

**SOCIAL SECURITY ACTS 1975 TO 1986
CLAIM FOR INVALID CARE ALLOWANCE
DECISION OF THE SOCIAL SECURITY COMMISSIONER**

Name: Annie Gair (Mrs)

Appeal Tribunal: Galashiels

Case No: 01/03

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal ("the tribunal") dated 18 September 1987 is erroneous in law and is set aside. In place of the said decision I give the decision that the tribunal should have given, that is to say:-

- (a) The claimant is not entitled to invalid care allowance from 22 December 1984 to 24 November 1985 (both dates included) because the claim was made on 25 November 1986 and no person is entitled to invalid care allowance in respect of any period more than 12 months before the date of claim.
- (b) Invalid care allowance is not payable from and including 25 November 1985 because the claimant has been in receipt of widow's pension at the rates current from time to time since 24 December 1984 which have at all times exceeded the current rates of invalid care allowance.

The reasons for my above decision are as hereinafter stated.

2. This is an appeal brought by the claimant with the leave of the tribunal chairman against the above-mentioned decision of the tribunal which was given on the claimant's appeal against the decision of the adjudication officer issued on or about 26 March 1987. The latter decision was in substance to the same effect as my decision in (a) and (b) of paragraph 1 above. The tribunal's decision was "Uphold Adjudication Officer" and had the effect of confirming the adjudication officer's decision.

3. I heard the appeal at an oral hearing granted at the claimant's request. The claimant did not attend but was represented by Mr Mark Rowland of Counsel, instructed by Ms Vicki Chapman, Solicitor, of the Child Poverty Action Group and the adjudication officer was represented by Mr M. R. Parke of the Solicitor's Office, Department of Health and Social Security. I am indebted to both representatives for their helpful submissions.

4. There is no dispute about the facts of the case. The claimant was widowed on 14 August 1980 and is in receipt of widow's pension. Following the death of her husband she ran their farm and intended to continue to do so until she reached retirement age. However, she had to give up work in order to care for her daughter, who was in receipt of attendance allowance and on 25 November 1986 she made the claim for invalid care allowance which is the subject of the present appeal, stating that she wished the claim to be considered from 22 December 1984.

5. The adjudication officer's decision on the claim for the period 22 December 1984 to 24 November 1985 was a straightforward application of section 165A(3) of the Social Security Act 1975 and for the reasons given in paragraph 8 below I need say no more about it. As for the claim from and including 25 November 1985, it was accepted that the claimant satisfied the conditions for an award of invalid care allowance but the adjudication officer applied regulation 4 of the Social Security (Overlapping Benefits) Regulations 1979 which provides that where two or more personal benefits would otherwise be payable - widow's pension and invalid care allowance are both personal benefits as defined in the regulations - and one of the benefits is a contributory benefit and one is a non-contributory benefit, the non-contributory benefit is to be adjusted by deducting from it the amount of the contributory benefit and only the balance, if any, is to be payable. Widow's pension is a contributory benefit and invalid care allowance is not. The weekly rate of the claimant's widow's pension from and including 25 November 1985 has at all times exceeded the weekly rate of invalid care allowance and the adjudication officer accordingly gave the decisions mentioned in paragraph 2 above.

6. On her appeal to the tribunal the claimant raised a matter which had evidently not previously been considered. She submitted that the provisions of the Overlapping Regulations which prevent payment of invalid care allowance to widows in receipt of widow's pension are indirectly discriminatory within the terms of the European Community Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (hereinafter called "the Directive"). The record of the tribunal's proceedings does not include any note of evidence or argument or any findings of fact beyond "Facts accepted" but the reasons for decision include:-

"(3) No discrimination within terms of EEC Directive 79/7/EEC of 19.12.78, as the relevant United Kingdom Social Security Regulations do not discriminate between men and women."

which indicates that the claimant's written submission must have been considered.

7. The claimant's present appeal was originally based partly on the ground that the tribunal had failed to comply with regulation 25(2) of the Social Security (Adjudication) Regulations 1986 as regards the record of their findings of fact and reasons for their decision. However, before the hearing Mr Rowland helpfully submitted that such failure in the present case was purely technical and did not suggest that the case should be remitted to another tribunal on that ground alone. In effect he invited me to decide the question of law involved and to give my own decision on the appeal. It is, of course, open to me to give my own decision only where I have first found a tribunal's decision erroneous in law and have set it aside. In the present case, although I consider that the tribunal reached the correct conclusion, I am satisfied that their decision was erroneous in law in that it was not supported by an adequate statement of reasons and I have accordingly given my decision in the form set out in paragraph 1 above.

8. Mr Rowland also accepted that invalid care allowance was not payable to the claimant before 25 November 1985. He said that he anticipated that if she was successful on the main point on this appeal she would receive an ex gratia payment from the Secretary of State in respect of the period 22 December 1984 to 24 November 1985 but that was not a matter within my discretion. I do not propose to say anything further about that aspect of the appeal.

9. I turn now to the substantial question in issue on this appeal, that is to say, whether the Directive affects the operation of the Overlapping Benefits Regulations. Article 1 defines the purpose of the Directive as follows:-

"The purpose of this Directive is the progressive implementation, in the field of social

security and other elements of social protection provided for in Article 3, of the principle of equal treatment for men and women in matters of social security, hereinafter referred to as 'the principle of equal treatment'".

Articles 2 and 3 define respectively the persons to whom the Directive applies and the schemes and other provisions to which it applies. It is not in dispute that the Directive applies to the claimant and that it applies to invalid care allowance but not to widow's pension. Article 4, so far as relevant for the present purpose, provides:-

"1. The principle of equal treatment means that there shall 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 scope of the schemes and the conditions of access thereto,
- the obligation to contribute and the calculation of contributions
- 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.

2. ..."

The remaining Articles deal with implementation.

10. It was ruled by the Court of Justice of the European Communities on a reference for a preliminary ruling in a case pending before that court between The State of the Netherlands and Federatic Nederlandse Vakbeweging that:-

"Where no measures have been adopted to implement Council Directive 79/7/EEC, Article 4(1) thereof, which prohibits all discrimination on grounds of sex in matters of social security, could be relied on as from 23 December 1984 in order to preclude the application of any national provision inconsistent with that article. In the absence of measures implementing that article women are entitled to be treated in the same manner as men who are in the same situation, since, where the directive has not been implemented, those rules remain the only valid point of reference." [my underlining]

It follows that, if I find that the application to the claimant of regulation 4 of the Overlapping Regulations is discriminatory within the meaning of Article 4(1), the claimant will be entitled to have her claim for invalid care allowance treated in the same way as such a claim by a man in the same situation.

11. Article 4(1) refers to both direct and indirect discrimination and it was at first submitted on behalf of the claimant that the Overlapping Benefits Regulations are directly discriminatory. However, before and at the hearing Mr Rowland submitted that since they do not in terms discriminate between men and women they should be regarded as indirectly discriminatory. Mr Parke took the same view as regards direct discrimination and submitted that the regulations are "sexually neutral". For my part, I can see that, looked at superficially, the regulations do not have the appearance of drawing any distinction between the rights of men and women on grounds of sex but as soon as they are looked at to ascertain what they actually provide it is immediately apparent that one result is going to be that widows in receipt of widow's pension who are also entitled to invalid care allowance will have the latter benefit adjusted, that is to say, reduced. There is no question of having to wait to see what happens in practice and no need for any statistical or other evidence before one can judge the effect of the regulations. In the circumstances I do not see how the effect, if it is discriminatory, can be said to be other than directly so. I have considered the passage from the opinion of Mr Advocate-General Mancini delivered on 7 October 1986 to

the Court of Justice of the European Communities in the case J.W.Teuling-Worms v Bedrijfsvereniging Voor de Chemische Industrie (Case 30/85) to which my attention was drawn by Mr Rowland as throwing light on the meaning of indirect discrimination but I have found nothing therein to persuade me that the Overlapping Benefits Regulations could appropriately be described as indirectly discriminatory. In particular, the effect of the regulations seems to me to be a very far cry from the "'hidden discrimination' which might 'in practice affect workers of one sex as a result of marital or family status being taken into account in determining the rights being covered by the two directives'". However, as will appear, I have reached the conclusion that the regulations are not discriminatory at all and it is therefore unnecessary for me to say anything more about the difference between direct and indirect discrimination.

12. In my view a rule or regulation is discriminatory on ground of sex within the meaning of Article 4(1) if when it is applied it results either directly or indirectly in a person or group of one sex who, before the application of the rule was or were in the same situation as a person or group of the opposite sex, being treated less or more favourably than the second mentioned person or group. It is for that reason that the words "men who are in the same situation" appear in the ruling quoted in paragraph 10 above. It is interesting to note that the same view of discrimination is taken in the Sex Discrimination Act 1975 which in section 1(1) provides:-

"1-(1) A person discriminates against a woman in any circumstances relevant for the purposes of this Act if -

(a) on the ground of her sex he treats her less favourably than a man, or"

and then goes on to provide in Section 5(3):-

"(3) A comparison of the cases of persons of different sex or marital status under section 1(1) or 3(1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other."

The same considerations must apply to both direct and indirect discrimination.

13. In the present case there is no man in the same situation as the claimant, or in a situation not materially different from hers, before the Overlapping Regulations are applied. The fact that she has a widow's allowance puts her in a situation different from that of any man whether or not he is entitled to invalid care allowance and it is therefore not in my opinion appropriate, in considering the question of discrimination, to compare her with any man. It is of course true, as Mr Rowland pointed out that there is a difference between her and any man who is entitled to invalid care allowance in that she is under the disadvantage that she loses her invalid care allowance for a reason which can never apply to a man but that is not the result of discrimination; it results from the fact that she starts from a different situation from that of any man. The same applies to Mr Rowland's argument that whereas a widow who is working receives her salary and her widow's pension but when she becomes a person "whose activity is interrupted by illness" [see Article 2] she does not have the same access to the "statutory schemes which provide protection against the ... risks ... [of] invalidity ..." [see Article 3(a)] as any person who is not a widow. It is true that she does not have such access but the lack results from her different starting point, not from discrimination.

14. As I have decided that the effect of the Overlapping Benefits Regulations is not discriminatory against the claimant in terms of Article 4(1) of the Directive it follows that the appeal fails. My decision is as set forth in paragraph 1 above.

(Signed) J N B Penny
Commissioner

Date: 11 November 1988