I — Introduction

1. A college of further education terminates the employment of its part-time, mostly female lecturers. It subsequently buys in their services again through the intermediary of an agency with which those lecturers are registered as self-employed persons. Through these arrangements the college seeks to achieve savings in operating costs. For the lecturers concerned the arrangements entail a diminution in emoluments in relation to those which they received under the original employment relationship with the college. In that context the following questions have arisen:

— whether the female lecturers concerned may compare themselves, in regard to their remuneration, including the conditions governing access to a pension scheme, with a male lecturer remaining in the service of the college, and

— whether the lecturers concerned may demand admission to the pension scheme where the condition restricting access to that scheme to lecturers who are employees of the college results in an objectively unjustified difference in treatment?

II — Legal framework

A — Community law

2. According to Article 2 EC, the Community has the task of promoting, inter alia, equality between men and women.

3. The principle of equal pay for male and female workers for equal work or work of
equal value is enshrined in Article 141(1) EC. The first subparagraph of Article 141(2) EC provides:

'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.'


(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:

5. In the United Kingdom, the principle of equal pay for men and women is laid down in the Equal Pay Act 1970, section 1 of which provides:

'1. Requirement of equal treatment for men and women in same employment

The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called “principle of equal pay”, means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.'
(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:

(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;

(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.

(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.’

6. The Pensions Act 1995 contains new provisions which the United Kingdom adopted as a result of the Court’s decision in Barber\(^4\) and of a number of decisions which followed. Section 62 of that Act,

(6) Subject to the following subsections, for purposes of this section:

\(^4\) — Case C-262/88 Barber [1990] ECR I-1889
which section 63(4) requires to be construed as one with section 1 of the Equal Pay Act 1970, provides in its first four subsections:

'62. 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.

(3) Subject to subsection (6), an equal treatment rule has the effect that where:

(a) a woman is employed on like work with a man in the same employment;

(b) a woman is employed on work rated as equivalent with that of a man in the same employment; or

(c) a woman is employed on work which, not being work in relation to which paragraph (a) or (b) 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, but (apart from the rule) any of the terms referred to in subsection (2) is or becomes less favourable to the woman than it is to the man, the term shall be treated as so modified as not to be less favourable.

(4) An equal treatment rule does not operate in relation to any difference as between a woman and a man in the operation of any of the terms referred to
in subsection (2) if the trustees or managers of the scheme prove that the difference is genuinely due to a material factor which

(a) is not the difference of sex, but

(b) is a material difference between the woman’s case and the man’s case."

7. The occupational pension scheme for teachers is contained in the Teachers’ Superannuation Scheme 1988 (TSS) and is governed by the Teachers’ Superannuation (Consolidation) Regulations 1988 and the Teachers’ Superannuation (Amendment) Regulations 1993 (TSS regulations). The TSS is administered by the Secretary of State for Education and Employment. Under the rules governing the TSS teachers employed under a contract of employment, whether full-time or part-time, are eligible to join this pension scheme.

9. Ms Allonby was originally employed by the College as a part-time lecturer in office technology. She was employed from 1990 to 1996 on 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. It is not disputed that for present purposes these were continuous contracts of service, carrying with them an employer’s statutory obligations.

10. By 1996, those obligations had become financially more onerous for the employer because of legislative changes which required part-time lecturers to be accorded equal or equivalent benefits to full-time lecturers. The College employed 341 part-time lecturers. In order to reduce its overheads it decided not to renew their contracts of employment and instead to
retain their services as sub-contractors. Ms Allonby's employment was terminated with effect from 29 August 1996. She was informed that she could continue to offer lecturing services at the College as a sub-contractor. To that end she was required to register with ELS. ELS is a company limited by guarantee which operates as an agency, on a commission basis, and holds a database of available lecturers on whom colleges can call, by name if they wish, for lecturing services. Ms Allonby, and others like her who had to register with ELS in order to continue to work as part-time lecturers, thereby became self-employed. Their pay was a proportion of the fee agreed between ELS and the College. Their income fell and they lost a series of benefits attached to their earlier employment. The College, which like most further education colleges was in financial straits, estimated that it would thereby save £13 000 a year.

11. Of the 341 hourly-paid part-time lecturers who were made redundant by the College and were offered the opportunity of again working through the intermediary of ELS in 1996, 110 were men and 231 were women. Also in 1996 the College had 105 full-time salaried lecturers, of whom 55 were men and 50 women and 23 part-time salaried lecturers of whom 12 were men and 11 women.

12. The relationship between men and women on hourly-paid part-time contracts with the College in 1996 reflected the national picture in the United Kingdom, where part-time work is overwhelmingly done by women. On the other hand, ELS's database contained almost as many men as women: 18 050 to 19 909 on the most recent count available to the tribunal of first instance in this case, a difference of less than five per cent.

13. In August 1996 Ms Allonby, supported by her union, brought proceedings against the College. She sought a redundancy payment and claimed that her dismissal was unfair on the basis of unlawful discrimination on the ground of sex. In December 1996 she brought three further sets of proceedings against:

- the College on the ground that it was discriminating against her as a contract worker contrary to the Sex Discrimination Act 1975;

- ELS on the ground that it was obliged by law to pay her equally — that is, pro rata — with a male full-time lecturer at the College; and
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— the State, represented by the Department for Education and Employment, on the ground that it was acting unlawfully in denying her access, as a self-employed worker, to the TSS.

It appears from the case file in the main proceedings that both groups of proceedings are in the nature of a test case for others similarly affected.

14. The redundancy claim was settled. In a decision of 20 August 1997, the Employment Tribunal 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 a series of decisions of 8 July 1998 that tribunal decided that Ms Allonby's dismissal by the College was unfair but attracted no redress, and that it constituted indirect sex discrimination but was justifiable. It also dismissed the claim against the Department for Education and Employment concerning access to the TSS, as well as the claim under section 9 of the Sex Discrimination Act 1975 on the basis that all the service providers made available by ELS to the College, whether women or men, were treated alike. All those decisions were upheld in March 2000 in a group of interlocking judgments by the Employment Appeal Tribunal (United Kingdom) which, however, granted Ms Allonby leave to appeal on all issues.

15. Before the Court of Appeal it was contended on behalf of Ms Allonby that:

(a) Her dismissal by the College constituted unlawful indirect sex discrimination: this issue was remitted to the Employment Tribunal for reconsideration;

(b) The College, by thereafter denying her benefits available to salaried lecturers, was discriminating against her as a contract worker on the ground of her sex. This issue was also remitted for reconsideration by the Employment Tribunal;

(c) ELS was required to pay her equally with a male lecturer employed at the College: this question forms part of the subject-matter of the present reference;

(d) Her exclusion from the TSS constitutes unlawful sex discrimination: this question is also referred for a preliminary ruling.
16. As for claims (c) and (d), the referring court makes the following observations (paragraphs 17 to 20).

17. 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 Ross Johnson.

18. The circumstances material to that equal pay claim are that:

(a) Ms Allonby and Mr Johnson undertake lecturing work of presumptively equal value at the College although not always on the same site;

(b) Mr Johnson is employed by the College as a lecturer and is paid by the College at a rate set by the College;

(c) 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;

(d) 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;

(e) The College and ELS employ both male and female staff.

19. Against ELS, the College and the Secretary of State Ms Allonby claims access to the TSS either (i) by comparison with a male lecturer employed by the College or (ii) since the TSS was set up pursuant to statute, without such comparison if she can show 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. 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 Court of Appeal considers that the least inconvenient course from a procedural point of view is to refer the question to the Court of Justice and then, if the answer makes it appropriate, to order the material facts to be found.

20. The circumstances material to Ms Allonby's pension claims are that:

(a) The TSS was set up by the Secretary of State under powers conferred by primary legislation;

(b) 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;

(c) No self-employed person is eligible to be a member of the TSS;

(d) 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;

(e) The rates of pay which determine the level of benefits under the TSS may differ between employers;

(f) The benefits payable under the TSS are funded by contributions from the members of the TSS and their employers;

(g) No lecturer engaged by ELS is engaged as an employee. In consequence none is eligible for membership of the TSS.

The questions submitted for a preliminary ruling

21. By order of 23 March 2001, which was received at the Court on 3 July 2001, the Court of Appeal referred the following
questions to the Court 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?

Procedure before the Court

22. In the procedure before the Court written observations were submitted by Ms Allonby, ELS, the United Kingdom Government, the German Government and the Commission. Ms Allonby, ELS, the United Kingdom Government and the Commission provided further clarification of their views at the hearing on 28 January 2003.

IV — Assessment

The first question submitted for a preliminary ruling

23. Ms Allonby argues that the facts at issue in the present case are representative of a development in employment relationships of major importance to the effectiveness of the principle enshrined in Article 141 EC of equal treatment of men and women in the employment market. It has become increasingly common for employers to contract out some of their work to subcontractors or recruitment agencies. The workers engaged in connection with contracted-out work customarily work in the same undertaking, establishment or department as workers who have continued to be employed by that undertaking and are frequently engaged on work comparable to that done by such employees. However, remuneration which they receive in that connection may be considerably lower, whilst their status may also differ in the sense that in the performance of individual services they carry on their activities as self-employed persons instead of as employees. Unfavourable consequences may be attached to that difference in status for persons performing contracted-out activities as self-employed persons.
24. If employers adopt the practice of contracting out activities which are performed predominantly by women with the attendant unfavourable consequences on remuneration, the effect is that the protection afforded by Article 141 EC is lost if that provision cannot — any longer — be relied on in such a situation. That is all the more so if employers specifically resort to such arrangements in order to evade the consequences of the principle of equal pay laid down in Article 141 EC. Therefore it is essential for Ms Allonby that Article 141 EC be so construed as to retain its effectiveness also in situations in which establishments, departments or undertakings contract out their activities wholly or in part.

25. Ms Allonby stresses that in the present case the College terminated the employment of part-time staff in order subsequently to re-engage them indirectly, via ELS. In that way the College saves costs attendant on applying legislation concerning the equal treatment of part-time employees. She points out that she continues to perform the same work at the College but under substantially less favourable terms than the comparator selected by her. She further considers that under those circumstances she must be able to compare her work and pay with that comparator.

26. She adds that the fact that the direct employer, ELS, and the indirect employer, the College, are according to national law two separate legal entities does not of itself preclude the application of Article 141 EC. Unlike under section 1(6)(c) of the Equal Pay Act 1970 where the comparator must be employed by the same employer or an associated employer in the same undertaking or group of undertakings, that requirement is not to be found in the Court's case-law. She considers that in order to give full effect to the principle of equal pay for men and women for equal work she must be able to plead the work performed and the pay received by men and women in the same establishment or service, irrespective of who the employer is and with there being no requirement that it must be the same employer. For under the judgment in Defrenne II\(^5\) it is sufficient that a woman and a male comparator are 'in the same establishment or service'. In the present case both she and Mr Johnson work in the same establishment.

27. At the hearing it was stated on behalf of Ms Allonby that it is to be inferred from the recent judgment in Lawrence and Others\(^6\) that in order for reliance to be placed on Article 141 EC the difference in treatment must be attributable to a single source. The Court did not state that the operation of Article 141 EC is confined to men and women who work for the same employer. In Lawrence the difference was not attributable to a single source.

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Ms Allonby asserts that in the present case it is so attributable. For the source of the discrimination is the College when it took its decision to use ELS as an intermediary. She was thereby required, if she wished to continue to lecture at the College, to register with ELS as a self-employed person. Subsequently, the College was able to avail itself via ELS more cheaply of her services. However, she still actually works for the College and subject to the direction and instructions of that establishment. In Ms Allonby’s view, the fact that ELS is not in itself the source of the discrimination does not preclude the applicability of Article 141 EC. For that provision is also applicable where the source of the discrimination is the management of a group of undertakings, a collective labour agreement or a legislative provision. In all those cases the source of the discrimination is outside the purview of the individual employer yet he must in the final analysis pay more to his female employees if discrimination is found.

28. Another feature, according to Ms Allonby, which distinguishes the present case from Lawrence is that that case concerned the transfer of an undertaking. Nor in that case was it established that the transfer of employees was such as to enable the Council to prevent the unequal treatment. Nor after the transfer could the Council any longer determine the individual wages of the transferred employees. However, the present case does not concern the transfer of an undertaking. Moreover, by virtue of its agreement with ELS the College indeed is able to influence the level of the fee paid by ELS to Ms Allonby. For within the scale applied by ELS for various categories the College and ELS agree an hourly rate for lecturers working at the College. Thus under the agreement with ELS the College has a powerful influence on a lecturer’s pay. In its contractual relationship with ELS the College is said to be obliged to apply the principle of equal pay for equal work to men and women working for it and at its schools, regardless of whether they are directly employed or indirectly work for it under the agreement with ELS.

29. According to ELS, the United Kingdom Government, the German Government and the Commission Article 141 EC does not have direct effect in the present case.

30. ELS points out that discrimination in the matter of pay can exist only if it is possible to identify a discriminator, that is to say, a source which can be held responsible for the difference in pay as between men and women. That source may be an individual legal person or even a number of legal persons provided they are subject to common control. However, if the latter requirement is not satisfied and the separate entities pay different rates to their respective employees, there is no basis for a claim to equal pay under Article 141 EC. Only where the different rates of pay are from a single source can the court identify whether the reason for that difference is the
sex of the complainant, and only where there is a common employer can the complainant’s employer explain why there is a difference in pay.

31. ELS points out that it offers services to educational establishments in the whole of the United Kingdom. The lecturers who register with it may state their preference for a specific College and may indicate the periods when they are available. One of the conditions applied by ELS is that the lecturers registered with it work on assignments as self-employed persons. A lecturer is under no obligation to accept a specific assignment. ELS and the lecturer agree a fee for each assignment accepted by the lecturer. A lecturer may accept assignments with several educational establishments. ELS agrees annually with each educational establishment a fee for the services to be provided. The amount thereof is determined on a commercial basis. Finally, ELS points out that the College has no influence on the fee paid by ELS to Ms Allonby and also that ELS has no influence on the remuneration paid by the College to Mr Johnson.

32. ELS explains that, although all the lecturers registered in its database carry out their assignments as self-employed persons, ELS is regarded as the employer in connection with claims under the Equal Pay Act. That is owing to the definition of ‘employed’ in section 1(6)(a) of that law. That definition also encompasses agreements personally to execute any work or labour. That is why Ms Allonby also brought a claim against ELS although ELS has no charge of discrimination to answer.

33. ELS further points out that the aim of Article 141 EC, namely equal pay, requires an analysis of the pay provided by an employer to its male and female workforce. Nor may the concept of pay be interpreted so as to refer to the salaries paid by different employers. In that connection ELS points out that a central element of the concept of pay under the Court’s case-law is that a benefit arose from an employment relationship.

34. ELS points out that Ms Allonby is holding ELS and not her ex-employer responsible for the difference in pay between her and the male comparator employed by the College. If Ms Allonby’s claim is conceded the practical consequences go much further than the facts of the present case. That means, inter alia,

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8 — Judgment in Barber (cited above in footnote 4).
that she must be allowed to compare herself with a male comparator when working in another educational establishment. The consequences for management consultants offices and other intermediaries providing services cannot be overlooked.

35. The United Kingdom Government also points to such consequences which were not intended by Article 141 EC. A pay rise agreed by an employer with his staff could automatically trigger a claim on the basis of unequal pay in the case of another employer, unless that employer also raises the salaries of its staff. Moreover, one employer may not be aware of such pay rises, irrespective of the desirability of such disclosure, particularly in the private sector. For agencies providing staff that would mean that they would be required to pay their staff the same salary as that paid by the client to its staff. Thus an agency could not supply staff until it had ascertained levels of salary and other conditions of employment — including health insurance or sickness benefits often paid by a third party — provided by that client. The agency would then have to ensure the same level of salary for all its staff, irrespective of the client. Conversely, an employee of the client could claim the same salary as that paid to agency staff.

36. The German Government points out that if Article 141 EC were also to have direct effect in regard to pay differences as between different employers the consequence of that would be that the freedom of collective wage bargaining between workers and employers’ organisations would be significantly reduced.

37. In its written observations the Commission put forward two alternatives. The first consists in deeming the College still to be the employer rather than ELS. The arrangement conceived of by the College must be disregarded. This merely serves in order to avoid a direct contractual relationship with Ms Allonby in order thus to circumvent the relevant employment legislation. However, at the hearing the Commission announced that it was abandoning this line of argument. None the less, the Commission considers it unsatisfactory that an employer can significantly reduce rights conferred on employees under Article 141 EC (or other employment legislation) but at the same time is of the view that the solution to that problem is not to be found in an artificial extension of Article 141 EC such as the deeming of a notional employer with all the problems which that entails.
38. The second alternative finally opted for by the Commission entails that, irrespective of whether ELS is not the employer within the meaning of Article 141 EC, a comparison between ‘employees’ and ‘self-employed persons’ is not possible under Article 141 EC. For the latter category does not come within the scope of that article. The right to equal pay can extend only to workers whose situation is governed by the same entity as that of the comparator, since it is only in that case that there is a common source of pay discrepancy. It is inherent in the notion of discrimination that there is ultimately a single source which causes or is responsible for the difference in treatment.

Assessment

39. In my assessment I am proceeding from the starting-point that Ms Allonby continues to work at the same College, albeit as a self-employed person via ELS and performs the same work there as before. Is she entitled as a self-employed person to compare herself with an employee of that College whom I am assuming performs equivalent lecturing duties? Ms Allonby takes the view that the reply must be affirmative. The fact that from a formal point of view the employers are different is in her view not relevant. Moreover, she is demanding that equal pay from ELS. I will deal with these matters separately.

40. In the recent Lawrence judgment the Court noted that 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. To that extent a comparison between her and a comparator at the College would thus be possible.

41. However, the Court also held in that judgment, as I also stated in my Opinion in that case, that 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.

42. If that judgment is applied to the present case the following picture emerges. It is apparent from the order for reference and the case file that Ms Allonby carries out assignments in the context of her agreement with ELS for the provision of services. Indeed she carries out those assignments at the College where her comparator is employed but there is no longer any employment relationship between her and the College. As established by the

9 — Cited above in footnote 6.
10 — Emphasis added.
referring court, that was brought to an end by termination of her employment. Furthermore, the College and ELS apply different working conditions which are determined independently of each other. In that connection ELS determines the remuneration payable to Ms Allonby and the College determines Mr Johnson's remuneration. Although Ms Allonby and Mr Johnson give lectures at the same College the difference in pay between them is not attributable to a single source. On the basis of the case-law mentioned above Article 141 EC is not applicable to that situation with the result that Ms Allonby cannot base a claim against ELS or, possibly, the College on a comparison with Mr Johnson.

43. I could confine myself to this finding which is undeniably supported by the Court's case-law in Lawrence. However, the question is whether the courts must turn a blind eye to the fact that in the circumstances of the main proceedings a legal device has been used precisely, it should be noted, in order to evade the consequences of the principle of equal treatment laid down in Article 141 EC. A change in the legal form of the relationship between Ms Allonby and her original employer, the College, thus results in the loss of the protection conferred by Article 141 EC on Ms Allonby as a female employee.

44. We are here confronted with an illustration of a broader evolution which is emerging in employment relations in the European Community, albeit in a more pronounced fashion in some Member States than in others. On the one hand, it entails that employers are increasingly contracting out to specialised contractors or undertakings more and more activities which they do not regard as central to their undertaking. As the expression of a progressive specialisation in the economy this development should not per se be regarded as undesirable from a social or societal point of view. On the other hand, the phenomenon is emerging whereby in certain occupations the classic employer-employee relationship under an employment contract is being supplanted by contractual arrangements for the provision of services under which the providers of the services operate as self-employed persons. In this connection also the advantages of technical and functional specialisation and diversification mean that this is in principle not an undesirable development from a social or societal point of view.

45. None the less, the legal arrangements instituted as a result of these developments may also be used to evade the consequences of employment-protection legislation or, as in the case of Article 141 EC, legislation which seeks to give effect to fundamental legal principles in regard to the employment market. The facts underlying the present case, as they incontestably appear in the case file of the main proceedings, strongly point in that direction. Ms Allonby's work as a lecturer and the environment in which since August 1996 she has continued to exercise her profes-
46. Incidentally I would observe that both ELS and the United Kingdom Government concede by implication that the changes which have occurred since August 1996 in Ms Allonby's legal position have had very little effect on her functions as a lecturer at the College.

47. The Commission has identified the dilemma arising in this case, namely whether the alteration which has occurred in Ms Allonby's legal position furnishes a ground for widening the Court's case-law concerning the attributability of indirect discrimination to a single source, or whether the legislature should take action against legal devices whose effect is that the protection afforded to persons by Article 141 EC may be undermined.

48. In its written observations the Commission expressed an initial preference for a judicial solution. It initially asserted that the College, although no longer formally the employer, could still be regarded as such for the purposes of Article 141 EC. The idea behind this was to counter what it regards as a misuse of law where employers who dismiss their part-time staff subsequently make use of their services again via an agency, thus seeking to evade the relevant employment-protection legislation, such as equal pay for equal or equivalent work and other social rights conferred on part-time employees. Such 'misuse' could undermine the operation of the principle of equality laid down in Article 141 EC. Accordingly, in cases such as this the decisive factor should not be the legal relations between the original employer and his part-time employees, but the factual relations which none the less remain unaltered.

49. At the hearing the Commission expressly distanced itself from this idea based on a legal fiction. First, there is no common source, within the meaning of the Lawrence judgment, which could be held responsible for the difference in treatment and could correct that difference. For the termination of employment is a fact; there is therefore no longer any link from the point of view of employment law between the College and Ms Allonby which could serve as the basis for restoring equality in terms of pay conditions. The question then
arises as to how long the legal fiction could be used in order to hold the original employer responsible for differences in pay. For by the simple effluxion of time variations in conditions of pay may increase further. Initially the Commission sought to attribute liability to the body which in its view could be held responsible from the outset for the difference occurring, namely the College when it decided to restructure its organisation. The problem in that connection is that the College cannot be held entirely responsible for the difference occurring between Ms Allonby and her comparator. For the fee which Ms Allonby receives for the services provided by her is agreed between her and ELS. The College cannot be held liable for that even if it endeavours in its relations with ELS to ensure that equivalence is maintained as between the remuneration paid to its employees and the subcontractors engaged by ELS. Moreover, it goes without saying that over time maintenance of parity in pay conditions becomes more difficult. This may be accounted for again by the lack of a single source which could be held liable for preserving and restoring parity.

50. I would further point out that in the main proceedings Ms Allonby addressed her claim to ELS. I cannot share the view put forward on Ms Allonby’s behalf at the hearing that there is a single source to which the difference in pay may be attributed (the College) and that she must therefore be able to compare herself with Mr Johnson in order to be able to succeed in her claim for equal pay against ELS. The cause of the difference in the pay received by Ms Allonby when she was employed by the College and the pay which she now receives for her assignments from ELS may perhaps be attributable to the College but certainly not to ELS. In the words of the Court ELS is therefore not the ‘body which is responsible for the inequality and which could restore equal treatment’. On any other view the result would be that one employer (ELS) would have to bear the consequences attributable to another employer (the College) without there being any connection between the body responsible for the inequality and the body required to restore equal treatment.

51. In my view the Commission was correct to point out that in the present case it was the termination of employment itself which was open to challenge on the ground that the projected restructuring of legal relations with the part-time staff produced unequal effects for women. Indeed it was challenged in the present case and Ms Allonby obtained certain satisfaction.

52. Finally, the Commission pointed out that the nub of the problem lies in the fact that working relations are becoming more flexible. Legislative action is required in order to counter the effects of that development which are undesirable from the point of view of social protection. In that

11 — Emphasis added.
connection it has announced a directive which seeks to afford to workers engaged by employment agencies greater protection by analogy with staff in stable employment.

53. I share the view taken by the Commission in this connection, though it is not easy to accept. The unmistakeable phenomenon within the Community of a shift away from traditional employment relationships to more flexible arrangements, such as forms of self-employment, raises the more general question as to the consequences to be drawn from that phenomenon by the Community legislature concerning the specific protection conferred by Community law on workers whether employed or self-employed. The principle of equal treatment, laid down as a fundamental legal principle in Articles 13 and 141 EC and Articles 21(1) and 23 of the Charter of Fundamental Rights of the European Union, is an essential feature of that protection. That justifies specific action by the Community legislature under Article 141(3) EC. In my view such action may precede other measures to ensure the protection of workers for which under Article 137(2)(b) unanimity in the Council is required.

54. I therefore conclude that, as Community law currently stands, in the circumstances of the main proceedings no reliance can be placed on Article 141 EC in order for women to claim equal pay with men.

The second question referred for a preliminary ruling

55. In its second question the referring court seeks to ascertain whether Article 141 EC has direct effect with the result that Ms Allonby can claim access to the TSS, whether on the basis of a comparison of herself with Mr Johnson or on the basis of statistical evidence.

56. As is apparent from the foregoing the status of part-time lecturers who were initially employed at the College and are now engaged through the intermediary of ELS has changed. At the College they worked on the basis of a contract of service; with ELS they work as self-employed persons on the basis of a contract for services.

57. Access to the TSS may be obtained only if work is performed which confers entitlement to access to the pension scheme (pensionable employment). Under the TSS regulations a person is in pensionable employment where that person is employed under a contract of employment but not...
where the person is contractually bound under a contract to provide services.

58. The second question also arises in connection with the fact that Ms Allonby cannot point to a comparator which is a requirement under national pension legislation. Ms Allonby states that such a requirement impedes her claim for access to the pension scheme. She takes the view that, in support of her claim to access to the pension scheme, she may refer to Mr Johnson or, if the reply to the first question and thus also to the first part of the second question is negative, she may show on the basis of statistical evidence that the exclusion from participation in the pension scheme in respect of self-employed workers affects considerably more women than men. This disadvantage is accounted for by the definition in the pension scheme under which persons engaged under a contract to provide services are excluded from the scheme. If she is successful in that claim and there is no objective justificatory ground for such exclusion, the Secretary of State in his capacity as legislator and administrator of the pension scheme will have to change those conditions with the result ultimately that lecturers engaged as self-employed persons under contracts to provide services will be able to join the scheme and their employer ELS will be obliged to contribute to it.

59. Ms Allonby states that (1) the discrimination stems from the definition of persons eligible for access to the TSS, (2) on the assumption that this definition indirectly discriminates against women such discrimination can be detected by a purely legal analysis, and (3) that it is immaterial whether she can point to a comparator with her present employer, ELS, in order to identify the alleged discrimination because the discrimination stems from the conditions governing access over which ELS has no control.

60. Ms Allonby points out that the Court in cases of unequal treatment is satisfied by statistics proving that a practice or condition applied disproportionately disadvantages women. In such situations a comparator who does the same work for the same undertaking or establishment is not required.

61. In support of her claim she relies on the judgments in Rinner-Kühn 12 and Seymour-Smith and Perez 13 in which the discrimination stemmed from legislation. She points out that the same approach has been followed in the case of sector-wide occupational pension schemes, as for example in the Fisscher 14 judgment in which the Court held that the right to access to a scheme

came within the substantive scope of Article 141 EC, that the trustees of the pension scheme must, like employers, comply with the provisions of that article and that workers discriminated against may assert their rights directly against those trustees.

62. Ms Allonby observes that the judgments in *Fisscher*¹⁵ and *Bilka*¹⁶ concerned access to a pension scheme. In that connection the work carried out by the women concerned was not directly in issue. That is in contrast to cases concerning equal benefits under pension schemes. In those cases it may be necessary to determine if the woman is receiving less pension in respect of the same work or work of equal value. Even in such cases the Court has not found it necessary to confine its judgment to circumstances in which there is an actual comparator if it is clear from the terms of the scheme itself that either men or women receive unequal pensions for equal work carried out in the past.

63. She states that as a consequence of the provisions of the TSS a lecturer employed under a contract of employment doing the same work receives more pay by way of pension from his employer than she receives from her employer. She refers to the judgment in *Liefting*¹⁷ and states that in that case, just as in the present case, the employer of a man and a woman may be different. In both cases the discriminator is the legislator and manager of the pension scheme. None the less, Ms Allonby is of the opinion that the pension is in each case pay as it is received from employment and is paid by the employer. She states that the same principle may be deduced from the judgment in *Beune*.¹⁸

64. Ms Allonby takes the view that the judgment in *Coloroll*¹⁹ on which the United Kingdom Government relies in support of its assertion that Article 141 EC is confined to situations in which there is a sexually mixed workforce is of no avail to it. In her view that case concerned an occupational pension scheme covering only one workplace which employed only men. For those reasons there could therefore be no discrimination. In contrast the TSS is a nationwide scheme for both male and female teachers.

65. The United Kingdom Government considers that for the same reasons as in connection with the first question the reply

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¹⁵ — Cited above at footnote 14.
¹⁹ — Cited above at footnote 7.
to the first part of the second question must also be negative. Mr Johnson and his colleagues are eligible to join the scheme because the College has decided to employ them under a contract of service. Conversely, Ms Allonby and her colleagues cannot join the scheme because ELS has opted to engage them under a contract to provide services. As has been established by the courts, the College has no control over ELS as regards the levels of fees paid by it; it certainly could not be suggested that the College controlled whether persons under contract to ELS were eligible to join the TSS. According to the United Kingdom Government, all persons working for ELS are employed under a contract to provide services and are therefore excluded from the TSS. Ms Allonby cannot rely on Article 141 EC because she can point to no comparator.

66. Likewise the United Kingdom Government points to the consequences of the view put forward by Ms Allonby. An agency such as ELS providing staff would then be obliged under Article 141 EC to ensure that the same pension conditions as those applicable to clients’ employees were applied to staff on its database. That would be unworkable. The duty would not only arise in the case of sectoral pension schemes but also where clients have their own occupational pension schemes, which is normal in the private sector in the United Kingdom. It would be impossible for such an agency to secure for its staff membership of a client’s pension scheme. It would be equally impossible for it to set up its own pension scheme under which benefits for different periods of service were calculated in different ways according to the terms of each ELS client’s pension scheme.

67. As far as the second part of this question is concerned the United Kingdom Government observes that in the national proceedings statistical evidence has yet to be produced which would enable the courts to determine the existence of discrimination. The United Kingdom Government doubts whether Ms Allonby can demonstrate that since in regard to ELS alone there is equality as between men and women. On the basis of that relationship of equality it cannot be stated that appreciably more women than men are affected by the contracting-out of tasks. The United Kingdom Government further doubts whether the Court’s case-law in Rimme-Kühn, Liefting and Beune confers on Ms Allonby entitlement to join the TSS — and thus obliges ELS to pay contributions in respect of her — even though ELS is not practising any inequality on the ground of sex as between the male and female lecturers on its database. In the United Kingdom Government’s view the answer in that connection is negative.

68. The United Kingdom Government refers to the Court’s case-law under which pension benefits may constitute pay within the meaning of Article 141 EC when they emanate at least indirectly from the employer. It follows from this that

20 — Judgments in Bilka (cited above at footnote 16) and Beune (cited above at footnote 18).
Article 141 EC is infringed if an employer discriminates on the ground of sex in the payment of pensions. The trustee of an occupational pension scheme shares the employer’s duty to ensure that this does not occur. For he has the express duty of carrying out the employer’s obligations. A trustee must therefore pay in such manner as complies with the employer’s obligation but his duty does not extend further than that.

69. The United Kingdom Government points out that Ms Allonby’s argument implies that the terms of a pension scheme can infringe Article 141 EC without there being any inequality on the ground of sex in pay as between the employees of any participating employer. That is impossible to reconcile, the United Kingdom Government submits, with the grounds on which occupational pensions fall within the scope of Article 141 EC. In its view a pension scheme and its trustee cannot infringe Article 141 EC if there is no breach of that article by a participating employer.

70. The United Kingdom Government further points to another illogical consequence of the view contended for on behalf of Ms Allonby. An employer, in this case ELS, who is according equal treatment to all its lecturers, whether male or female, on terms not entitling them to join the TSS would be obliged in pursuance of the principle of equal treatment to pay employer’s pension contributions for all lecturers of both sexes on its database. In the United Kingdom Government’s view that inverts the relationship between an employer and a trustee, as explained by the Court in Coloroll. Ms Allonby’s argument contrives to impose via the trustee liability under Article 141 EC on an employer to participate in a pension scheme, although that employer is not practising pay discrimination and also does not wish to participate in a pension scheme.

71. It points out that the TSS was set up as a pension scheme for employees of public educational establishments which also offers employees of private establishments the possibility of joining provided an application is made under a specific procedure by the employer concerned. However, establishments such as ELS which engage lecturers on the basis of contracts to provide services have never manifested a desire to participate. It further points out that the United Kingdom has a form of State pension and it is for employers to set up pension schemes in substitution therefor but that it is by no means desirable that they should be compelled to do so.

72. As far as the definition of ‘employment’ is concerned the United Kingdom Government pointed out that there is a difference under national law between a contract of
service and a contract to provide services. The fact that the Equal Pay Act sought to create a right of action for both persons engaged under a contract of service and for persons engaged under a contract to provide services in no way implies in its view a policy decision that persons engaged under a contract to provide services should at all times be treated in the same way as employees.

Likewise the Commission considers that if Ms Allonby cannot rely on Article 141 EC for the purpose of her claim to equal pay nor can she in regard to pension entitlement. For occupational pensions come within Article 141 EC because they constitute pay by the employer. One cannot be viewed in isolation of the other. It observes that the choice made by ELS to engage all lecturers on the basis of contracts to provide services with the consequence that they cannot join the TSS has nothing to do with discrimination on the ground of sex. The Commission also points out that Ms Allonby’s claim would result in a change not only in regard to her but in regard to all staff.

75. As to the first part of the second question I am at one with the view put forward by Ms Allonby, the Commission and the United Kingdom Government, namely that the reply in that connection must be the same as the reply to the first question. Pay for the purposes of Article 141 EC may be defined as all existing and future consideration in cash or in kind which the worker receives directly or indirectly from his employer. The Court has held that pension benefits come within that definition. Accordingly, if Ms Allonby may not in respect of one component of her remuneration compare herself with a specific comparator then nor may she in respect of another component of her remuneration.

Assessment

74. I make the observations set out below concerning the question whether in connection with her claim to entitlement to join the TSS Ms Allonby may compare herself with Mr Johnson or whether a comparator is at all necessary.

76. Since pension benefits come within the concept of pay that means that in that connection no distinction on the ground of sex may be made (1) in regard to entitlement to membership and (2) in regard to the grant of benefits. An employer who did so would be acting in breach of Article 141 EC.
77. In the discussion of the first question it was established that as a result of termination of her employment Ms Allonby now no longer gives lectures at the College on the basis of a contract of employment with the College but as a self-employed person through the intermediary of ELS under a contract to provide services. If she had still been employed by the College as a part-time employee she would have been entitled to join the TSS. The change in her status on the basis of which she carries out her activities has however altered the situation.

78. Irrespective of the situation concerning the status of employee as opposed to self-employed person, it is the case that a comparator or a comparative framework is necessary in order to determine whether there is discrimination on the ground of sex. That is true also of entitlement to membership. In dealing with the first question I already observed that the situation may be unsatisfactory but that Ms Allonby, as the law currently stands, cannot by reliance on the direct effect of Article 141 EC compare herself with a comparator employed by the College.

79. Even though Ms Allonby cannot rely directly on Article 141 EC in order to compare her situation with that of Mr Johnson, that does not mean that there cannot be indirect discrimination stemming from a sector-wide or legislative scheme. In the present case the TSS regulations exclude lecturers who teach under an agreement to provide services. There may be (indirect) discrimination if it appears that appreciably more women than men are affected by this condition of membership. Whether that is the case and whether there is an objective justificatory ground are however matters for the national court.

80. In that connection I wish to make the following observations. The first is that by means of the Equal Pay Act 1970 the United Kingdom is in compliance with its obligations under Directive 75/117. Secondly, following the judgment in Barber and subsequent judgments the United Kingdom enacted the Pensions Act 1995 in order to enshrine the principle of equal treatment in pension legislation as well. The occupational pension scheme for teachers, a national scheme, was set up by the State and is governed by the Pensions Act and the TSS regulations. The latter excludes working relationships under a contract to provide services. The exclusion gives rise to a number of problems which I will discuss below.

81. I am not persuaded by the arguments put forward by the United Kingdom Government to the effect that there can be no discrimination. Naturally I share the view that no charge in that connection may be levelled against ELS or the College. The problem does not lie there. For the problem is in the legislation itself. That is also why Ms Allonby has addressed her claim primarily to the Secretary of State, not so much in his capacity as trustee but rather in his capacity as legislator. The United Kingdom Government’s observation to the effect that the position of a trustee of a
pension fund mirrors the obligations of the employer under Article 141 EC is in itself indeed correct but disregards the fact that the discrimination may also stem from the wording of the legislation itself.

82. By way of illustration I would observe that, in the event that the College had attempted to resolve its financial problems by offering its part-time employees thenceforth only contracts to provide services the College would have been required to offer to those employees pro rata the same pay as it offered to its full-time staff. The Equal Pay Act so provides. None the less part-time workers who are not employed by the College would not be entitled to join the TSS since they do not satisfy the condition of membership. A situation then arises in which employees and self-employed persons cannot be treated equally since the latter are not eligible for the deferred pay in the form of pension benefits. If statistical evidence can then be found to show that women are more seriously affected by this unequal treatment than men Article 141 EC may be directly relied on.

83. In that light I consider there to be an inherent inconsistency in the United Kingdom's reasoning reproduced at paragraph 72 above. It is said that the Equal Pay Act pursues the same objective as Article 141 EC, namely a prohibition of pay discrimination on the ground of sex and, in order to secure the effectiveness of that prohibition, places employees and self-employed persons on an equal footing; that being so, it is difficult to maintain that, in respect of pension benefits, which constitute deferred pay, there is no requirement for such parity.

84. Moreover, it may be inferred from paragraphs 50 and 109 of the order for reference that the Employment Appeal Tribunal ruled that in such a case the contract to provide services must under the terms of the Equal Pay Act be deemed to be a contract of employment for occupational pension purposes. In such a situation Ms Allonby would have been entitled to claim access on the basis of the Pensions Act. However, the fact remains that the TSS as a sector-wide scheme treats lecturers under a contract of employment and lecturers who offer their services as self-employed persons unequally. In so doing this scheme is precisely encouraging educational establishments to have recourse to arrangements such as those underlying the main proceedings. The fact that the Equal Pay Act expressly places both categories of persons on an equal footing in the matter of pay and that the TSS makes a distinction thus creates a situation which, on the supposition that relatively more women than men are affected by it, impinges on the substance of Article 141 EC. In such a case the national legislature is under a legal duty to ensure that both categories of persons may join the pension scheme under the same conditions.
85. The United Kingdom Government’s argument that an employer is not obliged to set up its own occupational pension scheme or to participate in it is not relevant at this stage. Moreover, Ms Allonby considers that private educational establishments are also obliged to contribute to the occupational pension fund in question but that establishments such as ELS on account of the definition used now have no choice. The question arising is whether Ms Allonby on the basis of statistical evidence can show whether the definition used in the TSS regulations is indirectly discriminatory. If she is successful in that, and there is no objective justification, the legislature will be required to enact an amendment. Whether she is then successful in her claim against ELS for it to contribute to the TSS in respect of her is a separate matter. In light of the foregoing I consider that the reply to the question referred must be affirmative.

V — Conclusion

86. On the basis of the foregoing considerations I suggest that the Court should reply as follows to the questions referred by the Court of Appeal (England and Wales) (Civil Division):

‘(1) In a situation such as that in the main proceedings where differences are established as between the pay of lecturers employed by the College and the pay of lecturers who under contracts for services with a third party provide services at the College, Article 141(1) EC cannot be relied on against the College or that third party because the pay differences including entitlement to join a pension scheme cannot be attributed to a single source and there is therefore no entity which can be held responsible for that difference and its elimination.

(2) Article 141(1) EC can be relied on against a statutory occupational pension scheme which is solely open to persons who provide educational services under a contract of employment and is not open to lecturers who teach under contracts for the provision of individual services if it appears that appreciably more women than men are affected by that restriction and there is no objective justificatory ground for it.’