A1/2003/2774, Neutral Citation Number: [2005] EWCA Civ 138

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE
EMPLOYMENT APPEAL TRIBUNAL
MR JUSTICE BURTON (PRESIDENT)

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday 22nd February, 2005

B e f o r e:

LORD JUSTICE MUMMERY,
LORD JUSTICE MAURICE KAY
AND
LORD JUSTICE GAGE

– – – – – – –

MR GUY ROBERTSON & ORS

Appellant

– v –

DEPARTMENT FOR ENVIRONMENTAL FOOD & RURAL AFFAIRS

Respondent

– – – – – – – – –

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
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Official Shorthand Writers to the Court)

MR BRIAN LANGSTAFF QC and MR MICHAEL FORD (instructed by Thompsons) for the Appellant
MR NICHOLAS UNDERHILL QC, MR BRUCE CARR AND MR ALAN PAYNE (instructed by Solicitor, Department for Environment, Food and Rural Affairs) for the Respondent

J U D G M E N T
As Approved by the Court

Lord Justice Mummery :

Introduction

1. The general principle of equal pay, which forms part of the foundations of the European Community, is contained in Article 141(ex−Article 119) of the EEC Treaty:

   "(1) Each member state shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

   (2) For the purposes 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."

2. Six male civil servants have brought this equal pay case. They are all employed in the Home Civil Service, which consists of about half a million civil servants managed under the Civil Service Order in Council 1995 (the 1995 Order). Their union (PCS) and the Equal Opportunities Commission support them in their efforts to invoke the direct effect of the EC equal pay principle against the Government Department in which they work, the Department of Environment, Food and Rural Affairs (DEFRA). Three of the applicants are Executive Officers. The other three are Administrative Officers. They all argue that a comparison should be made between their pay and the higher pay received by two female civil servants, who worked at the relevant date as Senior Personal Secretaries in a different Government Department, the Department of Transport, Environment and the Regions (DETR). The facts of the individual cases and the details of the comparisons sought to be made are contained in an Agreed Statement of Facts. It is unnecessary to include them in this judgment, as the arguments in this court were confined to preliminary issues of law on the interpretation and application of Article 141.

3. Although the male applicants and the chosen female comparators worked under different terms and conditions of employment set respectively by DEFRA and DETR acting under powers delegated to them, they all had one and the same employer, the Crown.

4. The preliminary issue of law, which was directed by the employment tribunal on the agreed facts, is whether it is permissible for civil servants in an equal pay case to use as comparators civil servants of the opposite sex, who work in a different Government Department under different pay and conditions set by that different Government Department. In other words, can cross−departmental comparisons be made, if all those concerned are Crown servants?

5. The employment tribunal ruled on the preliminary point in favour of the applicants and approved the choice of the female comparators: see the extended reasons sent to the parties on 10 January 2003.

6. The Employment Appeal Tribunal took a different view of the legal position. It overturned the ruling and found in favour of DEFRA, but gave permission to appeal: see judgment given by the President (Burton J) reported at [2004] ICR 1289.

Equal Pay Act 1970 (the 1970 Act)

7. The claim is brought under Article 141. It is common ground that the 1970 Act does not permit the applicants' choice of comparators. It is, however, instructive to explain the applicants' problems under the 1970 Act.

8. Applying the statutory direction to transpose the references to men and women in the 1970 Act, the relevant provisions read as follows:

> "1 (1) If the terms of a contract under which a man 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 man is employed (the "man's contract"), and has the effect that−
>
> > (a) where the man is employed on like work with a woman in the same employment−
> >
> > > (i) if (apart from the equality clause) any term of the man's contract is or becomes less favourable to the man than a term of a similar kind in the contract under which that woman is employed, that term of the man'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 man's contract does not include a term corresponding to a term benefiting that woman included in the contract under which she is employed, the man's contract shall be treated as including such a term..."

9. The 1970 Act applies to service for the purposes of a Government Department as it applies to employment by a private person and as if references to a contract of employment included references to the terms of service: s 1(8). Under s1(6) "employed" means− "employed under a contract of service." Related expressions are to be construed accordingly. It is provided by a deeming provision in s 1 (6) (c) (again transposing gender), that

> "×. 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."

10. The applicants accept that, although they have the same employer as the comparators (the Crown), they are not employed "in the same employment." They do not work "at the same establishment" as the two female comparators and "common terms and conditions of employment" have not been observed in DEFRA and DETR since the delegation of pay negotiations and settlements referred to later in this judgment. Cross−departmental comparison is accordingly unavailable under the 1970 Act.

Article 141 and the Single Source Approach of the ECJ

11. Like many other employees in recent years, the applicants looked for support to European Community law. Article 141 embodies a directly effective principle of equal pay on which the applicants are entitled to rely and to have directly enforced in national tribunals and courts: **Defrenne v. SABENA (No 2)** [1976] ECR 455.

12. Article 141 does not contain any detail on the comparison required or permitted by it for the purpose of determining whether there is equal pay for equal work by male and female workers. On that issue litigants have had to bring cases in order to obtain rulings from the Court of Justice on the interpretation of Article 141. Guidance is now available in the judgment of the Court of Justice in **Lawrence v. Regent Office Care Ltd** [2003] ICR 1092, and recently followed by it in **Allonby v. Accrington & Rossendale Further Education College** [2004] IRLR 224, paragraphs 45−46. Most of the excellent arguments in this court focused on the "single source" approach to Article 141 laid down in **Lawrence** and how it applies as between civil servants, who work for the Crown under different pay and conditions set by different Government Departments.

13. In **Lawrence** the Court of Justice held that, for equal pay proceedings to come within the ambit of Article 141(1), the pay differences between workers of different sex performing equal work must be "attributed to a single source." As I understand it, the focus of this rather imprecise approach is on the location of the body responsible for making decisions on levels of pay in the relevant employment or establishment rather than on the identification of the relevant legal source of that decision−making power. The comparator issue does not turn on precise legal analysis or on a comparison of the employment relationships between the workers and their respective employers or, in the case of state workers, on particular constitutional doctrines and arrangements, which condition the nature of the legal relationship between a member state and its civil servants and which are liable to differ from one member state to another.

Discussion of the Lawrence Judgment

14. The applicants in **Lawrence** were female school catering and cleaning staff. They were originally employed by the local authority. The local authority then contracted out to the respondent companies the provision of the relevant services performed by the applicants. The local authority thereby made transfers of the undertakings in which the applicants were employed. The applicants became employees of the respondent companies. The male comparators selected by the female applicants in proceedings seeking equality of pay were, however, still employed by the local authority. On a reference by the Court of Appeal for a preliminary ruling on the interpretation of Article 141(1) the Court of Justice ruled

> " A situation such as that in the main proceedings, in which the differences in the pay conditions of workers of different sex performing equal work or work of equal value cannot be attributed to a single source, does not come within the scope of Article 141(1)EC."

15. In paragraph 15 of its judgment the Court identified three distinguishing features of the case−

> "×..First, the persons whose pay is being compared work for different employers, that is to say, on the one hand the council and, on the other, the respondents. Secondly, the work which the applicants perform for those undertakings is identical to that which some of them performed for the council before the transfer of undertakings. Finally, that work has been recognised as being of equal value to that performed by the chosen comparators employed by the council and continues to be so recognised."

16. The reasoning of the Court on the interpretation of article 141 and its application to those facts is set out in paragraphs 17 and 18 of the judgment−

> "17. There is, in this connection, 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 court has held that the principle established by that article may be invoked before national courts in cases of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which work is carried on in the same establishment or service, whether private or public: see, inter alia, **Defrenne** [1976] ICR 547,58, para 40; **McCarthys Ltd v.Smith** (Case 129/79) [1980] ICR 672,690, para 10, and **Jenkins v. Kingsgate(Clothing Productions)Ltd** (Case 96/80) [1981] ICR 592,613−614, para17.
>
> 18. However, where, as in the main proceedings here, 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."

The Issues

17. Two issues arise on the application of the ruling and the reasoning of the Court of Justice to the agreed facts of this case. It has been assumed, for the purposes of deciding the preliminary point, that the applicants and the female comparators were doing work of equal value.

18. Both issues have significant ramifications for equal pay claims in general and, in particular, for equal pay claims by civil servants.

(1) **The same employer point**
Does the principle of equal pay always and automatically apply (subject, of course, to objective justification) whenever the applicants and the comparators of a different sex are employed by the same employer? (**Lawrence** and the cases cited in paragraph 17 of the judgment in that case make it clear that the equal pay principle is not *limited* to cases where men and women work for the same employer, so that comparisons can be made in some cases between employees who work for different employers).

(2) **The single source point**
On the facts of this case, can the difference in pay between the male applicants working for the Crown in DEFRA and the female comparators working for the Crown in DETR be "attributed to a single source" as laid down in **Lawrence**? If so, who is the responsible body answering to the description of the "single source"?

The Same Employer point: Crown Service

19. On the first point the employment tribunal and the appeal tribunal reached the same conclusion: the simple fact of the applicants and the comparators having the same employer is not in itself sufficient for the purposes of comparing the pay of men and women for equal work: see [2004] ICR at 1307E.

20. Mr Langstaff QC, appearing for the applicants, accepted that in an equal pay case there must be a like for like comparison. He submitted that the question of the comparability of jobs was distinct from the boundaries within which that comparison may be made. He argued that employment by the same employer (common employment) is sufficient for the purposes of making a comparison of pay between the applicants and the comparators. That, it was submitted, is the assumption underlying the authorities on equal pay. The judgment in **Lawrence** had not altered what Mr Langstaff described, but Mr Underhill QC, appearing for DEFRA, disputed, as previously "well understood", namely that it was sufficient for comparability under Article 141 for a person and his or her named comparator

to work for the same employer: see **Macarthys Ltd v. Smith** [1980] ICR 672,690 paragraph 13, cited in **Hasley v. Fair Employment Agency** [1989] IRLR 106, paragraph 21. Where a man and a woman work for the same employer and perform work of equal value, the common employer is, Mr Langstaff submitted, responsible for their pay: he is the person who must objectively justify differences in pay. That, it was submitted, is the position in this case: there is a common employer of both the male applicants in DEFRA and the female comparators in DETR and, for the purposes of the preliminary point, it is assumed that the work performed by the applicants and by the female comparators is of equal value.

21. Mr Langstaff QC further submitted that the Crown cannot escape from this fact or from its responsibility for discriminatory pay differences by "departmentalising" pay negotiations and settlements. Departmentalisation does not create a barrier preventing valid comparisons from being made between the pay of employees in the service of the same employer. To allow the Crown or, for that matter, any other employer, to create an additional artificial barrier by means of restricting comparisons with other employees of the same employer would undermine the effectiveness of the fundamental principle of equal pay for equal work. It would be contrary to the proper approach to Article 141 indicated in the Court of Justice: see **Enderby v. Frenchay Health Authority** [1994] ICR 112 at 150H−151B and paragraph 19 of the opinion of Advocate General Lenz ("for the same employer") and **EC Commission v. Denmark** (Case 143/83) at p430 and pp 434−435, paragraphs 8−11 of the Judgment, concerning the attempted imposition by member states of additional restrictions so as to limit and diminish the scope of the full protection of the principle of equal pay.

22. It is true that, in a typical equal pay case, the comparison is made between men and women working for the same employer, who is normally responsible for the levels of pay in the workforce and for discriminatory differences in pay between the sexes, which the employer is in a position to correct.

23. It is also true that a common employer is not necessary for comparability purposes. Comparisons may also be made between employees working for different employers if they are "in the same employment" or are treated as being "in the same employment" for the purposes of the 1970 Act. The same applies under Article 141. The single source to whom the inequality of pay is attributed under Article 141 is not necessarily the employer of both the applicants and of the comparators. Having a common employer is not necessarily the same as being "in the same employment" or having pay and conditions attributed to a "single source."

24. For comparability purposes, it is may therefore be necessary to look outside the confines of individual contracts of employment and outside the legal relationship to a wider perspective, including such circumstantial matters as the establishments in which the relevant work, for which the workers are paid, is performed, collective labour agreements, relevant legislative provisions and so on.

25. In brief, the concepts of "in the same employment" in s1(2) of the 1970 Act and "single source" attribution in Article 141 are different from the concept of common employment. There is no express requirement that the different concept of common employment should be imported as either a *necessary* or a *sufficient* condition of comparability in equal pay cases. Nor is there any underlying reason for importing such a requirement.

26. Mr Langstaff correctly pointed out that **Lawrence** was not actually concerned with the sufficiency of common employment for comparability purposes. The "single source" test formulated in paragraph 18 of the judgment is, he argued, only applicable where the applicants and the comparators work for different employers, but not where, as here, they work for the same employer.

27. On its facts **Lawrence** was concerned with the different question of comparisons between men and women working for different employers in circumstances where there was no direct link between the employers and no connecting factor between the employees, such as a single collective agreement determining their pay. It was contended that the "single source" approach was designed to deal only with comparisons in a case where there was no common employer.

28. I agree that the issue in **Lawrence** was different from this case and that the judgment of the Court of Justice does not directly deal with the case of a common employer. It appears, however, to lay down an approach of general application. In my judgment the statements of principle in paragraphs 17 and 18 indicate that something more than just the bare fact of common employment is required for comparability purposes. I reject the submission that in those paragraphs the Court of Justice proceeded on the basis that common employment is *sufficient* for comparability purposes. I agree with the appeal tribunal (paragraph 21) that

> "×**Lawrence** is not authority for the proposition that common employment is sufficient. It is rather authority for the proposition that what underlines the applicability of article 141 is that which is ordinarily exemplified by common employment, namely the existence of a common source, the existence of a central responsibility for terms and conditions. If that is absent, then comparability is not available."

29. The opinion of the Advocate General supports the view that Article 141 is addressed generally to those who may be held responsible for unauthorised differences in terms and conditions of employment and that it is not sufficient simply to look at who are the employers of the applicants and the comparators and to proceed to consider "single source" only if they are in not common employment. It is necessary to consider in each case whether the terms and conditions are traceable to one source: see [2003] ICR 1092, paragraphs 30,37−40,46,48−52,54. I agree with the appeal tribunal (see paragraph 18) that the Court of Justice was setting out a justification in the form of a "principled

basis upon which responsibility for difference and discrimination can be pinned" and that the justification is in the "single source" rather than in common employment. The Court of Justice made it clear that it is not necessarily the person with whom the workers have contracts of employment that determines comparability. The relevant body is the one "which is responsible for the inequality and which could restore equal treatment." The body responsible for the state of affairs will often be the same employer of both the applicants and the comparators, but that is not necessarily so. It depends on the circumstances of the particular case as to whether further inquiry be may necessary. If that were not the case, Mr Langstaff's submission would tend to have the extravagant consequence that every civil servant would be entitled to compare himself or herself with any other civil servant of the opposite sex, subject only to objective justification by the employer of differences in pay. That does not seem to be a sensible or practical approach to the preliminary task of identifying appropriate workers in circumstances comparable to the applicants. In my judgment the tribunals below were right to reject it. On my reading of **Lawrence** the approach of EC law is to locate the single source with the body responsible for setting the relevant terms. This is not determined by only addressing the formal legal question of the identity of the employer.

The Single Source Point: the Crown as "single source"

30. The second issue is, I think, more difficult. It was submitted by Mr Langstaff that the employment tribunal was legally correct in holding that the Crown, as well as being the employer, is the "single source" referred to in **Lawrence.** The Crown is the body responsible for the unequal pay between the applicants and the comparators. It is the source of pay. It is the body that can restore equal pay. The applicants' argument, though accepted by the employment tribunal, was rejected by the employment appeal tribunal as erroneous in law.

31. The general proposition certainly has considerable force. Almost by definition the employer is, via the contract of service, in control of the employee and the terms and conditions, including pay, on which he is employed. The individual departments have delegated discretion exercisable in day to day decision making, but control is ultimately with the Crown as employer. Departmentalisation of pay negotiations and settlements has not diminished that central control. It has made no difference, as the applicants and the comparators in the departments continue to have the same employer. The Crown is the paymaster, the single source of power over pay, with the ability to use that control to create inequality and to restore equality. Responsibility rests with the holder of that controlling power. The departmental discretions do not constitute a barrier to pay comparisons in the application of the principle of equal pay. Unequal pay requires objective justification by the person responsible for creating the discriminatory difference. Simply saying that different departments are responsible is not a justification. The Crown should not be able to escape the burden of objective justification of pay differences by creating different departments and devolving discretion to them to conduct pay negotiations and to reach pay settlements.

32. An assessment of the position has to be undertaken on the basis of the agreed facts in order to ascertain the body responsible for the difference in pay between men and women for what is assumed to be equal work. The legislative, official and evidential materials relevant to the restructuring of the employment of civil service in the 1990's are very fully set out in the judgment of the Employment Appeal Tribunal (see paragraphs 10−12). No useful purpose would be served by repetition of all the materials in another reported judgment. What matters is the interpretation of the materials and the end−result of the changes which have been made in the determination of the terms and conditions of service of civil servants on a departmental basis in DEFRA and in DETR.

Delegation to Individual Departments and the single source.

33. Government is carried on through civil servants employed by the Crown. They work principally in departments established either by statute or by prerogative powers exercised by Orders in Council. (Civil servants also work in other Executive Agencies which are not relevant for present purposes). The departments can be created, abolished or merged. Their responsibilities can be re−allocated. All of this can be done under prerogative powers, confirmed by the Ministers of the Crown Act 1975.

34. The Home Civil Service is managed under the 1995 Order, as amended, issued under the Royal Prerogative. The 1995 Order lays down certain requirements in relation to all civil servants. Under it the Civil Service Management Code (the Management Code) has been amended from time to time. The 1995 Order gives the Minister for the Civil Service (the Prime Minister advised by the Cabinet Secretary, as Head of the Civil Service) power to make regulations and to give instructions for the management of the Home Civil Service and in relation to such matters as remuneration and other terms and conditions of employment of civil servants.

35. The power to negotiate and set most aspects of pay of the civil servants employed in DEFRA was delegated by the Minister for the Civil Service to that Department by Transfer of Functions Orders dated 26 March 1996 and 20 August 2001 under s1(2) and (5) of the Civil Service (Management Functions) Act 1992. Their effect is that the pay and conditions of civil servants are no longer negotiated nor agreed centrally on a Civil Service−wide basis. This was a deliberate change in policy. Each individual department (and, according to the evidence, there are around 90 departments or Agencies employing civil servants) has delegated to it responsibility for negotiating and agreeing the pay of civil servants employed in its department, subject to compliance with the provisions of the Management Code and subject to overall budgetary control by the Treasury. Fresh collective bargaining arrangements are made by each department on an individual basis with different union officials and on different occasions. Neither the Treasury nor the Cabinet Office is involved in the negotiations and their approval of settlements is not required. There is no co−ordination between the different sets of negotiations. It has not been suggested that the change from central to departmental pay negotiations and agreements was made in order to avoid the impact of the equal pay legislation or Article 141 of the EC Treaty or was other than genuine.

Departments have actively used their discretion to introduce pay systems and negotiate pay settlements that best suit their particular needs. In consequence there is now significant divergence in the pay scales and terms of service applying in different departments. As the employment tribunal found in paragraph 43 of its decision, individual departments are free to negotiate and agree upon most terms and conditions of employment. Rates of pay differ significantly from one department to another. Most of the similarities in terms and conditions that remain as between departments are a matter of choice.

36. I agree with the conclusion of the appeal tribunal on this point (paragraph 29)

> " We conclude that the tribunal erred in law in concluding that the Treasury had material control over the terms and conditions, or that such was an answer to the "single source" test. In the light of the evidence that was before the tribunal, and upon the basis of the present legal structure described above, it is quite clear to us that no other answer can be given but that it is the individual departments, which fix the terms and conditions, which are responsible for any equality and which can restore equal treatment, and that in the present state of diversity of terms and conditions there is no single source, certainly not the Treasury, and not the Minister for the Civil Service, to which the "differences identified in the pay or conditions of workers performing equal work or work of equal value can be attributed."

Two Further points

37. Two further closely related points were taken in support of the applicants' contention that, notwithstanding delegation, the Crown is the single source to which responsibility for pay and other terms and conditions of service are attributed. It was submitted that (a) delegation to Government Departments has not divested the Crown of the power to regulate the pay of civil servants; and, even if it has, (b) the Crown has the power to revoke, at any time and without formality, the delegation of power to the departments.

38. On each of these points I would register a note of caution about using domestic constitutional arrangements or principles of English public law in the context of the interpretation of an article in the EC Treaty stipulating equal treatment in pay or in the application of a ruling of the Court of Justice on the interpretation of such an article. Regular students of the jurisprudence of the Court of Justice are aware of the obvious need to be realistic rather than legalistic and to think in terms of European Community law and its specific objectives rather than in terms of English law.

Non−divesting/retention of power point

39. It was argued for the first time in the employment appeal tribunal that the Crown continued to be the "single source" or the "body responsible" because delegation under the 1992 Act has not deprived or divested it of the power to intervene and control the pay of the male applicants and their female comparators. The power to make regulations and to give instructions may be exercised concurrently by the Crown (through the Minister for the Civil Service) and the delegate departments without expressly revoking the delegation: see **Huth v. Clarke** [1890] 25 QBD 391 at 394,395. Other authorities (**Gordon Dadds &Co v. Morris** [1945] 2 All ER 616; **Manton v. Brighton Corporation** [1951] 2 KB 393; cf **Blackpool Corporation v. Locker** [1948] 1 KB 349 and **Lewisham Metropolitan BC v. Roberts** [1949] 2 KB 608 at 621−622) were cited for the proposition that "delegation" does not ordinarily signify that a competent authority is divested of power or authority; the exercise of power is committed to another person, but that is subject to resumption of power and authority by the delegator without formally revoking the delegation. Delegation to individual departments should therefore be disregarded in ascertaining the "single source," because there was retained in the Minister for the Civil Service all the powers that were delegated to the individual departments.

40. It was argued that "delegate" in s1(2) of the 1992 Act does not bear any special meaning. There was no transfer of functions or power by the Minister for the Civil Service. There was no delegation of legislative power as in **Locker.** It was simply ordinary delegation of a regulatory power over civil servants with retention of centralised control over pay. That control could be re−asserted by the Minister at any time without formally revoking or amending the delegation under the 1992 Act. (At one point in his oral submissions I understood Mr Langstaff to go as far as saying that in law there was no delegation of relevant powers and functions by the Crown to the departments.)

41. The Employment Appeal Tribunal rejected the retention of power point after a very detailed discussion of the authorities, academic writings and the rival submissions (see paragraphs 31−49). It is unnecessary to go over that ground again or to express a view on the question whether delegation divested the delegator of relevant powers until the delegation has been revoked. In my judgment, the basic difficulty with the point is that it does not address the approach laid down in **Lawrence,** which requires identification of "the body responsible" for the state of affairs on pay of which complaint is made. The critical question is: is there a single body responsible for the discriminatory pay differences of which complaint is made? Retention of power by the Crown after delegation to the Department means that there is a theoretical legal possibility of the Crown exercising its power at some time in the future, but the retention of a legal power, which has not in fact been exercised by the Crown over pay conditions in the particular case, does not make the Crown "the body responsible" for the actual negotiations and decisions on pay by individual departments resulting in the pay differences of which complaint is made.

Revocation of delegation point

42. The second argument proceeds along similar lines and is unacceptable for similar reasons. It is submitted that the Crown is the "single source" to which the terms and conditions of the applicants are attributed, because the delegation under the 1992 Act can be revoked or altered by the Minister for the Civil Service at any time so as to resume the exercise control over and regulate pay and other conditions of service. The real power over pay is in the Crown and not in the delegate department. The Crown is the person responsible for unequal pay and has the responsibility for restoring equal treatment. The position of these civil servants was very different from the workers in **Lawrence.**

43. I would reject this submission as inconsistent with **Lawrence.** The argument is based on a theoretical legal possibility that delegation will be revoked at some time in the future rather than on recognition of the realities of the existing employment situation. The Department, not the Crown as employer, is actually responsible for conducting the negotiations on pay and other terms and conditions and for reaching agreement on them. I agree with the conclusion of the appeal tribunal on this point in paragraph 30:−

> " ×the fact that the present situation could be changed, that the delegation could be simply revoked, is of no significance if it has not been. A new situation would then arise, which has not arisen."

Result

44. I would dismiss the appeal. There was an error of law in the employment tribunal's interpretation and application of Article 141 to the Agreed Facts. The appeal tribunal rightly allowed the appeal.

45. In my judgment, it is unnecessary for the court to make a reference to the Court of Justice under Article 234 of the Treaty. The recent judgment of the Court in **Lawrence** is clear on the "single source" approach to the selection of appropriate comparators in an equal pay claim under article 141. It is for the national court to apply that approach to the facts of the particular case. The result on the facts of this case is that DEFRA is the "single source" responsible for the applicants' pay and conditions of employment and DETR is the "single source" responsible for the comparators' pay and conditions of employment. There is no "single source" to which the pay of the applicants and of the comparators is attributed. There are two sources of the difference in pay, one for the applicants' pay and the other for the comparators' pay. The simple fact of common employment by the Crown is not sufficient in this case to attribute the terms and conditions to the Crown as the "single source" responsible for determining levels of pay in both DEFRA and DETR.

Lord Justice Maurice Kay

46. I agree.

Lord Justice Gage

47. I also agree.

ORDER: Appeal dismissed; appellant pays the respondent's costs to be subject to a detailed assessment if not agreed; permission to appeal refused.

(Order does not form part of approved Judgment)