Appeal No. UKEAT/0466/13/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8AE

At the Tribunal
On 28 January 2014
Judgment handed down on 4 March 2014

Before

SIR DAVID KEENE

(SITTING ALONE)

THE MINISTRY OF JUSTICE — APPELLANT

MR D P O'BRIEN — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MR JOHN CAVANAGH QC (of Counsel) & Mr CHARLES BOURNE (of Counsel) & MS RACHEL KAMM (of Counsel) Instructed by: The Treasury Solicitors One Kemble Street London WC2B 4TS
For the Respondent	MR ROBIN ALLEN QC (of Counsel) & Ms Rachel Crasnow (of Counsel) Instructed by**:** Browne Jacobson LLP Mowbray House Castle Meadow Rd Nottingham NG2 1BJ

SUMMARY

PART TIME WORKERS

The calculation of the amount of pension to which a retired part-time judge is entitled under the Part-time Workers Directive and the consequential domestic regulations should, as a matter of law, take into account only his period of service since the Directive had to be brought into force, 7th April 2000, and not any earlier period of service when discrimination against part-time workers had not been rendered unlawful under the Directive. This follows from many decisions of the ECJ/CJEU on occupational pensions and reflects the principle well-established in European law of legal certainty. This legal position is *acte clair* and no reference to the CJEU is required.

However, the Claimant was, as a matter of pleading, entitled to argue that his pension calculations should reflect a notional full-day's pay for a full-day's training, even though the fees actually paid had only been for a half-day.

For the purposes of comparison with the position of a full-time circuit judge and the pro-rata calculation of pension for the part-timer, the full-time judge should be taken to work for 210 days per annum.

Appeal by the Ministry of Justice allowed in part.

SIR DAVID KEENE

Introduction:

1. This appeal from an employment tribunal sitting at London Central raises a number of issues as to the determination of the amount of the pension to which the respondent, Mr. O'Brien, is entitled as a person who was a Recorder on the Western Circuit. There is no dispute now that he is entitled to a pension as a former judicial office-holder. His right to such a pension, as a part-time fee-paid judge, was established by the Supreme Court decision dated 6 February 2013: see [2013] UKSC 6, [2013] ICR 499. That decision followed a reference by the Supreme Court to the Court of Justice of the European Union ("the ECJ") and the ruling given by the latter court on 17 November 2011: [2012] ICR 955. The process of litigation has thus been somewhat protracted already, and it may be that this present judgment of mine will not be the end of the story.

2. The Supreme Court in its February 2013 decision remitted the case to the Employment Tribunal for determination of the amount of the pension, commenting as it did so that working out what its conclusion entailed "will not be without its difficulties" (paragraph 76). Employment Judge Macmillan gave judgment on 19 August 2013 on a number of the issues which arose in the process of arriving at such a determination and the Ministry of Justice ("the MOJ") now appeals under section 21(1) of the Employment Tribunals Act 1996 on three of those issues. The right of appeal under that subsection lies on any question of law.

3. Mr. O'Brien was a barrister appointed as a Recorder on 1 March 1978 and he continued sitting as such on a part-time basis until he ceased to hold that office on 31 March 2005. He then wrote to the Department of Constitutional Affairs claiming a retirement pension under the judicial pension scheme on the same basis, adjusted pro rata temporis, as that paid to former full-time salaried judges who had been engaged on the same or similar work. The domestic

legislation provides for the payment of judicial pensions under two statutes, the Judicial Pensions Act 1981 ("the 1981 Act") and the Judicial Pensions and Retirement Act 1993 ("the 1993 Act"). The latter, unlike the former, requires the person retiring from "qualifying judicial office" to have completed at least five years service in such office before becoming entitled to a judicial pension. However, under neither statute is a Recorder a judicial office qualifying for the payment of a pension. Under both schemes, the amount of pension payable to a full-time judge is based upon his or her final year's salary but reflecting the number of years served in that capacity by the date of retirement. There is also a lump sum payable on retirement, the amount being based on the figure for the annual pension.

4. Mr. O'Brien eventually succeeded in his claim under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ("the 2000 Regulations") which came into force on 1 July 2000. Those 2000 Regulations sought to transpose into domestic law the Council Directive 97/81/EC of 15 December 1997, the Part-time Workers Directive ("the Directive"), which had as its purpose the implementation of a Framework Agreement on part-time work concluded between general cross-industry organisations. Part of the purpose of that Framework Agreement was and is "to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work": clause 1(a). The Supreme Court held that there was no objective justification for treating part-time judges less favourably than comparable full-time workers in respect of their pensions on a pro rata temporis basis and that Mr. O'Brien is entitled to a pension on terms equivalent to those applicable to a circuit judge.

5. Some of the issues still live in these proceedings are likely to have implications for other part-time fee-paid judicial office holders, apart from Recorders. There are many such, including deputy district judges and part-time immigration judges: see paragraph 23 of the Supreme

Court's judgment of 6 February 2013. But the choice of a circuit judge as the full-time comparator is to be seen (as I understand the position) as specific to the position of a recorder.

6. I conclude this introduction by recording, in similar fashion to that adopted by Judge Macmillan, that I have no personal interest in the outcome of this appeal. I have been specifically appointed by the Senior President of Tribunals, following consultation with the Lord Chancellor, as a judge of the Employment Appeal Tribunal to hear and determine this appeal. Since I have retired as a full-time judge and have a full judicial pension already vested in me, I have no financial interest, actual or potential, in the outcome of this appeal, and neither party has raised any objection to my dealing with the matter.

The Directive and the 2000 Regulations:

7. The recitals to the Directive include a reference (recital 11) to the desire of the parties to the Framework Agreement "to establish a general framework for eliminating discrimination against part-time workers and to contribute to developing the potential for part-time work on a basis which is acceptable for employers and workers alike". That is indeed part of the Preamble to the Framework Agreement, which is annexed to the Directive. Clause 4 of the Framework Agreement spells out the "Principle of non-discrimination" in the following terms:

> **"1. In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part-time unless different treatment is justified on objective grounds.**
>
> **2. Where appropriate, the principle of pro rata temporis shall apply."**

The Directive was extended to the United Kingdom by Directive 98/23, as a result of which this country was required to bring into force the provisions necessary to comply with the Directive no later than 7 April 2000.

8. The domestic regulations, the 2000 Regulations, include an interpretation provision. By virtue of regulation 1(2),

> **""pro-rata principle" means that where a comparable full-time worker receives or is entitled to receive pay or any other benefit, a part-time worker is to receive or be entitled to receive not less than the proportion of that pay or other benefit that the number of his weekly hours bears to the number of weekly hours of the comparable full-time worker."**

That is further defined by regulation 1(3):

> **"In the definition of the pro rata principle and in regulations 3 and 4 "weekly hours" means the number of hours a worker is required to work under his contract of employment in a week in which he has no absences from work and does not work any overtime or, where the number of such hours varies according to a cycle, the average number of hours."**

9. Regulation 5(1) states, under the heading "less favourable treatment of part-time workers":

> **"A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker-**
>
> **(a) as regards the terms of his contract; or**
>
> **(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer."**

The Issues

10. As I have said, three issues are raised by this appeal. It is convenient to adopt the terminology used by Judge Macmillan when summarising them:

(i) The Year 2000 point. Does the period of reckonable service for the purpose of calculating the amount of Mr. O'Brien's pension and lump sum begin on 7 April 2000, the date by which the Directive should have been transposed into domestic law, or 1 March 1978, the date of his appointment as a Recorder?

(ii) The training days point. For the purposes of this appeal, this issue has become one simply of pleading. Mr. O'Brien sought to argue that his earnings as a recorder should, for the purpose of pension calculation, reflect a full day's fee for attending a day's training course from time to time, rather than the half-day's fee which he was actually paid. The MOJ contended that this argument was not open to him because it had not been expressly pleaded.

(iii) The full-time rate of days point. To apply the pro rata temporis approach, it is necessary to ascertain how many days per annum a full-time circuit judge is required to work in return for his salary. The MOJ argued for a figure of 220 days. Mr. O'Brien advanced a number of propositions, each pointing to a lower figure for the divisor. The judge arrived at a figure of 210 days.

11. By far the most significant of these issues in terms of its practical consequences is the first. For someone in Mr. O'Brien's position, it would seem likely to make a difference between an annual pension of about £1,500 and one around £10,000. The figures do not matter. As Judge Macmillan noted (paragraph 10), if Mr O'Brien is right on this aspect of the case, it is likely to cost the public purse some millions of pounds. The second and third issues are far less significant. The first issue is also of importance because it has implications not only for other types of part-time judge, but also potentially for other part-time workers, who began working as such before 7 April 2000. I shall take each of these issues in turn.

The Year 2000 Point

12. Judge Macmillan noted that, as from 7 April 2000, Mr O'Brien was entitled by virtue of the Directive and later the Regulations not to be treated less favourably in respect of his pension

rights than his full-time comparator, a salaried circuit judge who had also been appointed on 1 March 1978 and retired on 31 March 2005. He recorded the MoJ's submission that no claim in reliance on EU law could be brought in respect of a right arising in a period before implementation of that law unless the law said so or it was absolutely clear from the context that it had retrospective effect and the further submission that the right to a pension did not arise simply at the moment of retirement but instead accrued while reckonable service took place. His judgment includes a reference to *Magorrian v Eastern Health and Social Services Board* (C-246/96) [2002] ICR 979 and *Land Nordrhein-Westfalen v Pokrzeptowicz-Meyer* (C-162/00) [2002] 2 CMLR 1 and to the fact that the MoJ had referred to other ECJ decisions in support of those principles (paragraph 11).

13. He did not find it necessary to deal with those authorities, because he concluded that this issue was determined by the "future effects principle" of EU law and in particular by the way in which that principle had been applied by the ECJ decision in *Istituto Nazionale Della Previdenza Sociale (INPS) v Bruno and Pettini* (C-395/08 and C-396/08) [2010] IRLR 890. He quoted from *Bruno and Pettini* a passage setting out that principle:

> **"According to settled case law, new rules apply, unless otherwise specifically provided, immediately to the future effects of a situation which arose under the old rule (see, to that effect Case 68/69 Brock [1970] ECR 171, paragraph 7; Case 270/84 Licata v ESC [1986] ECR 2305, paragraph 31; Case C-290-00 Duchon [2002] ECR I-3567, paragraph 21; Case C-334/07 P Commission v Freistaat Sachsen [2008] ECR I-9465, paragraph 43; and Case C-443/07 P Centeno Mediavilla and others v Commission [2008] ECR I-10945, paragraph 61)."**

He then went on to say in his concluding paragraphs on this issue:

> **"27. The answer to the question is to be found in *Bruno and Pettini*. It is clear from Art 7.1 of Legislative Decree No 463 that the periods of service of Ms Bruno and her colleagues prior to the date on which the Directive came into effect were relevant for the purpose of calculating their retirement pensions, that is they were relevant to the level of benefits they were to receive. They were also a qualifying period in that if Ms Bruno and her colleagues did not achieve a minimum level of qualifying weeks of work over their life-times they apparently got no pension at all (at least not under that scheme). The effect of those weeks was therefore identical to the**

first five years of service of a judge under the JPRA – they were both qualifying and reckonable.

28. Mr Allen is therefore correct. *Bruno and Pettini* does unequivocally resolve the year 2000 question in Mr O'Brien's favour. By reading paragraph 55 of the judgment in the context of the first referred question and the Legislative Decree to which it relates, the effect of the Court's ruling is seen to be that the future effects principle means that where the calculation date for determining the amount of, as well as entitlement to, a pension falls after the date on which the PTWD came into effect, years of service prior to that date which had previously been excluded for a reason which the Directive now prohibits as unlawful, must be taken into account in the calculation for both purposes. Mr Allen's strictures about the misuse of terms such as 'qualifying' and 'reckonable are also seen to be justified as the former is used in *Bruno and Pettini* to mean both.

29. Accordingly, the answer to the year 2000 question is that Mr O'Brien is entitled to a pension based on service in the office of recorder from 1st March 1978."

14. The MoJ now advances essentially the same arguments which failed to persuade Judge Macmillan. Mr Cavanagh, QC, on its behalf, emphasises that it is agreed that the Directive is not retrospective. He submits that it is clear on the basis of ECJ authorities that pension rights accrue during a worker's service, and not simply at the end of it when he retires, and yet the ECJ does not normally recognize rights under EU law before the date at which those rights are created by EU law. For these propositions, reliance is placed on *Coloroll Pensions Trustees Ltd v Russell* (C-200/91) [1995] ICR 179, *Barber v Guardian Royal Exchange Assurance Group* (C-262/88) [1990] ICR 616, *Ten Oever* (C-109/91) [1995] ICR 74, and *Magorrian* (ante). In all of these ECJ cases, benefits such as pensions payable under occupational pension schemes were regarded as part of the consideration received by the employee in respect of his employment and were a form of deferred pay. As such, they fell within the ambit of Article 119 of the EEC Treaty, which laid down the principle of equal pay between men and women for equal work (now Article 141). If part-time workers could bring themselves within that Article by demonstrating indirect discrimination by reason of sex, then they could in principle claim pension benefits in respect of service from the date of the Article (subject to the temporal limit imposed in *Barber*).

15. But, contends Mr Cavanagh, Mr O'Brien is not relying on EU legislation going back to the time of the EEC Treaty. He is relying on a Directive which only had to be transposed into domestic law by 7 April 2000. Hence it is only those rights to pension benefits which he acquired after that date because of service after that date that he can now rely on when calculating his pension.

16. The MoJ accepts that the future effects principle forms part of EU law, but the principle does not mean that service prior to a law coming into force counts for the purpose of the calculation of pension benefits. *Bruno and Pettini* was not dealing with the calculation of pension benefits. It was concerned with whether the claimants had sufficient service to qualify for membership of the pension scheme at all. For that limited purpose the ECJ was prepared to take into account service before the Directive had to be in force, but the case was only concerned with qualifying service and not with reckonable service, in the sense of service which affected the level of pension payable.

17. Finally, Mr Cavanagh emphasises that to adopt Judge Macmillan's approach would be to place no historic limit of time back beyond which service would not count towards pension benefits. That would be quite unlike the equal pay claims, which never covered service before Article 119 came into being. Moreover, it would make employers liable for a wholly unexpected level of payment, deriving from a period of service when the part-time workers had no lawful claim to equal rights with full-time workers, unless they could rely on Article 119. That would be contrary to the basic EU law principle of legal certainty.

18. On behalf of Mr O'Brien, Mr Allen QC denies that his client is asserting a retrospective claim. A judge's pension rights do not accrue during service. When he or she retires, one simply applies a formula under the relevant statute, and it is to the date of retirement that one

must have regard. It is at that date that the part-time judge is entitled to equal treatment with a comparable full-time judge, taking into account the periods of service of each of them.

19. Reliance is placed on the future effects principle, a long-standing rule of EU law. Pension benefits are future effects of past events which took place under the old law. That is why *Bruno and Pettini* was decided as it was, and that decision resolves this issue. While it is right that that case used the words "qualifying periods", it makes no sense to distinguish such periods of service from "reckonable periods" of service which go to the calculation of the amount of benefit.

20. Cases like *Barber* and *Coloroll* are concerned with a derogation from EU law, applying Article 119 in a limited way. There are no derogation provisions in this Directive.

21. It is argued that there is further support for the ECJ's approach in *Bruno and Pettini* to be found in the way in which both the Advocate-General and the Court dealt with the observations on behalf of Latvia when Mr O'Brien's case was before the ECJ on the reference to it: *O'Brien v Ministry of Justice* (C-393/10) [2012] ICR 955. The Latvian government questioned the admissibility of the reference on the ground that Mr O'Brien's appointment as a recorder had taken place before the date when the Directive had to implemented by the United Kingdom. Latvia argued that the Directive could only be applied to events occurring after the expiry of the transposition period, but the Advocate-General, relying on the decision in *Bruno and Pettini*, was of the opinion that the future effects principle rendered the reference admissible. Mr Allen points out that the Court took the same approach as the Advocate-General in its judgment: paragraphs 24 to 26.

22. It is contended that other examples of the future effects principle being applied can be found in other decisions of the ECJ, notably *Bundesknappschaft v Brock* (Case 68/69 [1970] ECR 171, an accidental injury pension case; *Duchon v Pensionsversicherungsanstalt* (C-290/00), an occupational disability case; and *Filev* (C-297/12), a case concerning the length of entry bans on expelled third-country nationals. Consequently it is submitted on behalf of Mr O'Brien that there is nothing retroactive in taking account of his periods of service before 7 April 2000. To do so merely takes account of past events for the purpose of future payments of his pension. Indeed, it would be absurd, it is said, to take account of pre-April 2000 service for the purpose of ascertaining whether a person qualified for a pension, in accordance with *Bruno and Pettini*, but to ignore such service when it comes to calculating the amount of the pension.

23. Both parties contend that this issue of European law is *acte clair* in its favour but seek a reference to the ECJ if I were to reject its principal submissions on this point.

Discussion of Issue 1

24. I can see the attraction of the argument which says that one simply looks at Mr O'Brien's position at the date of his retirement and this requires him to be put into the same position in terms of the amount of his pension as a salaried circuit judge appointed in 1978 and retiring in 2005, but allowing for the pro rata temporis principle to reflect the lesser amount of sitting done by the part-timer. Mr O'Brien is, after all, to be treated under the terms of the Framework Agreement in a manner not less favourable than his full-time comparator. That is his essential argument in this appeal on the main issue. Part of it rests upon the proposition that judicial pension rights do not accrue year by year but only "crystallise upon retirement", as it is put in the respondent's skeleton argument.

25. That does not seem to be the approach adopted in European law towards benefits payable under occupational pension schemes generally. The ECJ has treated pension benefits as a form of deferred pay and capable as such as coming within the scope of "equal pay" in Article 119. In *Ten Oever* (ante) the Advocate-General said at paragraph 17:

> **"From the legal point of view, this accruing nature of occupational pension schemes leads to a distinction between the coming into being of pension rights, namely as a result of the accrual of the pension on the basis of completed periods of service, and those rights becoming exercisable, namely when the pension falls to be paid for the first time."**

He went on in the following paragraph to note that:

> **"It is the service itself and, <u>in some cases</u>, the relevant contributions which give rise to the employee's pension rights, on the one hand, and the obligations of the employer and/or the trustees of the pension fund on the other." (emphasis added).**

(I observe from the words I have emphasised that this characterization is not seen as being confined to contributory schemes.)

The Court itself, when referring to the decision in *Barber* (ante), noted about occupational pensions that:

> **"It is a characteristic of that form of pay that there is a time lag between the accrual of entitlement to the pension, <u>which occurs gradually throughout the employee's working life</u>, and its actual payment, which is deferred until a particular age." (paragraph 17; emphasis added).**

26. The point that this approach applied to occupational pension schemes generally and not simply to contributory schemes was confirmed by the ECJ in the *Coloroll* case (ante). The Court there repeated also the passage from paragraph 17 of the judgment in *Ten Oever* set out above: see paragraph 46. *Barber* and other authorities make the same point about the gradual accrual of legal rights to a pension during the employee's period of service – assuming, of course, that such rights exist at the time of the service in question. There can be no doubt that

this characteristic of rights under occupational pension schemes is well-established in European law. It is the foundation stone for all the pension claim cases brought under the concept of "equal pay".

27. Are the judicial pension schemes in the United Kingdom different, as Mr Allen contends? It is difficult to see why they should be treated differently, particularly in the light of the case of *Beaune*, the full title of which is *Algemeen Burgerlijk Pensioenfonds v Beaune* (Case C-7/93). That ECJ decision concerned a civil service pension fund in the Netherlands, a fund which was governed by statutory provisions just as are judicial pensions in the UK. The Court decided that pensions payable under that scheme were to be treated in the same way and in accordance with the same principles as the private occupational pension schemes on which it had already pronounced. At paragraph 57 of its judgment, it stated that the pension paid under the civil service scheme:

> **"must be regarded as a benefit under an occupational scheme… . Although governed by statute, that benefit protects the civil servant against the risk of old age and constitutes consideration received by the worker from the public employer in respect of his employment, similar to that paid by a private employer under an occupational scheme."**

That analysis applies with equal force to a judicial pension. It follows that the European law principle that pensions are a form of deferred pay, the right to which accumulates over time, assuming that right to exist at such time, forms part of the legal context within which the interpretation of the Directive and the Regulations must take place.

28. Indeed, one needs to set the scene in terms of European law before considering the meaning and effect of the decision in *Bruno and Pettini*, which was so crucial to Judge Macmillan's decision. He was entirely right to observe that the future effects principle is well-established in European Law. But the ECJ has been dealing with pension cases, principally under Article 119, for many years now, and of great importance to several of its decisions in

such cases on unequal treatment has been the principle of legal certainty, a 'fundamental principle' of Community Law: see, for example, *International Association of Independent Tanker Owners v Secretary of State for Transport* [2008] ECR 1-4057 at paragraph 69. That principle has been set out by the ECJ on a number of occasions in similar terms. It requires the application of the law to a particular situation to be reasonably predictable, so that individuals 'may ascertain unequivocally what their rights and obligations are and may take steps accordingly' (ibid). As a result,

> **"substantive rules of Community Law must be interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, their objectives or their general scheme that such effect must be given to them": *Land Nordheim-Westfalen* (ante), paragraph 49**

29. A vivid illustration of the application of this principle of legal certainty is to be found in the well-known *Barber* decision (ante). There, for the first time, the ECJ held that pensions paid under a contracted-out scheme constituted consideration paid by the employer to the worker in respect of his employment and consequently fell within the scope of Article 119 of the Treaty, dealing with equal pay between men and women. Previously, although the ECJ had held that Article 119 had direct effect so as to apply to pension benefits under an occupational scheme (*Bilka-Kaufhaus v Weber von Hartz* (case 170/84) [1987] ICR 110), certain of its decisions might have been seen as excluding contracted-out pension schemes from the scope of Article 119. As the court put it in *Barber* at paragraph 43 of its judgment:

> **"In light of those provisions, the member states and the parties concerned were reasonably entitled to consider that article 119 did not apply to pensions paid under contracted-out schemes and that derogations from the principle of equality between men and women were still permitted in that sphere."**

30. Consequently, it noted at paragraph 44:

> **"In those circumstances, overriding considerations of legal certainty preclude legal situations which have exhausted all their effects in the past from being called in question where that might upset retroactively the financial balance of many contracted-out pension schemes."**

31. It therefore ruled at paragraph 45:

> **"It must therefore be held that the direct effect of article 119 of the Treaty may not be relied upon in order to claim entitlement to a pension with effect from a date prior to that of this judgment, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law."**

32. That approach was one followed and endorsed by the ECJ in *Ten Oever*. In its judgment, at paragraph 19, the Court stated:

> **"Given the reasons explained in *Barber* [1990] I.C.R. 616, 672, para 44, for limiting its effects in time, it must be made clear that equality of treatment in the matter of occupational pensions may be claimed only in relation to benefits payable in respect of periods of employment subsequent to 17 May 1990, the date of the judgment in *Barber*, subject to the exception in favour of workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law."**

The Court said much the same in *Coloroll* at paragraph 98. Thus this time-limiting approach in *Barber* cannot be regarded as some one-off maverick decision but one which forms an established part of European law.

33. It is important to appreciate what the ECJ was doing in *Barber*. Normally it regards its function as being merely declaratory of the law, not as one of making new law: see paragraph 13 of the Advocate General's Opinion in *Ten Oever*. As a result, it would normally regard a decision by it that a party enjoyed a certain right under a Directive or Article of the Treaty as establishing that the right had existed since the date of the Directive or Treaty in question. What was unusual about the *Barber* decision was that the Court decided, largely for reasons of legal

certainty, not to backdate the entitlement to pension benefits to the time of the legal provision in question, namely the Treaty, but to limit the period of backdating to the date of its own decision, a much more recent event. Before that date, the pension rights concerned had not been understood to have existed. As the Advocate General said in *Ten Oever*, paragraph 20:

> **"Legal certainty means in this connection that the extent of those rights falls to be determined on the basis of the Community rule which applied at the time of the period of service on the basis of which those rights were acquired, that is to say article 119 as it was interpreted before *Barber*." (emphasis added)**

34. *Magorrian* (ante) sees the same approach, though with a different date from which benefits could be calculated, because the Court found that there had not been the room for misunderstanding of the law that had existed in *Barber*; see paragraph 28 of judgment. The Court there decided that the periods of service for pension calculations should be taken as from the date when it had been held that Article 119 had direct effect, namely 8 April 1976, the date of the *Defrenne* judgment (case 43/75; [1976] ICR 547).

35. These were all Article 119 cases. A pension case in the ECJ based upon a Directive is that of *Brouwer* (case C-577/08). That concerned a state pension payable in Belgium, where the amount of the pension reflected past average wages. Until 1995, the daily wage used for this purpose had been lower for women workers than for men. After that date, it was the same. Directive 79/7/EEC sought to eliminate discrimination on grounds of sex in matters of social security. It was to be transposed into national law by 23 December 1984. The ECJ held that domestic legislation could not lawfully calculate such pensions for women on a lower basis than for comparable male workers for the period of service from 1984 to 1994. The latter date was the date after which the discrimination in wage rates had ceased. But the earlier date, the start of the period, was taken as the date by which the Directive was to be transposed. The ECJ did not include service before the date by which the Directive was to be transposed. Ms

Brouwer had in fact claimed as from 1 January 1968, but her claim was based on the Directive, and service prior to the Directive was not allowed in the calculation of benefit to which she was entitled.

36. That was not a final salary case, as Mr Allen emphasises, but it was a case (a) where the level of pension payable depended on past events and (b) where the claim was based on a Directive rather than Article 119. It seems clear that, as a matter of European law, where a pension claim is based on alleged discrimination of some kind, the period of service taken into account when calculating the level of pension payable begins at the earliest on the date when such discrimination became unlawful as a result of a Directive or a treaty provision. In some cases that period will only begin at a later date if the unlawfulness of the discrimination was not initially apparent: see *Barber*, *Ten Oever* and *Coloroll*. But in no case does it seem to have been held that the level of pension payable should reflect service at a time when the discrimination was lawful. I come to *Bruno and Pettini* very shortly, to examine whether that decision was to different effect.

37. Before I do so, I note that European law has at times acknowledged a distinction between being denied access to membership of a pension scheme on discriminatory grounds and denial of a particular level of benefits, with the *Barber* temporal limitation applying to the latter category but not to the former. A helpful summary of the authorities is given by Mummery LJ in *Quirk v Burton Hospital NHS Trust* [2002] EWCA Civ 149, at paragraphs 5 – 7. In neither category does one go back earlier than the date of the legislative provision making the discrimination unlawful, but one notes that the two situations have been distinguished.

38. That then was the state of European law in respect of pension claims based upon allegations of unlawful discrimination, prior to the Directive with which this appeal is

concerned, and prior to the decision in *Bruno and Pettini*. In short, European law has regarded pension rights of an employee as accruing gradually during service, assuming that those rights existed during a relevant period of service, rather than arising on retirement. They are seen as a form of deferred pay. Periods of service when the discrimination was not unlawful did not count towards the level of pension benefits payable. In some cases where the discrimination was unlawful but the employer could not have been expected to appreciate that, the period of service taken into account was only that since the law had been clarified. That reflects the fundamental principle of legal certainty.

39. That last point needs to be borne in mind in this appeal. Although we are concerned with a particular type of part-time worker, namely a part-time fee-paid judge, there would seem to be no reason to believe that part-time workers generally should be treated any differently in respect of their reckonable period of service. I have rejected Mr Allen's submission that part-time judges and the judicial pension schemes are to be seen as different from other final salary occupational pension schemes. Consequently, the decision on this first issue is likely to be of importance to part-time workers generally and, of course, to those who have employed them over the years before the Directive was to take effect in UK domestic law. It may be doubted whether such employers have anticipated having to pay pensions to part-time workers based, in part, on the latter's years of service pre-2000.

40. I have taken some time on this consideration of European law on such pension claims, because it cannot be disregarded when considering *Bruno and Pettini*. I do not see that decision as providing quite such a quick and easy solution as Judge Macmillan appears to have believed. There can be no doubt that the ECJ there applied the "future effects principle" to some periods of service before the Directive came into force, but it is necessary to look more closely at the purpose for which the Court did so.

41. The domestic legislation involved was complex, but it seems that it required a certain period of work of a person before that person qualified for a pension at all. As Advocate-General Sharpston explained it in her Opinion at paragraphs 93 – 95:

> **"93. The problem, as the INPS admitted at the hearing, seems to lie in the calculation of the number of weeks necessary to *gain access to a pension* ('qualifying weeks'). Counsel for the INPS explained that in order to gain access to a pension, 1 820 qualifying weeks are necessary. A qualifying week is defined as a week in which work is performed on at least one day.**
>
> **94. In the example I have just given, that means that, for the same number of hours worked, the horizontal part-time worker will have acquired 52 qualifying weeks, while the vertical-cyclical part-time worker will have acquired only 26 qualifying weeks.**
>
> **95. The unequal treatment therefore appears to arise from the manner in which qualifying weeks are calculated, which directly determines how long it will take for workers to gain access to a pension. Because only weeks in which work was performed during at least one day count as qualifying weeks, for an equal number of hours worked, vertical-cyclical part-time workers may end up having to work twice as long as horizontal part-time workers to gain access to their pension. In my example, the horizontal part-time worker would have to work 35 years to gain access to a pension, while the vertical-cyclical part-time worker would have to work 70 years. If that person spent his whole career working on a vertical-cyclical part-time basis, he would be unlikely ever to qualify for a pension."**

42. The Advocate-General expressly noted that there did not appear to be any discrimination against part-time workers in the way in which the scheme calculated the amount of the pension, assuming that the workers qualified for access to it in the first place: paragraph 91. The Court itself also observed that the dispute concerned periods of service required to qualify for a pension: paragraphs 20 and 22. To that issue it applied the future effects principle, set out in its paragraph 53, and concluded at paragraph 55:

> **"According, the calculation of the period of service required to qualify for a retirement pension such as the pensions at issue in the main proceedings is governed by Directive 97/81, including periods of employment before the directive entered into force."**

43. It is clear that, in taking into account periods of service before the Directive entered into force, the Court was only dealing with the issue of qualifying service, not with the level of

pension to which the claimants were entitled. One can appreciate that it may seem strange to take into account such periods of employment for one purpose and not to do so for another. Yet the Court was not seeking to deal with the issue of the level of benefits, and if it had been addressing that issue, it would have had to deal with the long-established law on the topic of occupational pensions and how far past service could be reflected in the amount payable. It would have had to deal, as would the Advocate-General, with *Ten Oever*, *Barber*, *Coloroll*, *Magorrian*, *Brouwer* and other previous decisions of the Court, and to explain why the fundamental principle of legal certainty did not operate in this instance. It would have had to consider the effect on any decision as to the level of benefits of the "deferred pay" nature of those benefits. It did none of those things. It observed that "pay" covered pensions (paragraph 41), but it did so only in order to judge whether pensions were covered by the phrase "employment conditions" in clause 4(1) of the Framework Agreement: see paragraph 42 of the judgment.

44. I therefore cannot accept Mr Allen's submission that *Bruno and Pettini* deals with the issue of what service is to be taken into account in determining the level of a pension payable to a part-time worker. It has the more limited meaning contended for by the Ministry of Justice. This is underlined by the cases referred to by the Court when it spelt out the "future effects principle". For example, the case of *Brock* was a qualifying periods case, where the claimant had to have paid contributions for a minimum period of time. *Licata* was not a pensions case at all, but involved a conventional application of the "future effects principle". *Duchon* again was a qualifying periods case.

45. The case of *Filev*, relied on as part of Mr O'Brien's case, is of little if any assistance. It applies the "future effects principle", but it is not a pensions case and adds nothing to the argument based on *Bruno and Pettini*.

46. I turn finally in this section of the judgment to the submissions made by Mr Allen about the way in which the ECJ dealt with the observations of the Latvian government in *O'Brien v Ministry of Justice* (ante). As I said earlier, the Latvian government questioned the admissibility of the reference for a preliminary ruling, but the Court ruled otherwise. It is pertinent to note the basis of the Latvian doubts. The observations it put forward have been put before me in full. What they disclose is that Latvia was concerned that Mr. O'Brien had been appointed a recorder long before the Directive came into effect and that even his final extension in that office had been made in 1999, again before the transposition date (paragraph 15). It relied on the principle of legal certainty and argued that:

> **"It would not be acceptable for legal rules adopted subsequently to be applicable to legal relationships which commenced before the adoption of those rules." (para 17, emphasis added)**

47. The Court rejected that argument, relying on the "future effects principle" and referring to its decision in *Bruno and Pettini* as illustrating that qualifying periods of service could include employment before the Directive entered into force: paragraph 25. In short, its rejection of the Latvian observations did not add anything to the *Bruno and Pettini* decision. The reference to the ECJ in *O'Brien* was not concerned with what could be taken into account in calculating the level of his pension benefits. The questions referred by the Supreme Court raised the issue of whether judges were "workers who have an employment contract or employment relationship" within the meaning of the framework agreement. On any basis, Mr O'Brien had an employment relationship (if at all) which continued after the date when the Directive came into force. The ECJ decision on admissibility of the reference is unsurprising and provides little if any help with the present issue.

Conclusion on Issue 1

48. I have come to the firm conclusion that Judge Macmillan was wrong on this first, very important, issue of European law. If the part-time worker has a right to a pension, based upon his employment, the level of his pension benefits will be the result of the gradual accrual of rights during the period of his employment but only in so far as he enjoyed such a right at any given time under the law in force at that date. That is as true under the Directive as it is under the equal pay provisions of European law and under such other Directives as that involved in the *Brouwer* case. Any other approach would (a) assume that part of his "pay" was being deferred at a time when there was no legal reason for the employer to take such a step and (b) impose upon employers a financial burden to provide payments of pensions in respect of a period of service when it could not have been anticipated that such service would count towards the quantum of pension benefits. That would run counter to the well-established principle of legal certainty, long recognised by European law. Therefore Mr O'Brien's rights in respect of the level of his pension begin with the date for the transposition of the Directive, 7 April 2000. He cannot rely on the accrual of pension rights before that date, because he enjoyed no such rights at that time, save in respect of any period needed for qualifying for access to a pension.

49. I have expressed this as a firm conclusion. I regard this as being *acte clair* and I do not propose to make any reference to the ECJ for a preliminary ruling. I shall allow this appeal on Issue 1.

Issue 2: The Training Days Point

50. Happily, this issue can be dealt with more succinctly, As explained earlier, it concerns whether or not Mr. O'Brien was required to plead the point that his pension should be

calculated on the assumption that he was entitled to a full day's fee for a training day, rather than the half-day's fee he actually received. Judge MacMillan held that this point did not need to be expressly pleaded, because it went simply to remedy, in the sense that it was one component of the calculation of the pension to which Mr O'Brien was entitled: paragraph 32.

51. The MOJ challenges that conclusion. It is contended that this is not merely part of a pension claim, but is in effect a claim for a full-day's pay for each such training day. It depends, argues Mr Cavanagh on behalf of the MOJ, on the proposition that paying only a half- day fee is itself a breach of the Directive. There is, in effect a hidden claim which should have been pleaded.

52. I am unpersuaded by the MOJ's argument on this. Mr O'Brien does not seek in these proceedings to advance a claim which amounts to a fresh cause of action. His case is that he is entitled to a pension at a certain level and this argument about training days fees, whether good or bad in its substance, goes only to the calculation of the level of pension. It is, as Judge Macmillan rightly said, a pure remedy point. It did not need to be pleaded.

Issue 3: The Full-Time Rate of Days Point

53. This issue concerns the appropriate figure for the number of days per annum that a full-time circuit judge is required to work. This becomes the divisor in the calculation when applying the pro rata approach for a part-time fee paid judge. As noted earlier, Judge Macmillan concluded that the right figure was 210 days. The MOJ challenges that, contending that the divisor should have been 220.

54. Judge Macmillan took into account the fact that the Senior Salaries Review Body ("SSRB") had used a divisor figure of 220 when dealing with the fees which should be paid for part-time judicial work. The SSRB did so because that figure represented "the typical public sector working year": para.109 of its Twenty First Report on Senior Salaries (1998). It had rejected arguments that the figure should be lower, to correspond with the minimum number of days full-time judges were required to sit, saying at para.110:

> **"110. We are not persuaded that the divisor of 220 should be changed to reflect minimum sitting requirements in different courts or tribunals. Such a link would ignore the fact that, unlike part-timers, full-time post-holders in all jurisdictions have a continuous commitment to the court, with consequential research, preparation, administrative and other obligations. We therefore recommend that the divisor for calculating daily fees remains at 220 days."**

55. But Judge Macmillan did not regard full-time circuit judges as typical public sector workers, for reasons which he set out at paragraph 70 of his judgment. Because he saw such judges as being atypical workers, he was not prepared simply to assume "that the judicial commitment and the typical public sector working year are coextensive" (paragraph 71). In that same paragraph, he went on to say:

> **"In the case of circuit judges that does not appear to be the case. The literature points inexorably to a different figure – 210 days. The judge's outline conditions of appointment speaks of a requirement to devote at least 210 days each year to the business of the courts 'and perhaps more'. The 'requirement' is therefore 210. The practical guide to judicial salaried part-time working shows 100% of a circuit judge's commitment to be 210 days and Mr Palmer's own figures show that in practice judges and administrators alike regard 210 as the benchmark figure. Although a judge would not refuse to sit more than 210 days if the exigencies of the list demanded it, they would be expected by both sides of the 'commitment' to have any days over 210 offset against their work plan for the following year. The starting point for the divisor is therefore 210 not 220."**

He then considered whether the figure of 210 days should be reduced further to reflect absence through sickness and similar factors, but rejected such arguments, and thus reached his conclusion that 210 was the appropriate divisor.

56. The MOJ does not contend that the SSRB choice of 220 days is in any sense determinative of this issue. Its argument is that the decision below did not reflect the full-time judge's "continuous commitment" to the job as noted by the SSRB. Mr. Bourne on behalf of the MOJ on this issue draws attention to regulation 1(2) and 1(3) of the Regulations, set out herein at paragraph 8. Those provisions direct one's attention to what an employee "is required to work under his contract of employment", which means what he commits himself to do in return for his pay. In the case of a full-time judge, the commitment is to get the job done. That means that such a judge will do work outside of normal hours, in the evenings and sometimes at weekends. This is what the SSRB was referring to when it spoke of such judges having to do research, preparation and administration. A figure of 220 days a year represents a reasonable reflection of such extra time.

57. For my part, I cannot see that this argument undermines Judge Macmillan's reasoning or his conclusion. I have no doubt that full-time circuit judges do work outside the normal working hours, particularly in preparation for a hearing and in judgment writing. But there is no evidential basis for suggesting that part-time fee-paid judges do less preparation or devote less time to judgment writing. Mr. Bourne accepts that one has to approach this issue on a like-for-like basis, and there is no evidence that this aspect of judicial office is, pro rata, something which weighs more heavily on the full-timer than on the part-timer. I can see that the latter may have fewer administrative duties, but there is a complete absence of any evidence to indicate that that is a significant component of the full-time circuit judge's working life. I therefore reject that criticism of Judge Macmillan's decision.

58. If one applies the test of what is the <u>requirement</u> imposed on a circuit judge, the evidence demonstrates, as Judge Macmillan observed, that the correct figure is 210 days. One gets that, for example, from the document Outline Conditions of Appointment and Terms of Service for

Circuit Judges, which specifies “at least 210 days in each year, and perhaps more”: paragraph 11. While that includes the words “at least”, it is clear from the evidence that if a circuit judge sat for more than 210 days in one year, he would be given credit for any excess in the following year’s schedule. The Outline Conditions do speak of an “initial yearly plan for any year’s work” providing for between 215 and 220 days of judicial work, but that is expressly so as to achieve 210 days in practice: paragraph 11. In addition, the Ministry’s document entitled “Judicial Salaried Part-Time Working: A Practical Guide” has an annex dealing with the very topic of the pro-rata calculation of sitting days for circuit judges for (inter alia) pensions purposes. That annex, Annex 5, cites 210 days as the number of sitting days per year for 100% sitting.

59. There was, therefore, a sound evidential basis for Judge Macmillan’s finding that the divisor for present purposes should be 210. I can see no error of law in his so finding.

Overall Conclusion

60. For the reasons set out above, I allow this appeal on Issue 1, “the year 2000 point”, but dismiss it on Issues 2 and 3, “the training days point” and the divisor point, otherwise called “the full-time rate of days point”.