

SOCIAL SECURITY ACTS 1975 TO 1990
CLAIM FOR SEVERE DISABLEMENT BENEFIT
DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Elsie Rita Johnson (Mrs)

Appeal Tribunal: Sutton

Case No: 7/19/02874

[ORAL HEARING]

Decision of a Tribunal of Commissioners

1. We hold that the decision of the social security appeal tribunal dated 24 October 1988 is erroneous in law and we set it aside. Our decision is as follows:-

(a) Non-contributory invalidity benefit is not payable to the claimant for the inclusive period from 22 August 1982 to 27 November 1985 and severe disablement allowance is not payable to the claimant for the inclusive period from 28 November 1985 to 16 August 1986. That is because those periods are more than 12 months before the relevant date of claim on 17 August 1987: Social Security Act 1975, section 165A;

(b) Severe disablement allowance is payable to the claimant from 17 August 1986 onwards because the claimant has shown good cause, continuous to the date of claim on 17 August 1987, for the delay in claiming: Social Security Act 1975, section 165A and the Social Security (Claims and Payments) Regulations 1979, regulation 14, Schedule 1 and Schedule 2, paragraph 2A.

2. This is an appeal to the Commissioner by the claimant, a woman born on 27 March 1936. The Chief Commissioner directed that the appeal should be heard by a Tribunal of Commissioners. The appeal is against the unanimous decision of the social security appeal tribunal dated 24 October 1988, which was in similar terms to our decision in paragraph 1(a) above, but which held the claimant not to be entitled to severe disablement allowance for any period earlier than 16 July 1987. The appeal was the subject

of two oral hearings before this Tribunal of Commissioners. The first was on 17 January 1990. The claimant was not present but was represented by Mr R Drabble of Counsel. The adjudication officer was represented by Mr R Jay of Counsel. Following that hearing this Tribunal made a Reference to the European Court (see Appendix 1 to this Decision). The European Court gave its judgment on 11 July 1991 (see Appendix 2 to this Decision). There then followed a further oral hearing before this Tribunal of Commissioners on 9 December 1991 at which the claimant was present and gave evidence to the Tribunal. She was represented again by Mr R Drabble. The adjudication officer was represented by Miss A V Windsor of the Office of the Solicitor to the Departments of Health and Social Security. We are indebted to Mr Drabble to Mr Jay and to Miss Windsor for their assistance to us at the hearings.

3. The further hearing before the Tribunal of Commissioners on 9 December 1991 was to consider the effect on the present appeal of the judgment of the European Court and for this Tribunal to make the appropriate decision. At that hearing Mr Drabble and Miss Windsor concurred in submitting to us that the only question for this Tribunal to decide was whether, following the judgment of the European Court, the claimant was within the personal scope of Directive 79/7/EEC which by Article 2A thereof,

"shall apply to the working population - including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary employment and persons seeking employment - and to retired or invalidity workers and self-employed persons."

Article 3(1) of the Directive provides that it applies to "statutory schemes which provide protection against the following risks:- sickness - invalidity ..".

4. Mr Drabble and Miss Windsor also concurred in submitting that if the claimant could bring herself within the personal scope of the Directive then she would be entitled to an award of severe disablement allowance for the 12 months prior to the claim made on 17 August 1986 but not for any earlier period because there applied thereto the imperative provision of section 165A of the Social Security Act 1975 that no benefit can be paid for any period that is more than 12 months before the date of claim. This Tribunal accepts those concurring submissions.

5. Mr. Drabble and Miss Windsor further agreed (and this Tribunal accepts that agreement) that for the 12 months prior to the date of claim the claimant has demonstrated "good cause" for the delay, continuous to the date of claim. They also agreed (which this Tribunal accepts) that if the claimant is within the EEC Directive, she is able to take the benefit of regulation 20(1) of the Social Security (Severe Disablement Allowance) Regulations 1984, S.I. 1984 No. 1303, which reads as follows,

"Persons formerly entitled to non-contributory invalidity pension

20. (1) Any person who immediately before both 10 September 1984 and 29 November 1984 was entitled to a non-contributory invalidity pension shall be entitled for 29 November 1984 and for any subsequent days which together with 29 November 1984 fall within a single period of interruption of employment, to a severe disablement allowance whether or not -

(a) he is disabled for the purposes of section 36 of the Act, or

(b) 29 November 1984 is appointed for the purposes of section 11 of the 1984 Act in relation to persons of his age,

if he satisfies the other requirements for entitlement to such an allowance."

6. Having considered the written and oral evidence available to us (detailed below), we unanimously hold that the claimant has shown that she comes within the personal scope of Article 2 of Directive 79/7/EEC. The relevant passages of the European Court's judgment (see Appendix 2 to this decision) are paragraphs 22 and 27 which read as follows,

" 22. However, the person concerned must prove that he or she was a person seeking employment when one of the risks specified in Article 3(1)(a) of the directive materialised. In this regard, it is for the National Court to determine whether the person concerned was actually seeking employment at the time when he or she was affected by one of the risks specified in the directive by looking to see in particular whether that person was registered with an employment organisation responsible for dealing with offers of employment or assisting persons seeking employment, whether the person had sent job applications to employers and whether certificates were available from firms stating that the person concerned had attended interviews.

.....

27. The answer ... must therefore be that Article 2 of Directive 79/7/EEC must be interpreted as meaning that the directive does not apply to a person who has interrupted his or her occupational activity in order to attend the upbringing of his or her children and who is prevented by illness from returning to employment unless that person was seeking employment and his or her search was interrupted by the materialisation of one of the risks specified in Article 3(1)(a) of the directive, it being unnecessary to make a distinction according to the reason for which that person left previous employment. It is for the National Court to determine that the person relying on Directive 79/7/EEC was actually seeking employment at the time when one of the

risks specified in Article 3(1)(a) of the directive materialised."

7. The evidence on this point before this Tribunal was as follows. A written statement dated 8 November 1991 by the claimant (affirmed by her in oral evidence to us) reads,

"I make this statement in connection ... with the requirement to show that my incapacity for work materialised after I began to seek employment. My daughter was born on 10 December 1963. I worked as a telephonist until my daughter was 6 and I then gave up work to look after her. When my daughter left school [in the summer of 1980 when she was aged 15] she went to Secretarial College for a year, at Merton College. At some point about that time (I cannot remember exactly when) I was told by the benefit office that I would need to go back to work, as my daughter was now out of school. I went into the local benefit office but they sent me to another office in Wimbledon above a JobCentre to get a form or number to sign on. They told me I had to work full-time, not part-time. I was at that time perfectly fit, and ready and able to work. I can vaguely remember signing on a few times once a week or fortnight. I started looking for work. I saw a job advertised in the local paper which was ideal, as it was only down the road doing the type of work I had done before - working as a telephonist. I applied for the job and was short listed. Unfortunately, before I was able to go for the interview I injured my back. I was in the bathroom at the time and reached up to a shelf to get something and felt my back go. I went to the doctor who said I had a slipped disc. I telephoned the woman at Depike Engineers (where I had been shortlisted) to say I would be unable to attend the interview but would telephone her as soon as I was feeling better. In fact, I did not get back to her because instead of getting better I got worse. Everything seemed to aggravate my back. My doctor sent me for physiotherapy and traction. I telephoned the local benefit office who told me to send in a doctor's certificate, which I did. I think the first certificate was for a month. My back did not get any better and eventually it was diagnosed as severe degenerative disc disease. I have been continuously incapable of work since."

8. That statement is supported by two documents from the prospective employers, Depike Engineers. The first is a letter to the claimant from Depike Engineers dated 28 October 1980 reading,

"Reference: Telephonist/Receptionist vacancy

Thank you for your letter in response to our advertisement. Would you kindly complete and return to this address the enclosed application form. We would also like you to telephone 01-897-1131 on Thursday 30 October 1980, with a view to arranging an interview for some time during the evening on that date at our Wimbledon office."

There is also a copy of what appears to be a telegram dated 13 November 1980 to the claimant from Depike Engineers, reading as follows,

"Reference telephonist vacancy

Compiling new short list if still interested. Kindly phone 01-897-1131."

9. A Schedule of dates attached to a submission from the adjudication officer now concerned (dated 21 August 1991) shows that the claimant claimed unemployment benefit on 8 October 1980 and then claimed sickness benefit on 5 November 1980. This is consistent with the evidence outlined in paragraphs 7 and 8 above.

10. At the hearing before us on 9 December, Miss Windsor also drew our attention to the fact that in a statement dated 8 June 1988 to an adjudicating medical practitioner in connection with the claimant's claim for severe disablement allowance, the claimant said,

"I have problems with my neck and lower back for last 10 years. It is steadily getting worse ... worked as telephonist until about 1965 and stopped work due to children and no work since then."

11. On the facts of this particular case, in accordance with the evidence before us (as detailed above), we hold that the claimant is within the personal scope of Article 2 of Directive 79/7/EEC in that she was seeking employment at a time when that search was interrupted by the risks of "sickness" and "invalidity" in Article 3(1) of the Directive. Consequently, the claimant is entitled to severe disablement allowance for the dates specified in paragraph 1 of our decision. We emphasise that our decision depends on the facts of this particular case and is given in exercise of our power to make findings of fact, conferred by the amended section 101 of the Social Security Act 1975.

(Signed) M.J. Goodman
Commissioner

(Signed) A.T. Hoolahan
Commissioner

(Signed) R.A. Sanders
Commissioner

Dated: 16 December 1991