**Trinity Term**
**[2013] UKSC 45**
*On appeal from: [2011] CSIH 2*

# JUDGMENT

## North and others (Appellants) *v* Dumfries and Galloway Council (Respondent) (Scotland)

**before**

**Lord Hope, Deputy President**
**Lady Hale**
**Lord Wilson**
**Lord Reed**
**Lord Hughes**

## JUDGMENT GIVEN ON

## 26 June 2013

**Heard on 20 and 21 May 2013**

*Appellant*
Dinah Rose QC
Iain Steele
(Instructed by Unison Legal Services)

*Respondent*
Ian Truscott QC
Linda Marsh
(Instructed by Glasgow City Council Corporate Services)

*Intervener*
Robin Allen QC

(Instructed by Equality & Human Rights Commission)

**LADY HALE (with whom Lord Hope, Lord Wilson, Lord Reed and Lord Hughes agree)**

1. Under the Equal Pay Act 1970, women (or men) whose work is of equal value to that of men (or women) in the same employment are entitled to the benefit of a deemed equality clause in their contracts of employment. This means that if any of their terms and conditions is less favourable than the equivalent term or condition of the men with whom they are compared, they are entitled to have the benefit of that more favourable term, as if it had been included in their original contract of employment. It is therefore necessary to identify the precise terms and conditions with which comparison is to be made. This entails finding an individual or group of the opposite sex who constitute a valid comparator. There are several elements in that task. One involves looking at the *kind of work* the men and the women do: is it "like", or has it been "rated as equivalent", or is it "of equal value"? Another involves looking to see whether there are *material factors other than the difference in sex* which explain the difference in treatment. But a threshold question is whether the men and women are "*in the same employment*". The issue in this case is what that means.

2. The answer would be easy if all it meant was that they were employed by the same employer, the person with whom they all have contracts of employment and who therefore has it within his power to correct the inequality. Unfortunately, it is not that simple. There are occasions when women may be able to compare themselves with men who are not employed by the same employer. However, in United Kingdom law, there are also occasions when women may not be able to compare themselves with men, even though they are employed by the same employer, because they are not employed at the "same establishment". But if that provision erects a barrier to a claim which would otherwise be available under European Union law, it would be our duty to disapply it.

3. Section 1(6) of the Equal Pay Act 1970 provides:

> ". . . 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. " (emphasis supplied)

The Equal Pay Act 1970 has now been repealed and replaced by provisions in the Equality Act 2010 which are intended to be of equivalent effect, but the 1970 Act continues to govern claims, such as those in the present case, which were brought before the 2010 Act came into force.

*The case law so far*

4. Section 1(6) falls into two separate propositions, one contained in the words before and the other contained in the words after "or" where it appears for the second time in the subsection. The first proposition is straightforward: if the woman and her comparator are employed by the same or an associated employer in the same establishment, then they are in the same employment and there is no need to consider the question of common terms of employment: see *Lawson v Britfish Ltd* [1987] ICR 726; *North Cumbria Acute Hospitals NHS Trust v Potter* [2009] IRLR 176.

5. The difficulty comes with the second proposition, where they are employed "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." The interpretation of this proposition has come before the House of Lords on two previous occasions and we have not been invited to depart from the conclusions they reached.

6. In *Leverton v Clwyd County Council* [1989] AC 709, the applicant was a nursery nurse who wished to compare herself with male clerical workers employed by the same local authority under terms and conditions derived from the same collective agreement, known as the "Purple Book". None of the male workers worked at the same establishment as she did and their hours of work were longer and their holidays shorter than those of the applicant. The employment tribunal, the Employment Appeal Tribunal, and the Court of Appeal (by a majority) held that they were not "in the same employment" for the purpose of section 1(6). They took the view that the subsection called for a comparison between the terms and conditions of the applicant and of her comparators and that only if those were "broadly similar" to one another was the test satisfied.

7. The House of Lords disagreed. Lord Bridge of Harwich gave the leading opinion, with which the other members of the appellate committee agreed. He thought that the language of the subsection was clear and unambiguous:

> "The concept of common terms and conditions of employment observed generally at different establishments necessarily

> contemplates terms and conditions applicable to a wide range of employees whose individual terms will vary greatly inter se" (p 745F).

Terms and conditions governed by the same collective agreement seemed to him the paradigm, though not necessarily the only example, of common terms and conditions contemplated by the subsection.

8. But if there was any ambiguity, he would reject a construction which required a "broad similarity" between the terms and conditions of the woman and of her claimed comparators. Such a construction:

> "frustrates rather than serves the manifest purpose of the legislation. That purpose is to enable a woman to eliminate discriminatory differences between the terms of her contract and those of any male fellow employee doing like work, work rated as equivalent or work of equal value, whether he works in the same establishment as her or in another establishment where terms and conditions of employment common to both establishments are observed" (pp 745H – 746A).

It could not have been the intention of Parliament to require a woman to prove "an undefined substratum of similarity" between her terms of employment and his as the basis of a claim to eliminate any discriminatory difference between them.

9. In his view, the reason why Parliament had not simply required that the woman and her comparators be employed by the same employer but had also required that common terms and conditions of employment be observed between two different establishments was that a single employer might operate "essentially different employment regimes at different establishments" (p 746C). He gave the examples of one employer having establishments in London and in Newcastle, where the regimes were quite different, or of a company operating one factory taking over a company operating another factory, where there were quite different collective agreements resulting in quite different structures.

10. *Leverton* was an easy case, because everyone was employed under the same "Purple Book" agreement. But once it is clear that Parliament cannot have been referring to common, or even broadly similar, terms and conditions between the woman and her comparators, it is equally clear that it cannot be a requirement that they are covered by the same collective agreement. In *British Coal Corporation v Smith* [1996] ICR 515, the applicants were canteen workers, canteen manageresses and cleaners, employed at 47 different British Coal Corporation establishments.

Their named comparators were mainly surface mineworkers working at 14 different establishments, some of them the same as the places where the women worked and some of them not. Their terms and conditions were governed by a variety of agreements. It was not disputed that the women could take a comparator from their own colliery or other workplace. The question was whether they could take comparators from other collieries or workplaces.

11. Lord Slynn of Hadley, with whose opinion all the other members of the appellate committee agreed, pointed out that it was obvious why a woman was not limited to comparing herself with men employed in the same workplace as she was: ". . . otherwise an employer could so arrange things as to ensure that only women worked at a particular establishment or that no man who could reasonably be considered as a possible comparator should work there" (p 525H). The inclusion in section 1(6) of the words "which include that one" (that is, the establishment at which the woman works) was at first sight puzzling, but read with the words "and at which common terms . . . are observed" which follow it simply meant that common terms must be observed, not only at the other place but also at the woman's place of work if employees of the relevant class were employed there. It was agreed that the woman did not have to show that she shared common terms and conditions with her comparator, either in relation to those terms which were alleged to constitute the discrimination or in relation to the other terms. What had to be shown was that the different classes of employee shared common terms. It was agreed that the women did so. Hence:

> "What therefore has to be shown is that the male comparators at other establishments and at her establishment share common terms and conditions. If there are no such men at the claimant's place of work then it has to be shown that like terms and conditions would apply if men were employed there in the particular jobs concerned" (p 526F).

The Corporation claimed that this meant that the terms and conditions of the comparators had to be the same in substantially all respects. Lord Slynn rejected this and adopted a test of broad similarity:

> "The purpose of requiring common terms and conditions was to avoid it being said simply 'a gardener does work of equal value to mine and my comparator at another establishment is a gardener.' It was necessary for the applicant to go further and to show that gardeners at other establishments and at her establishment were or would be employed on broadly similar terms. It was necessary but it was also sufficient" (p 527D).

12. The principles to be derived from these two cases are therefore plain. First, the "common terms and conditions" referred to in section 1(6) are not those of, on the one hand, the women applicants and, on the other hand, their claimed comparators. They are, on the one hand, the terms and conditions under which the male comparators are employed at different establishments from the women and, on the other hand, the terms and conditions under which those male comparators are or would be employed if they were employed at the same establishment as the women. Second, by "common terms and conditions" the subsection is not looking for complete correspondence between what those terms are, or would be, in the woman's place of work. It is enough that they are, or would be, broadly similar.

13. It is also plain from the reasoning of both Lord Bridge in *Leverton* and Lord Slynn in *British Coal Corporation* that it is no answer to say that no such male comparators ever would be employed, on those or any other terms, at the same establishment as the women. Otherwise, it would be far too easy for an employer so to arrange things that only men worked in one place and only women in another. This point is of particular importance, now that women are entitled to claim equality with men who are doing completely different jobs, provided that the women are doing jobs of equal value. Those completely different jobs may well be done in completely different places from the jobs which the women are doing.

14. However, it is fair to say that it is not clear from the facts as we have them that this was the actual situation in the *British Coal Corporation* case. Some of the male surface mine workers were working in the same colliery as some of the claimants. It could just be, as suggested by Mr Truscott QC on behalf of the employers in this case, that all the 47 places where the women worked were collieries at which it was possible that surface mineworkers might also work, even though those chosen do not in fact do so. The issue, therefore, is whether the women can compare themselves with men employed by the same employer in other places of work when in practice those men would never be employed to do their current jobs in the same place as the women.

*The facts*

15. These claims are brought by 251 classroom assistants, support for learning assistants and nursery nurses employed in a local authority's schools. The classroom and support for learning assistants are employed in the local authority's education service under the terms contained in a national collective agreement, the Administrative, Professional, Technical and Clerical agreement, known as the "Blue Book". The nursery nurses are employed under a supplement to the Blue Book. They are based at a variety of schools in the local authority's area. Their individual contracts specify the particular school at which they are based and also state that they may be required to work at other locations. They are employed

during the school terms only and work less than 35 hours per week. The convenience of these hours for people with child care or other domestic responsibilities is no doubt one of the reasons why these posts are predominantly held by women.

16. The claimants wish to compare themselves with a variety of manual workers employed by the same local authority, as groundsmen, refuse collectors, refuse drivers and a leisure attendant. They are employed in the authority's combined services, under a different collective agreement, the Scottish Council for Local Authorities' Services (Manual Workers) Scheme of Pay and Conditions of Service, known as the "Green Book". The leisure attendant is based at a swimming pool, but the others are based at various depots in the local authority's area, from which they go out to do their work in a variety of locations. Although some of their work is done at schools, they are not based there. Their individual contracts of employment specify the depot at which they are based and that they may be required to work at other locations. They work full time with a fixed annual leave entitlement. They are entitled to substantial bonus payments or supplements on top of their basic pay, whereas the claimants are not.

17. The authority does employ a small number of manual workers as school janitors. They are based in schools and, like the claimants, work only during the school terms. But the claimants do not wish to compare themselves with the janitors, who are not entitled to the bonuses or supplements which the other manual workers enjoy.

18. It may be worth noting that the employers and trade unions have negotiated a single status collective agreement, known as the "Red Book", which would cover both the claimants and the comparators. But the existing pay and grading arrangements were to remain in force until the employers had completed a job evaluation exercise. This had not been done at the time of the employment tribunal's decision in this case, so the essential terms remained governed by the original Blue and Green Books.

*The proceedings*

19. Most of the claims were lodged between February and December 2006, with the last claim lodged in February 2007. As none of the claimants was employed at the same establishment as their chosen comparators, the local authority applied for a pre-hearing review to have the employment tribunal determine whether or not they were "in the same employment" as defined in section 1(6) of the 1970 Act. The claims were conjoined by order at the outset of the pre-hearing review in December 2007.

20. This is but the first hurdle which the claimants face. If they succeed in jumping it, they will still have to prove that their work is comparable to that of the men. In its original form, the 1970 Act only imposed an equality clause where they were employed in "like work" (now covered by section 1(2)(a)) or "work rated as equivalent" in a formal job evaluation exercise (now covered by section 1(2)(b)). Although both are mentioned in the sample claim form which we have seen, these claims are primarily based on the allegation that the work done by the claimants is of "equal value" to that done by the comparators. Section 1(2)(c) of the 1970 Act (added by SI 1983/1794) applies 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". That issue has yet to be addressed.

21. Furthermore, if the claimants succeed in establishing that their work is of equal value, the employer could still seek to establish that there was a good reason for the difference between their terms and conditions. Section 1(3) of the 1970 Act (as substituted by SI 1983/1794) provides:

> "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 and that factor –
>
> > (a) in the case of an equality clause falling within subsection (2)(a) or (b) above, must be a material difference between the woman's case and the man's; and
> >
> > (b) in the case of an equality clause falling within subsection (2)(c) above, may be such a material difference."

22. This issue, too, has yet to be addressed. Nevertheless, it is important to bear in mind that the question of whether there are other explanations for the difference in treatment is analytically quite distinct from the question whether the claimants and their comparators are in the same employment within the meaning of section 1(6). So too is the question of what modifications to the women's terms and conditions would be necessary to eliminate the less favourable treatment. At times during the argument at all levels in this case, it appears that those distinctions have not been observed.

23. In May 2008, the employment tribunal determined the "same employment" issue in the claimants' favour. The employment judge defined the question in this way, at para 61:

> "In the present case, the claimants and comparators are neither employed under the same terms and conditions nor in the same establishment. It is therefore necessary for the claimants to satisfy the Tribunal that if their comparators were employed at their establishment, they would be employed under broadly similar terms to those that they are employed under at present."

That, as the Court of Session later acknowledged, was exactly the right question.

24. The judge answered that question in the affirmative. It was not enough for the respondents to say that the comparators would never be employed at the same establishment. They did some of their work at schools, there was no suggestion that this work was of less significance than the work they did elsewhere, and when they did work at schools there was no change to their terms and conditions of employment. "There was no persuasive evidence before the Tribunal that in the event they were based at the same establishment as the claimants, the comparators would be employed under terms and conditions other than the Green Book" (para 61 bis). The judge did not at that stage specifically refer to the evidence which had been given for the local authority on which that statement was based (excerpted at para 27 below), although she had earlier referred to some of it when reciting the submissions of the parties.

25. The local authority appealed to the Employment Appeal Tribunal, which handed down judgment allowing the appeal in May 2009: UKEATS/47/08, [2009] ICR 1363. Lady Smith accepted the respondents' argument that a woman who seeks to compare her terms and conditions with those of a man who does not work at the same establishment as she does must first show that there is a "real possibility" that he could be employed there to do the same or a broadly similar job to the one which he does at the other establishment. Such a finding was not open to the Tribunal on the evidence.

26. The claimants then appealed to the Court of Session. Before their appeal was heard, the EAT decided the case of *City of Edinburgh Council v Wilkinson* [2010] IRLR 756. The women claimants were employed by the council on Blue Book terms in a variety of posts in schools, hostels, libraries or social work. They wished to compare themselves with manual workers, including road workers, refuse collectors, gardeners and grave diggers, employed on Green Book terms.

Lady Smith (having revisited the House of Lords authorities discussed above) accepted that the intention of section 1(6) "could be undermined if claimants were required to establish, as fact, that there was a real possibility of their comparators being employed at the same establishments as them". It was enough to show that "it is likely that those comparators would, wherever they worked, always be employed on the same terms and conditions". If they were always employed on the same terms and conditions, it was "legitimate to assume that they would be employed on those terms and conditions at the claimants' establishment and men and women would thus be shown to be in the same employment" (para 77). The paradigm example of the required hypothetical exercise would be where the comparators were always employed under the same collective agreement, as in that case.

27. When the present case came before the Court of Session, in January 2011, that court agreed with Lady Smith's rejection of the "real possibility" test in *Wilkinson*: [2011] CSIH 2, 2011 SLT 203. Nevertheless, Lady Paton (delivering the opinion of the court) held that the evidence did not support the employment tribunal's factual conclusion. She quoted several paragraphs from the evidence of Mr Archibald, for the local authority, at para 35 of her judgment, which included the following:

> "If a manual worker comparator were for any reason to transfer to do their job solely and only in a school context, which would seem an impossible suggestion, then I cannot envisage other than that they would retain core Green Book conditions, but because of the nature of the work undertaken across all educational establishments, their terms and conditions would require to be very significantly varied to make working in such locations possible" (para 32).

In her view, that passage was concerned with a worker who was transferred to do most of his work at a school but remained based at his depot. Later passages in Mr Archibald's evidence hypothesised a manual worker based at a school:

> "Conceivably some new, hybrid, 'handyperson' type job incorporating all the tasks of the comparators could be created – but as to what the terms of such a job would be would be difficult to assess – if it was to remain on Manual Worker terms, because of the job content then the Green Book terms any such postholder would be on (whether doing a hybrid job or his/her current job) would not be similar to those s/he currently enjoys because so many of the provisions of the Green Book which s/he now enjoys would no longer be apt. I cannot imagine even in the hypothetical context the job or jobs being able to remain similar to what they would be now –

> they simply would not fit into any JES manual worker profile – and that would have an effect on their terms and conditions" (para 36).

Hence the claimants had not established that, if the comparators were *based at* the same establishment as the claimants, the comparators would still have been employed on Green Book terms and conditions. The appeal was therefore refused, not because the employment tribunal had applied the wrong legal test, but because the evidence did not support the conclusion on the facts.

28. To complete the chronology, the *Wilkinson* case then came before the Court of Session: [2011] CSIH 70, 2012 SC 423. The Court upheld the decision of the EAT. Lord Eassie held, at para 35, that:

> "What has to be considered is whether if a manual worker, in casu a gardener, refuse collector, or grave digger, whether hypothetically likely or not, were to be located in the claimant's establishment for the performance of his current job he would continue to be employed on terms and conditions applicable to manual workers".

Lady Paton distinguished the case from the present one, because the tribunal had analysed the evidence relating to the terms and conditions of work for the hypothetical transposed worker, and found it not inconceivable that he could be assigned to work at one of the claimants' establishments and that, if so, he would still be employed on Green Book terms. But both she, at para 49, and Lord Hardie, at para 54, disagreed with Lord Eassie's further observation, in para 35, that it was:

> "erroneous (perhaps particularly in an equal value claim) to consider whether, on the transfer of the male comparator hypothetically to the woman's establishment, adjustment might be made to his terms and conditions to dovetail more closely with those of the female claimant".

29. Thus, it would appear that, while the Court of Session has rejected the "real possibility" test, it remains unclear to what extent the Tribunal is obliged to hypothesise about possible adjustments to the terms and conditions which would apply in the unlikely event of the comparator being transferred to work at the same establishment as the claimant.

*Discussion*

30. Not surprisingly, Ms Dinah Rose QC, on behalf of the appellant claimants, argues that the tribunal should not speculate about the adjustments to the comparators' present terms and conditions which might be made in the unlikely event that they were transferred to the claimants' workplace. The hypothesis is that the comparators are transferred *to do their present jobs* in a different location. The question is whether in that event, however unlikely, they would remain employed on the same or broadly similar terms and conditions to those applicable in their current place of work. As Lord Slynn had recognised in the *British Coal Corporation* case, the object of the legislation was to allow comparisons to be made between workers who did not and never would work in the same work-place. An example might be a manufacturing company, where the (female) clerical workers worked in an office block, whereas the (male) manufacturers worked in a factory.

31. She also argues that, the employment tribunal having adopted the correct test, the Court of Session should not have interfered with its findings in fact. The tribunal had founded its conclusion on the first of the two passages of Mr Archibald's evidence quoted in paragraph 27 above. This was contemplating that the manual workers would become based in the claimants' schools in order to do their present jobs, although he could not envisage that ever happening. In the second passage, he was hypothesising the creation of a completely new all-purpose handyman who might plausibly be based in schools. That was an unnecessary and illegitimate hypothesis and the tribunal was clearly entitled to conclude that there was no compelling evidence that the comparators would not be employed on the same or broadly similar terms and conditions in the unlikely event that they became based in schools.

32. Mr Truscott, for the local authority, agrees that there is no need to show a "real possibility" that the comparators could be transferred to do their current jobs in the claimants' workplace. But, he argues, how does the *British Coal Corporation* test work in a factual situation such as this, which goes well beyond what was envisaged in that case? That case was premised on the fact that the comparators *could be* based at the same place as the claimants, even though some of them were not. So, while he agrees that there is no need to show a real possibility that the workers could be co-located, he argues that it should at least be *feasible* that they might be. The evidence of Mr Archibald was clear that it was not.

33. I have no hesitation in preferring the arguments presented by Ms Rose. In the first place, it is by no means clear from the facts reported in the *British Coal Corporation* case that all the women claimants were based in collieries where there might also be surface mine-workers employed. In the second place, there is no hint of a "real possibility" or "feasibility" test in that case and I find it difficult to discern a genuine difference in principle between them. Both add an unwarranted

gloss to the wording of the subsection as interpreted in the *British Coal Corporation* case.

34. In the third place, to adopt such a test would be to defeat the object of the exercise. This is not just a matter of preventing employers from so organising their workplaces that the women work in one place and the men in another. There may be perfectly good reasons for organising the work into different places. But the object of the legislation is to secure equality of treatment, not only for the same work, but also for work rated as equivalent or assessed by the experts to be of equal value. It stands to reason, therefore, that some very different jobs which are not or cannot be carried out in the same workplaces may nevertheless be rated as equivalent or assessed as having equal value. One example is the (female) office worker who needs office equipment in a clean environment and the (male) factory worker who needs machines which create dirt and dust. But another is the (female) factory worker who puts microscopic circuits on silicon chips in one factory and the (male) factory worker who assembles computer parts in another. The fact that of necessity their work has to be carried on in different places is no barrier to equalising the terms on which it is done. It is well known that those jobs which require physical strength have traditionally been better rewarded than those jobs which require dexterity. It is one of the objects of the equality legislation to iron out those traditional inequalities of reward where the work involved is of genuinely equal value.

35. In the fourth place, it is not the function of the "same employment" test to establish comparability between the jobs done. That comparability is established by the "like work", "work rated as equivalent" and "work of equal value" tests. Furthermore, the effect of the deemed equality clause is to modify the relevant term of the woman's contract so as not to be less favourable than a term of a similar kind in the contract under which the man is employed or to include a beneficial term in her contract if she has none (section 1(2)(a), (b) or (c) as the case may be). That modification is clearly capable of taking account of differences in the working hours or holiday entitlement in calculating what would be equally favourable treatment for them both. Moreover, the equality clause does not operate if a difference in treatment is genuinely due to a material factor other than sex (section 1(3)). The "same employment" test should not be used as a proxy for those tests or as a way of avoiding the often difficult and complex issues which they raise (tempting though this may be for large employers faced with multiple claims such as these). Its function is to establish the terms and conditions with which the comparison is to be made. The object is simply to weed out those cases in which geography plays a significant part in determining what those terms and conditions are.

36. In the fifth place, the construction of section 1(6) favoured by the appellants is more consistent with the requirements of European Union law than is the

construction favoured by the respondents. The 1970 Act was the United Kingdom's way of giving effect in United Kingdom law to the principle of equal treatment of men and women, first enshrined in article 119 EEC, then translated into article 141 EC, and now translated into article 157 of the Treaty on the Functioning of the European Union. The Court of Justice held as long ago as 1976, in the case of *Defrenne v Sabena* (Case 43/75) [1976] ICR 547, 566, para 12 that the principle of equal pay for men and women "forms part of the foundations of the community" and has direct effect in the member states in relation to direct discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay. As Advocate-General Geelhoed explained in *Lawrence v Regent Office Care Ltd* (Case C-320/00) [2003] ICR 1092:

> "It is not evident from the wording of Article 141 EC that the comparison must be confined to one and the same employer. Its case law demonstrates that the Court has consistently stood by its requirement that for a finding of direct discrimination there must be a clear difference in pay *vis-à-vis* male co-workers working in the 'same establishment or service' (see, *inter alia*, *Defrenne v Sabena* (Case 43/75) [1976] ICR 547, 567, para 22) or that the difference in pay must have its origin in legislative provisions or provisions of collective labour agreements (*Defrenne*, para 21)." (para 46)

37. There were three categories of case where it was possible to go outside the individual undertaking or service in order to make the comparison: first, where statutory rules applied to the working and pay conditions in more than one undertaking, establishment or service, such as the pay of nurses in the National Health Service; second, where several undertakings or establishments were covered by the same collective works agreement or regulations; and third where terms and conditions were laid down centrally for more than one organisation or business within a holding company or conglomerate (paras 50, 49). This was because:

> "The feature common to the three categories is that regulation of the terms and conditions of employment actually applied is traceable to one source, whether it be the legislature, the parties to a collective works agreement, or the management of a corporate group" (para 51).

38. This was an essential criterion because article 141 was "addressed to those who may be held responsible for the unauthorised differences in terms and conditions of employment" (para 52). Hence:

> "It is clear from the foregoing that the direct effect of article 141 EC extends to employees working for the same legal person or group of legal persons, or for public authorities operating under joint control, as well as cases in which for purposes of job classification and remuneration, a binding collective agreement or statutory regulation applies. In all these cases the terms and conditions of employment can be traced back to a common source" (para 54).

39. In *Lawrence* itself, the Court of Justice agreed that the principle was not limited to situations in which men and women worked for the same employer (Judgment, para 17). But in the case in question, the differences "cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment" (Judgment, para 18). This was because the claimants, women cleaners and catering workers who had previously been employed by North Yorkshire County Council and whose work had then been rated as equivalent to that of men doing jobs such as gardening, refuse collection and sewage treatment, were now working for the private company to whom the cleaning and catering service had been contracted out. They could no longer, therefore, compare their pay and conditions with the men who now worked for a different employer. (It is worth noting that no question had been referred to the court about the effect of the regulations governing the transfer of undertakings.)

40. The position is thus that, for the principle of equal pay to have direct effect, the difference in treatment must be attributable to a single source which is capable of putting it right. As it happens, the researches of counsel have discovered no case in the Court of Justice in which the principle of equal pay has not been applied between men and women who work for the same employer. However, in *Department for Environment, Food and Rural Affairs v Robertson* [2005] EWCA Civ 138, [2005] ICR 750, the Court of Appeal held that the terms and conditions of civil servants working in different Government departments were not attributable to a "single source" for the purpose of article 141 EC. Although they were all the servants of the Crown, responsibility for negotiating and agreeing their pay and conditions had been devolved by delegated legislation to the individual departments concerned. It was common ground that the claimants and their would-be comparators in the Department for Transport, Environment and the Regions were not in "the same employment" within the meaning of section 1(6) of the 1970 Act, because they did not work at the same establishment and common terms and conditions had not been observed in the two departments since the delegation.

41. Mr Robin Allen QC, for the Equality and Human Rights Commission, tells us that it is the view of the Commission that *Robertson* was wrongly decided, because it did lie within the power of the Crown to put matters right. It is not necessary for us to determine that question now. In this case it is quite clear that

the difference in treatment between the claimants and their comparators is attributable to a single source, namely the local authority which employs them and which is in a position to put right the discrepancy if required to do so. If section 1(6) were to operate as a barrier to a comparison which was required by EU law in order to give effect to the fundamental principle of equal treatment, it would be our duty to disapply it. However, for the reasons given earlier, it sets a low threshold which does not operate as a barrier to the comparison proposed in this case.

42. I would therefore allow this appeal and restore the decision of the employment tribunal. The employment judge asked herself the right question and was entitled on the evidence to answer it in the way that she did.