JUDGMENT OF THE COURT

13 January 2004 *

In Case C-256/01,

REFERENCE to the Court under Article 234 EC by the Court of Appeal (England and Wales) (Civil Division) for a preliminary ruling in the proceedings pending before that court between

Debra Allonby

and

Accrington & Rossendale College,

Education Lecturing Services, trading as Protocol Professional, formerly Education Lecturing Services

Secretary of State for Education and Employment,

on the interpretation of Article 141 EC,

* Language of the case: English.

THE COURT,

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans, C. Gulmann and J.N. Cunha Rodrigues (Presidents of Chambers), A. La Pergola, J.-P. Puissochet, R. Schintgen, F. Macken, N. Colneric (Rapporteur) and S. von Bahr, Judges,

Advocate General: L.A. Geelhoed,
Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

— Ms Allonby, by T. Gill, barrister, instructed by Michael Scott & Co., solicitors,

— Education Lecturing Services, trading as Protocol Professional, by D. Pannick QC and P. Nicholls, barrister, instructed by KLegal, solicitors,

— the United Kingdom Government, by G. Amodeo, acting as Agent, assisted by N. Paines QC and M. Hall, barrister,

— the German Government, by W.-D. Plessing and R. Stüwe, acting as Agents,

— the Commission of the European Communities, by J. Sack and N. Yerrel, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Ms Allonby, represented by T. Gill and R. Moretto, barrister, of Education Lecturing Services, trading as Protocol Professional, represented by Lord Lester of Herne Hill QC, of the United Kingdom Government, represented by P. Ormond, acting as Agent, assisted by N. Paines, and of the Commission, represented by N. Yerrel, at the hearing on 28 January 2003,

after hearing the Opinion of the Advocate General at the sitting on 2 April 2003,

gives the following

Judgment

1 By order of 22 June 2001, received at the Court on 3 July 2001, the Court of Appeal (England and Wales) (Civil Division) referred to the Court of Justice for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 141 EC.

2 Those questions were raised in proceedings brought by Ms Allonby, who works as a lecturer, against Accrington & Rossendale College ('the College'), Education Lecturing Services, trading as Protocol Professional, ('ELS') and the Secretary of State for Education and Employment ('the Secretary of State') concerning equal pay for men and women.

Legal background

Community law

3 According to Article 2 EC, the Community is to have as its task to promote, *inter alia*, equality between men and women.

4 Under Article 141(1) EC, each Member State is to ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

5 The first subparagraph of Article 141(2) EC states:

'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.'

6 Article 5 of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19) provides:

'Member States shall take the necessary measures to protect employees against dismissal by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal pay.'

7 Article 6 of that directive provides:

'Member States shall, in accordance with their national circumstances and legal systems, take the measures necessary to ensure that the principle of equal pay is applied. They shall see that effective means are available to take care that this principle is observed.'

8 Article 2(1) of Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (OJ 1986 L 225 p. 40), as amended by Council Directive 96/97/EC of 20 December 1996 (OJ 1997 L 46, p. 20, 'Directive 86/378') provides:

'"Occupational social security schemes" means schemes not governed by Directive 79/7/EEC whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to

supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.'

9 Article 5(1) of Directive 86/378 provides:

'Under the conditions laid down in the following provisions, the principle of equal treatment implies that there shall be no discrimination on the basis of sex, either directly or indirectly, by reference in particular to marital or family status, especially as regards:

— the scope of the schemes and the conditions of access to them;

— the obligation to contribute and the calculation of contributions;

...'

10 Article 6(1) of that directive states:

'Provisions contrary to the principle of equal treatment shall include those based on sex, either directly or indirectly, in particular by reference to marital or family status, for:

(a) determining the persons who may participate in an occupational scheme;

(b) fixing the compulsory or optional nature of participation in an occupational scheme;

...'

Domestic law

11 In the United Kingdom, the right to equal pay for men and women is laid down by the Equal Pay Act 1970, section 1 of which provides:

'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

...

(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) 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.

...

(6) Subject to the following subsections, for 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;

(b) ...

(c) two employers are to be treated as associated if one is a company of which the other (directly or indirectly) has control or if both are companies of which a third person (directly or indirectly) has control, and men shall be treated as in the same employment with a woman if they are men employed by her employer or any associated employer at the same establishment or at establishments in Great Britain which include that one and at which common terms and conditions of employment are observed either generally or for employees of the relevant classes.'

12 The Pensions Act 1995 contains provisions which the United Kingdom has been required to adopt as a result of the Court's decision in Case C-262/88 *Barber* [1990] ECR I-1889 and of a number of decisions which followed. Section 62 of that Act, which section 63(4) requires to be construed as one with section 1 of the Equal Pay Act 1970, provides inter alia as follows:

'The equal treatment rule

(1) An occupational pension scheme which does not contain an equal treatment rule shall be treated as including one.

(2) An equal treatment rule is a rule which relates to the terms on which:

(a) persons become members of the scheme, and

(b) members of the scheme are treated.

...'

13 The Secretary of State administers an occupational pension scheme for teachers ('the Teachers' Superannuation Scheme 1988', hereinafter 'the TSS', governed by the Teachers' Superannuation (Consolidation) Regulations 1988 and the Teachers' Superannuation (Amendment) Regulations 1993). The terms thereof confine membership to employment under a contract of employment, whether full-time or part-time, thereby restricting membership of the TSS to teachers with a contract of employment. Moreover, only certain categories of establishment come within its scope.

14 According to the explanations given by the United Kingdom Government at the hearing, the TSS is a scheme for persons employed by public bodies in the

teaching sector. It has been expressly extended to certain categories of employees of private entities by virtue of a procedure which the employer applies in order to be accepted as an employer participating in that fund.

15 According to section 9(1) and (2) of the Sex Discrimination Act 1975:

'Discrimination against contract workers

(1) This section applies to any work for a person ("the principal") which is available for doing by individuals ("contract workers") who are employed not by the principal himself but by another person, who supplies them under a contract made with the principal.

(2) It is unlawful for the principal, in relation to work to which this section applies, to discriminate against a woman who is a contract worker

(a) in the terms on which he allows her to do that work, or

(b) by not allowing her to do it or continue to do it, or

(c) in the way he affords her access to any benefits, facilities or services or by refusing or deliberately omitting to afford her access to them, or

(d) by subjecting her to any other detriment.'

The main proceedings

16 These proceedings arise out of the dismissal, by non-renewal of their contracts of employment, of a number of lecturers of hourly-paid lecturers employed by the College, including Ms Allonby, and the College's decision to engage hourly-paid lecturers only through ELS, which offered lecturers the possibility of being registered as self-employed persons for teaching assignments at institutes of further education.

17 Ms Allonby was originally employed by the College as a part-time lecturer in office technology. She was employed from 1990 to 1996 under a succession of one-year contracts under which she was paid by the hour at a rate determined by the level at which she was teaching.

18 By 1996, the College's financial obligations had become increasingly more onerous because of legislative changes which required part-time lecturers to be accorded equal or equivalent benefits to full-time lecturers, in particular as regards retirement pensions. The College employed 341 part-time lecturers. It decided that in order to reduce its overheads it would terminate or not renew

their contracts of employment, and instead would retain their services as sub-contractors. This was done in Ms Allonby's case by terminating her employment with effect from 29 August 1996 and offering her re-engagement through ELS.

19 ELS operated as an agency, holding a database of available lecturers. Colleges could call on ELS to provide contract lecturers, mentioning the person concerned by name if they so wished. Ms Allonby, and others like her who had to register with ELS if they wanted to continue to work as part-time lecturers, thereby became self-employed. Their pay became a proportion of the fee agreed between ELS and the College. Their income fell and they lost a series of benefits linked to their employment, ranging from sick pay to a career structure. ELS is not an employer contributing to the TSS.

20 Of the 341 hourly-paid part-time lecturers who were made redundant by the College in 1996, 110 were men and 231 were women. Among the College's full-time salaried lecturers, the male:female ratio had gone from 74:40 in the year 1994/95 to 55:50 in 1995/96.

21 ELS's database contained almost as many men as women, namely 18 050 compared with 19 909 on the most recent count available to the tribunal hearing the present case at first instance.

22 Ms Allonby, supported by her union and, on appeal, by the Equal Opportunities Commission, brought proceedings against the College for a redundancy payment and for redress for unfair dismissal and indirect sex discrimination by reason of the dismissal.

23 Ms Allonby brought a further set of proceedings alleging, first, that the College was discriminating against her as a contract worker contrary to section 9 of the Sex Discrimination Act 1975, that ELS was obliged by law to pay her equally — that is, pro rata — with a full-time lecturer at the College and that the State, represented by the Secretary of State, was acting unlawfully in denying her access, as a self-employed worker, to the TSS. Both sets of proceedings are in the nature of a test case for others similarly affected.

24 The redundancy claim was settled amicably.

25 In July 1997, the Employment Tribunal (United Kingdom) decided, as a preliminary issue, that Ms Allonby was not entitled to use as a comparator for equal pay purposes a male lecturer employed full-time by the College. In April 1998 that tribunal decided that the dismissal by the College was unfair but attracted no redress, and that it constituted indirect sex discrimination but was justifiable. It also held that the claim against the College under section 9 of the Sex Discrimination Act 1975 and those against ELS and the Secretary of State all failed. All those decisions were upheld in March 2000 by the Employment Appeal Tribunal (United Kingdom) which, however, gave permission to appeal on all issues.

26 In the first two claims before the national court, Ms Allonby alleged that her dismissal by the College constituted unlawful indirect sex discrimination and that, by thereafter denying her benefits available to salaried lecturers, the College was discriminating against her as a contract worker on the ground of her sex. Those two claims were remitted for reconsideration by the Employment Tribunal.

27 Regarding the other claims, the national court made the following findings.

28 Against ELS Ms Allonby claims that Article 141 EC entitles her, when she works at the College, to a rate of remuneration equal to that of a male lecturer employed by the College on work which is to be taken to be of equal value. Ms Allonby seeks against ELS a rate of pay equal to that of employed lecturers at the College by means of a comparison with a named teacher, Mr R. Johnson.

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;

— Mr Johnson is employed by the College as a lecturer and is paid by the College at a rate which the College sets;

— Ms Allonby is engaged by ELS on a self-employed basis. She works on specific assignments agreed by her with ELS, at the College or elsewhere. She has no contractual relationship with the College;

— The College agrees with ELS the fee which it will pay for each lecturer. ELS agrees with Ms Allonby the fee which she is to receive for each assignment

and sets the conditions under which its lecturers are to work. The College has no direct control over ELS in those or other matters;

— The College and ELS employ both male and female staff.

30 Against ELS, the College and the Secretary of State Ms Allonby claims access to the TSS. She claims that right either (i) by comparison with a male lecturer employed by the College or (ii) since that pension scheme was set up pursuant to statute, without such comparison if she can show statistically that among the teachers who satisfy all the other conditions for membership, female teachers who can comply with the requirement of being employed under a contract of employment in order to be entitled to membership of the TSS are proportionally much less numerous than male teachers who can do so. Neither the existence of such proof nor the question of objective justification has yet been determined by the courts in the present case. However, the referring court considers that the least inconvenient course is to refer the questions to the Court and then, if the answer makes it appropriate, to order the material facts to be found, thus avoiding duplication of effort.

31 According to the national court, the material circumstances relating to the claim for access to the TSS are the following:

— The TSS was set up by the Secretary of State under powers conferred by primary legislation.

— It is a condition of membership of the TSS that the member be an employee and be engaged as a teacher in a specified category of educational institution. The College is in one of these categories.

— No self-employed person is eligible to be a member of the TSS.

— The TSS provides old age pensions and other benefits calculated principally by reference to the duration of the member's employment and to a 'reference salary' earned in employment to which the TSS relates, which need not have been the same employment throughout but must have been at eligible establishments.

— The rates of pay which determine the level of benefits under the TSS may differ between employers.

— The benefits payable under the TSS are funded by contributions from the members of the TSS and their employers.

— No lecturer engaged by ELS is engaged as an employee. In consequence, none is eligible for membership of the TSS.

32 It appears from the explanations given by the United Kingdom Government that it is open to ELS to contribute to the TSS in respect of teachers employed by it.

The questions referred to the Court

33 The first question which arises for the Court of Appeal is whether two people working in the same service or establishment, albeit under contracts with different employers, must nevertheless be regarded as working in the same employment for the purposes of Article 141 EC, at least where the work is done for the purposes and benefit of the employer whose establishment it is. According to the national court, only if the answer is 'No' is there no conflict between Article 141 EC and section 1(6) of the Equal Pay Act 1970.

34 It is clear, first, that Ms Allonby's contract is not with the College but with ELS and, second, that ELS and the College are not associated employers within the meaning of section 1(6)(c) of the Equal Pay Act 1970. Mr Johnson is not then 'employed by [the same] employer... at the same establishment' within the meaning of that provision. He is employed by the College, albeit at the same establishment.

35 According to the Court of Appeal, the way section 1(6) of the Equal Pay Act 1970 is written makes it possible to construe 'the same employment' in section 1(2)(c) as also covering work in the same establishment or service. However, the original wording of that act makes that interpretation improbable. Ms Allonby has therefore to fall back on Community law, whether as an aid to the construction of the Equal Pay Act or as directly effective law.

36 For the national court, there is no doubt that, if a comparison with Mr Johnson is to be made, the inequalities are numerous: he has, but she has not, security against unfair dismissal and dismissal for redundancy, and rights to sick pay. Ms Allonby does not argue that her right to equality with Mr Johnson extends

beyond occasions when ELS allocates Ms Allonby to work at the College. But if the argument succeeds there, it should succeed — or at least be available — in relation to other establishments which obtain her services through ELS.

37 Second, the Court of Appeal raises the question whether Ms Allonby may, on the basis of Article 141 EC, claim access to the TSS. It explains in that connection that, in the context of her employment with ELS, Ms Allonby, having only a contract for services, has no access to the TSS.

38 The national court states that if Ms Allonby can rely on Mr Johnson as her comparator, she will be entitled in principle to succeed in this aspect of her claim and that in any event she submits that she is entitled to equality of treatment without providing a male comparator. Ms Allonby relies on the Employment Appeal Tribunal's decision — with which the referring court agrees — that, contrary to the view of the Employment Tribunal, Ms Allonby's contract with ELS, is by virtue of section 1(6)(a) of the Equal Pay Act 1970, a contract of employment for occupational pension purposes.

39 In those circumstances the Court of Appeal (England and Wales) (Civil Division) stayed proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'1. Does Article 141 EC have direct effect so as to enable a woman to claim equal pay with a man in the circumstances of this case?

2. Does Article 141 EC have direct effect so as to entitle Ms Allonby to claim access to the pension scheme either (i) by comparing herself with Mr Johnson or (ii) by showing statistically that a considerably smaller proportion of female than of male teachers who are otherwise eligible to join the TSS can comply with the requirement of being employed under a contract of employment, and by establishing that the requirement is not objectively justified?'

40 Ms Allonby informed the Court at the hearing on 28 January 2003 that the claims which had been remitted to the Employment Tribunal had been settled amicably between her and the College, with payment of compensation but no admission of liability.

The first question

41 The national court submitted the first question to enable it to rule on Ms Allonby's claim for entitlement to remuneration from ELS equal to that of a male lecturer employed by the College.

42 Accordingly, this question must be construed as seeking to ascertain whether, in circumstances such as those of the main proceedings, Article 141(1) EC must be interpreted as meaning that a woman whose contract of employment with an undertaking has not been renewed and who is immediately made available to her previous employer through another undertaking to provide the same services is entitled to rely, vis-à-vis the intermediary undertaking, on the principle of equal pay, using as a basis for comparison the remuneration received for equal work or work of the same value by a man employed by the woman's previous employer.

43 It must be borne in mind at the outset that Article 141(1) EC can be relied on only by workers within the meaning of that provision.

44 However, even if that condition is satisfied, the first question cannot be answered in the affirmative.

45 Admittedly, there is nothing in the wording of Article 141(1) EC to suggest that the applicability of that provision is limited to situations in which men and women work for the same employer. The principle established by that article may be invoked before national courts, in particular in cases of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which work is carried out in the same establishment or service, whether private or public (see, inter alia, Case 43/75 *Defrenne II* [1976] ECR 455, paragraph 40, and Case C-320/00 *Lawrence and Others* [2002] ECR I-7325, paragraph 17).

46 However, where the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment. Such a situation does not come within the scope of Article 141(1) EC. The work and the pay of those workers cannot therefore be compared on the basis of that provision (*Lawrence*, paragraph 18).

47 It is clear from the order for reference that the male worker referred to by Ms Allonby is paid by the College under conditions determined by the College, whereas ELS agreed with Ms Allonby on the pay which she would receive for each assignment.

48 The fact that the level of pay received by Ms Allonby is influenced by the amount which the College pays ELS is not a sufficient basis for concluding that the College and ELS constitute a single source to which can be attributed the differences identified in Ms Allonby's conditions of pay and those of the male worker paid by the College.

49 Moreover, it is clear from the order for reference that ELS and the College are not associated employers within the meaning of section 1(6)(c) of the Equal Pay Act 1970.

50 Therefore, the answer to the first question must be that, in circumstances such as those of the main proceedings, Article 141(1) EC must be interpreted as meaning that a woman whose contract of employment with an undertaking has not been renewed and who is immediately made available to her previous employer through another undertaking to provide the same services is not entitled to rely, vis-à-vis the intermediary undertaking, on the principle of equal pay, using as a basis for comparison the remuneration received for equal work or work of the same value by a man employed by the woman's previous employer.

The second question

51 The second question, which is in several parts, concerns membership of the TSS.

52 First, it must be borne in mind that, according to settled case-law, a pension scheme such as the TSS at issue in the main proceedings, which essentially relates to the employment of the person concerned, forms part of the pay received by

that person and comes within the scope of Article 141 EC (to that effect, see in particular Case 170/84 *Bilka* [1986] ECR 1607, paragraph 22, Case C-262/88 *Barber* [1990] ECR I-1889, paragraph 28, Case C-7/93 *Beune* [1994] ECR I-4471, paragraph 46, and Joined Cases C-234/96 and C-235/96 *Deutsche Telekom* [2000] ECR I-799, paragraph 32).

53 Moreover, Article 141 EC covers not only entitlement to benefits paid by an occupational pension scheme but also the right to be a member of such a scheme (see, in particular, Case C-128/93 *Fisscher* [1994] ECR I-4583, paragraph 12).

Part (a) of the second question

54 Part (a) of the second question seeks to ascertain whether Article 141(1) EC must be interpreted as meaning that a woman in circumstances such as those of the main proceedings is entitled to rely, vis-à-vis the intermediary undertaking and/or vis-à-vis her previous employer, on the principle of equal pay in order to secure entitlement to membership of an occupational pension scheme for teachers, set up under State legislation, of which only teachers with a contract of employment may become members, using as a basis for comparison the remuneration, including such a right of membership, received for equal work or work of the same value by a man employed by the woman's previous employer.

55 As far as the relationship between Ms Allonby and ELS is concerned, the same reasoning as that applied to the first question must be followed.

56 As regards her relationship with the College, it must be held that, following the amicable settlement reached between Ms Allonby and the College while the case was pending before the Court, the question whether Ms Allonby suffered indirect discrimination on grounds of sex as a result of her dismissal and the question whether, if appropriate, she may still claim elements of remuneration from the College on the basis of Article 141(1) EC no longer arise.

57 Accordingly, the answer to part (a) of the second question must be that Article 141(1) EC must be interpreted as meaning that a woman in circumstances such as those of the main proceedings is not entitled to rely on the principle of equal pay in order to secure entitlement to membership of an occupational pension scheme for teachers set up by State legislation of which only teachers with a contract of employment may become members, using as a basis for comparison the remuneration, including such a right of membership, received for equal work or work of the same value by a man employed by the woman's previous employer.

Part (b) of the second question

58 Parts (b) of the second question concerns, first, the State, represented by the Secretary of State, and, second, ELS, as an intermediary undertaking.

59 It is concerned with possible discrimination deriving from legislation.

The first part of part (b) of the second question

60 In so far as the State is concerned, the national court seeks in essence to ascertain whether the requirement of being employed under a contract of employment as a precondition for membership of a pension scheme for teachers, set up by State legislation, must be disapplied where it is shown that, among the teachers who fulfil the other conditions for membership, a clearly lower percentage of women than of men are able to satisfy that condition and it is established that that condition is not objectively justified.

61 In order to answer this question, it is necessary, first, to interpret the concept of 'worker' within the meaning of Article 141(1) EC, second, to determine precisely the category of persons who may be included in the comparison and, third, to examine the consequences of possible incompatibility of the condition at issue with that provision.

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

62 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 III* [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.

63 In that connection, it must be pointed out that there is no single definition of worker in Community law: it varies according to the area in which the definition is to be applied (Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 31).

64 The term 'worker' within the meaning of Article 141(1) EC is not expressly defined in the EC Treaty. It is therefore necessary, in order to determine its meaning, to apply the generally recognised principles of interpretation, having regard to its context and to the objectives of the Treaty.

65 According to Article 2 EC, the Community is to have as its task to promote, among other things, equality between men and women. Article 141(1) EC constitutes a specific expression of the principle of equality for men and women, which forms part of the fundamental principles protected by the Community legal order (see, to that effect, Joined Cases C-270/97 and C-271/97 *Deutsche Post* [2000] ECR I-929, paragraph 57). As the Court held in *Defrenne II*, cited above (paragraph 12), the principle of equal pay forms part of the foundations of the Community.

66 Accordingly, the term 'worker' used in Article 141(1) EC cannot be defined by reference to the legislation of the Member States but has a Community meaning. Moreover, it cannot be interpreted restrictively.

67 For the purposes of that provision, there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration (see, in relation to free movement of workers, in particular Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraph 17, and *Martínez Sala*, paragraph 32).

68 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 services who are not in a relationship of subordination with the person who receives the services (see also, in the context of free movement of workers, Case C-337/97 *Meeusen* [1999] ECR I-3289, paragraph 15).

69 The question whether such a relationship exists must be answered in each particular case having regard to all the factors and circumstances by which the relationship between the parties is characterised.

70 Provided that a person is a worker within the meaning of Article 141(1) EC, the nature of his legal relationship with the other party to the employment relationship is of no consequence in regard to the application of that article (see, in the context of free movement of workers, Case 344/87 *Bettray* [1989] ECR 1621, paragraph 16, and Case C-357/89 *Raulin* [1992] ECR I-1027, paragraph 10).

71 The formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of Article 141(1) EC if his independence is merely notional, thereby disguising an employment relationship within the meaning of that article.

72 In the case of teachers who are, vis-à-vis an intermediary undertaking, under an obligation to undertake an assignment at a college, it is necessary in particular to consider the extent of any limitation on their freedom to choose their timetable,

and the place and content of their work. The fact that no obligation is imposed on them to accept an assignment is of no consequence in that context (see to that effect, in relation to free movement of workers, *Raulin*, paragraphs 9 and 10).

— The category of persons who may be included in the comparison

73 When it is necessary to consider whether a set of rules conforms with the requirements of Article 141(1) EC, it is in principle the scope of those rules which determines the category of persons who may be included in the comparison.

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 to 143 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] ECR I-4389, paragraph 103). On the other hand, in the case of national legislation, in Case 171/88 *Rinner-Kühn* [1989] ECR 2743 (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.

76 If that is the case, the difference of treatment concerning membership of the pension scheme at issue must be objectively justified. In that regard, no justification can be inferred from the formal classification of a self-employed person under national law.

— Legal consequences

77 Where it is found that the requirement of being employed under a contract of employment as a precondition for membership of a pension scheme is not in conformity with Article 141(1) EC, the condition concerned must be disapplied, in view of the primacy of Community law (see, to that effect, Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 24).

78 Having regard to the observations submitted by the United Kingdom Government at the hearing on 28 January 2003, it should be added that, under Article 6(1)(b) of Directive 86/378, which specifies the scope of Article 141 EC as far as employees are concerned, the compulsory or optional nature of membership of an occupational pension scheme must be fixed without discrimination on grounds of sex.

79 In view of the foregoing considerations, the answer to the first part of part (b) of the second question must be that, 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. The formal classification of a self-employed person under national law does not change the fact that a person must be classified as a worker within the meaning of that article if his independence is merely notional.

The second part of part (b) of the second question

80 As far as ELS is concerned, the national court seeks to ascertain in essence whether the applicability of Article 141(1) EC vis-à-vis an undertaking is subject to the condition that the worker concerned can be compared with a worker of the other sex who is or has been employed by the same employer and has received higher pay for equal work or for work of equal value and that a woman cannot therefore invoke statistics in order to claim, on the basis of that provision, eligibility for membership of a pension scheme set up under State legislation.

81 In that connection it must be held that a woman may rely on statistics to show that a clause in State legislation is contrary to Article 141(1) EC because it discriminates against female workers. Where that provision is not applicable, the consequences are binding not only on the public authorities or social agencies but also on the employer concerned.

82 If, for example, an employer employs only workers for whom normal working time does not exceed 10 hours a week or 45 hours a month and, regardless of the sex of the worker, he does not continue to pay remuneration in the event of sickness because a law which discriminates indirectly against women, such as the law at issue in *Rinner-Kühn*, cited above, so permits, female workers can nevertheless invoke Article 141(1) EC against their employer in order to enforce rights which national legislation confers on workers whose normal working time is longer and to ensure that the discriminatory condition is not applied.

83 In such cases, it is the legislature that is the sole source of the difference in treatment referred to in paragraph 18 of the *Lawrence* judgment, cited above.

84 The answer to the second part of part (b) of the second question must therefore be that Article 141(1) EC must be interpreted as meaning that where State legislation is at issue, the applicability of that provision vis-à-vis an undertaking is not subject to the condition that the worker concerned can be compared with a worker of the other sex who is or has been employed by the same employer and who has received higher pay for equal work or work of equal value.

Costs

85 The costs incurred by the United Kingdom and German Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Court of Appeal (England and Wales) (Civil Division) by order of 22 June 2001, hereby rules:

1. In circumstances such as those of the main proceedings, Article 141(1) EC must be interpreted as meaning that a woman whose contract of employment with an undertaking has not been renewed and who is immediately made available to her previous employer through another undertaking to provide the same services is not entitled to rely, vis-à-vis the intermediary undertaking, on the principle of equal pay, using as a basis for comparison the remuneration received for equal work or work of the same value by a man employed by the woman's previous employer.

2. Article 141(1) EC must be interpreted as meaning that a woman in circumstances such as those of the main proceedings is not entitled to rely on the principle of equal pay in order to secure entitlement to membership of an occupational pension scheme for teachers set up by State legislation of which only teachers with a contract of employment may become members, using as a basis for comparison the remuneration, including such a right of membership, received for equal work or work of the same value by a man employed by the woman's previous employer.

3. 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. The formal classification of a self-employed person under national law does not change the fact that a person must be classified as a worker within the meaning of that article if his independence is merely notional.

4. Article 141(1) EC must be interpreted as meaning that where State legislation is at issue, the applicability of that provision vis-à-vis an undertaking is not subject to the condition that the worker concerned can be compared with a worker of the other sex who is or has been employed by the same employer and who has received higher pay for equal work or work of equal value.

Skouris Jann Timmermans

Gulmann Cunha Rodrigues La Pergola

Puissochet Schintgen Macken

Colneric von Bahr

Delivered in open court in Luxembourg on 13 January 2004.

R. Grass V. Skouris

Registrar President