HUMAN RIGHTS COMMITTEE

Vos v. The Netherlands

Communication Nº 786/1997

26 July 1999

CCPR/C/66/D/786/1997

VIEWS

Submitted by: A. P. Johannes Vos

Alleged victim: The author

State party: The Netherlands

Date of communication: 22 July 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 July 1999

Having concluded its consideration of communication No. 786/1997 submitted to the Human Rights Committee by Mr. A. P. Johannes Vos under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Antonius Petrus Johannes Vos, a married Dutch citizen born on 24 September 1919. He claims to be a victim of a violation by the Netherlands of article 26 of the Covenant.

The facts

2.1 On 24 September 1984, the author was awarded a pension under the Algemene Burgerlijke Pensioenswet (ABP, General Law on Civil Service Pensions).

2.2 In the Netherlands, civil servants are covered by both the ABP pension scheme and by the general pension scheme (AOW). The AOW pension is fixed by reference to the minimum wage and paid in full after 50 years' insurance. The ABP pension is equal to 70% of the pensioner's last salary and is paid in full after 40 years of service.

2.3 Before 1985, a married man was entitled under the AOW to a general pension for a married couple equal to 100% of the minimum wage. Unmarried persons of either sex were entitled to a general pension equal to 70% of the minimum wage. A married woman had no entitlement in her own right. To prevent overlapping of the AOW pension and the ABP pension, the AOW pension was incorporated into the ABP pension, that is to say it was regarded as forming part of the ABP pension. In practice, the ABP deducted the amount of the general pension from the civil service pension. The maximum amount of general pension to be incorporated was 80% (2% for each year of service). For married women civil servants, the incorporation was calculated by reference to the amount of the general pension of an unmarried woman, and the deduction was thus a maximum of 80% of 70% of the minimum wage.

2.4 On 1 April 1985, married women became entitled in their own right to a pension under the AOW. Married persons then received each a pension equal to 50% of the minimum wage. The ABP scheme was amended accordingly, as of 1 January 1986. Between 1 April 1985 and 1 January 1986 a transitional scheme applied. As of 1 January 1986, pensions under the ABP are calculated in accordance with a "franchise" system, which is applied equally to men and women civil servants. However, for pension entitlements relating to periods of service before 1 January 1986 the old incorporation scheme continues to apply.

2.5 On 29 November 1990, following the publication of a decision of the Public Servants' Court (Ambtenarengerecht) of 28 February 1990 concerning a similar matter, the author filed a complaint against the incorporation of his general pension into his civil service pension as discriminatory. The decision on the author's complaint was deferred awaiting the outcome of the procedure in the similar case (Beune. v. ABP).

2.6 The Centrale Raad van Beroep (Central Council of Appeal, the highest court in these matters) asked the Court of Justice of the European Communities for a preliminary ruling on the calculation of the pension entitlements. By judgement C-7/93, of 28 September 1994, the Court held that the different calculations of the pensions awarded to married men and to married women were in violation of article 119 of the EEC Treaty. At the same time the Court held that only civil servants who had filed a claim under national law before 17 May 19901/ could invoke the direct effect of article 119 for the purpose of requiring equality of treatment with regard to the payment of the ABP pensions. Following the Court's judgement, the Centrale Raad van Beroep on 16 February 1995 decided the case of Beune v. ABP accordingly, restricting compensation for discrimination in these matters to claims filed before 17 May 1990.

2.7 The author's complaint was subsequently dismissed on 12 June 1995, since he had submitted his claim on 29 November 1990, that is after the cutoff date established by the European Court. His

request for revision was rejected on 30 June 1995. The District Court of The Hague rejected his appeal on 19 June 1996. The author did not appeal this decision to the Centrale Raad van Beroep, because of the high costs involved and counsel's opinion that a further appeal would have no chance of success in the light of the European Court's decision and the judgement by the Centrale Raad van Beroep of 16 February 1995.

The complaint

3. The author, who is married, claims that the different basis for calculation of the incorporation of the general pension into the civil service pension for married men and married women is since 1 April 1985 (when married women became entitled to their own general pension) in violation of article 26 of the Covenant, and that the limitation of the remedy, as set out by the judgement of the European Court of Justice, is also discriminatory. The author submits that since 1 April 1985 he receives 50% of a full AOW pension for married couples, but that, because his entitlement to a civil service pension dates from 1984, this pension is still, at present, calculated by incorporating 80% of the full AOW pension, whereas the pension of married women civil servants is calculated by incorporating 80% of half of the AOW pension. He thus receives a smaller pension from the ABP than female civil servants (pensioners) who are married.

State party's observations

4.1 By note of 16 March 1998, the State party challenges the admissibility of the communication for non-exhaustion of domestic remedies, since the author failed to appeal the judgement of the District Court to the Centrale Raad van Beroep. The State party also notes that the author based his case in the domestic proceedings on article 119 of the Treaty of the European Community, not on article 26 of the Covenant.

4.2 By submission of July 1998, the State party addresses the merits of the communication. It refers to the Committee's jurisprudence and states that the decisive question is whether a specific distinction is to be considered discriminatory. According to the State party, this is the case only when the parties concerned find themselves in a comparable situation and when the distinction is based on unreasonable and subjective criteria. The State party recalls that before 1 April 1985 married men and married women were not in a comparable situation with regard to the incorporation of the general pension in their civil service pension since married women had no entitlement in their own right to the general pension. The ABP scheme applied equally to married men and married women civil servants with regard to entitlement over periods of service after 1 January 1986.

4.3 According to the State party, the only period of time during which married men and married women were entitled to the same general pension, but had the incorporation into the civil service pension calculated differently, was between 1 April and 31 December 1985. The State party explains that this period of eight months was a transitional one, since the preparations for the introduction of new legislation had not yet been completed. For this reason and to achieve as fair a solution as possible, it was decided to equate married women civil servants with unmarried civil servants in respect of entitlements built up between 1 April 1985 and 31 December 1985. The State party is of the opinion that, in the particular circumstances, this does not constitute discrimination.

Author's comments

5.1 In his comments on the State party's observations, the author notes that his claim was rejected in the domestic proceedings on the basis of a recent judgement of the Centrale Raad van Beroep, and that a further appeal to the CRVB would have been futile. He also refers to his appeal of 7 August 1995 to the Court in which he refers not only to article 119 of the Treaty, but also in general to norms of non-discrimination and the Universal Declaration of Human Rights.

5.2 As to the merits, the author observes that the Court of Justice of the European Communities has decided that the different basis for calculation of the incorporation of the general pension into the civil service pension for married men and married women constitutes discrimination. He notes that his pension is still being calculated on this basis and that therefore the discrimination continues.

5.3 The author states that financial grounds cannot justify discrimination. The author requests the Committee to find that the limitation of the remedy established by the Court of Justice of the European Communities constitutes discrimination against him, and that the consequential failure of the Dutch authorities to remedy the situation also constitutes discrimination.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party has challenged the admissibility of the communication for non-exhaustion of domestic remedies. With regard to the State party's argument that the author failed to appeal to the Centrale Raad van Beroep, the Committee notes that the judgement of the District Court in the author's case followed a recent judgement by the Centrale Raad van Beroep in a similar case as the author's. In the circumstances, the Committee is of the opinion that an appeal to the Centrale Raad van Beroep was not an effective remedy for the author and the requirement of article 5(2)(b) therefore does not preclude the Committee from considering the present communication. With regard to the State party's argument that the author failed to invoke article 26 of the Covenant before the national courts, the Committee notes from the text of the author's appeal that he invoked general norms of non-discrimination, including the Universal Declaration of Human Rights. The Committee recalls its jurisprudence2/ that for purposes of article 5, paragraph 2(b) of the Optional Protocol the author has to invoke before the domestic instances the substantive right he claims to be violated, but that it is not necessary that he invoke the specific article of the Covenant in which the substantive right is embodied. The State party has not raised any other objections and accordingly the Committee finds the communication admissible and proceeds without delay to a consideration of its merits.

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The issue before the Committee is whether Mr. Vos is a victim of a violation of article 26,

because the calculation of the incorporation of his general pension into his ABP pension is different for him as a married man than for married women, as a consequence of which he receives less pension than a married woman.

7.3 The Committee notes that the European Court of Justice has already decided that the difference in calculation is in violation of article 119 of the EEC Treaty, which prohibits any discrimination with regard to pay as between men and women.

7.4 The State party has explained that the difference in calculation of the pension is a leftover of the initial different treatment between married men and married women with regard to the general pension, which was abolished in 1985 by amending the general pension legislation. The Committee recalls its jurisprudence that, when a State party enacts legislation, such legislation must comply with article 26 of the Covenant. Once it equalled general pensions for married men and women, it would have been open to the State party to change the General Law on Civil Service Pensions (Algemene Burgerlijke Pensioenwet) in order to prevent the difference in calculation of civil service pensions for married men and married women who as of 1 April 1985 enjoyed equal rights to the general pension. The State party, however, failed to do so and as a result a married man with pension entitlements of before 1 January 1986 has a higher percentage of general pension deducted from his civil service pension than a married woman in the same position.

7.5 The State party has argued that no discrimination has occurred since at the time when the author became entitled to a pension, married women and married men were not in a comparable position with regard to the general pension. The Committee notes, however, that the issue before it concerns the calculation of the pension as of 1 January 1986, and considers that the explanation forwarded by the State party does not justify the present difference in calculation of the pension of married men and married women with civil service pension entitlements of before 1986.

7.6 In this context, the Committee notes that the courts in the Netherlands, following the opinion by the European Court of Justice, have limited a remedy for the discrimination to those persons who filed their claim before 17 May 1990, in accordance with the law of the European Communities. The Committee observes that what is at issue in the instant communication under the Optional Protocol to the International Covenant on Civil and Political Rights is not the progressive implementation of the principle of equality between men and women with regard to pay and social security, but whether or not the application to the author of the relevant legislation was in compliance with article 26 of the Covenant. The pension paid to the author as a married male former civil servant whose pension accrued before 1985 is lower than the pension paid to a married female former civil servant whose pension accrued at the same date. In the Committee's view this amounts to a violation of article 26 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights, is of the view that the facts before it disclose a violation of article 26 of the Covenant.

9. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide Mr. Vos with an effective remedy, including compensation. The State party is under an obligation to take measures to prevent similar violations in the future.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to translate and publish the Committee's Views.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

1/ The date is the date of the judgement by the Court of Justice of the European Communities in the Barber case (C-262/88)). In the so-called Barber Protocol (Protocol No. 2 on Article 119 of the EEC Treaty) the member States of the European Union agreed that "benefits under occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990", except in cases initiated before that date.

2/ See *inter alia* the Committee's decision dated 30 March 1989 in case No. 273/1988 (B.d.B v. The Netherlands) para.6.3 (CCPR/C/35/D/273/1988/Rev.1)