PLH

Commissioner's Files: CI 16608/96, CI 537/97, CI 1847/97, CI 1896/97 & CI 2887/95

EU COUNCIL DIRECTIVE 79/7/EEC
SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992
SOCIAL SECURITY ADMINISTRATION ACT 1992
Claims for Reduced Earnings Allowance

REFERENCE TO THE COURT OF JUSTICE OF THE EUROPEAN UNION BY THE SOCIAL SECURITY COMMISSIONER PURSUANT TO EC TREATY ART. 177

(CI 16608/96)	*Claimant's Name:*	Regina Virginia Heppie
	Appeal Tribunal:	Wakefield SSAT
	Tribunal Case Ref:	1/11/96/08837
(CI 537/97)	*Claimant's Name:*	Anna Stec
	Appeal Tribunal:	Stoke on Trent SSAT
	Tribunal Case Ref:	4/10/96/13219
(CI 1847/97)	*Claimant's Name:*	Patrick Vincent Lunn
	Appeal Tribunal:	Stockton SSAT
	Tribunal Case Ref:	1/48/96/04758
(CI 1896/97)	*Claimant's Name:*	Oliver Kimber
	Appeal Tribunal:	Eastbourne SSAT
	Tribunal Case Ref:	7/02/96/14531
(CI 2887/95)	*Claimant's Name:*	Sybil Spencer
	Appeal Tribunal:	Bolton SSAT
	Tribunal Case Ref:	6/12/93/11294

Introduction

1. These five cases are representative of numerous others stayed pending the preliminary ruling of the Court of Justice. They concern the "reduced earnings allowance" (REA), which is an earnings-related weekly cash benefit payable in Great Britain to people who have suffered an impairment of earning capacity from an accident at work or an occupational disease.

2. In order to determine these and other appeals I have to decide the legal effect of provisions introduced into the national legislation after 1986 which purport to impose unequal age conditions on entitlement to REA. These conditions cause different weekly amounts to be payable to men and women whose circumstances are otherwise the same.

3. These cases are referred to the Court of Justice with the request for a preliminary ruling, as I am uncertain how the Community law on equal treatment (and in particular the Court's decisions in cases C-328/91 *Thomas* [1993] ECR I-1247 and C-92/94 *Graham* [1995] ECR I-2521) ought correctly to be applied here. I have been assisted by

detailed written and oral arguments on behalf of the claimants by Richard Drabble QC and Helen Mountfield, instructed by Richard Poynter and Bronwyn McKenna, solicitors; and on behalf of the adjudication officers by Christopher Vajda QC, instructed by the solicitor to the Secretary of State for Social Security.

The benefit

4. REA is an earnings-related additional benefit under the statutory occupational accident and disease scheme now contained in Part V Social Security Contributions and Benefits Act 1992. It is payable to workers or former workers who have suffered an accident at work or an occupational disease, and its purpose is to compensate for an impairment of earning capacity. The weekly amount is based on a comparison between earnings in the original occupation which the accident or disease has prevented the claimant from continuing, and those in any (actual or notional) alternative occcupation still considered suitable despite the disablement. The normal maximum at present is about £40 per week, including cost-of-living increases added annually; though not all claimants qualify for these, as explained below.

5. Earnings-related additions have formed part of the scheme since its inception in 1948. Originally they were known as "special hardship allowance" (SHA) but by the Social Security Act 1986 the benefit was re-cast and re-named as REA. The purpose and basic method of calculation remained the same throughout, and all awards of SHA were automatically converted into REA by transitional provisions.

6. Under more recent legislation, the benefit is being phased out altogether. No fresh right to REA can arise from an accident suffered or disease contracted on or after 1 October 1990. However many thousands of people continue to be entitled to REA by virtue of accidents or diseases suffered earlier.

The scheme

7. The provisions now in Part V Social Security Contributions and Benefits Act 1992 comprise a statutory social insurance scheme providing cover against accidents at work and occupational diseases. It was constituted in 1948, separately from the pension and other social insurance schemes as well as from the means-tested social welfare schemes. Though known historically as the "Industrial Injuries Scheme", it has at all material times applied to all persons in Great Britain in "employed earner's employment": that is all employees, but not self-employed people. Cover for employed earners is automatic, and compulsory.

Contributory or not?

8. It is also compulsory for all such earners and their employers to pay national insurance contributions, unless specially exempted (e.g. on the ground of very low pay). At least until 1990, employed earners' and employers' contributions included a proportion attributable to the cost of occupational accident and disease benefits: so that coverage for both SHA and REA may be called contributory. Conversely, full coverage

applied from the first day at work, and there were no minimum contribution conditions: so it may also be said that the benefits were not contribution-dependent.

Funding

9. From the beginning of the present social insurance schemes in Britain in 1948, and down to 1975, two separate funds of assets were held: (i) the National Insurance Fund, from which the ordinary old-age pensions and other insured benefits were paid, and (ii) the Industrial Injuries Fund, from which the Industrial Injuries Scheme benefits were paid. Neither fund was a mere book-keeping entry: each held assets, consisting of cash and United Kingdom government securities, to which contributions were added and from which benefits were paid out. However the assets held were not matched to the long-term liabilities, and the National Insurance Fund in particular has been maintained only at the levels needed to provide for current yearly payments and other outgoings.

10. Under s.94 Social Security Act 1973 the Industrial Injuries Fund (which by 1972 had accumulated surplus assets of some £400M: Cmnd 5019 para 357 cited in Ogus & Barendt, *Law of Social Security* 1978, p.269) was wound up as a separate fund, and in 1975 all its assets and liabilities were transferred to the National Insurance Fund. Subsequently by s.15 Social Security Act 1990, the liabilities of the Industrial Injuries Scheme were removed from the National Insurance Fund in its turn, and with effect from 1 April 1990 they are counted as unfunded government expenditure on social security in the same way as (for example) non-contributory disability benefits.

11. The reason behind this last change, as stated in the written submissions of the solicitor to the Secretary of State before me, was a fall in the assets of the National Insurance Fund attributable to rebates paid out of it to induce people to buy personal pensions. Liability for these rebates was newly imposed on the Fund by the Act of 1986.

Measures to curtail REA

12. As noted above the government eliminated REA altogether for accidents and diseases sustained from 1 October 1990. In addition, a succession of legislative measures after 1986 attempted to eliminate or cut it down for people no longer of working age, for whom the government considered any comparison of "earnings" artificial.

13. The method chosen was to impose cut-off or limiting conditions by reference to the unequal ages used by the statutory old-age pension scheme. (The provisions of that scheme are now set out in Part II Social Security Contributions and Benefits Act 1992.)

14. The Industrial Injuries Scheme had never previously contained such conditions. Since 1948 when the two schemes had begun, the practice (following the pattern of the earlier workmen's compensation schemes the Industrial Injuries Scheme had replaced: see Commissioners' decision R(I)14/62 paras 9-11) had been for the earnings-related additional benefits to remain payable notwithstanding any cessation of actual work or earnings, and notwithstanding the attainment of pension age and the start of the statutory old-age pension; so that both benefits had been payable concurrently in full.

The national law provisions

15. The provisions that impose the unequal age conditions are, so far as relevant:

***Primary legislation*: Schedule 7 Social Security Contributions and Benefits Act 1992, paragraphs 12 and 13:**

"12. - (1) A person who on 10 April 1988 or 9 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.

(2) *[Provides for the allowance under para 12(1) to be fixed for life at the same weekly rate as the person was receiving on 10 April 1988 or 9 April 1989, depending on when he or she "retired" (for the meaning of this see below)]* ...

13. - (1) Subject to the provisions of this Part of this Schedule, a person who -

(a) has attained pensionable age; and
(b) gives up [*before 1 October 1989* "retires from"] regular employment on or after 10 April 1989; and
(c) was entitled to reduced earnings allowance ... on the day immediately before he gave up [*before 1 October 1989* "retired from"] such employment,

shall cease to be entitled to reduced earnings allowance as from the day on which he gives up [*before 1 October 1989* "retires from"] regular employment.

(2) If the day before a person ceases under sub-paragraph (1) above to be entitled to reduced earnings allowance he is entitled to the allowance ... at a weekly rate ... not less than £2, he shall be entitled to a benefit, to be known as "retirement allowance".

(3) Retirement allowance shall be payable to him ... for life.

(4) ... the weekly rate of a beneficiary's retirement allowance shall be -

(a) 25 per cent of the weekly rate at which he was last entitled to reduced earnings allowance; or
(b) 10 per cent of the maximum rate of a disablement pension,

whichever is the less. ...

(8) Regulations may -

(a) make provision with respect to the meaning of "regular employment" for the purposes of this paragraph; and
(b) prescribe circumstances in which, and periods for which, a person is or is not to be regarded for those purposes as having given up such employment. ..."

***Secondary legislation*: Social Security (Industrial Injuries) (Regular Employment) Regulations 1990 SI No 256 (as amended from 24 March 1996) regulation 3:**

"3. Unless he is entitled to reduced earnings allowance for life by virtue of paragraph 12(1) of Schedule 7 to the Social Security Contributions and Benefits Act 1992, a person who has attained pensionable age shall be regarded as having given up regular employment at the start of the first week in which he is not in regular employment after the later of -

(a) the week during which this regulation comes into force; or
(b) the week during which he attains pensionable age."

Effect of unequal age conditions on benefit rates

16. The normal REA carries annual cost-of-living increases. Its top weekly rate is at present about £40. The top rate of retirement allowance under para. 13 is consequently about £10: this also carries cost-of-living increases. The fixed REA under paragraph 12 carries no increases: its top weekly rate remains frozen at about £27, the rate in 1989.

Special meanings of "pensionable age", "retire", and "gives up" in these provisions

17. *"pensionable age"* (in all of the above provisions) bears the same meaning as it has for the old-age pension: for men 65; for women 60 until 1996, then tapering up to eventual equality at 65 in 2020 (s.122(1) Social Security Contributions and Benefits Act 1992 as amended by the Pensions Act 1995).

18. *"retires from regular employment"* (in Schedule 7 paragraph 12(1)(b) above, and also paragraph 13(1) in its original form from 10 April to 30 September 1989) bore the same special meaning as it did in the old-age pension scheme prior to 1 October 1989. A person who had ceased normal working could opt when to "retire" and start drawing pension, at any time in the five years after attaining the pensionable age of 65/60. Anyone who had not so opted before the end of the five years was deemed to "retire" at 70 if a man or 65 if a woman, whether or not still working.

19. *"gives up"* in paragraph 13(1)(b) as in force from 1 October 1989 was initially left undefined. For people over pensionable age but not in fact working (so that they had no work to give up), the words were not given a meaning capable of terminating their continuing entitlement to REA until 24 March 1996, when regulation 3 as set out above came into effect. Consequently, many such people continued to be entitled to the full REA in the period 1989-1996, neither frozen under para 12 nor cut off under para 13.

Practical effects of the national law

20. The practical effect of the national provisions is summarised in the table set out on the following page.

(For completeness, the table refers to certain changes that have also taken place in the meaning of "regular employment": these can affect the date at which the cut-off conditions operate, but are not detailed further as they raise no fresh issues of principle on equal treatment.

In addition, it should be pointed out that some aspects of the national law as stated here are due to be considered by the Court of Appeal in other proceedings in June 1998: however the outcome is unlikely to remove the need for this reference.)

Table: the position under national law

I: Frozen rate REA for life under para 12 Sch 7 SSCBA 1992

applies to all REA recipients who ***before 10 April 1989*** had reached

either

age 70 (if a man) or 65 (if a woman);

or

the date of retirement fixed by a notice, at age 65+ (man) or 60+ (woman);

but to nobody else.

II: For all other REA recipients

REA stops, and Retirement Allowance for life begins*

on whichever *first* happens of

(a) *reaching*

age 70 (if a man) or 65 (if a woman),

or

the date of retirement fixed by a notice, at age 65+ (man) or 60+ (woman)

on any date from 10 April 1989 to 30 September 1989;

(b) *giving up* (in the ordinary sense)

regular employment (in the ordinary sense)

if engaged in it immediately before then,

at or after age 65 (if a man) or 60 (if a woman)

on any date from 1 October 1989 to 31 March 1990;

(c) *giving up* (in the ordinary sense)

regular employment (10-hour average in the original 1990 regulations)

if engaged in it immediately before then,

at or after age 65 (if a man) or 60 (if a woman)

on any date from 1 April 1990 to 23 March 1996;

(d) failing any of the above, ***the first day of any week after 24 March 1996 when the recipient is***

over age 65 (man), or over 60 or later pension age under PA 1995 (woman)

and

not in *regular employment* (10-hour average as revised by 1996 regulations).

*[Notes: *(i) no retirement allowance is payable where REA was less than £2;*
(ii) in cases II(b)-(d), there is no automatic cut-off at 70/65;
(iii) all cases involve potential sex discrimination]

These five appeals, and the questions

21. These five appeals have been selected as test cases to illustrate the effects of the unequal age conditions, and the questions arising in relation to Directive 79/7/EEC on the implementation of the principle of equal treatment in matters of social security.

22. It is not disputed that:

(a) the Industrial Injuries Scheme is a statutory occupational accident and disease scheme within the material scope of the Directive; and

(b) each of the five claimants is a former worker within the Directive's personal scope and entitled to assert a claim based on its direct effect so far as applicable.

23. Each claimant asserts that the conditions described above discriminate against him or her unlawfully contrary to the provisions of Article 4 of the Directive that "The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex ... in particular as concerns ... the calculation of benefits ... and the conditions governing the duration and retention of title to benefits."

24. The main issue (raised by questions I and II below) is whether those conditions are, as contended by the adjudication officers, within Article 7 by which the Directive is stated to 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".

25. The subsidiary issues (raised in question III) concern the principles governing the direct application of Article 4 and arise only if the Article 7 exclusion does *not* apply.

Nature of the questions: main issue (Questions I and II)

26. On the main issue, it is apparent from the information before me (and the adjudication officers so concede) that the imposition after 1986 of unequal age conditions on REA for the first time was not necessary to maintain the financial equilibrium or coherence (insofar as that word is to be understood in a financial sense) of the UK social security schemes.

27. It is also apparent (and on the information before me I so decide as a fact) that such imposition was not necessary to enable the United Kingdom to retain the different pension ages under its old-age pension scheme. That difference had co-existed with the Industrial Injuries Scheme as described in para 14 above for nearly 40 years from 1948 without it, and REA could simply have been left as it was, or a non-discriminatory cut-off age adopted, without upsetting the pension system as it had always operated.

28. The real question therefore is the more difficult one of whether a government which considers it a costly anomaly to go on paying a benefit such as REA to people too old to work is permitted to impose a new cut-off at unequal ages, claiming the benefit of the exclusion in Article 7 for the "possible consequences for other benefits" having regard to what was said in the Court's judgment in *Graham*, on the ground that the ages

selected are the same as those for the pension, and (as contended before me on behalf of the adjudication officers) the government takes the view as a matter of policy that the income-replacement functions of REA should be performed after pension age by the pension, plus the very much smaller "retirement allowance", instead.

Subsidiary issues (Question III)

29. Question III is concerned with the application of the principle of direct effect and with the requirements of transparency of equal treatment (referred to in the Court's judgments in Cases 109-88 *Danfoss* [1989] ECR 3220, para 12 and C-262/88 *Barber* [1990] ECR I-1889, para 35) in circumstances where the balance of advantage between men and women may vary between different weeks or may be affected by options. The nature of the issues can be most easily understood by reference to the facts of the third, fourth and fifth cases set out below.

The facts

(1) In **Case CI 16608/96 *Hepple,*** the claimant is a lady born on 15 April 1933 who contracted an occupational disease and was awarded REA from 27 January 1987. Under Sch 7 para 13 cited above her benefit was cut to retirement allowance from 31 March 1996 as she was then over 60 and not working. A social security appeal tribunal, considering itself bound to do so by *Graham,* confirmed this. She appeals to me on the ground that *Thomas* should have been applied, and the cut not imposed until she attained the male pension age of 65 on 15 April 1998.

(2) In **Case CI 537/97 *Stec,*** the claimant is a lady born on 13 April 1933 who suffered an accident at work and was awarded REA from 24 January 1990. Under Sch 7 para 13 her benefit was cut to retirement allowance from 31 March 1996 as she was then over 60 and not working. A social security appeal tribunal, considering itself bound to do so by *Thomas,* reversed this and awarded her the unreduced benefit until she attained 65 on 13 April 1998. The adjudication officer appeals to me on the ground that *Graham* should have been applied, and the cut imposed from 31 March 1996.

(3) In **Case CI 1847/97 *Lunn,*** the claimant is a man born on 19 May 1923 who suffered an accident at work and was awarded SHA, later converted to REA, from 12 May 1974. He began to draw his statutory old age pension from 19 May 1993, at age 70. His REA benefit was cut to retirement allowance from 31 March 1996 as he was then over 65 and not working, and this was confirmed by a social security appeal tribunal applying Sch 7 para 13. On appeal to me he claims that he should instead be given the frozen rate REA under Sch 7 para 12 for the rest of his life because a woman of his age would have got this from 19 May 1988. He does not however agree that the cost-of-living increases he (unlike such a woman) has had in the years from 1988-1996 should be brought into account.

(4) In Case CI 1896.97 *Kimber,* the claimant is a man born on 30 September 1924 who suffered an accident at work and was awarded SHA, later converted to REA, from 1982. He began to draw his statutory old-age pension from 30 September 1994 at age

70. His REA benefit was cut to retirement allowance from 31 March 1996 as he was then over 65 and not working. A social security appeal tribunal, considering itself bound to do so by ***Thomas***, reversed this and awarded him continuing REA at the full rate on the ground that a woman would have received this. The adjudication officer appeals to me on the ground that *Graham* should have been applied and the cut imposed from 31 March 1996. In fact, a woman born on 30 September 1924 who had not opted to receive her pension earlier would have already had her REA cut to retirement allowance from 30 September 1989 under Sch 7 para 13 as then in force; only if she had opted to start pension between 30 September 1988 and 9 April 1989 (as she could have done, but the claimant could not) would she have received the frozen rate REA under para 12 for life. He therefore contends that he has been unlawfully discriminated against by not being allowed such an option, though he did not seek to assert a right to one at the time.

(5) In **Case CI 2887/95 *Spencer*,** the claimant is a lady born on 11 December 1926 who suffered an accident at work and was awarded SHA, later converted to REA, from 1967. She exercised her option to start drawing her pension from 23 December 1986 when she was 60. An adjudication officer determined that in consequence she was entitled only to the frozen rate of REA under Sch 7 para 12 from 1988. A social security appeal tribunal, considering itself bound to do so by *Thomas*, reversed this and awarded her the full rate REA, including cost of living increases, which a man born on 11 December 1926 (who could not have exercised such an option so as to obtain frozen rate REA for life) would have received down to 31 March 1996. The adjudication officer appeals to me on the ground that *Graham* should have been applied, and only the frozen rate awarded. The claimant asserts that the Directive entitles her to the full benefit a man would have got down to 31 March 1996, but does not agree that she should then be cut down to retirement allowance as he would be.

Agreed statement by the parties

30. An agreed statement by the parties, in which the facts and opposing contentions are set out in more detail for the assistance of the Court, is annexed as a separate document at the end of this reference.

Significance

31. According to figures helpfully provided to me by the solicitor to the Secretary of State for Social Security, there are some 19,000 female REA claimants born after 31 March 1931 who, like the claimants in the first two cases, are concerned to obtain the full rate of REA for up to five additional years before being cut to retirement allowance and are thus directly affected by the main issue in questions I and II.

32. The subsidiary issues in question III would principally affect male REA claimants born before the end of March 1929 who (according to the figures provided) numbered over 32,000 at 31 March 1996. The cash significance of these issues for them is however more difficult to assess, because of the complexity of the questions involved.

Questions referred for a preliminary ruling under Article 177

33. In the circumstances set out above, I refer these cases to the Court of Justice with the request for a preliminary ruling under Article 177 EC on the following

QUESTIONS

I: Does Article 7 of Council Directive 79/7/EEC permit a member State to impose unequal age conditions linked to the different pension ages for men and women under its statutory *old-age pension scheme*, on entitlement to a benefit having the characteristics of Reduced Earnings Allowance under a statutory *occupational accident and disease scheme*, so as to produce different weekly cash payments under that scheme for men and women in otherwise similar circumstances, in particular where the inequality:

(a) is not necessary for any financial reason connected with either scheme; and

(b) never having been imposed before, is imposed for the first time many years after the inception of the two schemes and also after 23 December 1984, the latest date for the Directive to be given full effect under Article 8?

II: If the answer to Question I is Yes, what are the considerations that determine whether unequal age conditions such as those imposed in Great Britain for Reduced Earnings Allowance from 1988-89 onwards are necessary to ensure coherence between schemes or otherwise fall within the permitted exclusion in Article 7?

III: If those unequal age conditions are *not* within the permitted exclusion in Article 7, then does the doctrine of direct effect require the national court (in the absence of national legislation to comply with the Directive) to rectify the inequality by awarding an additional payment to each individual concerned in *any* week when the payment prescribed under the occupational accident and disease scheme for him or her is lower than for a person of the other sex but in otherwise similar circumstances ("the comparator"), *without regard to*

(a) any converse advantage in *other* weeks when, for the same individual, a higher payment is prescribed than for the comparator; and/or

(b) the existence or exercise of sex-differentiated options under the *pension* scheme to choose the pension starting age, the effect of which in conjunction with the unequal conditions under the *occupational accident and disease* scheme may be to cause altered (and unequal) weekly payments under that scheme: in some weeks to the advantage of the individual, in others to the comparator?

Or should some account be taken of such matters, and if so what are the principles to be applied in relation to them in giving direct effect to Article 4?

(Signed)

P L Howell QC
Commissioner

8 May 1998

ANNEX : AGREED STATEMENT BY THE PARTIES

BEFORE THE SOCIAL SECURITY COMMISSIONER

CASES

CI/16608/96	(MRS HEPPLE)
CI/537/97	(MRS STEC)
CI/1847/97	(MR LUNN)
CI/1986/97	(MR KIMBER)
CI/2887/95	(MRS SPENCER)

ON APPEAL FROM SOCIAL SECURITY APPEAL TRIBUNALS

BETWEEN:

(1) Mrs REGINA HEPPLE	*Claimant/Appellant*
– and –	
THE ADJUDICATION OFFICER	*Respondent*
(2) THE ADJUDICATION OFFICER	*Appellant*
– and –	
Mrs ANNA STEC	*Respondent*
(3) Mr PATRICK LUNN	*Claimant/Appellant*
– and –	
THE ADJUDICATION OFFICER	*Respondent*
(4) THE ADJUDICATION OFFICER	*Appellant*
– and –	
Mr OLIVER KIMBER	*Respondent*

AND BETWEEN:

(5) THE ADJUDICATION OFFICER	*Appellant*
– and –	
Mrs SYBIL SPENCER	*Respondent*

AGREED DRAFT/ SCHEDULE
REQUEST FOR A PRELIMINARY RULING OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES PURSUANT TO ARTICLE 177 REFERENCE

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1. These five cases concern the compatibility of an aspect of the United Kingdom industrial injuries legislation with Council Directive 79/7/EEC. This Schedule sets out a brief description of the relevant legislation, the facts giving rise to the dispute, a summary of the arguments of the parties, and then the questions that the Court of Justice is requested to answer.

The United Kingdom law

2. For the purposes of this reference it is necessary to describe three aspects of United Kingdom law:

   (i) the history and nature of the industrial injuries scheme as it stood immediately before reforms which commenced on 1 October 1986;

   (ii) the contributory social security scheme at the same date, and particularly contributory retirement pension;

   (iii) the history of the reforms made to the industrial injuries scheme from 1 October 1986 onwards.

(i) *The industrial injuries scheme before 1 October 1986*

3. The industrial injuries scheme has its origins in the National Insurance (Industrial Injuries) Act 1946, which repealed the Workmen's Compensation Acts and provided for a series of benefits for those suffering industrial accidents or from prescribed industrial diseases. The benefits included disablement benefit and special hardship allowance.

4. Immediately before 1 October 1986, the industrial injuries scheme was contained in Chapter IV of Part II of the Social Security Act 1975 ("the 1975 Act"). Section 50 of the 1975 Act provided that industrial injuries benefit was payable "where an employed earner suffers personal injury caused after 4th July 1948 by accident arising out of and in the course of his employment, being employed earner's employment". Industrial injuries benefit included

disablement benefit if the injured worker suffered loss of physical or mental faculty. An increase of disablement benefit, known as special hardship allowance ("SHA"), was also available by virtue of section 60 of the 1975 Act, in the circumstances described below. Disablement benefit and SHA could be awarded for any period, including for life. Entitlement to industrial injuries benefit could arise upon an accident occurring at any age. Related provisions dealt with those suffering from prescribed industrial diseases. Entitlement to disablement benefit (and therefore SHA) did not depend upon the payment of contributions.

5. Entitlement to SHA arose where, as a result of the relevant accident, disease or injury, the employed earner was incapable of following his or her regular occupation or any other available occupation of an equivalent standard. The amount of SHA was determined by reference to the probable standard of remuneration in the claimant's employment up to a maximum amount, with provision for annual up-rating. A person who was receiving contributory retirement pension (see below) could continue to receive SHA on the same basis.

(ii) The contributory retirement pension

6. The contributory retirement pension has its origins in the National Insurance Act 1946, which provided for a series of contributory benefits to give protection against the principal risks (unemployment, sickness, retirement etc). All were payable on the basis of a claimant's contributions record.

7. Immediately prior to 1 October 1986, contributory benefits were provided for by Chapter 1 of Part II of the 1975 Act. Sections 27 to 30 governed the payment of contributory Category A and B pensions. Section 27(1) provided a definition of "pensionable age" for the purposes of the Act: 65 for a man, 60 for a woman.

8. Until 1 October 1989, a person was entitled to a retirement pension if:

(a) sufficient contributions had been made;

(b) pensionable age had been reached (60 for women and 65 for men); and

(c) the person had "retired from regular employment", that is to say, complied with various conditions as to earnings and given appropriate notice to the authorities; in any event, a person was deemed to have retired from regular employment 5 years after attaining pensionable age if no notice of retirement had been given before that date.

(iii) Reforms of the industrial injuries scheme

9. The Government perceived that the continued full payment of SHA, which was intended to compensate for loss of earnings from a particular job, in retirement to be an anomaly. The Government put forward proposals whereby SHA would cease on retirement and be replaced by a new benefit available after retirement. The first legislative change made was the replacement of SHA on 1 October 1986 by a new benefit, Reduced Earnings Allowance ("REA"). Unlike SHA, REA is a free-standing benefit that is payable independently of disablement benefit itself. The conditions for the grant of REA and its method of calculation are essentially the same as for SHA, as described in paragraph 2 above, and are set out in section 59A of the 1975 Act (inserted by section 39 of the Social Security Act 1986; now in Part IV of Schedule 7 to the Social Security Contributions and Benefits Act 1992, "the 1992 Act"). There were transitional arrangements for treating outstanding awards of SHA as if they were awards of REA.

10. Between 6 April 1987 and 10 April 1989 a series of further legislative measures came into force which had the effect of restricting the amount of REA payable to those who had retired and then substituting REA with a new benefit, Retirement Allowance ("RA"), that was payable to persons in receipt of REA who had reached pensionable age and given the appropriate notice to the authorities, or had reached the deemed retirement age for the purposes of contributory pension (65 for women, 70 for men).

11. On 6 April 1987 paragraph 5(3) of Schedule 3 to the Social Security Act 1986 came into force. It provided that any person who as of 6 April 1987 was over pensionable age, had retired or was deemed to have from regular employment, and was entitled to SHA (treated

from 1 October 1986 as an award of REA) was to have the rate of REA restricted to the rate paid on 5 April 1987.

12. With effect from 11 April 1988 the so-called frozen-rate REA regime came into force (sections 2(4) and (5) of the Social Security Act 1988; now paragraph 12 of Schedule 7 to the 1992 Act). This provided that a person who retired or was deemed to have retired between 6 April 1987 and 9 April 1989 inclusive would be entitled to continue to receive REA for life, but frozen at the rate payable on 10 April 1988 or 9 April 1989, depending on the year when that person retired.

13. Those over pensionable age who retired or were deemed to have retired on or after 10 April 1989 ceased to be entitled to REA and were entitled instead to RA for life (section 59B of the 1975 Act, inserted by section 2(1) of the Social Security Act 1988; now paragraph 13 of Schedule 7 to the 1992 Act). The rate of RA is 25% of the rate of REA awarded prior to retirement, up to a maximum amount.

14. From 1 October 1989 the rules on eligibility for retirement pension changed. Thereafter, retirement pension was available to persons who were over pensionable age (still 60 for women and 65 for men) and met the relevant contribution conditions, regardless of their earnings; there was no longer any requirement to have "retired from regular employment".

15. Consequential amendments were made to the conditions of eligibility to receive REA and RA. From 1 October 1989, recipients of REA lost their entitlement when they reached pensionable age and had "given up regular employment" (those words replacing the words "retires from regular employment"), whereupon they would become eligible to receive RA (section 7 and Schedule 1 paragraph 8(2) of the Social Security Act 1989, amending section 59B of the 1975 Act).

16. However, where a person gave up regular employment *before* 1 October 1989 (for example, a person who had suffered an industrial injury which had prevented him from returning to work) but had not before that date retired from regular employment in the

sense used in the 1975 Act, Social Security Commissioners held that he could not give up (again) regular employment after 1 October 1989. The effect of those decisions was that such a person continued to receive REA beyond pensionable age even though he had stopped working.

17. As a result, the definition of "giving up regular employment" was amended with effect from 31 March 1996 so that a person over pensionable age was deemed to have given up regular employment at the start of the first week in which the person was not in regular employment after the amendment came into force (regulation 6(3) of the Social Security (Industrial Injuries and Diseases) (Miscellaneous Amendments) Regulations 1996, substituting new regulations 2 and 3 for regulation 2 of the Social Security (Industrial Injuries) (Regular Employment) Regulations 1990).

EC Law

18. Council Directive 79/7 provides in material part as follows:

> "Article 1
> The purpose of this Directive is the progressive implementation, in the field of social security..., 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 2
> This Directive shall apply... to retired or invalided workers and self-employed persons.
>
> Article 3
> 1. This Directive shall apply to:
> (a) statutory schemes which provide protection against the following risks:
> ...
> — accidents at work and occupational diseases
> ...
>
> Article 4
> 1. The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex... in particular as concerns:
> — the scope of the schemes and the conditions of access thereto,
> ...

— the calculation of benefits... and the conditions governing the duration and retention of entitlement to benefits.

...

Article 7

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;

...

Article 8

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within six years of its notification...."

The facts

19. Mrs Regina Hepple was born on 15 April 1933. On 28 January 1987 she began to suffer from tenosynovitis as a result of her employment. An Adjudication Officer awarded her REA from 27 January 1989, by which date she was unable to continue working. On 15 April 1993 she reached the age of 60. On 1 May 1996 an Adjudication Officer reviewed her award of REA, and decided that with effect from 31 March 1996 it should be replaced by an award of RA. Mrs Hepple appealed against this decision to the Wakefield Social Security Appeal Tribunal, which on 5 September 1996 upheld the decision of the Adjudication Officer. She appealed to the Commissioner.

20. Mrs Anna Stec was born on 13 March 1933. On 18 January 1989 she injured her back at work, as a result of which she was unable to continue in employment. She was awarded REA from 24 January 1990. She reached pensionable age on 13 March 1993. On 25 March 1996 an Adjudication Officer reviewed her award of REA and decided that with effect from 31 March 1996 her award of REA should be replaced by an award of RA. Mrs Stec appealed against this decision to the Stoke on Trent Social Security Appeal Tribunal, which allowed her appeal on 4 October 1996. The Adjudication Officer appealed to the Commissioner.

21. Mr Patrick Lunn was born on 19 May 1923. On 11 November 1973 he suffered a work-related injury to his right hand, as a result of which he was unable to continue in employment. An Insurance Officer awarded him SHA with effect from 12 May 1974. On 1 October 1986 his award of SHA was converted to an award of REA. On 19 May 1988 he reached the age of 65. He received retirement pension from 17 May 1993. On 26 March 1996, an Adjudication Officer reviewed his award of REA and decided that with effect from 31 March 1996 it should be replaced by an award of RA. Mr Lunn appealed against this decision to the Stockton Social Security Appeal Tribunal, which on 24 September 1996 dismissed his appeal. Mr Lunn appealed to the Commissioner.

22. Mr Oliver Kimber was born on 30 September 1924. On 12 March 1982 he injured his back at work, as a result of which he was unable to continue in employment. He was awarded SHA from 15 September 1982. On 1 October 1986 his award of SHA was converted to an award of REA. He reached the age of 65 on 30 September 1989, and received retirement pension from 29 September 1994. On 29 April 1996, an Adjudication Officer reviewed his award of REA and decided that with effect from 31 March 1996 it should be replaced by an award of RA. Mr Kimber appealed against that decision to the Eastbourne Social Security Appeal Tribunal, which allowed his appeal on 2 October 1996. The Adjudication Officer appealed to the Commissioner.

23. Mrs Sybil Spencer was born on 11 December 1926. On 17 July 1966 she suffered a work-related injury to her neck. She was awarded SHA from 15 January 1967. On 1 October 1986 her award of SHA was converted to an award of REA. On 11 December 1986 she reached the age of 60. She received retirement pension from 23 December 1986. On 10 May 1993, an Adjudication Officer reviewed and revised her award of REA with effect from 11 April 1988 so as to freeze the award at £25.28 for life, because she fell within the regime laid down by paragraph 5(3) of Schedule 3 to the Social Security Act 1986 (see paragraph 11 above). Mrs Spencer appealed against that decision to the Bolton Social Security Appeal Tribunal, which allowed her appeal on 30 November 1994. The Adjudication Officer appealed to the Commissioner.

24. The Commissioner heard arguments in the first four claimants' cases on 11 and 12 December 1997. Mrs Spencer's case has not been heard by the Commissioner, but it has been agreed by all parties that her case should be joined with those of the other four claimants for the purpose of the reference for a preliminary ruling.

Summary of the arguments

25. Before the Commissioner, it was argued on behalf of the first four claimants that the decisions to end their awards of REA and replace them with awards of RA amounted to sex discrimination contrary to Directive 79/7.

25.1 Mrs Hepple's and Mrs Stec's entitlement to REA ended when they reached the age of 60, but a man of the same age and in the same situation would continue to receive REA until the age of 65.

25.2 From 31 March 1996 Mr Lunn was only entitled to RA, but a woman of the same age and in the same situation would have reached the age of 60 on 19 May 1983 and the age of 65 on 19 May 1988, and so would have been entitled to receive frozen-rate REA for the rest of her life.

25.3 From 31 March 1996 Mr Kimber was only entitled to RA, but a woman of the same age and in the same situation would have reached the age of 60 on 30 September 1984 and the age of 65 on 30 September 1989, and so would have had the opportunity to retire before 9 April 1989 and so receive frozen-rate REA for the rest of her life.

25.4 Mrs Spencer (whose case was not argued before the Commissioner) maintains that she has been discriminated against in that her award of REA has been restricted to the amount that was paid to her before 5 April 1987, while the REA award of a man of her age and in her situation would have been up-rated each year until it was converted to an award of RA with effect from 31 March 1996.

26. The first four claimants further argued that the provisions in question were not excluded from

the scope of Directive 79/7 by virtue of the derogation in Article 7(1)(a).

26.1 Until the disputed measures were introduced, the concept of pensionable age and the statutory provisions contained in sections 27 to 30 of the Social Security Act had no relevance to the industrial injuries scheme, which made no assumptions about differential pensionable ages or the length of working life.

26.2 The purpose of the derogation contained in Article 7(1)(a) is to enable Member States to maintain in place temporarily different pensionable ages. It is not consistent with that purpose to introduce into the industrial injuries scheme for the first time, after the implementation date for the Directive (23 December 1984), a connection with the differential pensionable ages that were already contained in the contributory benefits scheme. Article 7(1)(a) cannot apply to discriminatory measures introduced for the first time after 23 December 1984.

26.3 In any event, the disputed measures do not fall within Article 7(1)(a). In Case C–328/91 *Thomas* [1993] ECR I–1247 the Court ruled that the discrimination complained of did not come within the scope of the derogation, whereas in Case C–92/94 *Graham* [1995] ECR I–2521 the Court reached the opposite conclusion. The reason for the different outcomes can only be that the benefit in the *Thomas* case was non-contributory, whereas the benefit in the *Graham* case was contributory. No contributions need be paid in order to receive REA or RA, and hence they are not benefits capable of falling within the derogation.

26.4 In withdrawing REA from the female claimants when they reached pensionable age, the Adjudication Officer was assuming that they would have stopped working when they reached that age. However, such an assumption is inconsistent with women's right under Community law to go on working beyond pensionable age, see Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723.

26.5 It is not relevant to the male claimants' case that between 1989 and 31 March 1996 they received REA when their notional female comparator would only have received frozen-rate REA. The male claimants were not discriminated against in breach of Directive 79/7 until after 31 March 1996, when they received less by way of benefit than their notional female

comparator, at which time the Directive gave them a directly effe
rate REA.

26.6 It is not relevant to Mr Kimber's case that his notional female compara
received frozen-rate REA if she had given notice of retirement before 1
Kimber was unable to give notice of retirement, because the relevant legislatic
he could not exercise that option until he had passed pensionable age. The re
give notice was therefore discriminatory and should not be applied to him.

27. The Adjudication Officer's submissions in response can be summarised as follows.

27.1 The changes were made to the industrial injuries scheme from 1 October 1986 because t.
continued payment of full SHA in retirement was perceived to be an anomaly, and the
Government considered that there should be a different arrangement when a person was in
receipt of retirement pension to reflect the fact that he or she was no longer in work. It is
unfair to other pensioners that persons should continue to receive replacement income after a
time when they would in any event have stopped working. There are different schemes
(frozen-rate REA and RA) to cater specifically for those in retirement. The reason why
persons over pensionable age are treated differently is that REA is intended to replace loss of
income for a person of working age; it is not intended to be a benefit paid in retirement.

27.2 Such difference in treatment is objectively justified as being an inherent part of a coherent
structure between REA and retirement benefits. In determining objective justification a
Member State has a broad margin of discretion in the field of social security, see Case C-
280/94 *Posthuma-van Damme* [1996] ECR I–179. The difference in treatment falls within
Article 7(1)(a) of Directive 79/7.

27.3 The derogation in Article 7(1)(a) applies to all social security schemes that are objectively and
necessarily linked to retirement or old age pensions. Accordingly it is immaterial that the
REA scheme came into force after Directive 79/7 was required to be implemented.

27.4 In the case of the men, it is questionable whether there is in any event any discrimination,

since it is part of the men's case that the notional female comparator who is in receipt of frozen-rate REA is herself discriminated against and should not have been converted from REA to frozen-rate REA. If that is right, then the female comparator would never have been in receipt of frozen-rate REA and would, like the men, have been converted from REA to RA. Further, in the case of Mr Kimber, a woman of the same age would have been in receipt of frozen-rate REA only if she had opted to retire before she reached 65.