Appeal No. UKEAT/0234/05/CK

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 30 June 2005
Judgment delivered on 31 August 2005

Before

HIS HONOUR JUDGE MCMULLEN QC

(SITTING ALONE)

MR CHRISTOPHER SHAIKH APPELLANT

THE DEPARTMENT FOR CONSTITUTIONAL AFFAIRS AND OTHERS RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RAMBY DE MELLO (Of Counsel) 6 King's Bench Walk The Temple London
For the Respondent	MR MICHAEL FURNESS (One of her Majesty's Counsel) Wilberforce Chambers 8 New Square London WC2A 3QP and MR JONATHAN SWIFT (Of Counsel) 11 King's Bench Walk London EC4Y 7EQ

SUMMARY

In a claim for equal access to a pensions scheme following the **Preston** litigation and **Allonby** it is necessary for the claimant to establish a comparator of the opposite sex doing like work or work of equal value, since this is the application of the principle of equal treatment as between the sexes.

HIS HONOUR JUDGE MCMULLEN QC

1. This case is about the application of the equal access to pension provisions made under the **Equal Pay Act 1970 (as amended)** in proceedings brought by a part time tribunal chairman. I will refer to the parties as the Claimant and the Respondents.

Introduction

2. It is an appeal by the Claimant in those proceedings against a judgment on a preliminary point of the Employment Tribunal Regional Chairman for Nottingham region, Mr J K Macmillan who sat alone over two days at Nottingham giving a judgment but reserving his reasons until they were registered on 14 February 2005. As here, the Claimant was represented by Mr Ramby De Mello of Counsel and the Respondents by Mr Michael Furness QC and Mr Jonathan Swift. The Claimant contended that he was entitled to equal access to the pension scheme which was available to full-time tribunal chairmen pursuant to the **Equal Pay Act** and Article 141 of the **amended Treaty of Rome.** The Respondents denied the claim, in the meantime not admitting that there were comparable female chairmen engaged on like work or work of equal value.

The issues

3. Two preliminary points were organised for a hearing involving seven claimants. Only Mr Shaikh appeals against the adverse judgment. These cases form part of the **Preston** litigation: **Preston and Others v Wolverhampton Health Care NHS Trust and Others No.3** [2004] ICR 993. Case management measures adopted for hearing these cases are that Mr Macmillan hears them sitting alone and, on appeal, I sit alone under s.28(4) of the **Employment Tribunals**

Act 1996. The (second) preliminary issue determined by the Chairman was that the Claimant was entitled to bring the proceedings, for he was engaged under terms of service to provide services for the purposes of a Minister of the Crown. Provisions under the **Equal Pay Act** excluding holders of statutory office were disapplied by operation of Article 141. There is no appeal by the Respondents against that holding.

4. The first preliminary issue was concerned with the application of the judgment of the European Court of Justice in **Allonby v Accrington and Rossendale College and others** [2004] IRLR 224 following a reference by the Court of Appeal: [2001] ICR 1189. The issue was whether the Claimant had to cite a named comparator doing like work or work of equal value. The Chairman, concluding that point against the Claimant, held that such a comparator was necessary, following his earlier judgment in **Stow and Others v Secretary of State for Defence** Case no.2203251/2000 which is annexed to his judgment in the instant case. Case management orders were made sending the Claimant's case and the others with it, for a full hearing on the question of whether the work being done was like work or work of equal value.

The legislation

5. The **Equal Pay Act 1970** provides as follows:

> **"1 Requirement of equal treatment for men and women in same employment**
>
> **(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) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and**
>
> **(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;**
>
> **(4) A woman is to be regarded as employed on like work with men if, but only if, her work and theirs is of the same or a broadly similar nature, and the differences (if any) between the things she does and the things they do are not of practical importance in relation to tem1S and conditions of employment; and accordingly in comparing her work with theirs regard shall be had to the frequency or otherwise with**

which any such differences occur in practice as well as to the nature and extent of the differences."

Similar provisions apply in relation to work rated as equivalent by a job evaluation study, and work of equal value.

6. Article 2 of the Treaty provides:

> **"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"**

7. Article 141 so far as is material provides:

> **"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 receives directly or indirectly, in respect of his employment, from his employer "**

8. Directive 75/117/EEC relating to the application of the principle of equal pay provides as follows 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."**

9. In **Defrenne v Sabena No.2** (Case Number 149/77) [1978] ECR 1365 the European Court of Justice said this:

> **"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]"**

10. It is common ground in our case that Article 141 and the **Equal Pay Act** together with amending regulations entitle a worker to make a comparison of the terms applicable for access to pension schemes.

The facts

11. The Claimant was called to the Bar in 1980. He was appointed as a chairman of a tribunal first on 8 July 1987 and continued to chair various tribunals which ultimately came under the authority of the Appeals Service, the second Respondent here, by the process of appointment or re-appointment, until he was told on 4 November 1999 that his appointment would not be extended. His appointment to these bodies was by the Lord Chancellor who is, by the Department for Constitutional Affairs, the first Respondent in these proceedings.

12. On 26 May 2000 the Claimant submitted the present claim for equal pay to an Employment Tribunal. I understand other proceedings were launched relating to the failure to achieve an extension of his appointments which I assume were determined against him. Two significant events occurred which have affected the extraordinary length of these proceedings. On 8 February 2001, the European Court handed down its judgment in **Preston No.2** [2001] ICR 217. Shortly after that, on 23 March 2001 the Court of Appeal gave its judgment in **Allonby** (above) and made its reference to the European Court which in turn handed down its judgment on 13 January 2004. Meanwhile, the Respondents' Notice of Appearance was delayed until 9 May 2001. The parties agree that the delay in this case is attributable to their wishing to see those judgments and no point is taken that it has taken 5 years for this case to reach a preliminary hearing in the Employment Tribunal.

13. Until relatively recently (when some tribunal chairman have been appointed on a salary to sit on a part time basis) all tribunal chairman have been appointed either on a full time basis, with a salary, or on a part time basis, in which case they are paid a fee for each day they sit. Mr Shaikh's appointments were in the latter category. With effect from 31 March 1995 salaried i.e. full-time chairman were entitled by the **Judicial Pensions and Retirement Act 1993** to access

to a judicial pension. Prior to that, salaried chairmen were provided, as part of their terms and conditions of appointment, with pensions equivalent to those prevailing under the Judicial Pensions Act 1981. The Claimant therefore claims that throughout the whole of his career when he was a part-time chairman i.e. from 1987 to 1999 he was denied access to the schemes contrary to the **Equal Pay Act.**

14. The precise terms of the Claimant's appointment are not important now since the Respondents' challenge to his entitlement to bring proceedings under the **Equal Pay Act** is not the subject of an appeal. I was told at the hearing that he was typically engaged on one or more days a week and in some cases when the Appeal Service was under stress had been working four days a week. His claim is that by that service he was entitled to access to the pensions scheme, which had been denied him solely on the basis that he was a part-time fee paid chairman.

15. He was asked to specify a comparator and I was told that he had such a comparator and had sent the name. Nevertheless, he contends that that is not a necessary requirement, relying on **Allonby** (ECJ). This appeal might therefore seem a rather sterile exercise, but it is possible that a named comparator may be the subject of a defence by the Respondents under s.1(3)

Discussion

16. The Chairman in his judgement in **Stow** recognised that there are passages in the judgment of the ECJ and the opinion of Advocate General Geelhoed which, taken with the judgment of the ECJ in **Rinner-Kuhn** [1989] IRLR 493 support at first sight the submissions of the Claimant. On behalf of the Respondents, it is contended that a full understanding of the facts in **Allonby** is necessary before it can be applied in the instant case. The short submission of the

Claimant is that he was denied access by virtue of his status pursuant to a rule deriving from statute which, it will be said, disadvantages substantially higher proportions of men than women. For the Respondents, it is contended that the principle of equal pay requires a comparative analysis as between men and women who are doing like work or work of equal value. Adopting what the Chairman said in **Stow,** the law applies to create equality as between men and women doing like work or work of equal value, and does not apply to give *fair* pay. I accept the central submission of the Respondents.

17. The Claimant in **Allonby** was employed as a part time lecturer by a college which decided not to renew its part-time lecturers' contracts. Instead, she went to work for ELS (a commercial supplier) on a self-employed basis continuing with her teaching duties more or less in the same way as she had been before. She was not allowed access to the pension scheme because she was not employed by an employer in a relevant college. She named a male comparator working full-time at the college who was not subject to the re-organization and the requirement that he work for ELS. And in any event she sought to rely on a statistical analysis to demonstrate that the proportion of female lecturers who could comply with a requirement to work under a contract of employment with a college employer was substantially less than that of male lecturers.

18. The ECJ decided that if a condition of membership of the pension scheme derived from legislation and this was inconsistent with Article 141, it should be disapplied. In order to show that such a legislative provision had disproportionate impact, statistical evidence was permitted. Further, if the legislative provision was discriminatory, the private sector employer ELS could not rely on it to justify its own actions: see paragraphs 75 to 84.

19. The central issue of substance in **Allonby** was whether a teacher engaged as self-employed by a private sector employer might compare herself with a teacher in the public sector engaged on a contract of employment with a different employer. The impetus for Ms Allonby's claim in practical terms was also the premise upon which in my judgment the ECJ decided the case. It was that prior to the change in circumstances in 1998 the Claimant did like work or work of equal value with a male full-time lecturer and continued to do so after the change albeit now supplied by ELS to the college. As she saw it, they were doing the same work and should have the same access to a pension. That factual circumstance clearly was the basis upon which the reference was made by the Court of Appeal and the judgment given by the ECJ reflects that. See paragraph 29 where the following is an assumption;

> **"29**
> **According to the national court, the material circumstances relating to that equal pay claim are the following:**
>
> **- Ms Allonby and Mr Johnson undertake lecturing work of presumptively equal value at the College, although not always on the same site."**

20. This is also apparent from paragraphs 74 and 75 of the judgment:

> **"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 119 of the EC Treaty. (Articles 117: to 120 of the EC Treaty have been replaced by Articles 136 EC to143 EC) 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 (case C~200/91 *Coloroll Pension.Trustees* [1994] IRLR 586, paragraph 103) On the other hand, in the case of national legislation, in case 171/88 *Rinner-Kuhn* [1989] IRLR 493 (paragraph 11), the Court based its reasoning on statistics for the numbers 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 TSS - 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.**

21. The reference to "performed comparable work" and "workers within the meaning of Article 141(1)" are plainly to the comparative exercise required by Article 141 which begins with the premise that male and female workers are engaged on equal work or work of equal value. This is because the ECJ said at paragraph 62:

"**62**

-The concept of worker within the meaning of Article 141 (1) EC

The criterion on which Article 141 (1) EC is based is the comparability of the work done by workers of each sex (see, to that effect, case 149/77 Defrenne (No.3) [1978] ECR 1365, paragraph 22). Accordingly, for the purpose of the comparison provided for by Article 141(1) EC, only women and men who are workers within the meaning of that article can be taken into consideration."

22. This is illustrated by the example given by the Chairman in the **Stow** case. A caretaker in a school who is denied access to a pension scheme limited to teachers, is denied access not because of the number of hours he works but because he is not in the group of people doing like work or work of equal value.

23. The facts in **Allonby** are remarkably different from the facts in our case since there is no private sector employer in the position of ELS. Further, there is still a live issue as to whether or not the Claimant is doing like work or work of equal value to a salaried chairman, since the Respondents do not admit that. That case is yet to be made out (by the Claimant) against resistance by the Respondents based upon what are said to be irregular working patterns, limited number of sessions, administrative difficulties in counting the periods of service, and disproportionate administrative costs. I understand from what I was told at the hearing that other issues such as different training requirements and supervisory requirements apply to part-time fee paid and to full-time salaried chairmen. I have to say from my own experience as a part-time chairman, and reflecting what the Chairman said in the instant case said about his own experience, that the differences would not be appreciable to members of the public and tribunal users, particularly in a case where the chairman was sitting, as here, for up to four days a week.

24. The only exception, and this is relied on by the Claimant, is in respect of legislative provisions. In **Rinner-Kuhn** (above) the German legislation required an employer to make payment to workers who are sick for up to 6 weeks; but there is an exclusion for workers who

work less than10 hours a week or less than 45 hours a month. The ECJ held that such a provision was unlawful.

> **"11**
>
> **It is clear from the file that the German legal provision in question grants the benefit of the principle of continued payment by the employer in the event of illness only to workers whose employment contracts provide for normal working hours exceeding 10 hours of work a week or 45 hours a month. As such payment falls under the definition of pay within the meaning of the second paragraph of Article 119; it follows that the German legislative provision concerned allows employers to maintain a global difference in pay between two categories of workers, those who carry out the minimum number of hours' work a week or a month and those who, whilst doing the same work, do not carry out that minimum number of hours.**
>
> **12**
>
> **It also follows from the Order to refer that a considerably smaller percentage of women than of men carries out the minimum number of hours' work a week or a month which is required to be entitled to the continued payment of wages in the event of incapacity to work because of illness.**
>
> **13**
>
> **In such a case, it must be noted that a provision such as the one in question results in practice in discrimination between male and female workers and is, in principle, to be regarded as contrary to the objective pursued by Article 119 of the EEC Treaty. It would only be otherwise if the different treatment between the two categories or workers is justified by objective factors unrelated to any discrimination on grounds of sex (cf Judgment of 13 May 1986, *Bilka* [1986] IRLR 317, case 170/84 Rec. p.1607)."**

25. It will be noted that the condition in paragraph 11 is that the men and women should do "the same work" and there appears to have been no argument that there would not have been a comparable male worker somewhere employed in Germany. In our case, however, the rule in question although embodied in statute does not apply across the whole of the labour force. It is in my judgment not a legislative provision of the same kind as was envisaged in the ECJ's judgment in **Rinner-Kuhn**. Even if it were, it would require a finding or a concession that there were workers engaged in like work or work of equal value.

Conclusion

26. For the reasons given above, I accept the Respondents' arguments that there must be a female comparator in this case. The Chairman was clearly right in his determination of this preliminary point and, there being no appeal against his determination in the Claimant's favour

of the other preliminary point, his case management directions now apply in this case. I would very much like to thank all Counsel for their helpful oral and written submissions.