Retirement — IS HRP — CPAG.
Smithson (ECJ) Binding

★ 65/94

JMH/TEMP/3

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SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR RETIREMENT PENSION

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal was erroneous in point of law. I set the decision aside. In pursuance of section 23(7)(a)(i) of the Adjudication Act 1992, I substitute my own decision namely that the claimant was not entitled to de-retire as she wished, because, as at 21.12.91, she was over 65. This involves the proposition that section 54 (1) of the Contributions and Benefits Act 1992 and regulation 2(1) of the Widow's Benefit and Retirement Pensions Regulations 1979 did not infringe Council Directive 79/7/EEC. I seems to me that I am bound by the decision in Smithson (E.C.Ref.c.243/90).

2. This is an appeal by the adjudication officer with the leave of the chairman from the decision of the appeal tribunal dated 6.4.93, allowing the appeal from the decision of the adjudication officer. The adjudication officer had, on 6.1.92, decided that the claimant "may not be treated as if she had not become entitled to retirement pension. This is because on the date the claimant elected to be treated as such, 21.12.91, she had reached age 65." In other words, the claimant was not allowed to de-retire since she had attained 65 and could not therefore bring herself within section 54(1) of the Claims and Benefits Act and regulation 2(1) of the Widow's Benefit and Retirement Regulations.

3. At the hearing of the appeal, the adjudication officer was represented by Mr Paines, and the claimant by Mr Drabble, both of Counsel. To them both, I am indebted for their assistance and

for the way they patiently led me through the veritable minefield that this corner of the law presents.

4. The relevant background facts are not in issue and can be summarised quite shortly.

(1) The claimant is a woman. She was born in 1924.

(2) The claimant worked up to the age of 58. At some stage, she paid contributions at the full rate but later only at the lower married woman's rate.

(3) When 58, she suffered invalidity and ceased work. She had not, however, paid sufficient contributions to entitle her to sickness benefit and she received income support.

(4) Upon attaining 60, she was paid a retirement pension having elements of both Category A and Category B.

(5) On 21.12.91, when she was 67, the claimant sought to de-retire. For the reasons I have set out in paragraph 2 above, her application was refused.

5. If the claimant had been able to de-retire she would have become entitled to sickness benefit under Section 31(1) Claims and Benefits Act 1992 and, after receipt of that for the 168 day period, to Invalidity Pension under section 33(1). She would cease to be entitled to retirement pension. The actual amount which she would receive in respect of first sickness benefit and then invalidity benefit would be no more than the weekly rate payable in respect of retirement benefit. Section 31(6) provides:

> "(6) In the case of any person over pensionable who is entitled under paragraph (b) or (c) of sub-section (2) above, sickness benefit shall be payable at the weekly rate at which the retirement pension referred to in the applicable paragraph of that sub-section would have been payable ...."

There is a corresponding provision in sub-section (4) of section 33 as regards invalidity pension (I appreciate that sickness benefit is payable at a lower rate than invalidity pension but for the present purpose I do not think that anything turns on that.)

But, in addition, if allowed to de-retire, she would qualify for higher pensioner premium - see para 10 (1)(b)(i) of Schedule 2 to the Income Support (General) Regulations 1987, but if and only if she were in receipt of invalidity pension - see para 12(1)(a)(i) of schedule 2, and she could only be entitled to invalidity pension if she could de-retire.

I need to consider the detailed statutory provisions no further. An argument that the claimant might be even worse off-

disregarding the point that sickness benefit is paid at a lower rate - based on regulation 42 of the General Regulations was, as I understand it, abandoned by Mr Paines, but it does not matter so far as his argument is concerned. All he need show is that, in respect of benefits within Article 3 of Directive 79/7, the claimant would be no worse off : indeed as we have seen, so far as these particular benefits are concerned - leaving aside the effect of higher pensioner premium - she will be in precisely the same financial position. At the hearing in front of me, the change in benefits from retirement pension to sickness benefit and invalidity pension was conveniently and aptly referred to as "a change of label". I adopt that expression in this decision.

6. Section 54(1) of the Contributions and Benefits Act 1992 provides as follows:-

" (1) Regulations may provide that in the case of a person of any prescribed description who -

(a) has become entitled to a category A or category B retirement pension but is, in the case of a woman, under the age of 65 or in the case of a man, under the age of 70; and

(b) elects in such manner and in accordance with such conditions as may be prescribed that the regulations shall apply in this case

this Part of this Act shall have effect as if that person had not become entitled to such a retirement pension"

Regulation 2(1) of the Widow's Benefit and Retirement Pension Regulations carries the section into effect. The short, but not easy question with which I am faced, is whether Directive 79/7 has the effect of making unlawful on the grounds of discrimination a decision under the section and regulation that the claimant could not de-retire and that brings into question the legality of those provisions themselves.

7. I now turn to the arguments of Counsel put to me. In summarising them in the way I do, I hope I have accurately set them out.

8. Mr Paines submitted on behalf of the adjudication officer as follows:-

" (i) In financial terms, the claimant would be no better off in respect of benefits which fall within Article 3 upon "a change of label". Qualification for higher pensioner premium is not a benefit within that Article, income support being outside the ambit of the Article and therefore outside the

Directive altogether. There is, therefore, no discrimination as regards benefits affected by the Directive. The submission proceeds on the basis that discrimination in the Directive involves a resultant degree of prejudice to the person involved whether he be male or female. It is not necessary therefore to get as far as article 7 at all. This submission raises the question, "What, in the context of the directive, constitutes discrimination at all?".

(ii) Relying on Smithson, it is not permissible to invoke the Directive in support of a claim to de-retire where the purpose of de-retiring is to improve the claimant's position in respect of benefits outside Article 3. Thus in this case, it is not permissible to rely on a benefit within Article 3 - as invalidity pension is - in order to introduce a benefit not within Article 3 - as qualification for higher pensioner premium is not.

(iii) If it is necessary to consider Article 7 at all, it nevertheless applies and has the effect of exonerating from the Directive the provisions in section 54(1) and regulation 2(1) which could otherwise be considered discriminatory. Article 7 provides:

" (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 benefit...."

The other paragraphs are irrelevant for the present purposes.

Following Thomas(EC Ref c328/91), it is accepted that under this Article discrimination in respect of other benefits schemes can only be justified "if such a discrimination is objectively necessary in order to avoid disrupting the complex financial equilibrium of the social security system or to ensure consistency between retirement pension schemes and other benefit schemes."

Reaching pensionable age has two consequences:

(1) It opens up an entitlement to the two benefits to persons who were not entitled before for want of sufficient contributions.

(2) Once the five years have elapsed, that entitlement expires and the claimant is only entitled to retirement pension. During the five year period the claimant has the option to choose between retirement pension and sickness benefit/invalidity pension though the levels are linked to retirement pension.

The discrimination is no more than a consequence of attaining pensionable age. Retirement is irrelevant. Mr Paines goes on to say that here one is faced with a series of contributory benefits where the known level of contributions is geared to the state's liability to the insured. The financial equilibrium of the scheme would therefore be disturbed. I was not altogether happy with this submission as it stood, without proper evidence. However, as will be seen, it is not necessary for me to determine the question. He then seeks to distinguish Graham CS/072/91 (starred 29/92) because, in that case, the benefit decreased on the claimant attaining pensionable age. In this case, the claimant was better off. Finally, he submitted that the provision is necessary in order to ensure consistency. I am not at all sure about that submission either.

9. Mr Drabble submitted, on behalf of the claimant, as follows:

(i) In considering the Directive it is necessary to start with Article 4. That provided as follows:-

" (1) The principle of equal treatment means that there should be no discrimination whatsoever on ground of sex either directly or indirectly by reference in particular to marital or family status, in particular as concerns:

- ....

- ....

– 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."

Mr Drabble says the adjudication officer misses a crucial aspect in the Directive as it is a breach of Article 4 to prevent or a woman from exercising an option to "a change of label" even if the motive is not the quantum of benefit that she would receive but the change would have some other effect. She must have the right to "a change of label". Retirement pension and sickness benefit/invalidity pension are within Article 3 and it is irrelevant if the reason to de-retire may fall outside i.e. in this case the wish to qualify for higher pensioner premium. He adds that if the Court had adopted this approach they would have had to answer the second question in Smithson. I asked Mr Drabble to reduce into writing his submission on Smithson which he helpfully did during the short adjournment. He said that the decision in Smithson on the first question did not dispose of his argument. There had been a submission on behalf of the claimant to the effect that the answer to the second question should be in the claimant's favour even if housing benefit fell outside the Directive, but the Court did not address that submission. Instead, it stated that it was not necessary to give an answer to the second question at all for on any view freedom to arrange one's affairs as one wished fell inside Article 4. The Court seems to have thought that no separate issue was involved on the second question. Had they thought they were considering his main submission – as set out in the previous

paragraph of this decision - they could not have said that the second question did not arise because it did.

(ii) As regards Article 7, the claimant's complaint was that once she has reached 65 the UK scheme contained no provision for sickness benefit for her - section 31(2)(b)(i) Contributions and Benefits Act - and that is not a permissible consequence of the determination of pensionable age and he relies on Thomas and Graham. Article 7 contains different pensionable ages but does not justify different assumptions when a person actually ceases work. If women are entitled to work after pensionable age, they must be entitled to work as long as men. Thus on de-retirement, if a man is entitled to go back into the labour market so should a woman. He makes submissions on the financial equilibrium and consistency according to the Thomas decision on which I have commented above when considering Mr Paines' submissions above.

10. Now, if I found myself forced to decide the case by reference to Graham, I made it quite clear that I would adjourn until Graham has come back from Luxembourg. I do not, however, find myself in that position.

11. The issues before me can I think be summarised thus:

(i) Is the inability to opt for "a change of label" by itself discriminatory?

(ii) Does the answer of the ECJ to the first question in Smithson also answer this case?

(iii) Does Article 7(1)(a) apply?

12. The questions put to the Court in Smithson were:

" (i) Does the inability of a woman aged between 65 and 70 to claim and receive higher pension

premium on the basis of paragraph 10(b)(i) of Schedule 2 to the Housing Benefit (General) Regulations 1987 contravene Article 4 of Council Directives 79/7?

"(ii) Is a woman aged between 65 and 70 entitled by reason of the combined effect of section 2 of the European Communities Act 1972 and Article 4 of Council Directive 79/7 to give notice of de-retirement pursuant to section 30(3) of the Social Security Act 1975, to claim and receive (if otherwise eligible) invalidity benefit under section 15 of that Act, and to claim and receive higher pension premium on the basis of paragraph 10(1)(b)(i) of Schedule 2 to the Housing Benefit (General) Regulations 1987?".

13. Advocate General Tesauro proposed that the questions be answered as follows:-

"1 (a) A benefit such as the higher pensioner premium which is linked to the age and invalidity of the person benefiting therefrom is a form of social assistance intended to supplement a statutory scheme within the meaning of article 3(b) of directive 79/7

(b) The fact that one of the conditions for entitlement to the benefits of the higher pensioner premium consists in a benefit (invalidity pension) discontinuation of which is tied to the different pensionable ages for men and from women is not a "necessary consequence" within the meaning of article 7(1)(a) of the directive.

"2. The automatic discontinuance of the invalidity pension five years after reaching pensionable age in as much as it is linked to the different ages set for retirement, is

not a necessary consequence of the different ages at which entitlement to an old-age pension arises.

14. The Court, however, did not agree and answered the questions differently. It seems to me to be a consequence of the way that they did answer the first question that they "answered" the second question in the way that they did. Mr Drabble has asked me to hold in effect that if the Court had adopted his approach they would have had to answer the second question and they would have decided in the claimant's favour. It seems to me, that the Court did approach the question from the standpoint of Article 4, but came to the decision they did on the grounds I set out below.

15. Pausing there, I think it is important to consider what the facts were in Smithson. They are set out in paragraphs 3 of the Report for the Hearing:

> " Florence Rose Smithson was in receipt of an invalidity pension for the five years prior to her 65th birthday. From then on, for reasons not explained, she drew a retirement pension. She was refused application of the higher pensioner premium on the ground that she did not fulfil the additional condition of being in receipt of invalidity pension. Since her age at the time of the facts relevant to the main proceedings was 67, she was unable to elect to de-retire and opt for an invalidity pension."

I would add that it would have been under paragraph 10 of Part III Schedule 2 Housing Benefit (General) Regulation 1987 that the claimant, in that case, would have qualified for higher pensioner premium. That paragraph is to all intents and purposes identical to paragraph 10 part III Schedule 2 of the Income Support (General) Regulations 1987.

16. The answer of the Court was as follows:-

> " Article 3(1) of Council Directive 79/7 EC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as not applying to a scheme for housing benefit the amount of which is calculated on the basis of the relationship between a notional income which the beneficiary is deemed to be entitled and his or her actual income, even if criteria concerning protection against some of the risks listed by the directive, such sickness or invalidity, are applied in order to determine the amount of the notional income".

Since paragraph 10 Schedule 2 of the Income Support Regulations is to all intents and purposes identical to paragraph 10 Schedule 2 of the Housing Benefit (General) Regulations it seems to me that this case is similar with that. The reasons given by the Court for answering the first question in the way that they did are to be found in the following parts of their judgement:

> " 12. .... In order to fall within the scope of Directive 79/7, therefore, a benefit must constitute the whole or part of the statutory scheme providing protection against one of the specified risks or a form of social assistance having the same objective...
>
> "14. It is therefore clear that although the mode of payment is not decisive as regards the identification of the benefit as one which falls within the scope of Directive 79/7, in order to be so identified the benefit must be directly and effectively linked to the protection provided against one of the risks specified in Article 3(1) of the Directive.
>
> "15. However, Article 3(1)(a) of Directive 79/7 does not refer to statutory schemes which are intended to guarantee any person whose real income is lower than a notional income calculated on the basis of certain criteria a special allowance enabling that person to meet housing costs.
>
> "17. The premium is in fact an inseparable part of the whole benefit which is intended to compensate for the fact that the beneficiary's income is insufficient to meet housing costs and cannot be characterised as an autonomous scheme intended to provide protection against one of the risks listed in Article 3(1) of Directive 79/7."

Throughout, read "living costs" for "housing costs".

17. The Court then went on to say as regards the second question:

" The second question does not require an answer because as the Commissioner pointed out in his observations, it is concerned solely with the means whereby the applicant in the main proceedings may pursue her rights of the first question as answered in the affirmative."

18. It seems to me that Smithson is really indistinguishable and, as I have said, it seems to me that the Court "answered" question 2 in the way they did because they answered question 1 in the way they did. The Advocate General suggested a composite and different answer but his approach was not accepted by the Court. In the final analysis, it seems to me that were I to accept Mr Drabble's argument on Smithson I would be in danger in effect of holding that the Court may have reached its decision per incuriam. In any event, it seems to me that the approach and judgement of the Court in that case were in fact correct.

19. The question of Article 7(1)(a) does not arise. The only other question which arises is whether there was discrimination in the first place at all and we have the counter submissions of Mr Paines and Mr Drabble. There are the definitions of discrimination in section 1 Sex Discrimination Act 1975 and the corresponding Section 1 of the Race Relations Act 1976. There is also the definition in the Oxford English Dictionary. I am not sure how much these definitions will assist and I do not propose to answer this question. For the purposes of this decision, I shall assume that loss of the ability to opt for "a change of label" did constitute discrimination. I must however make it quite clear that this is an assumption only and I express no view either one way or the other.

20. My decision is therefore as set out in paragraph 1 above.

(Signed) J.M. Henty
Commissioner

(Date) 30 June 1994