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ALLONBY V ACCRINGTON & ROSSENDALE COLLEGE AND OTHERS - ACCESS TO OCCUPATIONAL PENSION SCHEMES FOR THE SELF-EMPLOYED?

1. Ms Allonby's claim

On 2 April 2003, the Advocate General delivered his opinion in the case of Allonby v Accrington & Rossendale College and others which was referred to the European Court of Justice ("ECJ") by the Court of Appeal.

Debra Allonby was part of a group of part-time lecturers whose employment with Accrington & Rossendale College was terminated. She was then re-engaged as a self-employed lecturer at the College by an agency, Education Learning Services ("ELS"). The College's aim in implementing these measures was to save on operating costs.

Article 141 of the EC Treaty enshrines the principle that male and female workers carrying out equal work or work of equal value should be given equal pay. The benefits Ms Allonby received under the new working arrangement were not as favourable as they had been when she was employed by the College. In particular, she was not permitted access to the Teachers' Superannuation Scheme. Therefore, she brought a claim against the College, ELS and the State for sex discrimination.

2. The questions referred to the ECJ

The Court of Appeal referred two questions to the ECJ regarding female lecturers in Ms Allonby's position:

- whether they may compare themselves, as regards their remuneration (including the conditions governing access to a pension scheme), with a male lecturer remaining in the service of the College; and

- whether they may demand admission to the pension scheme where the condition restricting access to lecturers employed by the College results in a difference in treatment which is not objectively justified.

3. The Advocate General's opinion

In summary, Advocate General Geelhoed concluded as follows:

- Article 141 EC cannot be relied on either against the College or ELS because "pay differences including entitlement to join a pension scheme cannot be attributed to a single source". This is because the discrimination is not being caused by a single employer.

- However, Article 141 "can be relied on against a statutory occupational pension scheme which is solely open to persons… under a contract of employment and is not open to [those]… who teach under contracts for the provision of individual services if it appears that appreciably more women [than] men are affected by

that restriction". In other words, a self-employed worker may have a claim to join a statutory occupational pension scheme if he/she can prove that their exclusion results from indirect sex discrimination (e.g. if appreciably more women than men are affected by it).

NB: such discrimination may be "objectively justified" which, in this instance, will be a question for the national courts (namely, the Court of Appeal).

4. The first question - the arguments and the reasoning

The Advocate General seems to have reached the answer to the first question with some reluctance. In particular, he questioned whether "the courts must turn a blind eye to the fact that… a legal device has been used precisely… in order to evade the consequences of the principle of equal treatment". However, he agreed with the view put forward by the EU Commission that it was the termination of employment itself that was open to challenge.

5. The second question - the arguments and the reasoning

The UK Government argued that a pension scheme could not be in breach of Article 141 in respect of a self-employed worker as he/she has no employer.

However, Advocate General Geelhoed reasoned that, in pursuit of the elimination of pay discrimination under Article 141 EC, employees and the self-employed are placed "on an equal footing". As the statutory terms governing the Teachers' Superannuation Scheme makes a distinction between the two, it is this legislation which is out of step and the UK Parliament "is under a legal duty to ensure that both categories of persons may join the pension scheme under the same conditions".

6. Conclusion and some possible practical implications

The practical and cost implications raised by the Advocate General's opinion include:

- Is the case limited to statutory, industry-wide schemes such as that in the present case?
- Would an employment agency (like ELS) have to participate in the scheme? If not, how would contributions and benefits be calculated?
- What is the effect of the opinion (if it is followed by the ECJ) on the draft Temporary Worker Directive which is designed to eliminate discrimination between agency workers and those directly employed within the same organisation?
- Finally, from what date should such schemes have known that self-employed workers could claim equal access and how far back will successful claims need to be backdated?

It is important to bear in mind that the Advocate General's opinion is not binding on the ECJ. However, if the ECJ were to follow it, both the law and Inland Revenue practice would need to be radically rethought.

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