Letter on 1C13 because of industrial injury or prescribed disease not disqualified from 1C13 when reach 60 – consideration of Thurso & Graham

THE COURT SERVICE

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Our Ref.: CIB/13368/1996

Ms. Carolyn George
C.P.A.G.
94 White Lion Street
London
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8 May 1999

Dear Ms. George,

Claimant: Mrs. Elsie Rowlands
52 Firs Ave
Pentrebane
Cardiff
CF5 3TJ

I enclose a copy of the Commissioner's decision. A copy has been sent to all the parties involved.

Yours sincerely,

JBRAVO
MISS J BRAVO
For the Secretary

Enc.

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CIB/13368/1996

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

MR H LEVENSON COMMISSIONER

Claimant	:	Mrs Elsie Rowlands
Tribunal	:	Cardiff - St David's House
Tribunal Case No	:	3/05/95/14072

The Decision

1. This appeal by the claimant succeeds. In accordance with the provisions of section 23(7)(a) of the Social Security Administration Act 1992 I set aside the decision made by the social security appeal tribunal on 4th January 1996 as having been made in error of law. The basic facts of the case are not in dispute and I substitute my own decision. This is that the claimant continues to be entitled to incapacity benefit from and including 16th September 1995 and that regulation 17(4) of The Social Security (Incapacity Benefit) (Transitional) Regulations 1995 must be disapplied in so far as it precludes the claimant from continuing to be entitled to incapacity benefit once she reaches the age of 60 and before she reaches the age of 65.

2. My decision is intended to apply to all women whose entitlement to incapacity benefit derives from industrial injury or prescribed disease. My decision is without prejudice to the position of people whose entitlement to incapacity benefit derives from the payment of contributions. That issue has not arisen for decision in the present case and it is not necessary or appropriate that I express a view on it.

3. I received lengthy written submissions in connection with this appeal, both before and after the oral hearing which took place on 11th February 1999. These included detailed submissions (prepared at my request) on the effect of the overlapping payments provisions. I have not found it necessary to discuss these but I am very grateful for the effort involved in drafting the submissions. At the hearing the claimant was represented by Mr Richard Drabble QC of counsel and Ms Carolyn George of CPAG. The adjudication officer was represented by Mr Christopher Vajda QC of counsel and Mr Jeremy Heath from the office of the Solicitor to the Department of Social Security (who were accompanied by three officials from the staff of the Chief Adjudication Officer). I am grateful to all of them for their assistance.

The Facts and the Discrimination

4. The claimant is a woman who was born on 16th September 1935 and worked as a sewing room assistant. She was certified by her GP as having suffered from tenosynovitis of the right wrist from 1st November 1991 and as being incapable of work from 4th February 1992. The claimant is not entitled to a retirement pension in her own right although her husband might be entitled to a pension increase in respect of her when he reaches the age of 65. The claimant received statutory sick pay from her employer until 24th August 1992. There was then some confusion or dispute over her contributions record and it was not until February 1995 that she was awarded invalidity benefit with effect from 25th August 1992. Tenosynovitis is (or at any rate the claimant was treated as suffering from) Prescribed Disease A8 (regulation 2 of and schedule 1 to The Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985).

5. The effect of a collection of provisions is that subject to certain specific exceptions which are not relevant in this case benefit is payable on the same basis, at the same rate and on the same conditions for prescribed diseases as for personal injury caused by an industrial accident (see in particular part V of the Social Security Contributions and Benefits Act 1992, replacing similar provisions in the Social Security Act 1975; part IV of the 1985 regulations; and the Social Security (General Benefit) Regulations).

6. On 13th April 1995 the award of invalidity benefit became a transitional award of long-term incapacity benefit by virtue of the effect of regulation 17(1) of The SocialSecurity (Incapacity Benefit) (Transitional) Regulations 1995. Regulation 17(4) of those regulations provides as follows:

> 17(4). Where a person reaches pensionable age on or after the appointed day [i.e. 13th April 1995], entitlement to a transitional award of long-term benefit shall cease on his attaining pensionable age.

"Pensionable age" is defined in regulation 1(2) as:

> (a) the age of 65, in the case of a man; and
> (b) the age of 60, in the case of a woman;".

7. The claimant reached the age of 60 on 16th September 1995. I observe that had the claimant not suffered from the prescribed disease there is no particular reason why she could not have continued to work after the age of 60. However, by a decision issued on 16th September 1995 the adjudication officer decided that by virtue of regulation 17(4) the claimant was no longer entitled to incapacity benefit from that date. On 27th September the claimant appealed to the social security appeal tribunal against the decision of the adjudication officer. The tribunal considered the matter on 4th January 1996 and confirmed the decision. On 17th January 1996 the claimant applied for leave to appeal to the social security commissioner against the decision of the tribunal, and leave was granted on 20th February 1996 by the chairman of the tribunal.

8. Had the claimant been a man (and had she continued to satisfy the other conditions of entitlement) she would have been entitled to receive incapacity benefit for another five years. This provision is clearly discriminatory on the grounds of sex and it is now argued on behalf of the claimant that, in effect, the provisions of Council Directive (EEC) 79/7 require that the discriminatory aspect of regulation 17(4) must be disapplied. It is argued on behalf of the adjudication officer that this discrimination is permitted by the terms of article 7(1)(a) of the Directive.

Council Directive (EEC) 79/7 of 10th December 1978

9. Directive 79/7 is on the progressive implementation of the principle of equal treatment for men and women in matters of social security. As indicated below, if the United Kingdom (on which the Directive is binding) is in breach of its obligations under the Directive the claimant in the present case can rely on the Directive as having direct effect.

10. So far as is relevant, the Directive provides as follows:

> Article 1: 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 ...
>
> Article 2: This Directive shall apply to the working population - including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment - and 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:
- sickness,
- invalidity,
- old age,
- accidents at work and occupational diseases,
- unemployment;

...

Article 4(1): The principle of equal treatment means that there shall be no discrimination whatsoever on grounds 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.

Article 5: Member States shall take the measures necessary to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished.

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 ...

Article 8(2); Member States shall communicate to the Commission the text of the laws, regulations and administrative provisions which they adopt in the fields covered by this Directive, including measures adopted pursuant to Article 7(2). They shall inform the Commission of their reasons for maintaining any existing provisions on the matters referred to in Article 7(1) and of the possibilities for reviewing them at a later date.

Directive 79/7 and the Facts of the Present Case

11. The claimant is within article 2 as a person whose activity is interrupted by illness and/or an invalided worker. The invalidity and incapacity benefit schemes are within article 3(1)(a) as statutory schemes providing protection against the risks of sickness and/or invalidity. As indicated above regulation 17(4) is clearly discriminatory on the grounds of sex. It breaches the principle of equal treatment set out in article 4 unless (within article 7(1)(a)) the discrimination in regulation 17(4) is a permitted consequence of the determination of pensionable age for the purpose of granting retirement pensions, this having been set by successive statutes at 65 for a man and 60 for a woman born before 6th April 1950 (Pensions Act 1995 schedule 4 part I). The scope of the exception for such permitted consequences was considered in the Thomas case.

The Thomas Case - Commissioner and Court of Appeal

12. Thomas was concerned with entitlement to severe disablement allowance (SDA) and invalid care allowance (ICA) in a group of cases, but I shall confine my remarks to the former benefit and to the title case. Severe disablement allowance was introduced as a new benefit from 29th November 1984 by the insertion of an amended section 36 into the Social Security Act 1975. (It is now governed by sections 68 and 69 of the Social Security Contributions and Benefits Act 1992). The conditions for an award were that on the relevant day the claimant was incapable of work and disabled within the meaning of the section and had been so for at least 196 relevant days ending immediately before the relevant day. Section 36(4)(d) provided:

> 36(4). A person shall not be entitled to a severe disablement allowance if -
>
> ...
>
> (d) he has attained pensionable age and was not entitled to a severe disablement allowance immediately before he attained it and is not treated by regulations as having been so entitled immediately before he attained it."

It is not necessary to examine the effect of the regulations referred to there but section 27 defined "pensionable age" as meaning: "(a) in the case of a man, the age of 65; and (b) in the case of a woman, the age of 60".

13. The claimant was born on 8th July 1923 and worked until 16th November 1984, when she became incapable of work due to disablement. Subsequently she claimed SDA, which was refused by decision of the adjudication officer on 3rd October 1986 because she was excluded by the effect of section 36(4)(d) of the 1975 Act. She had worked beyond the age of 60 (the pensionable age for women) and had claimed SDA after that. This decision was upheld by the social security appeal tribunal. Had the claimant been a man she would have been able to claim SDA at any time up to her 65th birthday. On further appeal Mr Commissioner Monroe decided that by reason of the provisions of Directive 79/7 the claimant was not precluded by section 34(6)(d) of the 1975 Act from having title to SDA. The Secretary of State appealed to the Court of Appeal (whose decision is reported as Thomas -v- Adjudication Officer and another and other appeals [1991] 3 All ER 315).

14. In a helpful judgment Lord Justice Slade listed a number of matters which, in his view, were clear and which were common ground:

(a) that the claimant had given up work because she had become incapable of work
(b) that therefore she was within the scope of Directive 97/7 by virtue of article 2 because the definition of "working population" was based on the idea that it included a person whose work had been interrupted by one of the risks referred to in article 3
(c) that the provisions of the 1995 Act relating to SDA constituted a statutory scheme providing protection against invalidity within the meaning of article 3
(d) accordingly Directive 97/7 applied to it and the principle of equal treatment applied under article 4, subject to the operation of article 7
(e) the statutory pensionable age is a criterion which directly discriminates between men and women in that it treats women more favourably than men on the ground of their sex, although it does not fall foul of Directive 97/7/ because of the provisions of article 7(1)(a)
(f) the effect of section 36(4)(d) of the 1975 Act, which treats men and women differentially on the basis of the same criterion must equally involve discrimination on grounds of sex

(g) the failure to repeal or amend section 36(4)(d) so as to remove this discrimination renders the United Kingdom in breach of its obligations under articles 5 and 8(1) of Directive 79/7 unless the discrimination involved is permitted by article 7(1), the six year period referred to in article 8(1) having expired on 23rd December 1984

(h) the breach by the United Kingdom of such obligations would entitle the claimants to rely on Directive 79/7 as having direct effect for their benefit in any dispute with the state concerning section 36(4)(d) and in the absence of appropriate measures for the implementation of article 4(1) women are entitled to be treated in the same manner and to have the same rules applied to them as men who are in the same situation

(i) a provision such as section 36(4)(d) which disqualifies a person who has attained pensionable age from receiving SDA unless she was entitled to it immediately before attaining that age does not constitute the "determination of pensionable age for the purposes of granting old-age and retirement pensions" within the meaning of article 7(1)(a). To fall within the authority of article 7(1)(a) it must fall within the words "and the possible consequences thereof for other benefits". In the end the outcome of the appeal was likely to depend on the meaning of those words (which I have underlined) and their applicability to the particular provisions of domestic law

(j) no one had sought to argue that legislation by a member state has to include an explicit election to disapply Directive 79/7 in an identified respect if it is to benefit from the liberty conferred by article 7(1)(a).

15. As I understand it the parties in the case before me accept this analysis and I gladly adopt it as applying also to the issue I have to decide. I also adopt the following five points which were "clear" to Lord Justice Slade:

(1) the concept of "granting old-age and retirement pensions and the possible consequences thereof for other benefits " in article 7(1)(a) must be given an independent meaning, unaffected by variable national criteria which depend upon the manner in which each member state chooses to arrange its social security legislation

(2) the phrase "possible consequences" in article 7(1)(a) is part of a derogation from individual rights conferred by Directive 79/7 and must be construed strictly

(3) in considering such a derogation the court should have in mind the aim of the Community authorities in view of which the derogation was included

(4) the phrase "possible consequences" must be construed in accordance with the principle of proportionality, which requires that a derogation from an individual conferred by a Council directive remains within the limits of what is appropriate and necessary for achieving the aim in view

(5) it is for the national court to determine, consistently with the above propositions, whether in any given case the principle of proportionality has been observed by a member state which has sought to invoke the derogation permitted by article 7(1)(a).

16. The Court of Appeal confirmed the decision of the Commissioner and it is convenient to set out its reasons in the following series of propositions :

- The aim of the first limb of article 7(1)(a) is clearly to confer on member states the option at their discretion to differentiate between men and women in defining age qualifications in relation to old age and retirement benefits (the court's emphasis), notwithstanding the general prohibitions against sex discrimination

The aim of the second limb was to absolve member states from infringement of Directive 79/7 in cases where people's rights other than rights to old-age and retirement pensions are necessarily affected as a result of the fixing of a different pensionable age for men and women for the purpose of granting old-age and retirement pensions. It does not follow that any "link or gearing" will suffice. If a member state is to rely on the second limb,

> "... a sufficiently strong causative link must ... be shown to exist between the (permitted) discriminatory provisions relating to old-age or retirement pensions and the relevant discriminatory provisions relating to other benefits which are sought to be justified... [It]... gives member states authority to prescribe or retain different age limits for men and women when defining the qualifications for entitlement to benefits other than old-age and retirement benefits only when this is a necessary consequence of their having defined the qualifications for old-age or retirement benefits by reference to different age limits for men and women and only in a manner which is appropriate to meet this necessity... " (the Court's emphasis) (per Lord Justice Slade at p 328)

- The need to avoid illogicality, unfairness or absurdity may well give rise to necessity in this context but it is difficult to envisage other circumstances when the necessity will arise
- Parliament intended SDA to be available to people of working age who would have been entitled to contributory invalidity pension had they satisfied contribution conditions but who because of severe disablement have not been able to establish themselves as contributors
- It is appropriate and necessary for legislation to specify a minimum age which a person must attain before qualifying for SDA, and a minimum age after which a person cannot become eligible to receive benefit. However, the question is whether it is appropriate and necessary to follow the concept of pensionable age with its concomitant discrimination, rather than designating a uniform age.
- A uniform age would identify the target group with a sufficient degree of accuracy and would not render the legislation administratively unworkable and a uniform age had been adopted, for example, for mobility allowance under section 37A of the 1975 Act
- Some discrimination in the operation of SDA is appropriate and necessary, for example to avoid a women aged over 60 but under 65 to receive the full benefit of both SDA and retirement pension but that does not justify the blanket discrimination
- The inclusion of the discriminatory provisions of section 36(4)(d) and section 37(5) is not justified by article 7(1)(a) of Directive 79/7.

The Thomas Case - House of Lords and the Court of Justice

17. The Secretary of State appealed to the House of Lords. On 27th November 1991 the House of Lords referred four questions to the Court of Justice of the European Communities for a preliminary ruling under article 177 of the EEC Treaty. (The case number is C-328/91 and the proceedings are reported as Secretary of State for Social Security -v- Thomas [1994] 4 All ER 556).

18. The Court answered the first question but decided that it was unnecessary to answer the remainder. The first question was whether the scope for derogation permitted by the words "possible consequences ... for other benefits" in article 7(1)(a) is limited to:

(a) provisions in schemes for those other benefits which are necessary to enable the schemes to operate consistently with the schemes for old age and retirement pensions without illogicality unfairness and absurdity; or
(b) provisions in schemes for those other benefits which the Member States have linked to provisions in old age and retirement pension schemes, in the exercise of its discretion, acting in accordance with the principle of proportionality; or
(c) some other provisions, and if so which ones?

19. The Court first held that in so far as they provide protection against the risk of invalidity, the statutory schemes fall within the scope of article 3(1)(a). The age differential between men and women is discriminatory and may therefore be justified only under article 7(1)(a) of Directive 79/7. The exception to the prohibition of discrimination on grounds of sex must be interpreted strictly. The reason for the derogation is to allow member states to maintain temporarily the advantages accorded to women with respect to retirement to enable them progressively to adapt their pension systems in that respect without. The Court stated (paragraph 12 at page 575):

> "It follows that forms of discrimination provided for in benefit schemes other than old age and retirement pension schemes can be justified as being the consequence of determining a different retirement age according to sex, only if such 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".

20. The Court pointed out that the grant of benefits under non-contributory schemes such as SDA to persons in respect of whom certain risks have materialised, regardless of the entitlement to an old age pension by virtue of contribution periods completed by them "has no direct influence on the financial equilibrium of contributory pension schemes". It also endorsed the view of the Advocate General that such discrimination was unnecessary to preserve the financial equilibrium of the entire social security system, especially since there were rules to prevent the payment of overlapping benefits.

21. The United Kingdom government argued that SDA and ICA are intended to replace income in the event of materialisation of the risk and the discriminatory provisions were necessary to preserve consistency with the retirement pension scheme. The Court held that this intention, far from generally precluding the grant of such benefits to women who have attained retirement age, should, on the contrary, justify it in the circumstances at issue. Where women have continued to wok after attaining the normal retirement age for women and before attaining the normal retirement age for men, they are entitled, in the event that the risk materialises, to receive benefits such as SDA or ICA.

22. The Court's answer to the first question was that the scope of the article 7(1)(a) derogation is limited to the forms of discrimination existing under the other benefit schemes which are necessarily and objectively linked to the difference in retirement age (my emphasis).

23. On 23rd July 1993 the House of Lords affirmed the decision of the Court of Appeal. The Court of Justice has explicitly affirmed and purported to follow the Thomas decision in at least two other opinions, to which I make further reference below. It is clear that I am bound by the decision in Thomas.

Applying Thomas to the Present Case

24. Essentially the discrimination in regulation 17(4) is only permitted under article 7(1)(a) if it is a objectively necessary to avoid disrupting the complex financial equilibrium of the social security system or to ensure consistency with the retirement pension scheme (my emphasis).

25. Had there been no further legal developments, it would have been absolutely clear to me that the SDA scheme is so similar to the invalidity benefit and incapacity benefit schemes as applied to those whose invalidity or incapacity derives from industrial injury or prescribed disease, that if discrimination is not permitted in the SDA scheme then it is not permitted in the case of the claimant in the present case. This conclusion is strengthened by Mr Drabble's arguments in relation to the history of the benefit.

The Historical Arguments (1)

26. There are really two arguments based on the history of the legislative provisions. The first relates to the introduction of discrimination which did not previously exist. The second relates to the co-existence of discriminatory and non-discriminatory provisions.

27. Special provision for industrial injuries has been made by statute since 1897. There was major reform in the 1946-8 period but then there was little major change in provision (although there were changes in the governing statutes and the administration of the scheme) until 1982. Meanwhile state involvement in benefits for the sick and disabled began in 1911 and developed separately. After the 1946-8 reforms sickness benefit became payable for an unlimited duration provided that the contribution conditions, which were more stringent after one year's receipt of benefit, were satisfied. In 1971 invalidity benefit was introduced, also as a contributory scheme, to make proper provision for the long term disabled, who had been treated less generously than the short-term disabled. (Further aspects of the historical development of the benefit scheme are discussed by the Commissioner in CI/16608/1996 and related cases - see below).

28. In 1978, when Directive 79/7 was promulgated, the industrial injuries scheme provided by section 50 of the Social Security Act 1975 had no connection with retirement age or pension. Short-term injury benefit was payable under section 50(2)(a) for 156 days (section 56) and disablement benefit was payable under section 50(2)(b) at whatever age the injury occurred. Unemployability supplement was paid under section 58 and schedule 4 if the claimant was incapable of work and was likely to remain so indefinitely. Section 59 provided for increases in payment for a man who was under 60 and for woman who was under 55 at the beginning of the week in which he or she first became entitled to unemployability supplement but payments continued after pensionable age. Section 27 defined "pensionable age" as 65 in the case of a man and 60 in the case of a woman. Section 27(5) provided that a person who had not already retired from regular employment was deemed to have done so on the expiration of 5 years from attaining pensionable age. However section 27(3) provided that a person could be treated as having retired from regular employment notwithstanding that he (which must mean "he or she") intends to be an earner (subject to limits on the amount of work and the earnings). Thus any person who was retired for the purposes of the retirement pension scheme, if in employment, could be an employed earner for the purposes of the industrial injury scheme.

29. The agreed written submission of 1st April 1999 confirms that there was no automatic cut-off linked to pensionable age for disablement benefits arising out of accidents or injuries at work or for unemployability supplement.

30. Mr Drabble argued that only discriminatory provisions which existed in December 1978 could fall within article 7(1)(a) because article 2 refers to "any existing provisions". It is not lawful within the Directive to create a new discrimination, certainly after the passage of six years from promulgation and possibly from the date of promulgation. This general question has been referred to the European Court of Justice by Mr Commissioner Howell in CI/16608/1996 and related cases in the context of entitlement to Reduced Earnings Allowance, which is an earnings related benefit payable under the industrial injuries scheme. The reference was made on 8th May 1998 and the Commission submitted its written observations on 25th August 1998. By the date of the hearing in the present case there seemed to have been no further progress in determining the reference. There was some discussion at the hearing as to whether this case should also be the subject of a reference, although there was little enthusiasm for this.

31. I accept the argument that only discriminatory provisions which existed in December 1978 could fall within article 7(1)(a), but even if the Court takes a contrary view I am still of the opinion that the discrimination in the present case does not fall within article 7(1)(a). Nevertheless I adopt the view expressed by the Commission that:

> "Where pursuant to Article 7(1)(a) of Directive 79/7 a Member State retains different pensionable ages for men and women for the purposes of granting old-age or retirement pensions, it is precluded from introducing unequal age conditions linked to those different pensionable ages into a benefit under its statutory occupational accident scheme which had at all times previously treated men and women equally."

In my view it makes no difference that the discrimination is introduced by creating a special provision to move claimants from one benefit to another if the original reason for entitlement derives from industrial injury or prescribed disease.

32. In November 1981 the Secretary of State presented the white paper Reform of the Industrial Injuries Scheme (Cmnd 8402). The abolition of injury benefit and unemployability supplement was mooted. The relevant parts of the white paper stated:

> "16. ... the ending of injury benefit needs to take account of the position of those workers who are now entitled to it but would fail to satisfy the contribution conditions for national insurance sickness benefit. Examples are married women who have chosen not to pay full contributions ... or part-time workers whose earnings are insufficient to incur a contribution liability. The Government propose to protect the rights of such people to an industrial incapacity benefit. This will be done by waiving the contribution conditions for sickness benefit once title to [statutory sick pay] has been exhausted, where it is established that incapacity is attributable to an industrial accident or prescribed disease.
>
> ...
>
> 42. Exceptionally a person who suffers an industrial accident or disease and whose incapacity for work continues beyond the period when injury benefit is payable does not have the contribution to record to entitle him to sickness benefit, and subsequently invalidity pension ... In these circumstances an unemployability supplement can be paid ...

43. Proposals [in paragraph 16] ... will mean, in due course, that the contingency for which unemployability supplement is provided will disappear ..."

33. In due course a new section 50A was inserted into the Social Security Act 1975 by section 39(4) of the Social Security and Housing Benefits Act 1982. The relevant provisions of the 1975 Act (detailed below) were replaced by similar provisions in the Social Security Contributions and Benefits Act 1992. Section 50A of the 1975 Act became section 102 of the 1992 Act. With the introduction of incapacity benefit to replace both sickness benefit and invalidity benefit and related legislative changes, section 102 of the 1992 Act was repealed by section 11(2) of and schedule 2 to the Social Security (Incapacity for Work Act) 1994 with effect from 13th April 1995.

34. The relevant sections of the 1975 Act as amended were as follows:

14(2). The conditions of this subsection are that -
(a) the person is under pensionable age on the day in question and satisfies the contribution conditions specified for ... sickness benefit ...; or
....

15(1) ... where a person ... has been entitled to sickness benefit for 168 days ... then,

(a) he shall cease to be entitled to that benefit ... ; and
(b) he shall be entitled to an invalidity pension for any day of incapacity for work ... if on that day either -
(i) he is under pensionable age, or
(ii) being over that age *and not having retired from regular employment*, he satisfies [certain conditions].[From 1st October 1989 the words that I have italicised above were replaced by the words "but not more than five years over it". This was effected by the Social Security Act 1989.]

50 (1) ... industrial injuries benefit shall be 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 earners employment.

50A(1). In any case where -
(a) an employed earner is incapable of work as a result of a personal injury of a kind mentioned in section 50(1) of this Act; and
(b) the contribution conditions are not satisfied in respect of him;
those conditions shall be taken to be satisfied for the purposes of paragraph (a) or, as the case may be, (b) of section 14(2) of this Act as that paragraph applies in relation to sickness benefit.

35. Regulation 31 of The Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 (made under the authority of section 15(6) of the 1975 Act) provided that:

31(1). In any case where -

(a) an employed earner is incapable of work as a result of a personal injury of a kind mentioned in section 50(1);
(b) he has ceased to be entitled to sickness benefit under the provisions of section 15(1)(a);

(c) he is over pensionable age and has not retired from regular employment; and
(d) the contribution conditions are not satisfied in respect of him;
those conditions shall be taken to be satisfied for the purposes of section 15(1)(b)(ii)

36. Mr Drabble argues that this was a new discrimination because, for the first time, the categories of people with whom the extracts from the white paper were concerned were brought within the invalidity benefit scheme, where the differences in the pensionable and retirement ages, based on sex, were relevant. He argued that this was certainly the case from the actual abolition of unemployability supplement in 1987, if it was not the case before. I was referred to paragraph 4.1 of the Department of Health and Social Security Consultation Paper of December 1985 on the Industrial Injuries Scheme.

37. Under the new scheme a person who suffered an industrial injury while below pensionable age would be entitled to sickness benefit and then (if he or she continued to be incapable of work) to invalidity benefit until the age of 65 for a woman and 70 for a man. This introduced a new discrimination which had not previously existed. On 13th April 1995 sickness benefit and invalidity benefit were was replaced by incapacity benefit, which is payable until 65 for a man and 60 for a woman. I have cited the relevant regulations above. Mr Drabble argued that this introduced an extra level of discrimination because it was likely to affect more women aged between 60 and 65 than men between 65 and 70. Mr Vajda did not accept that, and no evidence was produced. It might be that Mr Drabble's submission on this point is correct but it is not necessary to my decision that I make a finding or ruling on this latter point. However I do find persuasive the general point in relation to there having been introduced a new discrimination which had not previously existed.

38. Mr Vajda argued that injury benefit, which was abolished with effect from 6th April 1983, could have been abolished at any time without breach of European law. In non-industrial injury cases long term benefit did not exist until the introduction of invalidity benefit in 1971 and this always had a cut-off date linked to a discriminatory pensionable age. Section 50A did not remove a right but opened the door of the contributory system to those who had suffered but not made contributions. There remained two long-term benefits: industrial injuries disablement benefit and invalidity benefit. Entitlement under section 50A replaced entitlement to injury benefit and not entitlement to unemployability supplement

39. However, it seems to me that the 1971 long-term benefit in non-industrial injury cases did not arise out of the blue but was created to improve provision for those who had been in receipt of sickness benefit for more than a year but on less generous terms than those who received it in the short term. In any case, the effect, now matter how the change is analysed was to introduce an element of discrimination for an affected group in respect of whom there had not previously been this element of discrimination.

The Historical Arguments (2)

40. The second historical argument relates to the previous co-existence of discriminatory and non-discriminatory provisions. If the industrial injuries scheme without age limits lived alongside retirement pension scheme from 1948 until the amendments made in 1982 and subsequently, it is difficult to see why it is necessary to link the relevant age limits in the two schemes. Thus, the discrimination in the present case cannot be necessarily and objectively linked to the difference in retirement age in such a way as to bring it within the scope of the article 7(1)(a) derogation.

41. Mr Vajda argued that there would be a serious and illogical anomaly if someone who is unable to make contributions becomes better off than someone who could make contributions. That could lead to discrimination between two classes of women. I agree that that is an anomaly but the real discrimination would be between those who had suffered an industrial injury or disease and those who had not. That has long been the case in the British system. It might, as a matter of policy, be acceptable or unacceptable but it is rational and coherent and the system can tolerate it.

The Graham Case

42. This case concerned three women who each had to stop working before the age of 60 because of ill-health (not caused by any industrial injury or prescribed disease). They received sickness benefit followed by invalidity pension. On reaching pensionable age (60) they each opted to continue to receive invalidity pension which, unlike retirement pension, was not subject to income tax, and to defer receipt of retirement pension for five years (to age 65). They were not entitled to full retirement pensions. In accordance with the provisions of section 33 of the Social Security Contributions and Benefits Act 1992 (repeating similar provisions from the Social Security Act 1975) the rate of invalidity pension was reduced to the amount of retirement pension to which they would have been entitled had they opted to receive it before age 65. (There were other related issues but it is not necessary to go into detail). A man in a similar situation would not have been put to the election and would not have had his invalidity pension reduced until he had reached the age of 65, and would then have been entitled to receive invalidity pension until age 70.

43. The matter came before Mr Commissioner Skinner in CS/027/1991 (*29/92). He decided that the provision was in breach of Directive 79/7 and must be disapplied. He had "difficulty in accepting the concept of a deemed end of working life", found that there was an insufficient causative link between discrimination for retirement pension and discrimination for invalidity pension, that there was no illogicality unfairness or absurdity in removing the discrimination, and rejected the argument that the case was distinguishable from that of Thomas because one related to a contributory and one to a non-contributory benefit.

44. On appeal the Court of Appeal referred the matter to the Court of Justice of the European Communities for a preliminary ruling under Article 177. The case number is C-92/94 and the proceedings are reported as Secretary of State for Social Security and another -v- Graham and others [1995] All ER (EC) 736. The Advocate-General's opinion (which was not accepted by the Court) was that there was no necessary link between the discrimination for retirement pension and the discrimination in entitlement to invalidity pension in that the removal of the latter would jeopardise neither financial equilibrium nor the coherence of the system.

45. However, the opinion of the Court was that as invalidity benefit is designed to replace income from occupational activity (paragraph 14), there is nothing to prevent the State from providing for it to cease when recipients would in any event stop working because they have reached pensionable age. To prevent the State from limiting the rate of invalidity pension to that of the retirement pension that would be payable would be to restrict the right of the State to set different pension ages. It would also undermine coherence between the two schemes.

46. I believe that I am not alone in finding this case difficult to follow, despite the fact that I was taken in great detail through the report by counsel on both sides. The Court endorsed the opinion that had been delivered in Thomas (paragraphs 11 and 12) but SDA concerned

income replacement in a similar way to invalidity benefit. Mr Vajda relied on paragraph 14 as the ratio of the opinion and the basis for distinguishing the two opinions. He argued that SDA and ICA went a great deal wider than the world of work. I can see this argument in relation to ICA, but not in relation to SDA.

47. Further, it is a false assumption that recipients would in any event stop working because they have reached pensionable age. Virtually everybody, in Britain at any rate, must know people who have reached pensionable age and have not stopped working (including a large proportion of the full time judiciary). The only basis I can find for distinguishing the two opinions of the Court (apart from the distinction between contributory and non-contributory benefits, with which I deal below) is really a finding or assumption of fact in Graham that the coherence between the two schemes would be undermined. This was discussed in some detail at the hearing before me but it is not necessary to rehearse all of the arguments. I do not find it to be the case that the coherence between the two schemes would be undermined if the discriminatory rule were disapplied when considering those who have become incapable of work because of industrial injury or a prescribed disease. I accept the argument put by Mr Drabble in his original written submission that it would be perfectly possible without absurdity for the UK to pay both men and women incapacity benefit until a common cut-off age despite the existence of differential pension ages, where entitlement to the benefit depended on the fact of the accident or disease.

The Contributory and Non-Contributory Distinction

48. In his original written submission Mr Drabble suggested that Graham concerns the transfer from one contributory benefit to another and therefore can be distinguished from the present case, which is governed by Thomas. Mr Heath argued in his original written submission that the distinction is nothing to do with the fact that the benefits in Graham were contributory. Although my experience in tribunals was that adjudication officers often argued that that was the true distinction, I agree that it is difficult to substantiate that by reference to the Court's opinion in Graham.

49. However Mr Heath had a fall-back position, which was adopted by Mr Vajda at the hearing before me. They argue that it makes no difference if the distinction between the two decisions of the Court is based on the contributions issue, because the claimant in the present has been deemed to have made contributions (regulation 31 of the 1983 regulations provides that the contribution conditions shall be taken to be satisfied). They rely on the opinion of the Court of Justice in Livia Balestra -v- Istituto Nazionale della Previdenza Sociale (INPS) Case C-139/95 [1997] ECR I-549, [1997] 2 CMLR 136 ("the Balestra Case").

50. The Balestra Case concerned early retirement benefits in Italy, where pensionable ages were 55 for women and 60 for men. If a business was declared to be "in critical difficulty" employees could retire up to five years early and be credited with a supplementary five extra years' worth of pension contributions. The Court held that the resulting discrimination against women was within the derogation in article 7(1)(a) because it was objectively and necessarily linked to the difference in pensionable ages and, if it did not exist, other forms of discrimination would arise in favour of women.

51. However, it seems to me that the credited contributions in the Balestra Case, which were for the very purpose of establishing entitlement to retirement pension unprejudiced by the financial difficulties of their employer, were intimately bound up with the provisions for retirement pension in a way that simply does not correspond with entitlement to invalidity or incapacity benefit in the case before me.

52. If the distinction between Thomas and Graham is based on contributions, the case before me is closer to Thomas and Balestra does not establish that deemed contributions for the purpose of entitlement to invalidity or incapacity benefit comes within the principle in Graham. I should add that what is clear, however, is that the Court in Balestra accepted and endorsed the opinion in Thomas. (The case before me concerns deemed contributions rather than credits but I am not sure that anything turns on that).

53. If the distinction is based on contributions, then I accept that whether the benefit is non-contributory (as in Thomas) or based on deemed contributions (as in the present case) no substantial issue of financial equilibrium can arise. In Graham the Court might have decided that it was not appropriate to allow a woman who had a deficient contribution record for the retirement pension but was ill to draw higher benefit than a woman who had a similar contribution record but was not ill. However this reasoning cannot apply in the context of the industrial injuries scheme.

54. For the above reasons this appeal by the claimant succeeds.

H. Levenson

26th April 1999