RETIREMENT PENSION

Trans-sexuality—claimant, born a male, subsequently adopts a woman's way of life—determination of entitlement to retirement pension.

The claimant who was born a male in 1915 commenced living and working as a woman in 1960 following medical and psychiatric treatment. On 28.12.60 the claimant was issued with a woman's national insurance card. On 14 January 1975 the claimant made an application for determination of questions relating to title to retirement pension, contending that she was a woman and would therefore reach pensionable age on her 60th birthday.

Held that:—

1. The issue of a woman's national insurance card was a concession made at the claimant's request. The concession expressly reserved consideration of the question of entitlement to a pension at 60 and accordingly the doctrine of estoppel could not be applied; (paragraph 11).
2. In any event, an estoppel cannot prevent a duty, imposed by statute, from being carried out and the insurance officer had a statutory duty to enquire into whether the claimant was a woman; (paragraph 14).
3. The statutory authorities should not be guided into making decisions in this type of case by extra-statutory action taken for medical or compassionate reasons; (paragraph 16).
4. The claimant, whilst living as a woman, was biologically a man and had not attained the pensionable age of 65 (paragraph 16).

1. This is an appeal by the claimant from the decision of a local tribunal. I heard the appeal at which the claimant gave evidence on 2 August 1976, when Mr Henry Hodge of the Child Poverty Action Group appeared for the claimant, and Mr J S Finney, solicitor's office, Department of Health and Social Security, represented the insurance officer. I have referred to "the claimant" only, and if I omit to refer to personal details such as names which perusal of the documents reveals, I do so to avoid identification of the claimant for reasons which my decision makes sufficiently apparent. For the same reasons I refer to the claimant where necessary by feminine pronouns.

2. On 14 January 1975 the claimant on form BR1 appropriate for a person applying on his or her own insurance made an application for the determination (in advance of retirement) of questions relating to title to retirement pension other than the question of retirement. (National Insurance (Claims and Payments) Regulations 1971 [S.I. 1971 No 707] Schedule 3 paragraph 5(4), replaced on 6 April 1975 by a similar provision, the Social Security (Claims and Payments) Regulations 1975 [S.I. 1975 No 560], Schedule 2, paragraph 4(4)).

3. The claimant's case is that she is a woman, at least for the purpose of any claim to retirement pension, and that in the circumstances of an unusual case the authorities are estopped from asserting that she is not. Pensionable age in the case of a woman is 60 years. (National Insurance Act 1965 section 114(1); Social Security Act 1975 section 27(1)). I turn to the facts of the claimant's case, as to which there is no dispute.

4. The claimant was born on 22 February 1915 in Canada. Her certificate of birth shows that she was registered as of the male sex and given an appropriate forename. In 1919 she came to England and has lived and worked here ever since. In 1933 she became employed as a radio serviceman and worked in that trade until 1939/40 when she was called up for military service with the army. She was on non-combatant duties with a forestry unit until 1944 when she became a coal miner, working in the pits until 1946 when she returned to radio and later television repair work until 1960.

Throughout the whole of the above period from birth the claimant had lived and worked as a man. By 1944 however her inclination was to dress up in woman's clothes, and she did so on occasions thereafter. At this stage she could properly be described as a transvestite, and apart from such episodes she continued to live and work as a man.

5. In 1956 or thereabouts the claimant sought medical advice on her problems, psychiatric and physical. By 1958 she was under the care of a consultant endocrinologist at a London hospital, and received hormone therapy. At intervals of slightly less than a year the claimant had female hormone implants, which accentuated female physical characteristics, but no surgical attention was ever undertaken.

6. The claimant experienced difficulty in her work and was helped by a psychiatric social worker. By 1960 the consultant was of the opinion that the time had come for the claimant to change roles, that is to say to adopt a woman's way of life and to live as such. With this object in view as I find, the claimant renounced and abandoned her then names, and adopted a forename appropriate to a woman. She has used that name and the prefix "Miss" ever since, and commenced to live and work in society as a woman. Since 23 November 1960, when the change of name was evidenced by a statutory declaration, the claimant passed from being a transvestite and became a trans-sexual.

7. By letter of 16 December 1960 the psychiatric social worker requested the manager of the local national insurance office to issue "a female insurance card" to the claimant in her adopted names to help on the question of employment. The request was considered by the Ministry of Pensions and National Insurance (now the Department of Health and Social Security). Acting on medical advice and on a consideration of the claimant's need to obtain employment in the chosen role of a woman the claimant was authorised on 20 December 1960 to hold a woman's national insurance card, and contributions at the lower appropriate rate were accepted until April 1975 when the rates for men and women became the same.

8. At the time when the card was issued to the claimant on 28 December 1960 it was explained to her that entitlement to benefit under the National Insurance Acts, in particular to a retirement pension at 60, was a matter for the statutory authorities to decide at the appropriate time. The claimant's evidence to the local tribunal and to me was that when the local "insurance officer" handed the card over he specifically explained that there would be no guarantee that at the age of 60 the claimant would be entitled to a pension and that she must not regard it as certain. The local tribunal found this conversation to have taken place, and that the claimant understood that the card was issued for social reasons. Mr Hodge accepted that the question of entitlement was reserved, but submitted that it should be taken as implied that the claimant was led to believe that she would get a pension at 60.

9. After receipt of the woman's card the claimant trained as a shorthand typist for about a year and subsequently obtained employments as such. She is now a secretary-shorthand typist, accepted in her role of woman by her employers, and socially accepted as such. She has received unemployment and sickness benefit as a woman. An insurance policy, now matured, was reissued to her in her adopted name, but so far as she can recollect the premiums were not adjusted in any way from the rates originally due when the policy was issued to her as a man.

10. Such being the facts I turn first to the estoppel point raised by the claimant. Mr Hodge invited my attention to the basis of estoppel by con-

duct as it appears in the judgment of Denning L J (as he then was) in *Central Newbury Car Auctions Ltd v Unity Finance Ltd* [1957] 1 QB 371 at pages 379–380, pointing out that both representation and conduct are recognised bases for the doctrine. I propose to rely on the short definition enunciated by Lord Birkenhead L C in *Maclaine v Gatty* [1921] 1 AC 376 at page 386: "Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time", and to consider this definition in relation to the facts of this case.

11. Estoppel by representation, or promissory estoppel, arises out of a unilateral act. What was done in this case was a concession made to the claimant on request, which, as Mr Hodge concedes, expressly reserved for consideration the question of entitlement to pension at 60. Nothing as I find was done or said on behalf of the Ministry, nor was there any unambiguous promise or assurance by them which justified the claimant in believing that the facts were otherwise than both parties then knew and accepted the facts to be. These were that the claimant, although a man, was being treated, for social and therapeutic reasons, as a woman, and that there was no commitment to accept any application for pension in the future as if made by a woman. The claimant does not assert a belief in any fact, justified by what was represented to her, upon which she acted to her detriment, but she in fact paid contributions for years at a rate lower than was appropriate to a man. It is not now sought to affirm against the claimant that a set of facts existed at the time when the card was issued any different from what the facts then were, and which were known and appreciated by the claimant. On this approach estoppel does not in my opinion arise on the facts of the case, the circumstances of the issue of the card being not in dispute and agreed. Having regard to the claimant's evidence I have no doubt that she fully understood and appreciated the reserved pension position. The evidence of what she was told and accepted is clear, and this being so I find it impossible to accede to the submission that the claimant was led to believe that she would get a pension at 60.

12. Mr Hodge relies on the case of *Robertson v Minister of Pensions* [1949] 1 KB 227, where it was held that the appellant, the claimant in a claim to pension against the Minister of Pensions, was entitled to rely on a prior assurance by the War Office that his disability was attributable to war service. Relying on that assurance he forbore to obtain an independent medical opinion on his own behalf. The case was decided on the principle "that if a man gives a promise or assurance which he intends to be binding on him, and to be acted on by the person to whom it is given, then, once it is acted upon, he is bound by it" (per Denning J (as he then was) at page 231). This was an extension of the principle to a situation where the parties were not previously bound by contract. Apart from the fact, however, that in this present appeal there was no promise or assurance upon which the claimant was intended to act, there was no contractual relationship between the Minister and the claimant, and nothing said to give the claimant cause to think that the entitlement provisions would not be applied as provided for by statute or by statutory regulation when the time came for that to be done.

13. The principle of promissory estoppel thus extended in *Robertson's case,* and relied upon by Mr Hodge is, I think, inconsistent with what was said in *Emmanuel Ayodeji Ajayi v R T Briscoe (Nigeria) Ltd* [1964] 3 All ER 556 PC. Lord Hodson at page 559 F there pointed out that the principle of promissory estoppel, as defined by Bowen L J in *Birmingham and District Land Company v London and North Western Railway Company*

(1888) 40 Ch D 268 had been confirmed by the House of Lords in the case of *Tool Metal Manufacturing Co. Ltd v Tungsten Electric Co. Ltd* [1955] 2 All ER 657, where the authorities were reviewed, and no encouragement was given to the view that the principle was capable of extension so as to create rights in the promisee for which he had given no consideration. He defined the principle as operating when one party to a contract, in the absence of fresh consideration, agreed not to enforce his rights. In my view the doctrine of promissory estoppel, upon which Mr Hodge relied is limited to modifying existing contractual rights, and I am not persuaded that the doctrine is applicable to this case where no contractual relationship existed, or that *Robertson's case,* the reasoning of which was criticised in *Howell v Falmouth Boat Construction Co Ltd* [1951] A C 837, can be relied upon by the claimant to raise the application of the doctrine of promissory estoppel in support of her case.

14. There is, I think, a further difficulty in the claimant's case. An estoppel cannot prevent a duty enjoined by statute from being carried out (*Maritime Electric Company, Limited v General Dairies, Limited* [1937] AC 610 PC). The application and the covering letter sent with it by the claimant raised the question whether the claimant was a woman who would attain the pensionable age of 60 years on 22 February 1975. Section 68(2) of the National Insurance Act 1965, (section 99(1) of the Social Security Act 1975) provides that the insurance officer should take the claim or question as to the right to benefit into consideration, and dispose of it in accordance with the section and any regulations as to the determination of claims and questions. The question which the insurance officer was under a statutory duty to investigate and decide was twofold, namely (1) whether the claimant would be 60 on 22 February 1975 and (2) whether the claimant was a woman. In my opinion estoppel could not be raised to prevent consideration being given to question (2), into which the insurance officer had a statutory duty to enquire.

15. Lastly I turn to the second point taken by Mr Hodge, that biological sex is not relevant to the situation in this case, and that the claimant, because of the factual situation, ought to be "assigned" by me to the feminine gender, and that an affirmative answer should be given to the question whether the claimant is a woman. If so, pensionable age will have been reached. Mr Finney contends that the biological sex of the claimant is the essential determinant of the question whether pensionable age has been reached by the claimant. Both representatives invited my attention to the case of *Corbett v Corbett (orse Ashley)* [1970] 2 WLR 1306 which I have read and considered, especially as regards the argument which was advanced on behalf of the respondent in that case on the question of "assignment".

16. I have no doubt that when in November 1960 the consultant endocrinologist advised that the time had come for the claimant to change roles he was "assigning" the claimant to the gender, rather than the sex, in which his patient could best be managed and could live in society. I do not regard such assignment as the test of the question which Mr Hodge agrees I have to decide, namely, is the claimant a man or a woman, nor am I persuaded that I should be guided by extra-statutory administrative action, taken for medical and compassionate reasons to enable the claimant to live as a woman. The claimant was registered at birth as male, and a doctor and nurse were in attendance. It is not suggested that the particulars recorded in the birth certificate are in any way erroneous, and there is no suggestion that the claimant, living as a woman, is biologically, that is anatomically and physiologically, other than male. Although the claimant lives successfully in the role of a woman my conclusion on the evidence is that the

claimant is male and a man, and has not attained the pensionable age of 65 years. My decision therefore is that the application for determination of the questions relating to entitlement to retirement pension made in advance of retirement fails, and the appeal is disallowed.

(Signed) R. J. A. Temple
Chief Commissioner