that, for any period during which the pensioner is residing with his wife and his wife [is engaged in any one or more employments from which she]\* has earnings -

(a) the increase of benefit under this section shall be subject to a reduction in respect of his wife's earnings; or

(b) there shall be no increase of benefit under this section.

.....

[Section 45A(3) contains an identical provision, with an identical repeal, in regard to an increase of a wife's pension for her resident husband]

47B (1) Except as may be prescribed -

(a) in section 41 and sections 44 to 47 above any reference to earnings includes a reference to payments by way of occupational pension; [and]\*

[(b) in sections 44, 45, 45A and 47 above any reference to a period during which a person is not engaged in any employment includes a reference to a period in respect of which a person is not entitled to any payment by way of occupational pension] \*

(2) ....."

\*Repealed by Schedule 5 to the Social Security Act 1988

12. In the Cottingham decision Commissioner Monroe held that the provision in section 47B(1)(a) of the 1975 Act that "any reference to earnings includes a reference to payments by way of occupational pension" must be read in the light, in the case of a pensioner residing with his wife, of subsection (2A) of section 45 of the 1975 Act empowering Regulations to diminish or extinguish the increase of pension for the wife "for any period during which the pensioner is residing with his wife and his wife is engaged in any one or more employments from which she has earnings" (my underlining). Commissioner Monroe further held in Cottingham that regulation 8 of the Social Security Benefit (Dependency) Regulations 1977 (S.I. 1977 No. 343 as substituted by S.I. 1985 No. 1190), providing in effect that "earnings" of an adult dependent if they exceeded a particular amount could reduce or negate any entitlement to increase of benefit for that adult dependent (regulation 8(2)), must be read in the light of the restriction in subsection (2A) of section 45 that regulations could provide for such a result only where the wife was "engaged in any one or more employments from which she has earnings". As the wife in the Cottingham case was not contemporaneously "engaged in any one or more employments" at the time she was receiving an occupational pension, Commissioner Monroe held that regulation 8(2) of the Dependency Regulations 1977 could not apply, the meaning of the word "earnings" in that regulation being limited in the same way that section 45(2A) was limited. Moreover, the provision of section 47B(b) as to "a period during which a person is not engaged in any employment" including also "a period in respect of which a person is not entitled to any payment by way of occupational pension" was held by Commissioner Monroe not to alter this result because its 'negative' wording was not apt to do so (cf. R(U) 1/90 as to unemployment benefit).

13. The Social Security Act 1988 by the above-cited provisions attempted to 'reverse' the Cottingham decision by deleting from subsection (2A) of section 45 of the 1975 Act the words "is engaged in any one or more employments from which she" and also by repealing section 47B(b) of the 1975 Act.

14. In addition, section 10 of the Social Security Act 1988 provides as follows,

"10. (1) Increases and reductions of benefit under the Social Security Act 1975 which in pursuance of any enactment to which this section applies fall to be calculated by reference to a person's earnings shall be calculated by reference to earnings from employment or to earnings from payments by way of occupational pension or to earnings of both descriptions, if the person is entitled to them.

(2) This section applies to sections 41, 44 to 47, 64 and 66 of the Social Security Act 1975."

15. Mr Poynter contended, in detailed written and oral

submissions to me that none of those provisions of the 1988 Act had the effect of 'reversing' the Cottingham decision. His argument hinged on the fact that subsection (2A) of section 45, as amended by the Social Security Act 1988, was merely an empowering provision enabling the making of regulations. In point of fact, no relevant new regulation has been made since the terms of subsection (2A) have been altered by the 1988 Act. The relevant regulation is therefore still regulation 8(2) of the Dependency Regulations 1977 which simply refers to "earnings". Therefore, argued Mr Poynter, the 'old' regulation 8(2) still had to be interpreted in the light of the restrictive words "is engaged in any one or more employments from which she has earnings", which words were in subsection (2A) of section 45 of the 1975 Act at the time that the Cottingham decision was given. Mr. Poynter further contended that, until such time as a new regulation was made (even if it was only a new regulation in exactly the same words as regulation 8(2) of the 1977 Regulations), the law remained as it was when Commissioner Monroe gave his decision in the Cottingham case.

16. When this contention was first made, I issued a Direction dated 21 June 1990 in the following terms,

"Direction

1. At the oral hearing before me on 20 June 1990, I indicated that if my research on the point raised by the claimant's Solicitor, as to non-exercise of the amended regulation-making power, revealed new material, I would give the parties an opportunity to make written submissions on that material.

2. My prima facie view is that Commissioner Monroe's decision on file CP/07/87 (Cottingham) proceeded on the basis that the word 'earnings' in regulation 8(2) of the Social Security (Dependency) Regulations 1977 (as inserted by reg. 2 of S.I. 1985 No. 1190) must be interpreted in the light of the definition of the word 'earnings' in sections 45(2A) and 47B of the Social Security Act 1975 (before amendment by the Social Security Act 1988), thus in effect applying section 11 of the Interpretation Act 1978, which provides, 'where an Act confers power to make subordinate legislation, expressions used in that legislation have, unless the contrary intention appears, the meaning which they bear in the Act.'

3. If that view is correct, then there appears to be relevant the following passage at p.149 of Bennion, 'Statutory Interpretation' (1st. Ed. 1984),

'If the definition in the enabling Act of a term also used in delegated legislation is amended, this will have the effect of amending the delegated legislation too (Interpretation Act 1978 s.11 as modified by sections 20(2) and [23(1)]. See Re Simpkin Marshall Ltd. [1958] 3 All E.R. 611.)'".

17. The sections of the Interpretation Act 1978 referred to by Bennion are as follows,

"20. (2) Where an Act refers to an enactment, the reference, unless the contrary intention appears, is a reference to that enactment as amended, and includes a reference thereto as extended or applied, by or under any other enactment, including any other provision of that Act.

.....

23. (1) The provisions of this Act ... apply, so far as applicable and unless the contrary intention appears, to subordinate legislation made after the commencement of this Act .."

18. As a result of that Direction, I received written and oral submissions from Mr Poynter and from Mr Butt. Mr Butt's contentions basically adopted what I gave as a prima facie view in my Direction of 21 June 1990 and stressed the case of Re Simpkin Marshall Ltd (cited by Bennion). Mr Poynter contended that the amendment to subsection (2A) of section 45 of the 1975 Act was not an amendment of a "definition in the enabling Act" but was an amendment to a regulation-empowering provision, with the result that the rule quoted by Bennion did not apply. I also received arguments from both Mr Poynter and Mr Butt on the true scope of Re Simpkin Marshall Ltd, but I do not think that case assists particularly. It is but an example of the general rule as stated by Bennion and concerned the ordinary case of a change of a definition by sections in succeeding Acts (the Solicitors Acts). It did not involve, as here, a change in a regulation-empowering section.

19. In my judgment Mr Poynter's submission on this point is correct. There is, of course, a relevant definition section in section 47B(1)(a) of the 1975 Act which provides simply that "any reference to earnings includes a reference to payments by way of occupational pension". But that definition was there when Commissioner Monroe gave his decision in Cottingham. There is now a further 'definition' in section 10 of the Social Security Act 1988 (cited in para.13 above) but that section does not in my view derogate from the validity of Mr Poynter's argument, since in the case of a husband pensioner residing with his wife a reduction or negation of the increase for the wife can be made only by regulations under section 45(2A) of the 1975 Act.

20. If the matter rested there, I should have to accede to Mr Poynter's further contention that the amendments made by the Social Security Act 1988 did not 'reverse' the Cottingham decision. But, in my judgment, the matter does not rest there. There must also be considered section 17(2) of the Interpretation Act 1978, which reads,

"17. (1) .....

(2) Where an Act repeals and re-enacts, with or without modification, a previous enactment then, unless the contrary intention appears, -

(a) .....

(b) in so far as any subordinate legislation made or other thing done under the enactment so repealed, or having effect as if so made or done, could have been made or done under the provision re-enacted, it shall have effect as if made or done under that provision."

21. In my judgment, that provision has the effect of causing regulation 8(2) of the Dependency Regulations 1977 to have effect as if it were made under the amended power in subsection (2A) of section 45 of the 1975 Act i.e without the words "is engaged in any one or more employments from which she" [has earnings]. When the Social Security Act 1988 deleted those words from subsection (2A) of section 45 by repealing them, that was, in my view, a repeal and re-enactment with modification of a previous enactment within the meaning of section 17(2) of the Interpretation Act 1978. The reference in section 17(2) to "a previous enactment" must in my view include any part of a whole enactment. There does not have to be repeal of the force, regulation 8(2) of the Dependency Regulations 1977 could have validity only under the amended subsection (2A) of section 45 and must therefore be subject to its terms, including the removal of the limitation as to the wife having to be engaged in contemporaneous employment. A regulation automatically ceases to have effect when the empowering provision of the Act is repealed (see R(U) 6/89), and regulation 8(2) of the 1977 Regulations would have done so but for the effect of section 17(2) of the Interpretation Act 1978. It can therefore survive only subject to the amended terms of section 45(2A) of the 1975 Act.

22. Dealing with this matter in a written submission dated 13 June 1990 (paragraph 29), Mr Poynter stated,

"The claimant will contend firstly that what has been done to section 45(2A) of the 1975 Act by the 1988 Act is not repeal and re-enactment but simply the deletion of the words 'is engaged in any one or more employments from which she' which were previously in that section. There is accordingly no need to rely on section 17 of the Interpretation Act to preserve regulations made under that section."

I have in fact dealt above with that contention (which, for the reasons given, I reject).

23. Mr. Poynter's written submission further states,

"However, if the claimant is wrong on the point immediately above, he will contend that the effect of section 17(2) of the 1978 Act is to preserve Regulation 8 in its original form and subject to those restrictions to which it was originally subject (having regard to the wording of the parent power at the time when it was made) and not to give the Regulations, without their being re-made, a wider effect than they had before the 1988 changes."

24. I reject that contention also. Where section 17(2)(b) of the Interpretation Act 1978 applies, subordinate legislation "shall have effect as if made or done under [the re-enacted] provision" (section 17(2) - my underlining). Regulation 8(2) of the 1977 Regulations could, after the repealing words of the 1988 Act, have effect only under the amended subsection (2A) of section 45 of the 1975 Act.

25. Consequently, I hold that the claimant's first contention must fail. I now proceed to his second contention, related to section 16(1)(c) of the Interpretation Act 1978, which provides as follows,

"16. (1) .. where an Act repeals an enactment, the repeal does not, unless the contrary intention appears, -

(a)-(b) .....

(c) affect any right, privilege, obligation or liability acquired, accrued, or incurred under that enactment;

....."

26. Mr Poynter contended that, as a result of the Cottingham decision and before the amendments made by the Social Security Act 1988 the claimant had a "right" which had "accrued" (within section 17(2) under the social security legislation in force at the date of the Cottingham decision. That right was, it was argued, to payment in full of an increase of retirement pension for his wife without regard to her occupational pension. Unless therefore a contrary intention appears, the repeals affected by the 1988 Act (see above) did not take away that right of the claimant, according to Mr. Poynter. He would therefore limit the amendments made by the 1988 Act to awards of increases of retirement pension for wives made after the date that the amendments made by the 1988 Act came into force. Mr Poynter cited a number of leading authorities on the meaning of section 16(1)(c) which I have taken into consideration as I have also a number of Commissioners' Decisions on the subject.

27. I received arguments from Mr Poynter and Mr. Butt on sections 12, 27, 28 and 45 of the Social Security Act 1975 as to the true nature of an increase of retirement pension for a

dependent wife. In particular, section 28(1) of the Social Security Act 1975 provides that retirement pension shall "be payable for the pensioner's life" but section 45(2) of the 1975 Act refers to "the weekly rate of a pension", when dealing with an increase for a wife.

28. Mr Poynter referred to the ruling of the Privy Council in Director of Public Works v. Ho Po Sang [1961] A.C. 901 at page 920 for the view that it does not prevent there being an accrued "right" within the meaning of section 16(1)(c) of the Interpretation Act 1978 that that right is subject to a risk that it could be defeated at a late date by the operation of some condition subsequent. I accept that that is the position. I also accept that when the adjudication officer first awarded an increase to the claimant of retirement pension for his wife the claimant did have a "right" to such increase, but subject to its being defeated wholly or partly by the operation of a condition subsequent, namely by the wife having earnings. However, it also appears to me that what was done by the Social Security Act 1988 was simply to change the nature of the circumstances in which the condition subsequent could come into operation i.e. the circumstances in which a wife's occupational pension could be treated as earnings. The claimant's underlying entitlement to an increase of retirement pension for his wife was not removed by the 1988 Act, In my judgment, therefore, section 16(1)(c) of the 1978 Interpretation Act does not assist the claimant. The amendments made by the Social Security Act 1988 did not take away the "right" which had "accrued" to the claimant. Alternatively, it could be said that, though the claimant had a "right" to an increase of pension for his wife, "subject to earnings" it is commonly expressed in awards, he had no "right" not to have the details of the earnings rule changed.

29. It follows that I do not have to consider whether or not there was anywhere shown a "contrary intention" within the meaning of section 16(1) of the Interpretation Act 1978. I should however perhaps record the fact that in a Direction dated 19 April 1990 I asked the following question,

"Does the context of ... the Social Security Act 1988 show a contrary intention within the meaning of section 16(1) of the Interpretation Act 1978, i.e. the fact that the provisions of the 1988 Act were correcting what was thought to be an error or anomaly in the earlier legislation?"

30. I have received a number of written submissions from the parties on this point. Suffice to say that there is no express provision in the Social Security Act 1988 to show an intention contrary to section 16(1)(c) of the Interpretation Act 1978. Mr Butt argued that the fact that the amending provisions in the 1988 Act were brought into force without qualification or any transitional provisions indicated that no such contrary intention was present. I prefer not to express any final view on these matters, as in view of my ruling above, the question does not fall for decision.

31. Lastly, I refer to a question which I raised in a Direction dated 15 November 1990 and which was the subject of the oral hearing before me on 20 March 1991. This related to regulation 8(6) of the Social Security Benefit (Dependency) Regulations 1977 (S.I.1977 No.343, as substituted by regulation 3 of S.I.1985 1985 No.1190), reading as follows,

"Earnings rules for increases for adult dependants

8(1) - (5) .....

(6) where on 14th September 1985, a beneficiary was entitled to an increase of benefit for that day or for a period including that day under any of the provisions of the Act to which paragraph (1) or (3) applies [includes section 45(2) - increase of retirement pension in respect of a wife] the provisions of the Act and of these regulations relating to the reduction of the rate of such increase on account of the earnings of the adult dependant in force on that day shall, if more favourable to the beneficiary, continue to apply after that day, to the exclusion of the provisions of this regulation, until such time as the beneficiary first ceases to be entitled to that increase."

32. The claimant in this case, unlike the claimant in the Cottingham case, was entitled on 14 September 1985 to an increase of benefit (retirement pension) for his wife. Therefore, prima facie, he could be entitled to benefit of the transitional provisions of regulation 8(6), which in effect preserved 'tapering' of the repealed section 45(3) of the 1975 Act instead of the new 'absolute cut-off' provision introduced by section 45(2A) of the 1975 Act (inserted by section 13(1) of the Social Security Act 1985) and the new regulation 8(2) of the Dependency Regulations 1977 (inserted by S.I.1985 No.1190 from 16 September 1985). As the Cottingham case was decided on the 'new' rules introduced by the Social Security Act 1985 and by S.I.1985 No.1190, if regulation 8(6) preserved the 'old' rules in the case of the claimant, it could be that the 'Cottingham case (and the consequences thereof) was not applicable to this present case.

33. However, it is clear that on 16 September 1985, when the 'new' rules came into force, that the claimant would not have been subject to regulation 8(6), since under the Cottingham decision, he would be entitled to a full-increase of pension for his wife (her occupational pension not being treated as earnings) and that would be more beneficial to him than the old 'tapering' rules.

34. But, when the amendments made by the Social Security Act 1988 came into force, the effect was, as I have held it above to be that the wife's occupational pension had to be treated as earnings. On the amounts of increase of benefits and of wife's occupational pension then prevailing, the claimant would then be entitled to the benefit of regulation 8(6) and thus be subject to the 'old' rules, including tapering, as indeed was decided by the adjudication officer in his decision of 28 April 1988 set out in paragraph 3 above. However, one can only arrive at this conclusion by interpreting the 1988 legislation as I have

interpreted it in paragraphs 1-31 above and my conclusions thereon are therefore not obiter, despite the claimant's consequent reversion in 1988 to the pre-Cottingham law.

35. I should perhaps add that I consider that regulation 8(6) is not a 'once-and-for-all' provision but is capable of applying and not applying at different times according to the financial position at those times, provided always that the underlying entitlement to the increase does not cease (see the concluding words of the regulation).

(Signed) M.J. Goodman  
Commissioner

(Date) 26 March 1991