MHJ/1/LM Commissioner's File: CG/037/1988

SOCIAL SECURITY ACTS 1975 TO 1990
SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR INVALID CARE ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

**Name:** Pauline Gwendoline Frances Woods (Mrs)

**Appeal Tribunal:** Sutton

**Case No:** 19/01179

[ORAL HEARING]

1. My decision is that -

   (a) the unanimous decision of the Sutton social security appeal tribunal given on 18 December 1988 is erroneous in point of law and is accordingly set aside;

   (b) the claimant is entitled to invalid care allowance with effect from 2 March 1987.

2. The claimant, to whom I shall refer as Mrs W, appeals with leave of the Commissioner against the decision of the tribunal upholding the decision of the adjudication officer, issued on 2 July 1987, that she was -

> " ... not entitled to invalid care allowance because she has attained pensionable age and was not entitled and cannot be treated as having been entitled to invalid care allowance immediately before attaining that age."

3. Mrs W completed a claim form for invalid care allowance on 27 February 1987. She was then aged 63 (her date of birth being 10 March 1923), and she stated that she was engaged for at least 36 hours a week in caring for her daughter, Carolyn (born on 17 April 1945, so then aged 41). Her claim was rejected on the ground that section 37(5) of the Social Security Act 1975 (now section 70(5) of the Social Security Contributions and Benefits Act 1992) provided that a person who has attained pensionable age shall not be entitled to invalid care allowance unless she was so entitled, or regulations provided for her to be treated as so entitled, immediately before attaining that age. Pensionable age in Mrs W's case was 60, which she had attained on 10 March 1983.

4. Mrs W appealed and on 18 December 1987 the tribunal disallowed her appeal. Mrs W, who has been represented throughout by Mr Derek Jackson, formerly of the Merton Community

Welfare Rights Project, appealed on the ground that rejection of her claim was discriminatory and contrary to the law of the European Economic Community. Thereafter, by direction of a Nominated Officer dated 20 February 1989, consideration of Mrs W's appeal to the Commissioner was deferred pending promulgation of the Commissioner's decisions in CG/29/87, CG/36/87 and CG/12/88, in which the issue of discrimination was being considered. CG/29/87 is now reported as R(G) 3/89, together with an appendix containing the judgments of the Court of Appeal in the cases of Thomas, Cooze, Beard, Murphy and Morley (see also (1991) 2 WLR 886).

5. On 16 April 1991 I held an oral hearing. Mrs W attended and was represented by Mr Jackson, and the adjudication officer was represented by Miss P. Cohen of the Office of the Solicitor to the Departments of Health and Social Security. As the cases of Thomas & ors were then to be heard by the House of Lords in the reasonably near future, I considered it inexpedient to decide the appeal at that time but in order to avoid a further hearing I heard evidence from Mrs W on the question of whether and, if so, when she had been a member of the working population. I also heard legal argument from Mr Jackson and Miss Cohen, which to a large degree has now been overtaken by events. On that further appeal the House of Lords on 27 November 1991 referred certain questions to the European Court of Justice and, on 31 December 1990 the adjudication officer now concerned with the case sought a further deferment of this appeal until the European Court had dealt with the matter.

6. On 27 July 1992, in the light of the length of time this appeal had been pending, I issued a further direction and, following receipt of a submission dated 17 August 1992, I agreed to the case being further postponed until the Court of Appeal had given judgment in yet another appeal. However the Court of Appeal then deferred their judgment and referred certain questions to the European Court and, on 24 March 1993, I came to the conclusion that I had no realistic alternative but to adjourn the present appeal of Mrs W until the European Court had pronounced upon the cases of Cooze and others. In the event the European Court gave judgment on 30 March 1993 and, on 7 April 1993, the adjudication officer now concerned with the case made a submission in which he accepted that -

> " ... discrimination against women because of the different pensionable ages is not excepted from the effects of the Directive by Article 7(1)(a)."

And went on to submit that -

> " ... applying the EC principle of 'levelling-up' (ie the disadvantaged party has the conditions applied to it that were applied to the advantaged party where the Directive has direct effect), pensionable age for the claimant should be for the purposes of this condition of entitlement be treated as 65."

7. In view of the adjudication officer's acceptance that the guidance of the European Court is clear in relation to the instant case, notwithstanding that there are still matters to be determined by the House of Lords, two things follow. Firstly, the basis upon which the initial decision was made and upon which the tribunal gave their decision has now gone; the tribunal's decision is consequently erroneous in point of law and must be set aside. And secondly, whether or not Mrs W is entitled to invalid care allowance depends, to reduce the matter to its simplest terms, upon whether she is to be regarded as a member of the "working population" within the meaning of Article 2 of EEC Directive 79/7.

8. This is a case which, perhaps unavoidably, has already been going on for far too long. Plainly it is expedient that I should exercise my power under section 23(7)(a)(ii) of the Social Security Administration Act 1992 to substitute my own decision and, in the light of the manner in which the law has developed and been clarified, no useful purpose would be served by my setting out the relevant domestic or European legislation or passages from the judgments of the Court of Appeal, House of Lords or the European Court. These are all self-explanatory and I can therefore now dispose of this appeal shortly.

9. EEC Direction 79/7 provides by Article 2 that the Directive as a whole applies "to the working population" including workers whose activity is interrupted by certain specified risks, and Article 3(1)(a) states the particular risks to which the Directive applies. The case of Drake v CAO [1987] QB 166, decided that invalid care allowance was an invalidity benefit within the scope of the Directive, and the only remaining question is whether Mrs W can also bring herself within the scope of Article 2.

10. I heard unchallenged evidence from Mrs W on 15 April 1991 that she had left school at the age of $16^{1}/_{2}$, had then attended a Commercial College, where she had learned shorthand and typing. Mrs W had then had several secretarial jobs, the last of which was with Merton and Morden Council, which she left in about 1941 to nurse her mother who subsequently died in September 1942. During the War she had a number of part-time jobs and, although she was principally engaged in looking after her father and grandmother, she did not finally cease all work until her pregnancy with Carolyn, to whom she gave birth on 17 April 1945. Carolyn suffers from Down's syndrome and Mrs W has been looking after her ever since.

11. I accept Mrs W's evidence. In my judgment the meaning of "working population" in European law is a very wide one, and certainly applies to someone in Mrs W's position, who at some time during their life has been in employment and consequently a member of a national insurance scheme. Mrs W's employment was interrupted by a relevant risk - Carolyn's disability, which effectively prevented Mrs W's return to work. I accept that her withdrawal from work towards the end of her pregnancy was

intended to be temporary and, in the context of the Directive, is not to be considered a relevant interruption. In my judgment, upon the particular facts of this case Mrs W was a member of the working population until the interruption occasioned by her giving birth to a severely disabled child. The fact that, for whatever reason, Mrs W did not claim invalid care allowance in respect of Carolyn until a late stage cannot of itself invalidate her claim.

12. In those circumstances I hold that, applying the law as I now understand it to be, Mrs W is entitled to invalid care allowance with effect from 2 March 1987. The matter will be referred to an adjudication officer to calculate what payments are due to Mrs W and, in the event of there being any dispute, I direct that the matter be referred to me for determination.

13. The claimant's appeal is allowed.

(Signed) M H Johnson
**Commissioner**

Date: 8 October 1993