

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The Secretary of State's appeal is allowed. The decision of the Stockton social appeal tribunal dated 2 September 1999 is erroneous in point of law, for the reason given below, and I set it aside. It is expedient for me to substitute the decision which the appeal tribunal should have given on the facts it found (Social Security Act 1998, section 14(8)(a)(i)). My decision is that the claimant's appeal against the adjudication officer's decision issued on 16 April 1998 is dismissed and that incapacity benefit is not payable to the claimant from and including 22 April 1998 because of the effect of regulation 4(1) and (5)(b)(ii) of the Social Security (Overlapping Benefits) Regulations 1979.

Background and legislation

2. The claimant had been in receipt of widow's pension since July 1995. The amount payable to her from 7 April 1998 was £92.91. She was in employment, but became incapable of work on 30 October 1997. She was paid statutory sick pay by her employer down to 21 April 1998. She then claimed incapacity benefit from 22 April 1998. She satisfied the conditions of entitlement to incapacity benefit, but on 16 April 1998 the adjudication officer gave the decision that that benefit was not payable to her.

3. The decision was based on regulation 4(1) and (5) of the Social Security (Overlapping Benefits) Regulations 1979:

"(1) Subject to paragraphs (2), (3) and (4) and regulation 12, an adjustment shall be made in accordance with paragraph (5) where either--

- (a) two or more personal benefits (whether of the same or a different description) are, or but for this regulation would be, payable under Parts II and III of the [Social Security Contributions and Benefits Act 1992] (which relate to benefits other than industrial injuries benefits) or under the Jobseekers Act [1995] for any period; or
- (b) [not relevant].

(5) Where an adjustment falls to be made in accordance with this paragraph and--

- (a) one of the benefits is a contributory benefit and one is a non-contributory benefit, the non-contributory benefit shall be adjusted by deducting from it the amount of the contributory benefit and only the balance, if any, shall be payable;
- (b) sub-paragraph (a) above does not apply, if one of the benefits is payable on a weekly basis--
 - (i) where the beneficiary has made application, before the payment is made, to have the benefit payable on a weekly basis adjusted, it shall be adjusted by deducting from it the amount of the other benefit and only the balance, if any, shall be payable;
 - (ii) in any other case, the benefit not payable on a weekly basis shall be adjusted by

- deducting from it the amount of the other benefit and only the balance of it, if any, shall be payable;
- (c) sub-paragraphs (a) and (b) above do not apply, the amount payable in respect of the benefits in question shall be an amount equal to that which would but for this provision be payable in respect of--
- (i) one of them, if they would have been payable at the same rate, or
 - (ii) the higher or highest of them, if they would have been payable at different rates, so however that in a case where more than 2 benefits would be payable then the total amount payable shall not exceed the amount which would be ascertained under sub-paragraph (c)."

4. Both incapacity benefit and widow's pension are payable under Part II of the Social Security Contributions and Benefits Act 1992 on contributory benefits. Incapacity benefit is payable on a daily basis (section 30B(1)). Widow's pension is payable on a weekly basis (sections 38(1) and 39(1)). An adjustment therefore had to be made to be made under regulation 4(5). None of the exceptions in paragraphs (2), (3) or (4) of regulation 4 or in regulation 12 applied. Nor did the obscure paragraph (2A) of regulation 4:

"(2A) Paragraph (1) shall not require an adjustment of widow's pension reduced in accordance with section 39(4) of the Contributions and Benefits Act only by reference to long-term incapacity benefit calculated in accordance with section 40(5)(b) of that Act."

Here the claimant's widow's pension might well have been reduced because she appears to have been below the age of 55 when she was widowed, but there was no question of long-term incapacity benefit under section 40(5)(b) as she was not incapable of work when her entitlement to widow's pension started.

5. According to the adjudication officer's submission to the appeal tribunal on form AT2 the adjustment was made under regulation 4(5)(c) of the Overlapping Benefits Regulations, on the basis that the amount of the higher rate of short-term incapacity benefit which would otherwise have been payable from 22 April 1998 was £57.70, so that only the higher amount of the widow's pension was payable. It does though seem clear, as acknowledged in the most recent submission on behalf of the Secretary of State, that the adjustment should have been made under regulation 4(5)(b), as between the daily benefit and the weekly benefit. The option given by regulation 4(5)(b)(i) was therefore most probably not drawn to the claimant's attention.

The appeal to the appeal tribunal

6. The claimant appealed against the adjudication officer's decision on the non-payability of incapacity benefit on the ground that it discriminated against her as a woman contrary to Council Directive 79/7/EEC. Her representative, Mr Brian Kennedy, a welfare rights officer of Stockton-on-Tees Borough Council, relied on the decision of the European Court of Justice (ECJ) in van Gemert-Derks v Bestuur van de Nieuwe Industriële Bedrijfsvereniging (Case C-337/91) [1993] ECR I-5435. There the claimant was in receipt of benefit for incapacity for work under Dutch legislation, which contained a provision that such benefits were to be withdrawn

***106/01**

CIB/230/2000

"when a woman to whom they have been granted becomes entitled to a widow's pension". The claimant's husband died and she applied for and was granted a widow's pension. For the period to which the ECJ's decision related, Dutch law was that widowers were not entitled to a state pension on the death of a wife. The ECJ held that, as a provision depriving women of the right to claim a benefit which men continue to receive in the same situation constitutes discrimination contrary to Directive 79/7, the Dutch provision was precluded by the Directive unless the withdrawal of benefit was the result of a voluntary renunciation by the claimant.

7. The adjudication officer made written submissions that there was no discrimination against the claimant and that van Gemert-Derks was distinguishable, but no presenting officer was sent to the hearing on 2 September 1999. The appeal tribunal allowed the claimant's appeal. It considered the arguments put forward by the adjudication officer, but applying the principle of van Gemert-Derks concluded that the claimant had been discriminated against contrary to Directive 79/7. Accordingly, it decided that incapacity benefit was payable from 22 April 1998.

The appeal to the Commissioner

8. The Secretary of State (who has taken over the functions of adjudication officers) now appeals against that decision with the leave of the chairman of the appeal tribunal. When the case was referred to me I granted the request on behalf of the claimant for an oral hearing, which was held in Doncaster. The claimant was represented by Mr Kennedy. The Secretary of State was represented by Mr Tim Ward of counsel, instructed by the Office of the Solicitor to the Department of Social Security. Following the hearing I directed further written submissions on the issue of objective justification. I am grateful for all the well-argued oral and written submissions.

Reference to the ECJ?

9. Let me first deal with the issue of a possible preliminary reference to the ECJ. Naturally both representatives submitted that Community law was clearly in their favour, but also submitted that at the least the law could not be clearly in favour of the other party, so that a reference might be considered. I have concluded that a reference is not necessary, fundamentally for the reason that the difficulty in the present case is not in identifying the applicable principles of Community law, but in applying those principles to the circumstances of the present case. That is something which it is for the national court to work out, not the ECJ. Thus I must grapple with the very considerable difficulties involved.

Discrimination contrary to Directive 79/7

10. It is agreed that the claimant is within the personal scope of Directive 79/7 and that incapacity benefit comes within Article 3(1) as a statutory scheme providing protection against the risks of sickness and invalidity, or as part of such a scheme. It is also agreed that the Directive does not apply to widow's pension because provisions concerning survivors' benefits are expressly excluded by Article 3(2). Article 5 requires Member States to ensure that provisions contrary to the principle of equal treatment are removed and Article 4(1) provides that:

"The principle of equal treatment means that there shall be no discrimination whatsoever on the ground 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."

11. The arguments made for the Secretary of State by Mr Ward were essentially the same as those made to the appeal tribunal. He put forward two reasons for distinguishing van Gemert-Derks: that there was a difference between a withdrawal of benefit and an adjustment of the amount payable and that it was essential to van Gemert-Derks that the withdrawal should involve a drop in income. I reject both of those reasons.

12. On the first of those issues, Mr Ward pointed to the use by the ECJ in paragraph 25 of the judgment of the description of the Dutch provision as one "depriving women of the right to claim benefit" and in other places and in the operative part of phrases like "withdrawal of benefit". He stressed that the effect of the adjudication officer's decision was that the claimant remained entitled to incapacity benefit; it was merely that the benefit was not payable to her. I agree with Mr Kennedy that the principle in van Gemert-Derks is not limited by such technical distinctions. What matters is the practical effect that the claimant was to receive nothing by way of incapacity benefit. The language of the ECJ partly followed the language of the Dutch provision involved, and in paragraph 25 the "deprivation of the right to claim a benefit" in my judgment includes a case where benefit is merely not payable although there is an underlying entitlement. That is in line with Article 4(1) of Directive 79/7 and the specific mention of the calculation of benefits.

13. On the second issue Mr Ward pointed to paragraphs 52 and 61(2) of the Advocate General's Opinion, where it was suggested that one of the conditions for Article 4(1) precluding an automatic withdrawal of incapacity benefits from widows but not widowers was that that lead to a drop in income. It appears from the facts in van Gemert-Derks that the widow's pension which the claimant was awarded was of a lower amount, at least initially, than the incapacity benefit which was withdrawn, and the drop in income was mentioned in one of the questions referred by the Dutch court. Mr Ward submitted that the Overlapping Payments Regulations could not produce the result that the claimant received an amount less than her entitlement to incapacity benefit. If the adjustment was done under regulation 4(5)(c), the higher benefit would always be payable. I add that it would be the same if the adjustment was made under regulation 4(5)(b) - if the amount of incapacity benefit was higher than that of widow's pension the excess would be payable. Again, I agree with Mr Kennedy. In its analysis of the issue of discrimination in paragraphs 18 to 29 of the judgment, the ECJ made no mention of any condition of there being a drop in income. The principle was stated clearly and unequivocally in paragraphs 24 and 25 that there is discrimination whenever women are deprived of a right to claim a benefit which men continue to receive in the same situation. It is that principle which

has to be applied.

14. That leads on to the main argument put forward by Mr Ward. In his skeleton argument it was put as follows:

"17. There is no discrimination against [the claimant] in respect of incapacity benefit. The effect of the 1979 Regulations [the Overlapping Benefits Regulations] is to adjust the total amount of benefit payable so that it does not exceed the level of her highest benefit - in fact her Widows pension, so as to prevent her from receiving two income replacing benefits at the same time. There are no circumstances in which she would receive less benefit than an incapacitated man.

18. The 1979 Regulations apply equally to men and women. The only difference in treatment in this case is that men are not entitled to Widows pension. That benefit falls outside the scope of the Directive."

15. That seems to involve identifying a man "in the same situation as" the claimant as being a man receiving some other benefit which came within the scope of the Overlapping Payments Regulations. Then men and women equally would receive the amount of the higher of the benefits involved. If no other benefit was being received the claimant would have been paid exactly the same incapacity benefit as a man. Thus Mr Ward submitted that there were no circumstances in which the claimant could be worse off than a man with incapacity benefit and there was no discrimination against her.

16. The analysis of Mustill LJ in Jones v Chief Adjudication Officer, appendix to R(G) 2/91, also reported in [1990] IRLR 533 might perhaps support that argument. That was another case on the Overlapping Payments Regulations, but as between the increase to a husband's invalidity pension for his wife (dependency benefit) and the wife's invalid care allowance (ICA). That fell under regulation 10, with the effect that the dependency benefit was not payable to the extent that it did not exceed the ICA. The amount of what turned out to be excess dependency benefit was deducted from arrears of ICA due to the wife, so that she brought the challenge. It was argued that there was discrimination under Directive 79/7 because more women than men were the object of dependency benefits. Mustill LJ concluded that there was no discrimination on the ground of sex in regulation 10. There was discrimination against women in the conditions of entitlement to dependency benefit, since so few women had dependent husbands. The effect of regulation 10 was to take away the husband's benefit, not the wife's. That was not discriminatory because it merely tended to reduce the discrimination in favour of men in the conditions of entitlement. I have summarised a long and subtle analysis brutally. It could be argued in the present case that there was discrimination in favour of women in the legislation at the relevant time providing benefits for widows but not for widowers and that the adjustment to the claimant's incapacity benefit under regulation 4(5) merely reduced that discrimination and so was not itself discriminatory.

17. My view is that that analysis does not work in the present case, although I do not in the

end have to express a definite conclusion (because of my conclusion in paragraph 33 below). First, in Jones both the dependency benefit and the ICA came within the scope of Directive 79/7. Here the claimant's widow's pension fell outside the scope of the Directive, so that discrimination was not precluded by Article 4(1). In common with Mr Kennedy, I have considerable doubt whether such a permitted discrimination outside the scope of the Directive can be relied on to counteract a discrimination in relation to a benefit within its scope. Second, and more important, I do not see how the analysis can stand with the approach of the ECJ in van Gemert-Derks. The ECJ was there dealing with circumstances in which Dutch law discriminated in favour of women in giving benefits to widows, but not to widowers. In paragraph 22 of the judgment it concluded that the fact that such benefits fell outside the scope of Directive 79/7 did not prevent the Directive applying to the withdrawal of incapacity benefit following the grant of widow's benefit. Then the conclusion was simply in terms of whether incapacity benefit was withdrawn from women in circumstances in which it would not be withdrawn from men.

18. That approach also undermines Mr Ward's main submission on this point. The ECJ did not regard the fact that men could not receive widower's pensions as placing them in a different situation from women when considering a possible discriminatory effect. Men who were receiving or claiming incapacity benefit and whose spouse had died were regarded as in the same situation as a woman receiving or claiming incapacity benefit whose spouse had died. Then there was found to be discrimination because the legislation withdrew benefit from women, but not men, because only women could be awarded widow's benefit.

19. I have considered the effect of regulation 4(5)(b)(i) of the Overlapping Benefits Regulations, under which the claimant could have opted to have her incapacity benefit paid in full and only the excess over that amount paid by way of widow's pension. It could possibly be argued that a failure to take that option was the equivalent of the voluntary surrender of incapacity benefit which the ECJ in van Gemert-Derks ruled would have removed any discrimination. However, in paragraph 27 of the judgment it observed that a voluntary surrender could only have that effect if the widow was given "clear, specific information on the potential financial consequences of replacing that benefit by [a widow's] pension". In the present case, it appears most likely that the claimant was never presented with the option, let alone any information on the consequences, as it was assumed that the adjustment of incapacity benefit had to be carried out under regulation 4(5)(c) (where there is no such option) and not under regulation 4(5)(b). In those circumstances there is no room for any argument based on the existence of the option.

20. Thus, if I had to, I would conclude that in the present case regulation 4(5) of the Overlapping Benefits Regulations, as applied to incapacity benefit and women in receipt or claiming widow's pension discriminated against women for the purposes of Directive 79/7. However, since below I have concluded that there is nevertheless objective justification for that discrimination, so that Article 4(1) of the Directive is not breached, I do not have to reach a final decision on this point.

R(S) 2/89

21. I should record that the Secretary of State did not at any stage rely on the reported Commissioner's decision R(S) 2/89. That was also to do with regulation 4 of the Overlapping Benefits Regulations, as between ICA (a non-contributory benefit) and widow's pension. The non-contributory benefit was to be adjusted under regulation 4(5)(a). Mr Commissioner Penny rejected the argument of discrimination contrary to Directive 79/7 on the ground that there could be no man in the same situation as the claimant, because no man could receive widow's pension. It seems to me that that reasoning has been overtaken by the judgment of the ECJ in van Gemert-Derks and that R(S) 2/89 should therefore no longer be followed.

Direct or indirect discrimination?

22. A further point which emerges from R(S) 2/89 is that the Commissioner gave the opinion in paragraph 11 that, if he had found there to be discrimination, he would have characterised it as direct discrimination. There was no need to look at what happened in practice or at any statistical evidence to see what the effect of the regulation would be where widow's pension was involved. I need to decide whether any discrimination in the present case is direct or indirect, because it is generally thought that there can be no question of any objective justification of direct discrimination (although I am not sure that that has in fact ever been conclusively decided). Mr Kennedy submitted that the discrimination was direct. He relied on the decision of the ECJ in Dekker v Stichting Vormingscentrum voor Jong Volwassen Plus (Case C-177/88) [1990] ECR I-3941. There an employer refused to employ a pregnant woman because of the possible adverse consequences following from its insurer's rules on compensation for unfitness for work. It was held that this was a breach of the equal treatment requirement of Council Directive 76/207/EEC. It was said that in that context whether discrimination was direct depended on whether the fundamental reason for the refusal of employment was one which applied without distinction to workers of either sex or was one which applied exclusively to one sex. As only women could be refused employment on grounds of pregnancy a refusal on that ground constitutes direct discrimination on the ground of sex (paragraph 12 of the judgment). Mr Kennedy submitted that only women could have other personal benefits adjusted by virtue of the receipt of widow's pension, so that the discrimination involved was necessarily direct.

23. I reject that submission. It is necessary to step back somewhat from the precise benefits involved. Regulation 4(5) of the Overlapping Benefits Regulations is a provision which applies to the interaction of a number of different personal benefits and on its face is one which applies without distinctions as to the sex of the claimant involved. It is different from the Dutch provision in van Gemert-Derks, which on its face applied a particular rule only to women and plainly, if it was discriminatory, was directly discriminatory. I have not been referred to any other authorities on the distinction between direct and indirect discrimination and do not propose to conduct any survey of my own. As far as I am aware the basic propositions in Dekker remain applicable, including in the context of Directive 79/7. Regulation 4(5) of the Overlapping Benefits Regulations on its face applies a rule containing conditions which do not distinguish according to the sex of the claimant. Accordingly, any discrimination involved is indirect. It is not inconsistent with that conclusion that the discrimination can be identified in

cases involving widow's benefits without the need to consider issues of disproportionate impact on one sex. If I am wrong about that, I nevertheless consider that the nature of any discrimination, whatever its classification, is such that the issue of possible objective justification arises.

Objective justification

24. The burden of showing objective justification is on the Secretary of State. Mr Ward made a brief submission on the issue at the oral hearing and a more comprehensive further written submission has subsequently been put forward, on which Mr Kennedy has commented.

25. The general test, as stated by the ECJ in De Weerd, née Roks and others v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and others (Case C-343/92) [1994] ECR I-571 and confirmed in Nolte v Landesversicherungsanstalt Hannover (Case C-317/93) [1995] ECR I-4625 and Megner and Scheffel v Innungskrankenkasse Rheinhessen-Pfalz (Case C-444/93) [1995] ECR I-4741, is of whether the national measure is "based on objective factors unrelated to any discrimination on grounds of sex", which will be the case where "the measures chosen reflect a legitimate social policy aim of the Member State whose legislation is at issue, are appropriate to achieve that aim and are necessary in order to do so" (see paragraphs 33 and 34 of the judgment in De Weerd and paragraph 28 of the judgment in Nolte).

26. However, in Nolte (and in Megner and Scheffel) the Court went on to say this in paragraph 33:

"The Court observes that, in the current state of Community law, social policy is a matter for the Member States (see Case C-229/89 Commission v Belgium [1991] ECR I-2205, paragraph 22). Consequently, it is for the Member States to choose the measures capable of achieving the aim of their social and employment policy. In exercising that competence, the Member States have a broad margin of discretion."

Thus the ECJ held that the German government's policy of fostering the existence and supply of minor employment justified the exclusion of such employment from compulsory insurance, although that affected considerably more women than men. It was said in paragraph 34 that the national legislature was reasonably entitled to consider that the legislation in question was necessary in order to achieve that aim. In R v Secretary of State for Employment, ex parte Seymour-Smith (Case C-167/97) [1999] ECR I-623, the Court, while accepting the wide margin of discretion mentioned in Nolte, stressed in paragraph 75 of the judgment that that could not have the effect of frustrating the implementation of a fundamental principle of Community law (in that case equal pay for men and women). But what the British government had to show, by evidence and not by mere generalisations, was described as that the rule in question reflected a legitimate aim of its social policy which was unrelated to any discrimination based on sex and that "it could reasonably consider that the means chosen were suitable to attaining that aim" (paragraph 77). I observe that the status of the test of a necessary connection between the measure in question and the legitimate policy aim is in some doubt.

26. In looking at the legitimate social policy aims involved in the present case I must consider not just the Overlapping Payments Regulations, but also the aims of the two benefits involved. At this stage it does not matter that incapacity benefit is within the scope of Directive 79/7 and widow's pension is not. I must also consider the existence of the option in regulation 4(5)(b)(i) of the Overlapping Benefits Regulations. That may not have been brought to the claimant's attention in the present case, but its existence does allow the payment of incapacity benefit in full to a woman receiving widow's pension. The woman would be left with the same total benefit income as through the operation of regulation 4(5)(b)(ii) (and there seem now to be no income tax advantages in taking the option), but there would have been equality of treatment in relation to the one benefit within the scope of Directive 79/7. Whether or not the existence of that option would prevent any prohibited discrimination arising as mentioned in paragraph 19 above, the fact that a prohibited discriminatory effect is not automatically imposed is relevant to the question of justification.

27. I see no difficulty in finding a justification for the general operation of the Overlapping Benefits Regulations in preventing the concurrent payment of different social security benefits, for the reasons set out in the Secretary of State's further submission. In particular I refer to the general principle accepted by the National Insurance Advisory Committee in 1948 that double provision should not be made for the same contingency. It is well within the sphere of the social policy of Member States to choose the kind of benefits which should not be allowed to overlap and the generosity or otherwise of the rules. However, the particular measure, ie regulation 4(5), must be considered, and its application to incapacity benefit and widow's benefit.

28. Paragraph 8 of the Secretary of State's further submission says this about the non-means tested benefit covered by regulation 4(5), ie benefits under Parts II and III of the Contributions and Benefits Act (subject to exceptions) and jobseeker's allowance:

"Many benefits are designed to provide a measure of income replacement when, for one reason or another, the individual claimant cannot, or can no longer, work. This applies in this case, as for example here, where the individual claimant is assured of an income through public funds on the grounds of being unable to provide an income through being incapable of work. Since there is entitlement to another benefit on different grounds - that of being widowed - the argument is that, without the ability to adjust one benefit against the other, the State would otherwise have to pay the individual twice from public funds. Hence the rule that Widows Benefit and Incapacity Benefit overlap."

29. That argument is not very convincing in the terms in which it is made. The assumption that the loss of a husband necessarily entails the loss of an income for the wife can no longer safely be made. And as the widow's pension rules allow a beneficiary to work and to earn as much as she likes without affecting the amount of benefit, it can hardly be said that a widow as such cannot work. However, with some refinement I think that the argument holds good. I do not like the term "income replacement". It seems to me that the major contributory benefits at the dates relevant in this case (incapacity benefit, retirement pensions, widow's benefit,

maternity allowance and jobseeker's allowance) have the aim of providing a basic level of income where a risk has materialised such that the claimant either cannot or cannot reasonably be expected to reach that basic level of income through the labour market. Widow's benefit and in particular widow's pension does not fit into that description as easily as some of the other benefits, but it does so when the conditions of entitlement are examined. Widow's pension was from 1988 restricted to women widowed after the age of 45 or who ceased to be entitled to widowed mother's allowance (which entails the care of children) after that age (Contributions and Benefits Act, section 38). The amount of pension was reduced under section 39(4) for every year by which the woman was under the age of 55 when the qualifying condition was met. These restrictions defined in a rough and ready way a group of widows who may not have had a recent connection with the labour market or who might find it difficult to enter the labour market so as to earn an income and who were thus to be entitled to widow's pension on the materialisation of the risk of bereavement. I note here that widow's benefits have now been replaced by unisex bereavement benefits.

30. The non-contributory benefits under Part III of the Contributions and Benefits Act which are also within the scheme of regulation 4(5) of the Overlapping Benefits Regulations have the same aim. Specific exceptions in regulation 4(2) take out of the scheme benefits in the form of one-off grants and those which are designed to meet extra expenses arising from a particular cause (attendance allowance and disability living allowance). I note also that under regulation 6 no adjustment has to be made as between incapacity benefit and industrial injuries disablement benefit. That leaves within the scheme of regulation 4(5) non-contributory benefits like severe disablement allowance (while it still existed), ICA and category C and D retirement pensions. Those benefits fit within the description of aims set out above.

31. I am satisfied that where there is entitlement to both widow's pension and to incapacity benefit there has in relation to both benefits been a materialisation of the same risk as described in paragraph 29 above. Mr Kennedy submitted in his comments that widowhood and incapacity for work were contingencies of different kinds, so that the argument put forward by the Secretary of State did not work. There is force in that submission, but in my view the social policy aim is a broader one, in terms of the general risk which I have described and not of individual contingencies. I am therefore satisfied that regulation 4(5) of the Overlapping Benefits Regulations reflects a legitimate aim of social policy, which is unrelated to any discrimination based on sex, and is appropriate to achieving that aim. I am satisfied that that aim is not solely related to budgetary considerations, but is related to the coordination of the social security system, so that the ECJ's observations in paragraph 35 of De Weerd do not prevent it being relied on.

32. The point at which I hesitate slightly is that of asking whether the measures contained in regulation 4(5) are necessary to achieving that aim of social policy. It could be argued, as in effect Mr Kennedy did, that an exception could have been written into the regulations to exclude adjustments as between widow's pension and other benefits which would have left the remainder of the scheme on overlapping benefits in a coherent state. But, if the social policy aim is formulated in the way I have done above, I do not think that it could remain as a coherent

***106/01**
CIB/230/2000

general aim if widow's pension were taken out of it. And if, as I think I must, I pose the question as set out in paragraph 77 of Seymour-Smith, the measures in regulation 4(5) are certainly ones which the legislature could reasonably consider suitable to achieving the social policy aim. The choice is within the broad margin of discretion described in Nolte and Megner and Scheffel.

33. Therefore my conclusion is that, if there was prima facie discrimination on the ground of sex contrary to Directive 79/7 in the application of regulation 4(5) of the Overlapping Benefits Regulations to the claimant, that discrimination was objectively justified. That is why I do not have to reach an absolutely final conclusion on whether there was discrimination or not.

Conclusion

34. The result is that the appeal tribunal of 2 September 1999 erred in law in concluding on the undisputed facts that regulation 4(5) was not to be applied because it contravened Directive 79/7. It should at the least have considered the issue of objective justification. It is clearly expedient for me to substitute the decision which should have been given on the undisputed facts. As Directive 79/7 does not prevent the application of regulation 4(5) the result must be that the appeal against the adjudication officer's decision of 16 April 1998 is disallowed. However, I put the ground for the non-payability of incapacity benefit not in regulation 4(5)(c), but in regulation 4(5)(b)(ii), the claimant not having exercised the option in regulation 4(5)(b)(i).

35. My decision to that effect is set out in paragraph 1 above.

(Signed) J Mesher
Commissioner

Date: 6 September 2001