

SEC Directive 79/7/EEC does not apply to different provisions of increase for spouse in retirement pension.

JJS/6/LS

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Region: Wales & South Western

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

[ORAL HEARING]

1. My decision is that an increase of Category A retirement pension is not payable to the claimant for her husband from and including 26 September 1985 because she fails to satisfy the condition provided for by section 45A(1)(a) of the Social Security Act 1975.
2. I held an oral hearing of this appeal. The claimant was represented by Mr N. Deller of the Civil Service Retirement Fellowship and the adjudication officer was represented by Mr Turner of the Chief Adjudication Officer's Office.
3. This is an appeal by the claimant against the unanimous decision of the Weymouth social security appeal tribunal given on 17 December 1985 which confirmed the adjudication officer's decision that her retirement pension was not to be increased for her husband because she did not satisfy the conditions of section 45A of the Social Security Act 1975.
4. The claimant was a civil servant. She was on job release from 29 August 1982 to 10 August 1983. On 25 June 1983 she claimed retirement pension based on her own contributions with effect from 11 August 1983, her 60th birthday, and her pension was awarded and paid from that date. On 20 September 1983 she made a claim for an increase of retirement pension for her dependant husband. The adjudication officer decided that her pension was not to be increased and on appeal the disallowance was upheld by the tribunal. The members found that the claimant was not entitled to an increase of unemployment benefit, sickness benefit or invalidity benefit immediately before she became entitled to retirement pension and consequently that she did not satisfy the terms of section 45A(1)(a) of the Social Security Act 1975. Leave to appeal to the Commissioner was granted by the chairman of the tribunal.
5. The question at issue in the present appeal is whether the claimant is not entitled to an increase of retirement pension for her husband because she fails to satisfy the relevant statutory provisions, and if she is not so entitled whether those provisions contravene the Directive of the Council of the European Communities on progressive implementation of the principle of equal treatment for men and women in matters of social security (Council Directive 79/7).
6. Section 45 of the Social Security Act 1975 provides for an increase in a married man's pension for his wife and section 45A provides for the increase to a wife's Category A retirement pension for her husband. I must set out the sections in full:

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

- (a) a Category A or Category C retirement pension;
- (b) an invalidity pension.

(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 by the amount respectively specified in relation to the relevant pension in Schedule 4, Part IV, column (3) -

- (a) for any period during which the pensioner is residing with his wife; or
- (b) for any period during which the pensioner is contributing to the maintenance of his wife at a weekly rate not less than that amount, and his wife is not engaged in any one or more employments from which her weekly earnings exceed that amount.

(3) Where the pensioner is residing with his wife, and the earnings of his wife for the week ending last before any week for which he is entitled to benefit under this section exceeded £45, the weekly rate of benefit under this section shall for the last-mentioned weekly be reduced -

- (a) where the excess is less than £4, by 5 pence for each complete 10 pence of the excess; and
- (b) where the excess is not less than £4, by 5 pence for each complete 10 pence of the excess up to £4 and by 5 pence for each complete 5 pence of any further excess.

In this subsection "week", where used in the expression "week for which he is entitled to benefit", means such period of 7 days as may be prescribed by regulations made for the purposes of this subsection.

(4) With effect from such day as may be prescribed in the week containing 6th April in a year mentioned in the first column below, subsection (3) above shall have effect with the substitution for "£20" of the amount specified in relation to that year in the second column below -

1976 £35

45A.--(1) Where a Category A retirement pension is payable to a woman for any period -

- (a) which began immediately upon the termination of a period for which the pensioner was entitled to an increase in unemployment benefit, sickness benefit or invalidity pension by virtue of section 44(3)(a) or 47(1)(a) of this Act (increases in respect of adult dependants); and
- (b) during which the conditions specified in subsection (2) below are satisfied (without interruption),

then the weekly rate of the pensioner's Category A retirement pension shall be increased by the amount specified in relation thereto in Schedule 4, Part IV, column 3 ("the specified amount").

(2) The conditions referred to in subsection (1)(b) above are -

- (a) that the pensioner is residing with her husband or is contributing to his maintenance at a weekly rate not less than the specified amount; and
- (b) that the pensioner's husband is not engaged in any one or more employments from which his weekly earnings exceed the specified amount."

7. Article 1 of EEC Council Directive 79/7 is as follows

"The purpose of this Directive is the progressive implementation, in the field of social security and other elements of social protection provided for in Article 3, of the principle of equal treatment for men and women in matters of social security, hereinafter referred to as "the principle of equal treatment"."

Article 8 requires Member States to bring into force the laws, regulations and administrative provisions necessary to comply with the direction within six years of its notification. Notification was on 22 December 1978 and Member States were required to comply by 22 December 1984. The Directive applies inter alia to retired workers and to statutory schemes providing protection against, among other things old age; see Article 2 and Article 3(1)(a). Article 4(1) provides as follows:

- "1. The principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:
 - the scope of the schemes and the conditions of access thereto,
 - the obligation to contribute and the calculation of contributions,
 - the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits."

Article 7 is as follows:

- "1. This Directive shall be without prejudice to the right of Member States to exclude from its scope:
 - (a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits;
 - (b) advantages in respect of old-age pension schemes granted to persons who have brought up children; the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children;
 - (c) the granting of old-age or invalidity benefit entitlements by virtue of the derived entitlements of a wife;
 - (d) the granting of increases of long-term invalidity, old-age, accidents at work and occupational disease benefits for a dependent wife;
 - (e) the consequences of the exercise, before the adoption of this Directive, of a right of option not to acquire rights or incur obligations under a statutory scheme.
- 2. Member States shall periodically examine matters excluded under paragraph 1-in

order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned."

I find it unnecessary to set out any of the other Articles though of course I have read the entire Directive.

8. The first question I have to consider is whether the claimant satisfies the requirements of section 45A of the Act. There are a number of conditions, but it is argued that the claimant did not satisfy the condition specified in section 45A(1). It was contended by the adjudication officer in his submission to the tribunal that there was no record of her having claimed any of the benefits specified in the subsection, and, indeed, in her grounds of appeal to the tribunal she stated that she was not unemployed, sick or in receipt of invalidity benefit for her husband. She has not sought to show her entitlement at the relevant time to any of such benefits or to an entitlement increase of such benefits for her husband. In order for the claimant to be entitled to an increase of Category A retirement pension for her husband she has first to have been entitled to an increase of one of the other benefits during the earlier periods specified in the subsection. The claimant was not so entitled and therefore her claim for increase of retirement pension must fail. I am satisfied that the tribunal reached the correct conclusion on this aspect of the case.

9. I now turn to the discrimination point. It is contended on behalf of the claimant that section 45A is discriminatory against women and places them in a less favourable position to men in the matter of increases of retirement pension for spouses. Clearly such contention is correct. In order to obtain an addition for a husband a married woman has to satisfy similar conditions to those specified in section 45 for a married man, seeking an increase for his wife, in addition she has to get over another hurdle, the condition provided for in section 45A(1). It is further maintained on behalf of the claimant that this discrimination is inconsistent with the Directive and in breach of it. If this is so, then she may rely on the Directive to obtain entitlement to benefit. But is it so? Article 4 of the Directive provides that the principle of equal treatment means that there should be no discrimination whatsoever on grounds of sex, either directly or indirectly, by reference in particular to marital or family status, in particular as concerns the scope of schemes and the conditions of access thereto and the calculation of benefits, including interests due in respect of a spouse and for dependants, and the conditions governing the duration and retention of entitlement to benefits. Clearly if States were not allowed to derogate from that Article section 45A would be inconsistent with the requirements of the Directive. But Member States are permitted to derogate from this general obligation to the extent provided for by Article 7. Article 7(1)(d) allows, *inter alia*, the difference between the treatment of men and women in the matter of old age benefit in that the law of a Member State may provide for a husband to be awarded an increase for a wife in circumstances where a wife would not be awarded a comparable increase for a husband. In my judgment the Directive itself provides for a derogation from the principle of equal treatment laid down in Article 4(1) to that extent, and the inequality of treatment illustrated by section 45 and section 45A of the Social Security Act 1975 does not breach the Directive.

10. For the reasons which I have given the claimant's appeal must fail.

(Signed) J J Skinner
Commissioner

Date: 28 September 1987.