Case No. 2203251/2000 & others

EMPLOYMENT TRIBUNALS

BETWEEN:

Claimant	**and**	**Respondent**
1) Mr B Banerjee 2) Mrs C Ray 3) Mr C Shaikh 4) Mr J Clinton 5) Mr L Howard 6) Mr R Bear 7) Mr J Willis		1) The Department for Constitutional Affairs 2) The Appeals Service

At a Pre-hearing Review

held at: Nottingham
before: **Chairman:** Mr J K Macmillan
on: 31 January & 1 February 2005
on the question whether the Claimants are entitled to bring these proceedings, the Chairman gave judgment as follows

JUDGMENT

1. The Claimants are not employees of the Respondents but are entitled to bring these proceedings under Section 1(8)(a) of the Equal Pay Act 1970.

2. The Claimants are unable to succeed in these claims unless a comparator, engaged in equal work and eligible to join the judicial pension scheme, exists or existed.

3. The reasons are attached.

……..
Chairman
Date:

JUDGMENT SENT TO THE PARTIES ON

……
AND ENTERED IN THE REGISTER

……
FOR SECRETARY OF THE TRIBUNALS

EMPLOYMENT TRIBUNALS

at: Nottingham

BETWEEN:

Claimants	**and**	**Respondent**
1) Mr B Banerjee		1) The Department for Constitutional Affairs
2) Mrs C Ray		2) The Appeals Service
3) Mr C Shaikh		
4) Mr J Clinton		
5) Mr L Howard		
6) Mr R Bear		
7) Mr J Willis		

Representations:

For the Claimants:	
Mr Banerjee, Mrs Ray, Mr Clinton, Mr Howard, Mr Bear, Mr Willis:	Edward Benson, Solicitor
Mr Shaikh:	Rambi De Mello of Counsel
For the Respondent:	Michael Furniss QC Jonathan Swift of Counsel

REASONS

1. These claims form yet another sub-set of the litigation known as the part-time worker pension cases (***Preston & Others -v- Wolverhampton Healthcare NHS Trust & Others***). The Claimants are all part-time holders of judicial office, specifically part-time chairmen of the Appeals Service, formerly the Independent Tribunal Service, and at least some of its predecessor constituent bodies, the Social Security Appeal Tribunals, the Disability Appeal Tribunals, the Medical Appeal Tribunals, Child Support Appeal Tribunals and the Vaccine Damage Tribunals. Although they seek a declaration of entitlement to retrospective membership of the Judicial Pension Scheme, a potential complication unique to this case is that prior to 1995 the small number of full-time chairmen then serving the Independent Tribunal Service did not have access to the Judicial Pension Scheme but

did have equivalent pension arrangements, the details of which it has not yet been necessary to consider.

2. I am asked to deal with two preliminary issues. The first is whether the Claimants were employees of the Respondents or are otherwise entitled to bring these proceedings under the Equal Pay Act 1970 or Article 141 of the Treaty of Rome. The second is whether as a matter of law, if the Claimants are so entitled, they are unable to succeed unless a comparator, engaged in like work or work of equal value and eligible to join the Judicial Pension Scheme, exists or existed.

3. The second issue is identical to the one I recently considered in the case of ***Stow & others -v- The Secretary of State*** (2204297/02), a claim brought by members of the Reserve Forces seeking admission to the Armed Forces Pension Scheme. I decided that issue against the Claimants, ruling that they were not entitled to bring the proceedings unless they could establish that they were doing like work or work of equal value with regular members of the Armed Forces. That decision has not been appealed by the Claimants. Mr Furniss QC for the Department of Constitutional Affairs and the Appeals Service simply adopts my reasoning in the ***Stow*** case. Mr Benson and Mr De Mello have sought to challenge it briefly and have adopted the arguments there put forward on behalf of the Claimants. All are agreed that to avoid the need for me simply to repeat in these reasons the reasons which I gave in ***Stow***, those reasons are to be annexed to these reasons and I should deal only with the additional points raised by Mr De Mello and Mr Benson.

4. Mr De Mello seeks to distinguish paragraph 28 of the reasons in ***Stow*** where I refer to the exclusion of reservists from the Armed Forces Pension Scheme as being by the nature of the work undertaken not by status. He points to the relevant provisions of the Judicial Pensions and Retirement Act 1993 which define those judicial office holders who are eligible to be members of the Judicial Pension Scheme by reference to the *"salaried basis"* of their appointment. Part-time chairmen are of course fee-paid not salaried and that, he submits, is in effect an exclusion by reference to their status. Both Mr Benson and Mr De Mello concede that full-time comparators exist but submit that, applying the ruling in ***Allonby***, they do not need to establish that the work of the Claimants is of equal value with or broadly similar to the work of the full-time chairmen if it can be demonstrated that the requirement to be salaried has a disproportionate impact on one or other sex.

5. Mr Furniss of course does not concede that the Claimants were engaged on work of equal value with or which was broadly similar to the work of the full-time chairmen. That being so, Mr De Mello's and Mr Benson's submissions cannot be right because they admit of the possibility that even if the Claimants are shown to have been engaged on work which was not equal to the work of the full-time chairmen, nonetheless they are entitled, in the matter of pension, to equality of pay with those chairmen if the exclusion of fee paid chairmen from the pension scheme has disproportionate impact. For the reasons which I gave in ***Stow***, that is clearly not an outcome contemplated by the European Court of Justice in ***Allonby & others -v- Accrington and Rossendale College & others***, the fundamental principle of European Community Social Policy being equality of pay for equality of work.

6. Their proposition also founders against this largely practical question: until you decide who should be included in the pool, how can you determine whether the pool demonstrates disproportionate impact? The method for determining who should be in the pool is to identify those to whom all of the relevant requirements or conditions for membership apply apart from the exclusionary provision under challenge. If, as the respondents say here, it is said that that provision is not the reason for exclusion but a reflection of the fact that the work being done is not like work or work of equal value with those included within the pool, that rather than the claimants

status as fee paid, becomes the operative cause of their exclusion and is the issue which must be resolved first. These are basically the reasons which I gave for answering the second question in ***Stow*** against the Claimants and I see no reason for changing my views in the light of the further arguments now advanced to me.

7. The second preliminary issue requires rather more consideration. Although both UK domestic legislation and the Treaty of Rome are referred to in the first preliminary question, the correct way for me to approach this issue is common ground. There is no freestanding cause of action justiciable in the Employment Tribunal under Article 141 EC. It will not therefore avail the Claimants if Article 141 creates a right which has not been transposed into UK domestic law. The Employment Tribunal has no inherent jurisdiction. Its jurisdiction derives exclusively from statute and to succeed the Claimants must rely on a domestic legislative provision which gives the Employment Tribunal jurisdiction. That provision is the Equal Pay Act 1970. However, even though the 1970 Act was enacted prior to the United Kingdom's entry into the Community, in order to give effect to the Claimants' Treaty rights, it must be interpreted, if it is possible to do so without distortion of its language, consistently with the provisions of Article 141 and, to the extent that any provision of the Act is, on its proper interpretation, incompatible with Article 141 then that Article, being directly applicable, takes precedence and the offending provision of the Act must be disapplied to the extent necessary to give effect to it (***Barry -v- Midland Bank Limited*** [1998] IRLR 138 CA).

8. So far as material, Section 1 of the Equal Pay Act 1970 provides as follows;

"(1) If the terms of a contract under which a woman is employed at an establishment in Great Britain do not include (directly or by reference to a collective agreement or otherwise) an equality clause they shall be deemed to include one.

(6) Subject to the following subsections, for the purposes of this section -
(a) "employed" means employed under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and related expressions shall be construed accordingly;
…

(8) This section shall apply to –
(a) service for purposes of a Minister of the Crown or government department, other than service of a person holding a statutory office, or
(b) service on behalf of the Crown for purposes of a person holding a statutory office or purposes of a statutory body,
as it applies to employment by a private person, and shall so apply as if references to a contract of employment included references to the terms of service.

(10) In this section "statutory body" means a body set up by or in pursuance of an enactment … and "statutory office" means an office so set up; …"

I will turn to the provisions of Article 141 in a moment.

9. For the Claimants, Mr Benson's principle submission is that they are employees, being employed under a contract of service. As I understand it, whilst not expressly rejecting this approach, Mr De Mello does not feel able to associate himself with it in view of concessions which he previously made on behalf of Mr Shaikh and Mr Banerjee when appearing in unrelated proceedings for them against these Respondents in connection with their failure to obtain certain

appointments. Mr De Mello's principle argument and Mr Benson's subsidiary argument focus on section 1(8) of the Act.

10. In ***Perceval-Price & others -v- The Department of Economic Development & others*** [2000] IRLR 380, the Northern Ireland Court of Appeal (NICA) held that three full-time women tribunal chairmen were entitled to bring equal pay proceedings under the exact Northern Irish equivalent of Section 1(8)(a) in respect of a complaint arising out of the terms of the Judicial Pension Scheme which granted a widow's but not a widower's pension. Mr Furniss concedes that the relevant circumstances of the Claimants in ***Perceval-Price*** and in these proceedings are not materially different and the respective legislative provisions identical in their effect. However, I accept his submission that I am not bound by ***Perceval-Price*** which can be of no more than persuasive authority. But Mr Furniss goes further and submits that not only am I not bound by it, it is wrong in a number of respects and I should not follow it. He submits that the question of whether or not the Claimants were providing services for the purposes of a Minister of the Crown was simply not dealt with in the judgment and must be presumed to have been overlooked; that the NICA were wrong to conclude that the Claimants were workers for the purposes of Article 141; but even if they were correct in that conclusion they were wrong to disapply the proviso in the equivalent of section 1(8)(a) because although (if his submissions are correct) the Claimants have no remedy in the Employment Tribunals, they are not deprived of a remedy altogether as they could seek a judicial review of section 1(8)(a) on the grounds that it is incompatible with Article 141.

11. For reasons which I will explain, I reject all of those submissions. In my judgment ***Perceval-Price*** is plainly correct, although not binding upon me, and I see no reason to depart from any of its reasoning. That conclusion, which means that the Claimants succeed on issue 1, means that I can in due course dispose briefly of their alternative submissions under section 1(6) and 1(8)(b). At this point I need say merely that I am unpersuaded by any of them.

13. I must first say a little about the facts and the statutory background so far as it concerns the appointment of tribunal chairmen. It is common ground that although the Claimants may have served in different tribunals at different times and have been appointed initially under different instruments of appointment, they all fall to be treated similarly. It is also common ground that there is nothing peculiar about their service as judicial office holders in the Appeals Service, as opposed to holders of other part-time judicial office in other jurisdictions, which makes it necessary for me to make specific findings of fact about their roles or how they were performed. Having myself both been a part-time chairman of Employment Tribunals and, briefly, of the Social Security Appeal Tribunal, and in my current role as a regional chairman having what might loosely be called a supervisory function in connection with my own part-time chairmen, it was necessary to establish to what, if any, extent my personal experience differed from those of the Claimants and should therefore be disregarded. Other than on the question of the closeness of the supervision and the detailed nature of the guidance which these Claimants received from their district and regional chairmen, which seems to be somewhat closer and more detailed than that which I received and which my part-time chairmen currently receive, there are no significant differences. I am satisfied, however, that to the extent that they exist, nothing turns on either the existence or the degree of those differences.

14. Turning first to the legislative provisions, the Social Security Act 1998 created, at section 4, the unified appeal tribunals by transferring the functions of the tribunals which I mentioned above to *"…appeal tribunals constituted under the following provisions of this chapter"*. Mr Furniss relies on the use of the plural and the absence of either a definite article in support of his submission, which, semantically, seems to be correct, that there is no single appeal tribunal to which the Claimants are appointed but rather a great many tribunals whose

existence is co-terminous with their sittings and to which the Claimants are appointed by virtue of their membership of one of the panels set up under Section 6 of the Act.

15. Section 6 provides, so far as is material, -

"(3) The panel shall include persons possessing such qualifications as may be prescribed by regulations made with the concurrence of the Lord Chancellor.

(4) The number of persons appointed to the panel and the terms and conditions of their appointment shall be determined by the Lord Chancellor with the consent of the Secretary of State."

16. Section 7 provides –

"*(1) Subject to sub-section (2) below, an appeal tribunal shall consist of 1, 2 or 3 members drawn by the President from the panel constituted under Section 6 above.*

(*2) The member, or (as the case may be) at least one member, of an Appeal Tribunal must -*

(*a) have a general qualification (construed in accordance with Section 71 of the Courts and Legal Services Act 1990 … "*

17. Schedule 1 which creates supplementary provisions relating to appeal tribunals, provides at paragraph 3 under the heading 'Remuneration etc' -

"The Secretary of State may pay, or may make such payments towards the provision of, such remuneration, pensions or allowances to or in respect of any person appointed under this chapter to act as a member of an appeal tribunal, or as an expert to such a tribunal, as he may determine."

18. The Regulations contemplated by Section 6(3) are not included in the bundle but it is understood that they largely replicate provisions made in earlier, now repealed, legislation including the Social Security Administration Act 1992. It must of course be remembered that the Claimants are very long serving, Mr Willis having been appointed in 1978, Mr Howard in 1980, Mr Clinton in 1982, Mr Bear and Mrs Ray in 1984, Mr Banerjee in 1986, and Mr Shaikh in 1987. The statutory regimes under which they have been both appointed and served have therefore been various and indeed numerous but it is not suggested that the central questions of whether they are holders of a statutory office or whether they serve for the purposes of a Minister of the Crown are in any way affected by those changes.

19. The relevant provisions of the 1992 Act are to be found in Section 41 in respect of Social Security Appeal Tribunals, Section 42 in respect of Disability Appeal Tribunals and Section 50 in respect of Medical Appeal Tribunals. In each case it is provided that the President may nominate as Chairmen of an Appeal Tribunal inter alia "*a person drawn from the panel appointed by the Lord Chancellor … under Section 7 of the Tribunals and Enquiries Act 1971"* [Section 41(4)(c), 43(5)(c), 50(4)(c)].

20. Section 7 of the Tribunals and Enquiries Act 1971 provides so far as material,

"(1) The chairman or any person appointed to act as chairman of any of the tribunals to which this subsection applies shall (without prejudice to any statutory provision as to his qualifications) be selected by the appropriate authority from a panel of persons appointed by the Lord Chancellor.

(2) Members of panels constituted under this section shall hold and vacate office under the terms of the instrument under which they are appointed but may resign office by notice in

writing to the Lord Chancellor; and any such member who ceases to hold office shall be eligible for re-appointment."

21. The reference in Section 7(1) to "*any statutory provisions as to qualifications*" takes us back to the Social Security Administration Act 1992 which, at Sections 41(5), 43(6) and 50(5) provides that:

"No person shall be appointed chairman of a tribunal under [the relevant subsection] unless he has a 5 year general qualification …"

22. It seems to me that having regard to the statutory background under which chairmen are appointed, it is simply unarguable, as Mr Benson has sought to argue with a view to avoiding the proviso in section 1(8)(a), that the Claimants are not persons "*holding a statutory office*." It seems to me that that must also dispose of Mr Benson's submission under section 1(6). I accept Mr Furniss's submission that section 1(8) is unnecessary if persons such as the Claimants are employees. Whilst I accept that there are instances of holders of statutory office also being employees (***Johnson –v- Ryan and others*** [2000] ICR 236 EAT) they are the exception to a widespread general rule which does not arise here. For the sake of completeness, I should add that in my judgment Mr Benson's submissions under Section 1(6) fail also because whether they be employees (which they are not) or whether they be workers (which I have yet to consider) they are not engaged under a contract but under terms of appointment to provide service. If, therefore, they provide services for the purposes of a Minister of the Crown or Government Department then they fall within section 1(8)(a) and it becomes necessary to consider whether, as in ***Perceval-Price***, the proviso can be disapplied to allow the claims to proceed.

23. Mr Furniss submits, perhaps surprisingly, that such services the Claimants give are not for the purposes of a Minister of the Crown or a Government Department. If I understand his submissions on this point correctly, they appear to amount to a suggestion that if any service is provided, it is provided not for the Lord Chancellor who appoints them or the Secretary of State whose administrative tribunals they sit in, but for themselves - for their own purposes as independent judicial office holders charged only with the making of judicial decisions, wholly independent from those whom Mr Benson and Mr De Mello submit they are serving. There are many echoes here of Mr Furniss's submissions on why the Claimants cannot be workers for the purposes of Article 141.

24. The concept of holders of judicial office serving only their own purposes has somewhat nightmarish implications (Marty Feldman's "Friendly Neighbourhood Judge" being a comedic example). The judge as "loose cannon" may not exactly be an unknown phenomena but even the loosest of judicial cannons is not purporting to do anything other than administer the law and apply the concept of justice as prevailing in the society which appointed him, (albeit as interpreted by him). The idea of justice as something apart from and superior (in many societies divinely inspired) to both law-makers and the function of law-making, has been recognised from ancient times. Modern democracies regularise the administration of justice through ministries of justice or, in the United Kingdom, the Lord Chancellor's Department now the Department of Constitutional Affairs. By serving the interests of justice, the Claimants are therefore serving the purposes of the Minister heading the relevant ministry, the Lord Chancellor. It seems to me that it is beside the point that other departments of state are involved in the administration of the tribunals and in the payment of the Claimants as in neither case are they serving the purposes of that department in the way that they are serving the purposes of the Department of Constitutional Affairs.

25. Mr Furniss relies on two decisions of the Employment Appeal Tribunal (***Knight -v- Attorney General*** [1979] ICR 194 and ***Arthur -v- Attorney General & another*** [1999] ICR 631) neither of

which appears to have been drawn to the attention of the NICA in ***Perceval-Price***. Both concern lay justices of the peace. Mr Furniss concedes that there are substantial differences between lay justices of the peace and paid holders of judicial office appointed under specific statutes, and he does not submit that either ***Knight*** or ***Arthur*** are decisively in his favour on the point. He relies on them, as I understand it, more to demonstrate that the point was not considered in ***Perceval-Price***. I do not propose to dwell on either as Mr Furniss is plainly right when he concedes that they do not determine the point in his favour.

26. I am wholly unpersuaded that the point was overlooked in ***Perceval-Price***. It is clear that the relevant statutory provisions, which are identical in Northern Ireland, were examined at length and the only conclusion which it seems possible to draw is that the Department of Economic Development either regarded the point as not worth taking or, if they had taken it below unsuccessfully, as not worth pursuing. In that judgment they were plainly correct. The Claimants are in service for the purposes of a Minister of the Crown. Section 1(8)(a) therefore applies to the Claimants and prima facie bars them from continuing with these proceedings by virtue of the proviso.

27. Are they saved by Article 141 EC? This provides, so far as is material –

> *"1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.*
>
> *2. For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker received directly or indirectly, in respect of his employment from his employer."*

28. It is common ground that entitlement to membership of an occupational pension scheme is pay for this purpose, and that Article 141 is not expressly qualified so as to exclude any particular categories of work or work in any particular sector.

29. There is much jurisprudence of the European Court of Justice on the meaning of 'worker'. In concluding that Mrs Perceval-Price and her colleagues were workers for the purposes of Article 141, the NICA relied on ***Lawrie-Blum -v- Land Baden-Wuerttemberg*** [1986] ECR 2121. Mr Furniss also relies on it, but submits that the correct conclusion to be drawn from it is that the Claimants are not workers. He also relies on a passage from the judgment of the European Court of Justice in ***Allonby & others -v- Accrington & Rossendale College & others*** [2004] IRLR 224 which of course post dates ***Perceval-Price***.

30. ***Lawrie-Blum*** was concerned with the meaning of the word 'worker' in a different provision of the Treaty (Article 48 now Article 39) on freedom of movement for workers. At paragraph 15 of its judgment, the Court held that the criterion for application of Article 39 (Art. 48) is the existence of an employment relationship, regardless of the legal nature of that relationship and its purposes. At paragraph 17 it held:

> *"That concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the person concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration."*

32. In ***Allonby*** at paragraph 68 of the judgment the Court held:

> *"Pursuant to the first paragraph of Article 141(2) EC for the purpose of that Article, pay means the ordinary basic or minimum wage or salary and any other consideration whether in*

cash or in kind which the worker receives directly or indirectly in respect of his employment from his employer. It is clear from that definition that the authors of the Treaty did not intend that the term 'worker' within the meaning of Article 141(1) EC should include independent providers of service who are not in a relationship of subordination with the person who receives the services."

31. But the Court said something very similar in ***Lawrie-Blum*** at paragraph 15:

"… namely the existence of a relationship of subordination vis-à-vis the employer, irrespective of the nature of that relationship, the actual provision of services and the payment of remuneration are satisfied."

32. As the NICA in ***Perceval-Price*** actually quoted paragraph 17 of the judgment in ***Lawrie-Blum*** in its judgment, it must be presumed that paragraph 15 had also been drawn to its attention. But it is clear, particularly in the context of ***Allonby***, that the references to subordination were in the context of distinguishing the truly self-employed from others for the purposes only of excluding them from the definition of worker.

33. Mr Furniss submits that neither of the first two of the three criteria identified in ***Lawrie-Blum*** - the performance of services for the employer and the performance of such services under the direction of the employer – are satisfied. I have already disposed of the first of those submissions and it is now necessary to consider in more detail the second. Mr Furniss again places great emphasis on the independence of the judiciary from the executive and of the utter independence of judicial decision making, factors clearly identified by the NICA in ***Perceval-Price***.

34. I am indebted to Mr De Mello for the detailed analysis of the nature of the working relationship between the Lord Chancellor's Department and holders of judicial office set out in his skeleton argument. He identifies some 26 or 27 separate components to that relationship and although I do not dissent from any of them, some are plainly of greater importance than others. I can summarise the most important as follows:

34.1 Appointments are made as a result of a competitive interview followed by an offer of appointment and an acceptance of that offer. The appointment process is controlled by the Lord Chancellor.

34.2 It is a condition of appointment that an initial training period is undertaken and thereafter further periodic training is also undertaken.

34.3 The Claimant's work is monitored by a more senior chairman and is the subject of written appraisal after each monitoring visit.

34.4 Suggestions for improvement are made and are expected to be adhered to, the suggestions generally being confined to the way in which proceedings are conducted and decisions written.

34.5 Persistent under performance, including failure to improve as suggested, might lead to non-renewal of the appointment or, in the worst cases, to premature termination of appointment as might failure to comply with training requirements.

34.6 Chairmen are expected to sit for a minimum number of sitting days at places and at times dictated by the second Respondents.

34.7 The places at which hearings are conducted are controlled by the second Respondent who provides all of the relevant statutory and other material necessary for the hearings to take place.

34.8 Chairmen have no control over their own workload; they must do the cases which are allocated to them and they are able to do only those cases which are allocated to them.

34.9 The work cannot be delegated; it must be done by the chairman to whom it is allocated who is obliged to produce a written decision within a reasonable time and to sign it.

34.10 Payment is made only in return for work actually done and not for the mere fact that office is held.

34.11 Having accepted a sitting commitment, a failure to honour it would be regarded as unacceptable.

34.12 Misbehaviour, either in the course of a sitting or in private life, could lead to the appointment being terminated.

35. All of the Claimants, in addition to periodical monitoring and training, received Presidential protocols (the office of President, normally held by a Circuit Judge or senior Circuit Judge is the creation of the statute the responsibilities of which are, at least in part, outlined therein) which set out in some detail how they were expected to manage hearings. For example, they were required to introduce themselves and their fellow tribunal members to each Claimant by name. Quite clearly the actual decision making - the conclusion to which the tribunal came as opposed to the manner in which and the timescale within which that decision was to be reduced into writing and communicated to the parties which was the subject of Presidential guidance - was beyond the control of anyone; that is the hallmark of judicial independence. But even judicial independence must be exercised within the statutory framework which creates the substantive law and the procedural rules governing the conduct of the tribunal and its hearings. The training which the chairmen are required to attend is not designed, of course, to ensure that pre-determined outcomes are reached but to eliminate, so far as possible, error in the decision-making process as a result of a lack of understanding of the relevant law.

36. Mr Furniss further submits that the fact that judicial office holders have individual positions of independent authority renders the office which they hold qualitatively different from employment as envisaged by the Equal Pay Directive and therefore the work which they undertake is outside the "type of activity" with which either the Equal Pay Directive or Article 141 is concerned. In my judgment this is a misconception. To an extent, Article 39 is concerned with types of activity and is expressed to be so in Article 39(4): *"The provisions of this Article shall not apply to employment in the public service*." There is no such qualification to Article 141 and not even Article 39(4) is truly directed to types of activity. Rather it is concerned with the sector in which the activity is performed. Article 141, in my judgment, is concerned with types of relationship not types of activity and as is made clear both by ***Allonby*** and ***Lawrie-Blum***, the only types of relationship which are excluded are those which are clearly of self-employment where there is no subordination. In my judgment, these Claimants are plainly workers for the purpose of Article 141.

37. Mr Furniss's final submission is that even if I am of the opinion that the Claimants are workers for the purposes of Article 141, the NICA were wrong to disapply the proviso in the equivalent to section 1(8)(a). They were wrong to do so because there is an alternative course open to the Claimants, namely judicial review, which means that the inclusion of the proviso in section 1(8)(a) does not offend against the community law principles of equivalence or effectiveness. With respect to Mr Furniss, in my judgment that submission is also misconceived.

38. The principles of equivalence and effectiveness derive from two early cases of the European Court of Justice, ***Comet BV -v- Produktschap voor Siergewassen*** [1976] ECR 2043 and ***Rewe-Zentralfinanz -v- Landwirtschaftskammer fur das Saarland*** [1976] ECR 1989. Their starting point is that European Law itself does not lay down time limits and related procedural matters for proceedings seeking European Law remedies, that being a matter for each member state. The principles of equivalence and effectiveness are those by which the procedures attached by member states to proceedings seeking European Law remedies are judged, the comparison being between those which are attached to the European Law remedies and those which attach to the nearest domestic law equivalent. In my judgment, those principles have no application to the broad

question which might be said to arise here which is whether a Treaty obligation has been transcribed accurately or at all into UK Law.

40. Secondly, in my judgment Mr Furniss is wrong (and, as I understand it, may now accept that he is wrong) when he submits that an offending provision in legislation may only be disapplied if there are clearly no other means available to a Claimant to enforce the European right which gives rise to the need for disapplication. In my judgment that must plainly be wrong. The only Court within the United Kingdom charged with determining equal pay cases is the Employment Tribunal. No other Court has that jurisdiction. The Employment Tribunal must therefore disapply the offending provision.

42. That analysis also answers Mr Furniss's third point. There is in fact no alternative remedy available because any application for judicial review would have to be predicated on the basis of a failure to provide a remedy. In my judgment, therefore, my duty, as was the Northern Ireland Court of Appeal's in ***Perceval-Price***, is to disapply the provision which is incompatible with Article 141, that which has been described as the proviso in Section 1(8)(a). It therefore follows that the Claimants are entitled to bring these proceedings as they are engaged under terms of service to provide services for the purposes of a Minister of the Crown and the provision excluding holders of statutory office falls to be disapplied.

39. Finally, although I accept Mr Furniss's submission that it is very difficult to see a distinction in practical terms between the persons at whom sections 1(8)(a) and 1(8)(b) are respectively aimed, I do not accept Mr Benson's submission that they are not alternatives and that a person may succeed under both. The disjunctive '*or'* between them appears to have at least that purpose. Having found that the Claimants succeed under section 1(8)(a), it would seem to follow that they cannot succeed under section 1(8)(b) and it is unnecessary for me to address Mr Benson's submissions to the contrary.

40. Having announced my decision (whilst reserving my reasons) at the end of the hearing, the following Case Management Orders were made by consent after a detailed discussion between the Representatives:

1. By not later than Tuesday, 22 February 2005 the Treasury Solicitor is to serve on the Claimants' Solicitors the available statistics for the Appeals Service and its predecessors showing the proportions of male and female chairmen who were and who were not salaried, together with a witness statement explaining the statistics.

2. By not later than Friday, 1 April 2005 the Claimants are to say whether or not they accept the statistics and the suggested pool for comparison. If the statistics are accepted the Claimants are to say whether or not they concede (as the Respondents will allege) that disproportionate impact is not demonstrated. If the statistics are not accepted they are to say what they contend the appropriate pool for comparison to be and why.

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Chairman

Date:

REASONS SENT TO THE PARTIES ON

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AND ENTERED IN THE REGISTER

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FOR SECRETARY OF THE TRIBUNALS

ANNEX

BETWEEN:

Claimants	**Respondent**
Mrs J Stow & others	Secretary of State for Defence

REPRESENTATION

For the Claimants: Ms M Tether of Counsel

For the Respondent: Mr N Paines QC
Raymond Hill of Counsel

REASONS

1. These proceedings, which concern the Armed Forces Pension Scheme (AFPS), are a subset of the main proceedings known as the part-timer worker pension cases (***Preston & others -v- Wolverhampton Healthcare NHS Trust & others (No. 3***)). The claimants are all members of the reserve forces and claim that their exclusion from the AFPS is in breach of Section 1(1) of the Equal Pay Act 1970 and Article 141 of the Treaty of Rome in that it is indirectly discriminatory

against women. The majority of the claimants are, however, male but, for reasons explained in the main proceedings, nothing turns on that point.

2. The matter was originally listed for pre-hearing review on two issues. The first was in two parts - the correct pool for determining whether the exclusion of reserve forces from the AFPS had a disproportionately adverse impact on women and, once that pool had been established, whether the statistics provided by the respondent demonstrated that a significantly smaller proportion of women were eligible for membership of the scheme. The second was whether, following the judgment of the European Court of Justice in ***Allonby -v- Accrington and Rossendale College & others*** *(case C-256/01) [2004] ICR 1328*, it continues to be necessary for the claimants to establish that they are doing like work or work of equal value with members of the regular forces.

3. The first point is now conceded by the Secretary of State. Ms Tether, who represents some but not all of the claimants, submits that, following ***Allonby***, that concession must mean that the claims succeed subject to any defence of objective justification for the exclusion of reservists from the scheme. She submits that ***Allonby*** establishes that where the pension scheme in question is governed by state legislation, once disproportionate adverse impact is demonstrated, there is no longer a need for a claimant to identify a comparator, or for a comparator - a person of the opposite sex engaged on like work or work of equal value with the claimant and who is a member of the pension scheme – to exist.

The Background

4. I have heard no evidence and I note that it has not even proved possible to agree in broad terms on the differences between the roles of reservists and members of the regular forces. Nor has it proved entirely possible, it would seem, to agree on the precise ambit of the exclusionary provisions in the AFPS. For the purposes of this hearing that is not important. It is agreed that reservists are denied access to the scheme by the exclusion from the scheme of certain types of military duty exclusively undertaken by reservists; their obligatory training and voluntary training and other duties (VTOD). However, since the 1997 amendment to the Army Pensions Warrant 1977, other duties performed by reservists are pensionable. These are full-time reserve service, provided that by the date of retirement or discharge the total FTRS is two or more years, and mobilised service. Although the original version of the 1977 Warrant (together with any amendments made before 1997), is not available, it is understood that it worked in a similar way, but with more restricted categories of pensionable service for reservists and with only reservists who had previously been regulars eligible for temporary membership of the AFPS whilst undertaking those more restricted categories.

The Law prior to *Allonby*

5. Prior to ***Allonby***, there could be no doubt that in order to succeed in these claims, the claimants would have had to demonstrate that they were engaged, when undertaking duties excluded from the AFPS, on work which was broadly similar to or of equal value with work undertaken by regulars. I am asked to determine whether ***Allonby*** has changed that.

6. I have said on many occasions during the course of the principal litigation that these cases are not about fair pay but equality of pay as between men and women. This is a concept which underpins both UK and European law. Section 1 of the Equal Pay Act 1970 provides:-

"*(1) If the terms of a contract under which a woman is employed at an establishment in Great Britain do not include (directly or by reference to a collective agreement or otherwise) an equality clause they shall be deemed to include one.*

(2) An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the woman's contract) and has the effect that

(a) where the woman is employed on like work with a man in the same employment -
(i) ...
(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term:

(b) ...

(c) where a woman is employed on work which, not being work in relation to which paragraph (a) or (b) above applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment -
(i) ....
(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term.

(3) An equality clause shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material factor which is not the difference of sex ..."

7. So far as Community law is concerned, Article 2 EC provides (so far as material):-

"*The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing policies or activities ... to promote throughout the community ... equality between men and women ...*"

8. Article 141 EC provides:-

"(1) Each Member State shall ensure that the principal of equal pay for male and female workers for equal work or work of equal value is applied.

(2) ... equal pay without discrimination based on sex means :

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement

(b) that pay for work at time rates shall be the same for the same job."

9. Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women provides, at Article 1:-

"*The principle of equal pay for men and women outlined in [Article 141] of the Treaty hereinafter called 'principle of equal pay' means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on the grounds of sex with regard to all aspects and conditions of remuneration."*

10. In ***Defrenne -v- SABENA No. 2*** *(Case Number 149/77) [1978] ECR 1365* the Court said (judgment paragraphs 19 - 22):-

"19. In contrast to the provisions of Articles 117 and 118, which are essentially in the nature of a programme, [Article 141] EC, which is limited to the question of pay discrimination between men and women workers, constitutes a special rule, whose application is linked to precise factors.

20…

21… the fact that the fixing of certain conditions of employment - such as a special age limit - may have pecuniary consequences is not sufficient to bring such conditions within the field of application of Article [141], *which is based on the close connection which exists between the nature of the services provided and the amount of the remuneration*.

22 That is *a fortiori* true since the *touchstone* which forms the basis of [Article 141] – *that is, the comparable nature of the services provided by workers of either sex* – is a factor as regards which all workers are *ex hypothesi* on an equal footing …" [emphasis added]

11. It is common ground that entitlement to membership of the pension scheme is pay for the purposes of both the Equal Pay Act and Article 141.

The effect of *Allonby*

12. Against that background it would be surprising in the extreme if the European Court of Justice had ruled, as Ms Tether submits they have ruled in ***Allonby***, that where the pension scheme is statutory in origin, once it is established that the exclusionary provision complained of has a disproportionately adverse effect on one sex or another, the concept of equal pay for equal work becomes otiose. It would be even more surprising if that result had been achieved by anything other than the clearest possible words.

13. And yet there is no doubt that there are passages both in the judgment of the Court and the Opinion of the Advocate General in ***Allonby*** and in the judgment of the Court in the earlier case of ***Rinner-Kühn -v- FWW Spezial Gebäudereinigung GmbH & Co*** *(Case 171/88) [1989] IRLR 493 ECJ* which at first sight support Ms Tether's submissions.

14. It is necessary to say a few words about the facts in ***Allonby***. As a cost-saving exercise the respondent colleges had dispensed with the services of Mrs Allonby and a number of other lecturers. It was part of a concerted plan whereby they would be taken on by an agency known as ELS in a nominally self-employed capacity and hired back to the college to lecture at an hourly rate agreed between the College and ELS. The fact that in her new status Mrs Allonby was a self-employed person meant that she was unable to gain access to the Teachers' Pension Scheme which was confined to employees. She brought an equal pay claim, naming as a comparator a Mr Johnson, one of her former colleagues at Accrington and Rossendale College, who remained in the College's employment and who was a member of the pension scheme.

15. In his Opinion, the Advocate General noted:-

"55. In its second question, the referring court [the Court of Appeal] seeks to ascertain whether Article 141 EC has direct effect with the result that the applicant can claim access to the Teachers Superannuation Scheme whether on the basis of a comparison of herself with Mr Johnson or on the basis of statistical evidence."

"58. The second question also arises in connection with the fact that the applicant cannot point to a comparator, which is a requirement under national pension legislation. The applicant states that

such a requirement impedes her claim for access to the pension scheme. She takes the view that, in support of her claim to access to the pension scheme, she may refer to Mr Johnson, or if the reply to the first question and thus also to the first part of the second question is negative [i.e. that she may not refer to Mr Johnson] she may show on the basis of statistical evidence that the exclusion from participation in the pension scheme in respect of self-employed workers affects considerably more women than men."

….

"74. On the question whether, in connection with her claim to entitlement to join the superannuation scheme, the applicant may compare herself with Mr Johnson, or whether a comparator is necessary at all I make the following observations.

….

"78. Irrespective of the situation concerning the status of employees as opposed to self-employed persons, it is the case that a comparator *or a comparative framework* is necessary in order to determine whether there is discrimination on the grounds of sex." (emphasis added)

"85 The question arising is whether the applicant on the basis of statistical evidence can show whether the definition used in the Teachers' Superannuation (Amendment) Regulations 1993 is indirectly discriminatory. If she is successful in that, and there is no objective justification, the legislature will be required in enact an amendment."

The claimant's submissions

16. Ms Tether makes a number of submissions about theses passages: that the use of the phrase "or a comparative framework" demonstrates a different approach to that which requires to be compared: that read as a whole the Opinion of the Advocate General is instructive because it shows that in his analysis there are only two issues - whether Mrs Allonby could use as a comparator someone employed by her former employers on the one hand, and on the other hand whether a comparator was necessary at all and that this dichotomy is repeated and treated equally in the judgment of the Court.

17. Turning to the judgment, she submits that at paragraphs 37 and 38 the Court's analysis of the Court of Appeal's second question of reference shows that the Court is of the opinion that equality of treatment does not have to be defined by reference to a precise equation of equal work. Nowhere in the judgment is there any reference to the need for Mrs Allonby to establish a comparison as a necessary part of her claim. At paragraph 61 the Court defines three key issues. The second is the need to determine precisely the category of persons who may be included in the comparison necessary to determine disproportionate impact, which is developed at paragraph 73 where the Court says that in principle it is the scope of the Rules which determines that category.

18. Paragraphs 74 and 75 need to be quoted in full:-

"74. Thus, in the case of company pension schemes which are limited to the undertaking in question, the court has held that a worker cannot rely on article [141] of the EC Treaty … in order to claim pay to which he could be entitled if he belonged to the other sex in the absence, now or in the past, in the undertaking concerned of workers of the other sex who perform or performed comparable work … On the other hand, in a case of national legislation, the court, in ***Rinner-Kühn*** … based its reasoning on statistics for the number of male and female workers at national level.

75. In order to show that the requirement of being employed under a contract of employment as a precondition for membership of the Teachers' Superannuation Scheme - a condition deriving from state rules - constitutes a breach of the principle of equal pay for men and women in the form of indirect discrimination against women, a female worker may rely on statistics showing that, among the teachers who are workers within the meaning of article 141(1) EC and fulfil all the conditions for membership of the pension scheme except that of being employed under a contract of employment as defined by national law, there is a much higher percentage of women than of men".

18. The Court answered the question referred to it by the Court of Appeal thus:

"In the absence of any objective justification, the requirement, imposed by state legislation, of being employed under a contract of employment as a precondition for membership of a pension scheme for teachers is not applicable where it is shown that, among the teachers who are workers within the meaning of article 141(1) EC and fulfil all the other conditions for membership, a much lower percentage of women than of men is able to fulfil that condition…"

19. Ms Tether further submits that the way in which the ECJ describe the Teachers' Pension Scheme, particularly at paragraphs 13 and 14 of the judgment, suggests that there is no difference fundamentally between it and the AFPS. The Court treats teachers as a generic category, an occupational species. She submits that it cannot be right that the Court was assuming equality between members of the teaching profession because of the very different types of teaching involved. This generic category was determined by the scope of the scheme's rules. The Armed Forces Pension Scheme is very similar. It applies to an equally broadly defined category of work, namely service personnel, also determined by the scope of the scheme rules.

20. Turning briefly to ***Rinner-Kühn***, the claimant, who worked less than 10 hours a week for a company which employed no-one either male or female for more than 10 hours a week, was not entitled to sickness pay under German law which excluded all persons working 10 hours a week or less. She successfully challenged that exclusionary provision on the grounds that it was indirectly discriminatory against women, the proportion of women in the workforce working 10 hours or less greatly exceeding the proportion of men. The relevant point for the purpose of these proceedings is that the Court went on to hold that this entitled her to bring a claim against her employers without the need for a comparator in their employment.

The respondent's submissions

21. I accept Mr Paines' submission (which I compress into a few words of my own) that the interpretation which Ms Tether seeks to place on both ***Allonby*** and ***Rinner-Kühn*** ignores their respective contexts. In ***Rinner-Kühn*** the offending provision was national legislation, applicable to the entire working population, and it was therefore assumed that a comparator would exist. As its primary focus was the exclusionary provision in national legislation, not the practice of Mrs Rinner-Kühn's employer, the existence of a comparator somewhere in the working population was taken for granted. It was simply not an issue in the proceedings.

22. In ***Allonby*** the Court of Appeal had in fact found that Mr Johnson was (at least putatively) engaged on like work or work of equal value to her work. The question of whether a comparator existed was not therefore merely taken for granted, it had, for the purposes of the reference at least, been established.

23. The reference which the Advocate General makes in paragraph 52 to a need to "point to a comparator, which is a requirement under national pension legislation," has to be read in the light of that legislation which requires not merely a comparator but a comparator *in the same employment.*

The ruling which the Court gave in answer to the question referred to it by the Court of Appeal was therefore applicable not when there was no comparator but only where there was no comparator in the same employment as the claimant.

24. Paragraph 60 of the Advocate General's Opinion shows that this is clearly right:

"The applicant points out that the Court of Justice in cases of unequal treatment is satisfied by statistics proving that a practice or condition applied disproportionately disadvantages women. In such situations *a comparator* who does the same work *for the same undertaking or establishment* is not required." (emphasis added)

25. That the Court had no intention of pronouncing the death knell of the comparator in cases where a pension scheme has as its origins state legislation, is, Mr Paines submits, clear from its recital at the start of its judgment, of the provisions of Community law which I have set out at the beginning of this judgment, with its repeated references to equal pay for work of equal value. At paragraph 62, referring to ***Defrenne -v- Sabena (No. 2)***, the Court says:

"The criterion on which article 141(1) EC is based is the comparability of the work done by workers of each sex."

Nowhere does the Court suggest that it is departing from any of these "touchstones" "criterion" or, as I would put it, fundamental principles.

Conclusion

26. The basic premise of ***Allonby*** was that Mrs Allonby was doing work which was broadly similar to, or of equal value with, work done by those who were members of the scheme, a point which, as I understand it, was never in issue. The reason why this matter is before me is that in these proceedings the point is in issue. The Secretary of State expressly does not concede that the categories of military duty undertaken by members of the reserve forces which by virtue of the Army Pensions Warrant are not pensionable, are not of equal value with or broadly similar to, military duties undertaken by the regular forces.

27. The inherent fallacy in Ms Tether's submission, the exposure of which, in my judgment, destroys her argument, is demonstrated by a submission made by Mr Paines and her response to it. If Ms Tether is right and the Teachers' Pension Scheme is aimed at a broadly defined category of work, generically the work of teaching, what does this mean? Does it mean, for example, all those involved in the field of education? Mr Paines submits that it would be absurd and is plainly not the intention of the ECJ that, for example, a school caretaker who admits that his work is not of equal value with the work of a teacher should nonetheless be able to claim equal pay with that teacher in the matter of admission to the Teachers' Pension Scheme on the basis that statistically it is demonstrable that the exclusion of caretakers from the scheme has a disproportionately adverse impact on men. Mr Paines extended the example to include classroom assistants, perhaps because the relationship between teachers and classroom assistants more closely reflected the Secretary of State's view of the relationship between the regular and the reserve forces.

28. Ms Tether conceded – as in my judgment she had to concede - that the caretaker would have to demonstrate that he was engaged on work of equal value with that of a teacher in order to gain access to the scheme. The scope of the rules of the scheme extended only to teachers and the caretaker was not a teacher. That amounts to a concession that the basis of exclusion from the scheme is not by status (part-time as against full time: employees as against the self employed: regulars as against reservists) but by the nature of the work undertaken (teaching as against

caretaking; full military duties as against obligatory training and VTOD). It immediately begs the question - what is the meaning of 'teaching' and how is it to be determined? Or to put it in more general terms, how is the scope of the scheme to be determined? It plainly could not be enough for a claimant merely to assert that they fell within the scope of the rules and that the nature of the work which they did meant that a significantly higher proportion of men than of women were excluded from the scheme. There must be some mechanism for determining whether the claimant did fall within the scope of the scheme rules.

29. There might be a number of ways of resolving that question, by the issue of a formal qualification, for example, or by reference to dictionary definition. But for the purposes of both European and domestic law, in my judgment the mechanism is clearly established and is unaffected by ***Allonby***. It is the need to demonstrate that one is not merely within the scope of the rules in a wide generic sense, but that one is doing a class of work which is broadly similar to, or of equal value with, that done by those to whom the pension is made available.

30. In my judgment once the fallacy in Ms Tether's submission is exposed, and once the judgment in ***Allonby*** is put into its proper context, it is clear that ***Allonby*** has not disturbed the *status quo* other than to remove the need for a comparator *in the same employment as the claimant* where the scheme rules or legislation under attack are of national application and statutory in origin. It has not removed the need for a comparator *per se* in those circumstances. It must follow therefore that the Secretary of State, not being prepared to concede that duties undertaken by reservists which are excluded from the ambit of the scheme, are of equal value to the duties undertaken by regulars, the reservists must establish that equality in order to be entitled to bring these proceedings.

31. The mechanics of that exercise will be the subject of a Case Management Discussion in due course.