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JJS/1/LM

Commissioner's File: CI/117/92
CI/198/92

SOCIAL SECURITY ACTS 1975 TO 1990
SOCIAL SECURITY ADMINISTRATION ACT 1992



111/92

CLAIM FOR REDUCED EARNINGS ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Norma Thomas (Mrs)
Josephine Tyson (Mrs)

Appeal Tribunal: Manchester

Case No: 614:23423
614:22018

[ORAL HEARING]

1. Both appeal succeeds. In exercise of my jurisdiction I give in each case the decision myself. My decisions are set out hereunder:

(a)(i) the decision of the social security appeal tribunal in the case of Mrs Thomas dated 3 October 1991 is erroneous in point of law

(ii) it is expedient that I should give the decision that the tribunal should have given and my decision is that the decisions of the adjudication officer awarding reduced earnings allowance from 9 May 1990 to 7 May 1991 were not to be revised and the claimant is not disentitled to reduced earnings allowance from and including 12 December 1990. The adjudication officer concerned with Mrs Thomas' case should have regard to what I have said about quantification in paragraph 7 thereof.

(b) my decision in the case of Mrs Tyson is that the decision of the social security appeal tribunal dated 18 June 1991 is erroneous in point of law; it is expedient that I should give the decision that the tribunal should have given and my decision is that the decisions of the adjudication officer awarding reduced earnings allowance from 15 February 1989 to 12 February 1990 were not to be revised and the claimant is not disentitled to reduced earnings allowance from and including 1 October 1989; the adjudication officer concerned with

Mrs Tyson's case should also have regard to what I have said about quantification.

2. The facts in these two appeals are closely aligned and the issue for determination in each is identical. I held an oral hearing. Mr Peter Roth of Counsel appeared for the adjudication officer and Mr Richard Drabble of Counsel appeared for both claimants.

3. Both appeals are by the adjudication officer. The decision in respect of Mrs Thomas was given by the Manchester social security appeal tribunal on 3 October 1991 and the decision in respect of Mrs Tyson was given by the same tribunal on 18 June 1991.

4. Each claimant received reduced earnings allowance before she became 60 years old, but on reaching that age the adjudication officer by a review decision decided that her entitlement to reduced earnings allowance had ended and that instead she became entitled to retirement allowance. The amount awarded in respect of retirement allowance was less than that which the claimant would receive by way of reduced earnings allowance. Each claimant appealed to the Manchester social security appeal tribunal. The claimant's grounds of appeal in both cases were that a man would continue to receive retirement allowance until he was 65 years old and that there was discrimination which was forbidden by Directive 79/7 EEC. The members of the tribunal in each case allowed the appeal. They accepted the argument made on behalf of the claimant and held that section 59 of the Social Security Act 1975 directly discriminated against women in breach of Directive 79/7/EEC and found that the claimants were entitled to receive reduced earnings allowance until they reached the age of 65 years. Both cases were decided on the basis of community law. The adjudication officer appealed to the Commissioner in each case on the ground that the members of the tribunal had erred in law by failing adequately to deal with the provisions for derogation contained in Article 7(1)(a) of the Directive. However it is now accepted by counsel on behalf of the adjudication officer that the decisions that the claimants ceased to be entitled to reduced earnings allowance are erroneous in point of law and should be set aside. He accepts that the decisions were based on a mistake as to the domestic law. Mr Drabble accepts the argument put forward on behalf of the adjudication officer as to the error of domestic law. It is common case before me that the tribunal in each case erred in law in considering community law in circumstances where in domestic law the claimant qualified in any event. The issue of community law does not fall for consideration.

5. At the time the decisions were given, both the decisions of the reviewing adjudication officers and of the tribunals, entitlement to reduced earnings allowance was governed by section 59(b) of the Social Security Act 1975 (as amended). The relevant provisions are now incorporated in the Social Security Contributions and Benefit Act 1992. I shall refer to the provisions of the 1992 Act as did counsel. The entitlement to

reduced earnings allowance arises by virtue of section 106 and Schedule 7 of the 1992 Act. Paragraph 11 of Schedule 7 provides for the making of awards, and further awards, of reduced earnings allowance. Paragraph 12(1) of Schedule 7 is as follows:

"A person who on 10th April 1988 or 9th April 1989 satisfies the conditions -

- (a) that he has attained pensionable age;
- (b) that he has retired from regular employment; and
- (c) that he is entitled to reduced earnings allowance':

shall be entitled to that allowance for life."

Neither claimant had reached the age of 60 years by 9 April 1989 and consequently did not come within paragraph 12(1). I now set out paragraph 13(1) of the same Schedule in so far as it is material

"Subject to the provisions of [Part V] of this Schedule, a person who -

- (a) has attained pensionable age; and
- (b) gives up regular employment on or after 10th April 1989; and
- (c) ... on the day immediately before he gave up such employment,

shall cease to be entitled to reduced earnings allowance as from the day on which he gives up regular employment."

It was under the provision equivalent to paragraph 13(1) in the Social Security Act 1975 that the adjudication officer held that the claimant ceased to be entitled to reduced earnings allowance, in the case of Mrs Thomas on 12 December 1990 and in the case of Mrs Tyson on 1 October 1989. It is accepted on behalf of the adjudication officer that, although the conditions of sub-paragraph (a) were satisfied, the further condition of sub-paragraph (b) was not. It is common case that each of the claimants had given up "regular employment" many years before 10 April 1989. Each had ceased gainful employment long before 10 April 1989 and so did not on that date come within the definition of "regular employment" specified in paragraphs 2(1) and (2) of the Social Security (Industrial Injuries) (Regular Employment) Regulations. It is again accepted that neither claimant was not to be treated as "not having given up regular employment" under paragraph 2(3) of the Regulations because the period since she stopped work was not a continuing period of "days of interruption of employment". I accept that that expression has the same meaning as regards the reduced

earnings allowance provisions as it has for the purpose of the provisions relating to unemployment benefit, sickness benefit and invalidity benefit: paragraph 13(10) of Schedule 7. Accordingly a day of interruption of employment means a day of employment or a day of incapacity to do work which the person can reasonably be expected to do: section 57(1)(a) and (c) of the Social Security Contributions and Benefits Act 1992. It is accepted on behalf of the adjudication officer that each claimant was properly to be regarded as having given up employment for the purpose of the statute at the time when she did in fact cease gainful employment. It is further accepted on behalf of the adjudication officer, and rightly so, that on the facts the provisions in paragraph 13(1) of the Schedule are of no application in the case of either of the claimants and that each was therefore entitled to receive reduced earnings allowance for the period covered by the adjudication officer's decision, pursuant to paragraph 11 of Schedule 7.

6. For the reasons set out in the preceding paragraphs, I am satisfied that the decision of the tribunal in both the case of Mrs Thomas and Mrs Tyson is erroneous in point of law because of the error in law in considering the effect of community law in circumstances where in domestic law the claimant qualified in any event. I do not, of course, come to any conclusion, one way or the other, on the question of the derogation provided for in Article 7(1)(a) of the Directive.

7. In the light of my decision it will be necessary for the adjudication officer in each case to deal with the question of quantification. In the case of Mrs Thomas it is not clear from the papers when the claim was made. Mr Roth undertakes on behalf of the Department that she would have good cause for late claim in the circumstances and consequently difficulty will not arise.

8. There is a further comment which I should make. There is reference in the record to severe disablement allowance ending not later than the day on which the claimants, being female, attain the age of 65 years. That is a question which will have to be adjudicated on in the future and I say nothing about it.

(Signed) J J Skinner
Commissioner

Date: 7 December 1992

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SOCIAL SECURITY ACTS 1975 TO 1990
SOCIAL SECURITY ADMINISTRATION ACT 1992

THE SOCIAL SECURITY COMMISSIONERS PROCEDURE REGULATIONS 1987
REGULATIONS 24(1)

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A
QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER - CORRECTION

Name: Norma Thomas (Mrs)
Josephine Tyson (Mrs)

Social Security Appeal Tribunal: Manchester

Case No: 614:23423
614:22018

Page 2	Paragraph 4	line 10	delete "retirement allowance" insert "reduced earnings allowance"
Page 3	Paragraph 5	line 39	delete "that neither claimant was not to be treated as "not having given" insert "that neither claimant was to be treated as "not having given"
Page 4	Paragraph 5	line 4	delete "a day of interruption of employment means a day of employment or" insert "a day of interruption of employment means a day of unemployment or"

(Signed) J J Skinner
Commissioner

Date: 5 August 1993

Commissioner's Files: CI/117/92
CI/198/92

Star No. 111/92



Please address any reply to
THE SECRETARY
and quote
Your reference.

C1/117/92

OFFICE OF
THE SOCIAL SECURITY AND
CHILD SUPPORT COMMISSIONERS
Harp House, 83 Farringdon Street,
London, EC4A 4DH

Telephone 071-353 5145 Ext.

Fax No. 071-936 2171

13/5/93

Mrs V. Chapman
C.P.A.G.
4th Floor
15 Bath St
London EC1V 9PY

rec'd
16/8/93

Dear Mrs Chapman re: Mrs Norma Thomas

Enclosed is a copy of a correction to the Commissioner's decision sent to you on 22.12.92

Yours sincerely

MRS. J. FRASER

For the Secretary

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