

FEE-PAID JUDICIAL PENSION CASES

MORATORIUM

In **O'Brien v Ministry of Justice** [2013] UKSC 6, the Supreme Court held that the exclusion of fee-paid Recorders from the judicial pensions scheme arrangements fell within the scope of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 and could not be objectively justified.

Accordingly, it is now clear that the exclusion of Recorders from the judicial pension scheme arrangements is in breach of the 2000 Regulations. The Supreme Court did not give a definitive ruling as to whether the exclusion of other types of fee-paid judicial office-holders from the judicial pension scheme arrangements was or was not unlawful under the 2000 Regulations.

In light of the **O'Brien** judgment, the Ministry of Justice will design, formulate and implement a bespoke pension scheme for Recorders which will provide them with a pension going forward and will also remedy the less favourable treatment in respect of appropriate periods of past service. This will inevitably take some time.

The Ministry of Justice is aware that a number of current and former fee-paid Recorders and other part-time judicial office-holders are considering whether to bring claims in the Employment Tribunal under the 2000 Regulations, in which they will claim that they were treated less favourably than comparable full-time judicial office-holders in that they are not entitled to a pension in respect of their non-salaried judicial work.

In March 2013, the Lord Chief Justice proposed to the Lord Chancellor that there be a “moratorium”, which would protect the position of potential claimants without requiring them to present their claims.

The purpose of this arrangement is to remove the need for any potential claimant in a pension-related claim under the 2000 Regulations to lodge a “protective” claim from now on to preserve his or her position.

The Ministry of Justice agrees that this would be the best way forward in this matter.

A flood of new claims would not be in anyone’s interests. They would not be in the claimants’ interests, because they would be put to the cost and inconvenience of presenting their claims; they would not be in the Ministry of Justice’s interests, because the Ministry would be put to the cost and inconvenience of responding to the claims; and they would not be in the Employment Tribunal’s interests because of the administrative burden that they would impose

upon Tribunals. In addition, a moratorium will afford the Ministry of Justice a breathing space to enable it to design, formulate and implement the bespoke pension scheme for Recorders referred to above.

The undertaking that is made by the Ministry of Justice

In order to give effect to the moratorium, the Ministry of Justice gives the following undertakings:

Under regulation 8(2) of the 2000 Regulations, a complaint under the 2000 Regulations must be made before the end of a three month period beginning with the date of the less favourable treatment or, where an act or failure to act is part of a series of similar acts or failures comprising the less favourable treatment or detriment, the last of them. Regulation 8(3) provides, however, that a Tribunal may consider a claim that is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

The Ministry of Justice undertakes that if a present or former fee-paid part-time judicial office-holder (including legal and non-legal tribunal members) is in time for the purposes of regulations 8(2) and (3) as at **1st March 2013** for a pension-related claim under the 2000 Regulations, the Ministry of Justice will not take any time point against him or her arising from the fact that the claim was not presented until some date after 1st March 2013. This means that the Ministry of Justice will accept in any future proceedings in a relevant claim that, if a claim was in time as at 1st March 2013, it would not be just and equitable for a claimant's claim to be struck out because s/he did not present the claim until a later date.

It is for the Employment Tribunal, not the Ministry of Justice, to determine whether a claim is in time. However, the Ministry of Justice believes that, in light of this statement, it is as certain as it can be that an Employment Tribunal would find that a claim of the relevant sort is in time if the claim would have been in time if it had been presented on 1st March 2013. A potential claimant will, therefore, suffer no disadvantage from any delay in claiming after 1st March 2013.

Some potential claimants will be current fee-paid judicial office-holders. This undertaking extends to them, and means that if, at some point in the future, they cease to be fee-paid judicial office-holders, so that time starts to run, the Ministry of Justice will not take a time point against them.

The same applies to any new fee-paid judicial office-holders whose term of office commences after 1st March 2013. The Ministry of Justice undertakes that it will not take any time point against them in relation to a pension-related claim under the 2000 Regulations.

No action need be taken by a current or former fee-paid judicial office-holder to benefit from the moratorium. It is not necessary for them to register their intention to bring a claim with the Ministry of Justice.

This undertaking applies to fee-paid judicial office-holders in England and Wales, Scotland and Northern Ireland.

It is important to note the following:

- (1) This moratorium applies only to pension-related claims: that is, claims that a fee-paid judicial office-holder has suffered less favourable treatment as compared to a comparable full-time judicial office-holder in that the fee-paid judicial office-holder is not entitled to a pension in relation to his or her fee-paid judicial work. The moratorium does not apply to any other type of claim, and so does not apply, in particular, to any other claim of less favourable treatment in relation to the terms and working conditions applicable to fee-paid judicial office-holders;
- (2) For the avoidance of doubt, this is not a concession of liability as regards pensions-related claims under the 2000 Regulations by fee-paid judicial office-holders other than Recorders (who are covered by the **O'Brien** judgment);
- (3) Again for the avoidance of doubt, the Ministry of Justice intends to take time points, where appropriate, against former fee-paid judicial office-holders who are out of time as at 1st March 2013. This applies, for example, to those who have retired, those who have become salaried judges, and may also apply to fee-paid judicial office-holders who moved from one type of fee-paid appointment to another, and to those who have had a break or breaks in fee-paid service;
- (4) The moratorium applies to the time limits in regs 8(2) and 8(3) of the 2000 Regulations. It is made without prejudice to arguments that the Ministry of Justice may advance as to how far back the remedy must go in respect of past service (for example, whether a successful Claimant is entitled to a remedy in respect of service prior to the coming into force of the 2000 Regulations).