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Region: London South

SOCIAL SECURITY ACTS 1975 TO 1986

CLAIM FOR UNEMPLOYMENT BENEFIT

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

See also Soc-Sec Bill Clause 6
Debate in Committee 4 Dec 1987 Mr Dawn Primarolo

1. Our decision is that -

- (a) We decline to refer to the European Court of Justice any questions relating to section 5 of the Social Security (No 2) Act 1980 concerning the principle of equal treatment contained in Directive 79/7/EEC of the Council of the European Economic Community and the permitted derogations from that principle;
- (b) unemployment benefit is not payable to the claimant for 2 September 1985 because he has attained the age of 60 and is in receipt of an occupational pension of such amount exceeding the amount prescribed for the purposes of section 5 of the Social Security (No 2) Act 1980 as reduces his entitlement to unemployment benefit to nil;
- (c) the claimant's appeal against the unanimous decision of the social security appeal tribunal given on 25 September 1986 is dismissed, save to the limited extent set out in paragraph 18.

2. The claimant appeals against the said decision confirming the decision of the adjudication officer, issued on 18 November 1985, in the terms of paragraph 1(b) above and, further, making a forward disallowance in respect of the inclusive period from 3 September 1985 to 1 September 1986.

3. In his application for leave to appeal dated 4 November 1986, the grounds of which the claimant adopted as his grounds of appeal, he put as his first ground -

"The occupational pension rule is discriminatory both in respect of age and sex. There appears to be no similar ruling for women over 55."

And he continued - having stated that the rule was "also an offence to natural justice" -

"While I accept that the Tribunal's decision was correct in law, I consider it wrong on moral grounds";

which we take to mean - and we have had no submission to the contrary - that, subject only to the effect of the Directive, it was accepted that the tribunal's decision could not be challenged on its merits. We consider that this is right, and counsel have not argued to the contrary. We add that the claimant attained the age of 60 years on 10 December 1981 and that his occupational pension was paid from 1 September 1985. Thus on the material date, 2 September 1985, the claimant was aged 63 years.

4. In the circumstances, at the oral hearing, which took place on 3 and 11 December 1987, we heard argument on whether this appeal raised any issue of Community law, and if it did whether we should make a reference concerning it to the European Court of Justice pursuant to Article 177 of the EEC Treaty. Having reached our conclusions on these points we have proceeded to determine the appeal.

5. Section 5(1) of the Social Security (No 2) Act 1980 ("the 1980 Act") provides that -

"(1) If payments by way of occupational pension which in the aggregate exceed the maximum sum are made for any week to a person who has attained the age of 60, the rate of any unemployment benefit under the principal Act to which apart from this section he is entitled for that week shall be reduced by 10 pence for each 10 pence of the excess; and in this subsection 'the maximum sum' means such sum not less than £35 as is prescribed."

Part III (comprising regulations 23 to 28) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 [SI 1983 No 1598] deals with "Abatement of Unemployment Benefit for Occupational Pension Payments". Regulation 24 prescribes £35 as "the maximum sum".

6. At the hearing the adjudication officer was represented by Mr Richard Plender, of counsel, instructed by the Solicitor's Office of the Department of Health and Social Security, and the claimant was represented by Mr Martin Rodger, of counsel, from the Free Representation Unit, to both of whom we are greatly indebted.

Counsel's submissions covered a wide area and a number of interesting arguments were addressed to us. In the event, in view of the way in which the relevant issues became apparent during the course of the hearing, it is not necessary - and we do not consider it would be helpful - for us to deal with all the points which were canvassed, but we wish to emphasise that we appreciate the thoroughness with which counsel argued the case, which has greatly assisted us in reaching our decision.

7. We can dispose of one preliminary matter shortly as, having heard argument and having considered the authorities to which we were referred by counsel, including Worringham and Anor v Lloyds Bank Limited, Case 69/80 (1981) ECR 767, and Defrenne v Belgian State, Case 80/70 (1971) ECR 445, we are satisfied that Article 119 of the EEC Treaty (stating the principle of equal pay for men and women) has, save perhaps to the limited extent of being an aid to interpretation of the provisions we have to consider, no application in the instant case because -

(a) it is the claimant's unemployment benefit which is abated by virtue of section 5 of the 1980 Act, and it is conceded that that does not fall within the meaning of "pay" as defined in Article 119. It is therefore not necessary for us to decide in what circumstances benefits under an occupational pension scheme may come within the definition of "pay", a question which was left unresolved in the Worringham case - see paragraph 18 of the judgment of the Court at page 791 referring to question 1(b) at page 789, and see also the opinion of the

Advocate General at page 805 concerning contracted out pension schemes, such as the one to which the claimant in the present case belongs;

- (b) the Community law issues in the instant case properly come within Article 118 of the Treaty. Our view is fortified by the observations of the European Court of Justice in Newstead v Department of Transport and HM Treasury, at paragraph 15 of the judgment delivered on 3 December 1987 (summarised in the European Law Report, The Times, 30 December 1987, but the full text of which Mr Plender kindly supplied to us).

8. In the circumstances the question before us resolved itself into the proper construction and application of the Council Directive of 19 December 1978, 79/7/EEC, "on the progressive implementation of the principle of equal treatment for men and women in matters of social security".

Article 2 provides that the Directive "shall apply to the working population ... and to retired ... workers", a class which plainly includes this claimant, and Article 3, paragraph 1, provides that the Directive shall apply (a) to statutory schemes providing protection against a number of contingencies, including old age and unemployment, and (b) to "social assistance, in so far as it is intended to supplement or replace the schemes referred to in (a)".

Article 4 recites that, without prejudice to the protection of women on the grounds of maternity "there shall be no discrimination whatsoever on the ground of sex either directly, or indirectly ..."

But paragraph 1 of Article 7 specifically permits Member States to exclude from the scope of the Directive -

"(a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits."

9. Section 27(1) of the Social Security Act 1975 provides that pensionable age in the case of a man is the age of 65, and in the case of a woman is the age of 60. This provision is clearly within the derogation relating to the determination of pensionable age in Article 7.1(a).

10. The questions which therefore arose for our decision were -

- (a) is section 5 of the 1980 Act, whether alone or in conjunction with section 27(1), discriminatory, either directly or indirectly, contrary to Article 4?
- (b) if it is discriminatory does such discrimination come, if at all, within the first limb of Article 7.1(a) - arising from "the determination of pensionable age for the purposes of granting old-age and retirement pensions" - or the second limb - arising from the "possible consequences thereof for other benefits"?

We accept that the derogations in Article 7.1(a) are to be narrowly construed.

11. In the instant case the claimant's unemployment benefit is abated pursuant to section 5(1) of the 1980 Act because he fulfils the twin conditions of being aged over 60 and being in receipt of an occupational pension. A woman also aged over 60 and also in receipt of an occupational pension would also be liable to abatement of unemployment benefit in exactly the same way so that, on the face of it, section 5 operates with complete impartiality as between men and women.

In R v Secretary of State for Education ex parte Schaffter [1987] IRLR 53, Schiemann J
eld, at paragraph 21 on page 56, -

"In my judgment ... the principle of equal treatment enshrined in the directive is, prima facie, not being observed if, in a situation where there is an equal number of men and women in the population, one sees a practice working in reality in such a way that many more women than men are adversely affected by it."

That is a case not concerned with social security law, but with the operation of the Education (Mandatory Awards) Regulations and the Education (Students' Dependents' Allowances) Regulations; however, it gives clear guidance as to the identification of indirect discrimination and shows the importance of the correct identification of the relevant "pool", that is the group of persons as to which the issue of discrimination or potential discrimination arises.

13. We identify the class of persons with which we are concerned in the present case as those who fall within section 5(1) in conjunction with section 27(1), namely those aged 60 or over but under 65 who have not retired (for whatever reason), who are out of work and available for employment and entitled to unemployment benefit, and who are in receipt of occupational pension from their former employment.

14. There is no doubt - and it was not in issue before us - that there will be a substantially greater number of men than women in that class of persons as, indeed, statistics produced to us show. Doubtless this is not unconnected with the fact that women who have reached the age of 60 are able to retire and claim both occupational and state retirement pension, while men customarily cannot do this until they are aged 65. In our judgment that disproportion amounts to indirect discrimination in accordance with the principles set out in the Schaffter case and in Bilka-Kaufhaus GmbH v Weber von Hartz [1986] 2 CMLR 701. The answer therefore to question (a) in paragraph 10 is that section 5 of the 1980 Act is indirectly discriminatory on the grounds of sex.

15. The next question is under which limb of Article 7.1(a) it may fall. There is no doubt that the difference in pensionable age for men and women under section 27(1) of the Social Security Act 1975 is discriminatory, but that is not what is in issue here; the indirect discrimination we find in the instant case is in relation to unemployment benefit. Consequently we have come to the conclusion that the second limb of Article 7.1(a) is properly applicable here.

16. While we accept that the derogation constituted by the second limb is to be construed narrowly, we are satisfied that what undoubtedly occurs in the cases with which we are concerned is one of the "possible consequences" (our emphasis) for unemployment benefit of the determination of pensionable age under section 27(1) of the 1975 Act.

17. It follows, in our judgment, that the discrimination by which the claimant is affected is excluded from the scope of Directive 79/7/EEC. We also consider that the point is sufficiently clear for us to be able to decide it ourselves. In those circumstances we decline to accede to Mr Rodger's submission that we should refer that question to the European Court of Justice, although we are grateful to both counsel for drafting possible questions, at our request.

18. In these circumstances we confirm the decision of the social security appeal tribunal that unemployment benefit is not payable to the claimant for 2 September 1985. So far as the decision regarding the forward disallowance is concerned, we do not have sufficient

information to enable us to confirm that the claimant's situation remained the same during the relevant period, and accordingly we must leave it to the adjudication officer to determine the claimant's entitlement in respect of any subsequent day for which a claim has been or may be made. That officer will of course wish to apply our decision on Directive 79/7/EEC.

(Signed)

Leonard Bromley
Chief Commissioner

M J Goodman
Commissioner

M H Johnson
Commissioner

Date: 18 January 1988