EMPLOYMENT TRIBUNALS

BETWEEN:

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

At a pre-hearing review

Held at: London Central

Before: Mr J K Macmillan sitting alone
Chairman

on: Wednesday 7 December 2004

the tribunal gave judgment as follows

JUDGMENT

The Claimants are not entitled to bring these proceedings unless they can establish that they are doing like work or work of equal value with regular members of the armed forces.

.....
Chairman Nottingham

December 2004

JUDGMENT SENT TO THE PARTIES ON
.....
AND ENTERED IN THE REGISTER
.....
FOR SECRETARY OF THE TRIBUNALS

EMPLOYMENT TRIBUNALS

BETWEEN:

Claimants	**Respondent**
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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.

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Chairman Nottingham

December 2004

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FOR SECRETARY OF THE TRIBUNALS