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Access to occupational pension schemes for self-employed workers?

1 BACKGROUND

On 13 January 2004, the European Court of Justice (ECJ) essentially concluded in *Allonby v Accrington & Rossendale College and others* that a self-employed worker may be able to claim membership of a statutory occupational pension scheme if appreciably more women than men are affected by restricting membership to employees only.

The Temporary Workers Directive (which was designed to eliminate discrimination between self-employed workers engaged through an agency and employees working within the same organisation) has, for the time being, been blocked by some EU Member States (including the United Kingdom). The Allonby decision could, to some extent, step in to fill the void created by the legislation's lack of progress.

2 THE FACTS – A QUICK RECAP

Ms Allonby's claim

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 through an agency, Education Learning Services ("ELS"). The College's aim in implementing these measures was to save on operating costs.

Under Article 141 of the EC Treaty, men and women 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 ("TSS"), a scheme set up under legislation. Therefore, she brought a claim against the College, ELS and the State for sex discrimination.

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The questions referred

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 only to lecturers employed by the College results in a difference in treatment which is not objectively justified.

3 THE ECJ'S DECISION

The ECJ came to the same conclusions on the questions referred to it as the Advocate General (who gave his opinion in April last year) but its reasons were slightly different. In summary, the ECJ decided that:

- the differences in Ms Allonby's pay and conditions could not be "attributed to a single source" (in other words, no single employer could be held responsible for the discrimination);

- consequently, Ms Allonby could not rely on Article 141 so as to compare her pay and conditions to that of a man who continued in the employment of the College (her previous employer);

- if Ms Allonby is a "worker" within the meaning of Article 141, and statistically a much lower percentage of female workers are able to meet the "employee" requirement for membership of the TSS, that "employee" requirement in the legislation cannot stand unless it can be objectively justified;

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- the fact that someone is classified as self-employed under national law "does not change the fact that a person must be classified as a worker within the meaning of [Article 141] if his independence is merely notional";

- when considering the validity of a legislative requirement for membership of an occupational pension scheme, a "worker" does not need to compare him/herself with "a worker of the other sex who is or has been employed by the same employer". Statistical evidence is sufficient.

Therefore, the right to equal pay enshrined in Article 141 could extend to the self-employed. Whilst the concept of "workers" is not defined, the ECJ makes it clear that it should not be interpreted restrictively and factors to be considered for the teachers in this case would include "any limitation on their freedom to choose their timetable, and the place and content of their work". The fact that the worker is not obliged to accept an assignment "is of no consequence in that context".

4 SOME PRACTICAL IMPLICATIONS

The case will now revert to the Court of Appeal (unless settled by the parties) which will need to consider whether there is an objective justification for the difference in Ms Allonby's treatment. Some of the practical questions which clearly need to be thrashed out (hopefully sooner rather than later) include:

- Is the case limited to statutory, industry-wide schemes such as that in the present case, or are private sector schemes equally affected?

- Was the ECJ's decision in this case dictated by its specific circumstances, namely, Ms Allonby's dismissal and almost immediate re-engagement by the College through an agency as part of a cost-saving device?

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- Could an employment agency (like ELS) participate in the scheme? Inland Revenue rules currently scupper this possibility as the self-employed cannot be members of an occupational pension scheme (the law may need to catch up and quickly);

- From what date could self-employed workers claim equal access and how far back will successful claims need to be backdated?

- Are the courts gradually ousting the need for an actual comparator in discrimination cases in favour of merely having to show statistical evidence?

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