Appeal No. UKEAT/0239/14/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 December 2014
Judgment handed down on 16 January 2015

Before

THE HONOURABLE MR JUSTICE LEWIS

SITTING ALONE

DR P MOULTRIE AND OTHERS — APPELLANTS

THE MINISTRY OF JUSTICE — RESPONDENT

Transcript of Proceedings

JUDGMENT

Revised

APPEARANCES

For the Appellants	RACHEL CRASNOW (of Counsel) and TAMAR BURTON (of Counsel) Instructed by: Browne Jacobson LLP Mowbray House Castle Meadow Road Nottingham NG2 1BJ
For the Respondent	CHARLES BOURNE QC (of Counsel) and RACHEL KAMM (of Counsel) Instructed by: The Treasury Solicitor One Kemble Street London WC2B 4TS

SUMMARY

PART TIME WORKERS

The Appellants are fee-paid medical members of Tribunals. They were not given access to a pension scheme in respect of their service whereas salaried or full-time regional medical members were. The Appellants contended that the work of the typical fee-paid medical member was the same as or broadly similar to that of the regional medical members within the meaning of regulation 2(4)(a) (ii) of the **Part–Time Workers (Prevention of Less Favourable Treatment) Regulations 2000**.

Employment Judge Macmillan held that 85% of the work that the regional members did, that is sitting on appeals in a judicial capacity, was the same as the work done 100% of the time by fee-paid medical members and he considered that the work was of high importance. He therefore considered whether the differences between the work that the two groups did were so important that they should not be regarded as being engaged in broadly similar work. He concluded that the differences were of such importance as the role of regional medical members was qualitatively different from that of fee-paid medical members and brought a new dimension to the judicial structure taking elements from both fee-paid medical members' work and work delegated to the regional medical member from the chief medical member and the chamber president.

The Employment Judge had correctly approached the task of deciding whether the work of the two groups was the same or broadly similar. He had approached the task in the way identified as appropriate by the House of Lords in **Matthews and others v Kent and Medway Fire Authority and others** [2006] ICR 365. He had considered the work that the regional medical members were engaged on. The conclusions he reached, on the facts as he found them, were ones that he was entitled to reach.

THE HONOURABLE MR JUSTICE LEWIS

Introduction

1. This is an appeal against a decision of Employment Judge Macmillan, on the hearing of a preliminary issue namely, whether fee-paid medical members of certain Tribunals were engaged in the same or broadly similar work as salaried regional medical members ("RMMs") within the meaning of regulation 2(4) of the **Part –Time Workers (Prevention of Less Favourable Treatment) Regulations 2000** ("the Regulations").

2. In brief, the three Appellants are all fee-paid medical members of Tribunals. They are not entitled to receive a pension in respect of their service. Salaried members such as RMMs did receive a pension. The Employment Judge held that 85% of the work done by RMMs (sitting as Tribunal members) was also the work, typically, done by fee-paid medical members and the work of sitting was of the highest importance. However, he held that the 15% of the work that the RMMs did, and the fee-paid medical members did not do, was of such importance that it could not be said that the two groups were engaged in the same or broadly similar work.

3. The Appellants advance four grounds of appeal. First, they contend that the Employment Judge did not properly apply the law as established by the House of Lords in **Matthews and others v Kent and Medway Fire Authority and others** [2006] ICR 365. They contend, in particular, that the Employment Judge failed to have regard to the need to give particular weight to the fact that 85% of what the RMMs and the fee-paid members did was the same, and was of high importance. They also had the same qualifications, skills and experiences. The 15% of other work that the RMMs did was not part of the core function of

sitting. In those circumstances, the Appellants submit that the Employment Judge erred in finding that the work of fee-paid members was not broadly similar to that of RMMs.

4. Secondly, the Appellants contend that the Employment Judge erred by considering what work the RMMs might be called upon to do in future rather than considering the work they were actually doing. Thirdly, the Appellants contend that the Employment Judge wrongly took into account transient and *ad hoc* duties and fourthly, that the Employment Judge failed properly to apply the two-stage test of establishing if there were less favourable treatment and then considering if that differential treatment was objectively justifiable.

The Legal Framework

5. The relevant legal principles are not in dispute. Regulation 5(1) and (2) of the **Regulations** provide as follows:

> **"(1) 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.**
>
> **(2) The right conferred by paragraph (1) applies only if–**
>
> **(a) the treatment is on the ground that the worker is a part-time worker, and**
>
> **(b) the treatment is not justified on objective grounds."**

6. Regulation 2(4) of the **Regulations** provides that:

> **"(4) A full-time worker is a comparable full-time worker in relation to a part-time worker if, at the time when the treatment that is alleged to be less favourable to the part-time worker takes place–**
>
> **(a) both workers are–**
>
> **(i) employed by the same employer under the same type of contract, and**
>
> **(ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience; and**

> **(b) the full-time worker works or is based at the same establishment as the part-time worker or, where there is no full-time worker working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements."**

7. The proper approach to the application of regulation 2(4) of the **Regulations** is set out by the House of Lords in **Matthews and others v Kent and Medway Fire Authority and others** [2006] ICR 365. That case concerned a category of retained, or part-time fire fighters who sought to be compared with full-time fire fighters. That involved, amongst other issues, the question of whether the retained, or part-time, fire fighters were engaged in the same or broadly similar work, having regard, where relevant, to whether they had a similar level of qualification, skills and experience for the purposes of regulation 2(4)(a)(ii) of the **Regulations**. The Employment Judge relied upon two paragraphs of the judgment of Lord Hope and two of Baroness Hale's judgement and the parties agree that those paragraphs identify the proper approach to the application of that Regulation. At paragraphs 14 and 15, Lord Hope said this:

> **"14. The wording of regulation 2(4)(a)(ii) identifies the matters that must be inquired into. One must look at the work that both the full-time worker and the part-time worker are engaged in. One must then ask oneself whether it is the same work or, if not, whether it is broadly similar. To answer these questions one must look at the whole of the work that these kinds of worker are each engaged in. Nothing that forms part of their work should be left out of account in the assessment. Regard must also be had to the question whether they have a similar level of qualification, skills and experience when judging whether work which at first sight appears to be the same or broadly similar does indeed satisfy this test. But this question must be directed to the whole of the work that the two kinds of worker are actually engaged in, not to some other work for which they may be qualified but does not form part of that work.**
>
> **15. It is important to appreciate that it is the work on which the workers are actually engaged at the time that is the subject matter of the comparison. So the question whether they have a similar level of qualification, skills and experience is relevant only in so far as it bears on that exercise. An examination of these characteristics may help to show that they are each contributing something different to work that appears to be the same or broadly similar, with the result that their situations are not truly comparable. But the fact that they may fit them to do other work that they are not yet engaged in, in the event of promotion for example, would not be relevant."**

8. At paragraphs 43 and 44, Baroness Hale said this:

> **"43…… The sole question for the tribunal at this stage of the inquiry is whether the work on which the full-time and part-time workers are engaged is "the same or broadly similar". I do not accept the applicants' argument, put at its highest, that this involves looking at the similarities and ignoring any differences. The work which they do must be looked at as a whole, taking into account both similarities and differences. But the question is not whether it is different but whether it is the same or broadly similar. That question has also to be**

> **approached in the context of Regulations which are inviting a comparison between two types of worker whose work will almost inevitably be different to some extent.**
>
> **44. In making that assessment, the extent to which the work that they do is *exactly the same* must be of great importance. If a large component of their work is exactly the same, the question is whether any differences are of such importance as to prevent their work being regarded overall as "the same or broadly similar". It is easy to imagine workplaces where both full- and part-timers do the same work, but the full-timers have extra activities with which to fill their time. This should not prevent their work being regarded as the same or broadly similar overall. Also of great importance in this assessment is the importance of the same work which they do to the work of the enterprise as a whole. It is easy to imagine workplaces where the full-timers do the more important work and the part-timers are brought in to do the more peripheral tasks: the fact that they both do some of the same work would not mean that their work was the same or broadly similar. It is equally easy to imagine workplaces where the full-timers and part-timers spend much of their time on the core activity of the enterprise: judging in the courts or complaints-handling in an ombudsman's office spring to mind. The fact that the full-timers do some extra tasks would not prevent their work being the same or broadly similar. In other words, in answering that question particular weight should be given to the extent to which their work is in fact the same and to the importance of that work to the enterprise as a whole. Otherwise one runs the risk of giving too much weight to differences which are the almost inevitable result of one worker working full-time and another working less than full-time."**

9. It is against that background, therefore, that the decision of the Employment Judge is to be assessed.

The Facts

The Background

10. The three Appellants are all fee-paid medical members of Tribunals. Dr Terry Reilly is a fee-paid medical member of the First-tier Tribunal assigned to the Social Entitlement Chamber. He sits on the Social Security and Child Support Tribunal. Dr Jonathan Cripps is a fee-paid medical member of the First-tier Tribunal assigned to the Health, Education and Social Care Chamber who sits on the Mental Health Tribunal and, since early 2014, in the Social Security and Child Support Tribunal. Dr Patricia Moultrie is a fee-paid medical member who sits in the Social Security and Child Support Tribunal and also in the War Pensions and Armed Forces Compensation Chamber.

11. The Appellants do not have access to a pension scheme in relation to their service as fee-paid medical members. Full-time, salaried staff do have access to such a pension scheme.

The Appellants contend that they are engaged in the same or broadly similar work as certain full-time staff and that their exclusion from the pension scheme was not objectively justified.

The Litigation

12. A preliminary hearing was held under paragraph 53(1)(b) of Schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the Tribunal Regulations"). The three claims had been identified as lead cases for the purposes of paragraph 36 of Schedule 1 to the **Tribunal Regulations**, that is, they were cases which "give rise to common or related issues of fact". Paragraph 36(2) of Schedule 1 to the **Tribunal Regulations** provides that:

> **"When the Tribunal make a decision in respect of the common or related issues it shall send a copy of that decision to each party in each of those related cases and, subject to paragraph (3), that decision shall be binding upon each party".**

13. The preliminary hearing was to deal with the question of whether the group or cadre of fee-paid medical members were engaging in work which was the same as or broadly similar to the work of certain named comparators. The Employment Judge considered that the work of fee-paid medical members was not in any way broadly similar to two of the comparators, namely the chief medical member of the Social Security and Child Support Tribunal and the chief medical member of the Mental Health Tribunal. There is no appeal against these findings.

14. The third comparator was Dr Rakowski who was a full-time salaried member known as an RMM. The task for the Employment Judge in this respect was firstly to identify the work carried out by typical fee-paid medical members. Next, the Tribunal had to identify the work carried out by RMMs. Then, the Tribunal had to consider whether the work carried out by typical fee-paid medical members was the same as or broadly similar to the work carried out by RMMs. The focus had to be on the typical fee-paid medical member as the Employment Judge

was engaged in assessing lead cases, to determine whether all members of that group (typical fee-paid medical members) were doing broadly similar work to RMMs so that there was a common issue of fact or law that could be determined in respect of all typical fee-paid medical members. In addition, the Appellants put forward a sub-set of fee-paid medical members, that is those who not only did the work of typical fee-paid members but undertook additional duties. The Employment Judge, therefore, also had to consider whether this was a valid sub-set for the purpose of making determinations on common issues of fact or law.

The Tribunal's Findings of Fact

15. The Employment Judge found that the typical fee-paid medical member in the Social Security and Child Support Tribunal and Mental Health Tribunal spent 100% of his or her time sitting in a judicial capacity determining appeals as part of a Tribunal. The Employment Judge found, also, that the typical fee-paid medical member in the War Pensions and Armed Forces Compensation Tribunal also sat for 100% of his or her time: see paragraphs 16 and 18 of the Tribunal decision.

16. The Employment Judge found that the RMMs sat in a judicial capacity determining appeals as part of a Tribunal. This sitting work by RMMs was identical to the sitting work of typical fee-paid medical members. The RMMs were engaged in this work for approximately 85% of their time and were engaged on other activities for approximately 15% of their time. The Tribunal found that the time spent by RMMs on sitting was, in fact likely to be lower than 85% and other activities would be likely to be greater than 15% but by no great margin. The details and analysis of the evidence are at paragraphs 17 and 20 of the Tribunal decision.

17. The Employment Judge then had to identify what the other activities of the RMMs involved. 10% out of the 15% of time devoted to other activities were devoted to appraisal, recruitment and training. These were tasks which typical fee-paid medical members could do but which in practice only a tiny minority did do. The remaining 5% out of the 15% were devoted to tasks delegated to RMMs by chief medical members. This work could not be done by typical fee-paid medical members. The Tribunal was aware that the role of RMMs was new (having been created 2 years previously) and was evolving. The precise content of the 5% of the RMM activities comprising tasks delegated by chief medical members and others was therefore described by the Employment Judge in these terms (see paragraph 33 of the Tribunal decision - FPMM being the acronym used for fee-paid medical members):

> **"I can, I think, legitimately and possibly most helpfully, approach the problem in this way: by recognising that there is a component of the work load of the RMM which FPMMs do not do, which consists of tasks delegated by the Chief Medical Member and the Chamber President, the precise content and temporal scope of the component being subject to some fluctuation, but neither being insignificant in terms of time or importance."**

18. The Employment Judge then dealt with the question of routine appraisals carried out by RMMs. This was dealt with at paragraph 34 of the decision. At paragraphs 37 to 39, the Employment Judge dealt with other aspects of the RMMs' role in other appraisals, recruitment and training in the following terms:

> **"37. In addition to sittings and routine appraisals which I have already dealt with, the RMMs are about to take on a new role in relation to the large intake – some 257 – of new FPMMs this year. This will take the form of shared sessions in which the RMM is likely to sit on the first case in the list while the new FPMM observes with the roles being reversed for the second case after which the RMM gives immediate feedback. Thereafter the two alternate on cases in the list during the day. If the FPMM appears to be struggling the RMM will give advice and guidance and may arrange a second shared session. Given the numbers involved this is a very substantial burden on the RMMs with each having to do between 30 and 40 such sessions. As the appraisal scheme has been modified to include this new model it seems likely to be the pattern for the future.**
>
> **38. So far as recruitment is concerned, in the two exercises which have taken place since the advent of RMMs, those of 2012 and 2013, the figures show the evolving nature of the involvement of RMMs on the one hand and FPMMs on the other. In 2012 six RMMs spent 26 days interviewing while 4 RMAs spent 22 days and an FPMM 5 days. In 2013 6 RMMs spent 45 days interviewing and 5 RMAs spent 36 days while 7 FPMM each spent only 2 days. There is an obvious logistical advantage in this as it takes far less administrative effort to deploy one salaried medical member than several FPMMs who have no obligation to participate. The RMMs were responsible for organising FPMMs to sit on the interviewing panels which were held across the regions.**

> **39. So far as training is concerned, since the creation of the post of RMM the reliance on RMAs and FPMMs to act as facilitators has reduced but in addition, RMMs have begun to take up training roles not previously done by RMAs or FPMMs, for example an RMM has co-presented a lecture at induction training and all RMMs co-facilitated small groups of salaried judges at their 2013 annual conference which all RMMs attend with time set aside for their own training needs. RMMs cover local training events which would previously have been attended by the CMM."**

19. At paragraph 40, the Employment Judge noted that there were a variety of other tasks which RMMs undertook, either being delegated to them by chief medical members or the chamber president or which were seen as naturally arising from their role. The chief medical member had delegated to RMMs the task of fielding enquiries from medical members about Tribunal related matters. The Employment Judge noted that the chamber president of the Social Entitlement Chamber (who gave evidence) considered that the performance of this role would develop and open the possibility of RMMs developing a pastoral relationship with fee-paid medical members. The Employment Judge also considered what he described as the expectations of RMMs in relation, in particular, to demonstrating good practice and leading by example (see paragraphs 40 and 41 of the Tribunal decision). In particular, the Employment Judge noted that although the RMMs have no formal leadership or management responsibilities, they were expected to lead by example. The Employment Judge then gave examples of this work. It included the fact that the RMMs had been trained on, and were about to sit on appeals involving, a new benefit that had been introduced, with a view to relaying their experiences and lessons learned to fee-paid medical members. Furthermore, RMMs were required to look for patterns of error in cases and to recommend remedial action. The Employment Judge used the word "expected", but it is clear from the context that he was using expected in the sense that it was part of the work the RMMs were required to do and, indeed, had been the subject of a meeting in March at which all RMMs attended.

The Tribunal's Assessment

20. Having identified the work done by typical fee-paid medical members and their comparators, the Employment Judge then considered whether the fee-paid medical members were engaged in the same or broadly similar work, having regard to the level of their qualification, skills and experience. The Employment Judge held that the role of chief medical member was very different from that of a typical fee-paid medical member. They had important strategic and leadership activities which, to a greater or lesser degree, involved them in a broad range of activities vital to the functioning of their respective jurisdictions over and above their role as sitting on appeal. They were the medical equivalent of a principal Judge. The Employment Judge then turned to the work of RMMs as compared with typical fee-paid medical members. The Employment Judge's reasoning is in these terms:

> **"46. The single fact that the RMMs sit for such a large proportion of their time calls for a much closer scrutiny of the other part of their role. Using Mr Bourne's analysis of what Marshall requires me to consider which I have set out at para 12, some first answers are relatively easy to give. The differences between the two roles are largely qualitative rather than quantitative and there are no, or no relevant, differences between the levels of qualification, skill and experience between the two groups (ignoring the new intake who are not typical for this purpose). The extent to which the claimants' work is exactly the same as that of the RMMs is considerable – between 80% and 85%. That leaves only two questions for consideration, namely the relative importance of the work and whether the similarities are more or less important than the differences. Turning to the emphasised passages in para 44 of Baroness Hale's speech on which Ms Crasnow relies, there is no doubt that the work which both groups do, sitting, is of the highest importance to the enterprise as a whole. In summary then, in a single graphic proposition, the question which I have to answer appears to be this: does the importance of what the RMMs do which the FPMMs do not do, trump the fact that for most of their time the RMMs are doing work which is for practical purposes identical to the work of the FPMMs, that work of being of high importance?**
>
> **47. This is very much a matter of drawing impressions from the findings of fact which I have made and before reaching my conclusions I have revisited and carefully reread those findings in order to gain as accurate an impression as I can. RMMs are not just FPMMs who take on additional tasks, that much is clear. It seems to me that they were designed to occupy a layer in the structure between those occupied by the CMM and FPMM at a level very much akin to that of the District Judge. While they are not in a technical sense the CMMs deputies within a region, important parts of her role are deputed to them – and not just the mechanical functions of carrying out appraisals or conducting interviews. I was impressed by the evidence of Judge Martin who, in my judgment, gave a thoughtful and detailed analysis both of the role and the thinking which lay behind it. The RMMS are people who have, or are in the processes of acquiring, a certain status, albeit that of first amongst equals, making them the focal point for the medical members in their region. They are the mentors, even tutors in a limited way, for newly appointed FPMMs and the bench markers for new jurisdictions such as Personal Independence Payments. They are beginning to take on an outward facing role in representing the jurisdiction with external bodies. None of this they have taken from FPMMs – it is delegated down to them from the CMM and the Chamber President. It is something which FPMMs have never done (or in the case of the mentoring of newly appointed FPMMs, not in this formalised, structured way) and sets the RMMs apart from them to a significant degree. The importance of this work to the enterprise cannot be doubted. RMMs are now the first port of call when a competition or training is to be organised and they are supplanting the FPMMs in dealing with appraisals and recruitment.**

48. The workload of SSCS has grown substantially in recent years. Ms Crasnow contends that non-judges could have been appointed to undertake training, appraisal and recruitment but instead judges who, she submits are very like FPMMs have been appointed, implying, I think, that the non-sitting element of the RMM role is much like that of an administrator or HR officer. While I reject this comparison as significantly underestimating the nature and importance of the RMMs additional tasks, the submission seems to me to miss the point. A solution to the problem which the jurisdiction faced in 2010/11 could have been to delegate more widely among the FPMMs tasks such as appraisal, recruitment and training, and just take on some salaried medical members to sit full time. But what was done was to intentionally create an entirely new role which was qualitatively different from that of the FPMM and which brought a new dimension to the judicial structure of the jurisdiction. It took elements from below and above and an essential part of the thinking behind its creation was that it should relieve the pressure on the CMM.

49. In my judgment therefore the importance of what the RMMs do and which the FPMMs do not, does indeed trump the fact that for most of their time they do the same thing. They are not, therefore, engaged on work which is broadly similar."

21. The Appellants also submitted that even if typical fee-paid medical members were not engaged in broadly similar work to RMMs, a subset of typical fee-paid medical members were. Those were identified as a group which, although not required to undertake duties additional to sitting, did so voluntarily. This group was identified as including all regional medical appraisers in the Social Security and Child Support Chamber, all 7 fee-paid medical members in the Mental Health Tribunal who carried out appraisals, all fee-paid medical members who had carried out training and participated in recruitment exercises, written articles about their work, and attended additional meetings and others. At least some of the Appellants, possibly all three, would fall into this sub-set. Dr Cripps, for example, had engaged in training and recruitment and had attended additional meetings. The purpose of identifying this group was that, if the group was accepted as a valid group and if its members were found to be engaged in broadly similar work to RMMs, then a decision that a fee-paid medical member within this group was doing the same or broadly similar work would be binding in the cases of all fee-paid medical members who fell within this group by reason of paragraph 36(2) of the **Tribunal Regulations**.

22. The Employment Judge, however, held that the proposed group was not a valid sub-group for comparison or, if it were, that its members were not engaged in the same or broadly similar work to RMMs. The Employment Judge said this:

> **"51. In my judgment this submission is doomed to failure by the choice of the sub-set. The net is cast far too wide and would, as Ms Crasnow accepted include a FPMM who had written a single article or attended a single meeting alongside the most active RMA who also took part in training and recruitment. Plainly, that can't be right and I understood Ms Crasnow to agree that the writing of a single article could not make a FPMM eligible for a pension if they were not otherwise eligible although it would seem to make them a member of her sub-set. It is simply unarguable, in my judgment that the additional work of the former is broadly similar to the additional work of the latter let alone the work of the RMM. In short it is not a valid sub-set. As I am offered no other sub-set as a basis for comparison, strictly that is the end of the matter, but I will add a short paragraph about the RMAs and others like them who also undertake activities such as training and recruitment on a regular basis (these last words being important) as, at least at first sight, they make a far more promising sub-set.**
>
> **52. In my judgment had I been offered such a sub-set the comparison with the RMMs would still not have gone through because it ignores the importance of the qualitative distinction between the role of the RMM taken as a whole and that of the FPMM even taking into account what I might (rather disparagingly perhaps in order to make the point) describe as the mere mechanical similarities of the shared activities of appraisals etc which changes the ratio of the similarity of the work done by the two groups in favour of the RMAs. My reasons for this conclusion are set out in paragraphs 47 and 48 above."**

23. Finally, the Employment Judge dealt with the very specific position of Dr Moultrie. No appeal is made in relation to the specific facts of her case.

The Issues

24. Against that background, in the light of the grounds of appeal, the skeleton argument and the oral submissions, the following issues arise:

(1) did the Employment Judge err in his application of the decision in **Matthews**, and in particular, did he fail to give particular weight to the fact that 85% of the work of fee-paid medical members and of RMMs was identical and of the highest importance, and/or did he give too much weight to the differences and fail to appreciate that the differences were subordinate to the core activity of sitting (ground 1)?

(2) did the Employment Judge err by taking into account how the role of RMMs might develop in future rather than considering the work which they were actually doing (ground 2)?

(3) did the Employment Judge err by wrongly taking into account transient or ad hoc duties and his perception of the status of the role rather than considering the work which they were actually doing?

(4) did the Employment Judge err in failing to apply the requisite two-stage test of less favourable treatment and objective justification and, in effect, adopt too high a test for deciding when work was broadly similar?

The First Issue - The Application of the Decision in *Matthews*

25. Ms Crasnow for the Appellants submitted that the Employment Judge had not, in fact, followed the approach in **Matthews** and he had failed to give particular weight to the extent to which the work the two groups did was the same and was important.

26. In my judgment, the Employment Judge clearly followed and applied the approach set out in **Matthews**. In relation to paragraph 44 of the judgment of Baroness Hale, for example, that recognises that:

(1) the fact that the work which the claimants and the comparators do is exactly the same must be of great importance;

(2) if a large component is exactly the same the question is whether any differences are of such importance as to prevent the work being regarded as overall, "the same or broadly similar";

(3) the fact that the work which is the same is also of importance is of great importance in the assessment of whether the claimants and the comparators are doing the same or broadly similar work;

(4) to that end, particular weight is to be given to the extent to which the work is the same and the importance of that work to the enterprise as a whole.

27. That is how the Employment Judge approached the assessment in this case. The Employment Judge recognised that there was no difference between the levels of qualifications, skills and experience between the two groups (typical fee-paid medical members and RMMs). The Employment Judge then expressly recognised that the extent of the work done by the typical fee-paid medical member and the RMMs which was the same was considerable – between 80 and 85%. Then he expressly referred to paragraph 44 of the judgment of Baroness Hale in **Matthews** and said that the work that both groups do (the sitting) "is of the highest importance to the enterprise as a whole". The question then, given the similarity of a large component of the work, and the importance of that same work, is (using the words of Baroness Hale) "whether any differences are of such importance as to prevent their work being regarded overall as 'the same or broadly similar' ". The Employment Judge put that very question, albeit in his own words, when he said:

> **"in a single graphic proposition, the question which I have to answer appears to be this: does the importance of what the RMMs do which the [fee-paid medical members] do not do, trump the fact that for most of their time the RMMs are doing work which is for practical purposes identical to the work of the [fee-paid medical members], that work being of the highest importance".**

28. That approach encapsulates the approach set out by Baroness Hale in **Matthews**. It gives particular weight to the very two factors identified by Baroness Hale that is, the extent to which the work is exactly the same and the extent to which it is important. Furthermore, the Employment Judge also had regard to the fact that the qualifications, skills and experiences of

the two groups were the same. The question then is whether the differences prevent the work being the same (or, using the Employment Judge's analogy, whether, given the fact that much of the work is the same and is important, do the differences trump those factors and justify the conclusion that the work is not broadly similar). The Employment Judge did, therefore, adopt the correct approach to a consideration of whether the work of the typical fee-paid medical member was broadly similar to the work of the RMMs.

29. The only basis upon which the Appellants' submission could be correct would be if the approach in **Matthews** meant that once a large component of the work was the same, and once that work was recognised as being important, then the two groups had to be engaged in the same or broadly similar work. But that is not what **Matthews** decides. Indeed, it is clear that particular weight must be given to those factors and then the question becomes whether the remaining differences are of such importance to prevent the work being regarded as broadly similar. It is not the case that whenever a large component of the work of the two groups is the same, and is of importance, it necessarily follows that the work is broadly similar.

30. Ms Crasnow made a number of subsidiary points on behalf of the Appellants. They can be dealt with relatively shortly. First, she submits that the Employment Judge failed to have regard to the fact that the level of qualifications, skills and experience of the RMMs and the fee-paid medical members was the same. The Employment Judge, however, expressly identified that one of the relevant questions was whether people in the Claimant's role and people in the comparator's role have similar levels of qualification, skills and experience: see paragraph 12 of the decision. The Employment Judge in paragraph 46 expressly addresses this question and takes into account as part of his assessment that there are no differences in terms of the qualification, skills, and experience between the two groups.

31. The Appellants, in their skeleton argument, criticise the Employment Judge for focussing too much on the 5% of work that was different and submit also that he wrongly left out of account the fact that 10% of the work the RMMs did was work that was carried out by some fee-paid medical members. In relation to the last point, in terms of the lead cases, the question was whether typical fee-paid medical member were doing broadly similar work to RMMs (so that any typical fee-paid medical member would be able, by reason of paragraph 32 of Schedule 1 to the **Tribunal Regulations**, to benefit from a favourable finding on the preliminary issue). The typical fee-paid medical member did not do activities falling within the 15% of work that was different. Further, in so far as any of them did so, that was considered in the context of the sub-group.

32. Thus, the Employment Judge was correct to approach the matter in the way that he did: given the comparison was between typical fee-paid medical members and RMMs, and given the large component of the work that was similar (80-85%), and given the importance of that work, were the differences such as to prevent the work being the same or broadly similar?

33. Ms Crasnow also submitted that the Employment Judge failed to recognise that care needs to be taken to make sure that the differences are not the inevitable result of one worker working full-time and one working less than full-time. This is a point that Baroness Hale made in **Matthews** in the last sentence of paragraph 44 of her judgment (pointing out that full-time workers may be given extra activities to fill their time but that should not prevent the work being regarded as broadly similar). The Employment Judge was aware of this concern and addressed it. First, he set out the passage from Baroness Hale warning of this danger. Secondly, he drew specific attention to the two sentences from the judgment of Baroness Hale in paragraph 23 of his decision. Thirdly, he concluded that the:

> **"additional tasks are not in any sense attributable to the fact that the comparator's are full-time and the claimants are not"**
>
> **and the**
>
> **"additional duties are very much a deliberately designed element of the comparator roles all three of which are [Judicial Appointments Commission] appointments."**

34. Ms Crasnow also submitted that the Employment Judge failed to recognise that all the additional tasks were done to facilitate the core activity of sitting. In this regard, however, the Appellants are substituting their view of whether the differences between them and RMMs are important because of their assessment of the importance of the activity of sitting in a judicial capacity and the relationship between that activity and the additional tasks undertaken by RMMs. That, however, is the very assessment that the Employment Judge had to make in deciding whether the work was the same or broadly similar. For the reasons that he gave at paragraphs 47 to 49, he concluded that the importance of what the RMMs did, and the typical fee-paid member did not do, did trump the fact that a very large component of their work was the same and was of the highest importance. Having approached the assessment in the correct way, and subject to consideration of the other grounds of appeal, that is a decision to which the Employment Tribunal Judge was entitled to come.

The Second Issue - The Question of Future Development of the Role

35. Ms Crasnow submits, and I accept, that the Employment Judge must consider the work that the comparator group is actually engaged upon, not work which might, at a future date, become work that the comparator might do. That follows from the wording of regulation 2(4) of the **Regulations**.

36. Ms Crasnow then submits that the Employment Judge was conscious that the role of the RMMs was new and still evolving and he was concerned that if he took a snapshot of the role

of the RMMs at the time of his decision and found it was comparable with the role of the typical fee-paid medical member, it might cease to be comparable in a year or two. Ms Crasnow submits that that concern led the Employment Judge into error and caused him to include in his assessment of the work of the RMMs not only work in which they were engaged but ways in which their role might develop in future.

37. It is the case that the Employment Judge was, it appears, concerned that any assessment of comparability might become out of date because the role of RMMs was new and was evolving. That appears in the first sentence of paragraph 33 which is set out above. In my judgment, however, far from falling into the trap of taking into account future development, the Employment Judge was careful to ensure that he was only taking into account work that the RMMs were actually engaged and trained to do. This appears, for example, from the way in which he considered the 5% or so of activities delegated to RMMs. First, he established, on the evidence before him, the amount of RMMs' work involving the doing of duties delegated to them by chief medical members and the chambers president. That, currently, amounts to approximately 5%. The content of it is not, at present, constant but there was a component of work "which consists of tasks delegated" (not tasks which will, in future, be delegated) and the precise content and temporal scope is "subject to some fluctuation, but neither is insignificant in terms of time or importance" (see paragraphs 32 and 33 of the decision). In other words, in finding the facts as to what RMMs did, the Employment Judge was careful to consider what precisely their role currently comprised.

38. Similarly, criticism is made of a passage in paragraph 40 of the decision where the Employment Judge refers to the anticipation of the president of the Social Entitlement Chamber as to how the RMMs' role might develop and to the expectations that go with the role. It is

clear, however, if the written reasons are read fairly, and as a whole, that the Employment Judge is careful to distinguish between what the RMMs are currently doing or trained to do as part of their work, and the anticipation of others. In paragraph 40 for example, the Employment Judge is careful to analyse the tasks which the RMMs currently undertake either by way of delegation or arising naturally from their role. He is not including in his assessment possible future developments in the role that others anticipate might happen.

The Third Issue - Transient or Ad Hoc Duties and Status

39. The Appellants contend, linked to the second ground, that the Employment Judge wrongly took into account transient and ad hoc duties of the RMMs and his perception of their status rather than focussing on the work on which they were actually engaged.

40. In relation to the ad hoc and transient duties, reference was made to paragraph 41 of the Tribunal decision, where the Employment Judge refers to the fact that the RMMs:

> **"are expected to look for patterns of error, for example, poor quality medical evidence submitted by ATOS on behalf of the DWP, analyse causes and recommend remedial action".**

41. The Employment Judge is, in my judgment, here describing an aspect of their duties. They are not simply adjudicating on individual cases. Part of their role is a systematic one of considering if there are patterns of error and recommending remedial action. The Employment Judge was entitled to take that, along with the other relevant factors, into account.

42. Further, in relation to status, the Appellants identify three comments at paragraph 47 of the decision, namely (a) the fact that the RMMs were said to be designed to occupy a layer between the chief medical member and the fee-paid medical member, (b) that they are in the process of acquiring a status of first among equals making them a focal point for fee-paid

medical members (akin to a district Judge) and (c) they are beginning to take on a role representing the jurisdiction with external bodies.

43. Again, reading, the decision fairly and as a whole, and considering the remarks in context, the Employment Judge is not departing from a careful assessment of the work that the RMMs are engaged in. Paragraph 47 is the Employment Judge's evaluation of whether the factual differences (that he has identified in previous paragraphs, as he explains in the first two sentences of paragraph 47) are important to the extent that they prevent the work being broadly similar. The comments he makes are, largely, part of his process of assessment or description of why the differences between what the RMMs do, and the fee-paid medical members do not do, are important.

44. The Employment Judge is saying in paragraph 47 that RMMs are not just fee-paid medical members who take on additional tasks. Rather they are designed to occupy a layer in the structure between fee-paid medical members and chief medical members. That is part of an assessment of the nature and importance of the work performed by the RMMs. Similarly, the fact that they are acquiring a status is a reflection of the fact that the work they do is different – they are becoming, in the discharge of their duties, the focal point for fee-paid medical members (reflecting the fact that they have had delegated to them the task of fielding enquiries from medical members). Their role includes them acting as mentors, in a limited way, for new members. Their work includes being trained to deal with appeals in relation to a new benefit. Similarly, their work involves representing their jurisdictions to external bodies. The rest of paragraph 47 goes on to explain that none of these roles were taken from the work done by fee-paid medical members. Rather it is work delegated to them from the chief medical members and the chamber president and was work not done (or not done in this way) by fee-paid medical

members. Read fairly, the Employment Judge is carrying out the task of evaluating the importance of the role, on the basis of the work that he has found they carry out, to determine if the differences are of such importance as to prevent the work of the typical fee-paid medical member from being the same as or broadly similar to the work carried out by RMMs. The comments criticised by the Appellants, when read fairly and in context, do not demonstrate any error of approach on the part of the Employment Judge.

The Fourth Issue - The Two Tier Process

45. The Appellants contend that the decision of the Employment Judge is wrong as, in effect, it means that there is no stage at which the question of the objective justification of the differences will be considered. It is submitted that this is contrary to the two stage test set out in the **Regulations**.

46. This complaint is not easy to follow. The **Regulations** require the Employment Tribunal to consider whether the part-time worker is comparable to a full-time worker. That requires consideration under regulation 2(4)(a) of the **Regulations** of whether they are engaged in the same or broadly similar work, having regard, where relevant, to whether they have a similar level of qualification, skills and experience. If they are comparable, the part-time worker cannot be treated less favourably than the full-time worker on the grounds that he or she is working part-time if the differential treatment is not justified on objective grounds: see regulation 5(2) of the **Regulations**. If the part-time worker and the full-time worker are not comparable (because they are not engaged in the same or broadly similar work) then the question of having to provide an objective justification for any differential treatment between the part-time worker and that full-time worker does not arise.

47. Provided, therefore, the Employment Judge correctly approaches the question of whether a part-time worker and a full-time worker are comparable, and providing that any decision that they are not comparable because they are not engaged in the same or broadly similar work, is not perverse, the question of objective justification will not be reached. That is what has happened here, in my judgment. The Employment Judge has correctly approached the question of whether fee-paid medical members are engaged in broadly similar work with RMMs. He has concluded that they are not, His decision is not perverse. It is one that he was entitled to reach on the facts as found by him. There was no error because his conclusion on that issue meant that the next stage of the exercise did not arise.

48. The Appellants further submit that the Employment Judge should have "allowed the Appellants to establish comparison with a full-time comparator" and then progressed to consider whether, in view of what they describe in their skeleton argument as "the small differences between the roles" the differential treatment was objectively justified. That, however, is either to confuse two distinct questions (is the work broadly similar, and, if so, are any differences of treatment justified) or reflects the view that the Appellants believe that the work they are doing is broadly the same as RMMs so that the Employment Judge must be wrong or perverse. In either event, the Appellants are unable to demonstrate any error of law, or any perversity, in the decision that the work of the typical fee-paid medical member is not broadly similar to that of the RMMs. Nor did the Employment Judge apply too high a standard in assessing whether the work was broadly similar. He applied the test set out in regulation 2(4(a)(ii) of the **Regulations**. He approached the task in accordance with the approach identified as correct by the Supreme Court in **Matthews**. The decision that he came to is one that he was entitled to reach on the facts.

Conclusion

49. The Employment Judge correctly assessed the question of whether the work of a typical fee-paid medical member was the same as or broadly similar to that of the RMMs within the meaning of regulation 2(4)(a)(ii) of the **Regulations**. He correctly considered that approximately 85% of the work that RMMs do was identical to the work done by fee-paid medical members and that that work was of great importance. He also took into account that there was no difference between them in terms of qualifications, skills, or experience. He did give the relevant matters particular weight. He then considered whether the differences between the work that the RMMs did, and the work that typical fee-paid medical members did not do, were of such importance that they could not be regarded as being engaged in broadly similar work. In considering that question he did consider the work that the RMMs were engaged in, not future work or merely transient or ad hoc duties. The conclusions that he reached, on the facts as found by him, were ones that he was entitled to reach. These appeals are therefore dismissed.