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# THE EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondents** |
|---|---|---|
| **Mr A J Engel** | **v** | **1. Ministry of Justice**<br>**2. Department for Communities and Local Government** |

**Heard at**: London Central **On**: 23-24 January 2018 (In Chambers)

**Before:** Employment Judge Macmillan

**Representation:**
**Claimant:** In person Written representations
**Respondent:** Mr Charles Bourne QC
Ms Jennifer Seaman of Counsel Written representations

# REMEDY JUDGMENT

1. The claimant's contentions that the methodology proposed by the respondents to settle the pension element of his claim made in an email dated 10 May 2016, does not give an appropriate remedy under regulation 8 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, are not well founded.
2. The appropriate methodology for assessing the pension provisions for former chairs of the Residential Property Tribunal Service is that proposed by the respondents
3. It is just and equitable to grant a declaration in terms to be agreed or determined by the Employment Judge in default of agreement as to the rights of the parties in relation to the pension to which the claimant is entitled.

# REASONS

**The Issues**

1. Mr Engel is a retired fee paid judge, formally a lawyer chairman, of the Residential Property Tribunal Service (RPTS). He has succeeded in a claim under the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTWR) in which he complains of his exclusion from the Judicial Pension Scheme by reason of his status as a part time member of the judiciary. On 3 October 2017, I

held a case management preliminary hearing the purpose of which as to bring on for hearing the so called 'which pension' remedy issue which arose in four jurisdictions in which no judicial office holders had been members of the Judicial Pension Scheme. Those jurisdictions were RPTS, Fee Paid Deputy Adjudicators of HM Land Registry, Asylum Support Tribunal and the Criminal Injuries Compensation Tribunal.

2. The Respondent had put forward a proposal to settle pension claims which was designed to put fee paid judicial office holders in those jurisdictions in the same position that they would have been in had they not been excluded from entitlement to pension because of their part time status. That proposal was intended to reflect the pension arrangements which had been made for the salaried members of the judiciary in their jurisdictions or which would have been made had there been any full time salaried post holders. Those pension arrangements differed from the mainstream of judicial post holders in that they were not, and did not accurately mirror, the statutory Judicial Pension Scheme. Instead they were something of a mish-mash of so called 'by analogy' schemes – schemes analogous to the various iterations of the Principal Civil Service Pension Scheme – and some purely ad hoc personal arrangements. By the time of the preliminary hearing on 3 October, that proposal had been accepted by all but a very small handful of the fee paid judges affected. The issue for determination identified and agreed at that preliminary hearing, was the question 'What is the appropriate methodology for assessing the pension provisions for Deputy Adjudicators (HMLR) and for RPTS members to provide a just and equitable remedy?'

3. Two cases were listed for hearing, the first being that of Mr Mark, the second that of Mr Engel. Mr Mark has now settled his claim and Mr Engel is therefore the only member of this group of judges who is not prepared to accept the respondents' proposal. The question for determination in Mr Engel's case was refined into three sub questions which were incorporated into the case management order. I will set out the specific questions agreed below and deal with them in turn. However, Mr Engel has provided a very useful summary of the issues in his written submissions, which I think it would be helpful to set out here. He suggests that the issue identified at the preliminary hearing has two limbs:-
   (a) How should his pension be calculated; and
   (b) What figures should be used in the calculation.

4. In respect of both limbs he identifies two possibilities. For Limb A those possibilities are:-
   (1) A full or 100% JUPRA (Judicial Pensions and Retirement Act) equivalent pension calculated in accordance with the Judicial Pension (Fee Paid Judges) Regulations 2017 (FPJPS), in respect of all of his service in RPTS since April 2000; or

   (2) A full or 100% JUPRA equivalent pension calculated in accordance with the FPJPS in respect of his service in RPTS since 1 July 2013 and a FPJPS Pension Credit in the region of 50% in respect of his service between April 2000 and 30 June 2013.

5. The first alternative is Mr Engel's contention. The second is a reasonably accurate summary of the respondents' contention. The 30$^{th}$ June 2013 is the date on which Mr Engel retired from his appointment in the RPTS and the date of April 2000 is the date on which the PTWR should have come into effect and, as the law currently stands, the earliest date to which the pensions of successful claimants in this litigation can be back dated. There is an appeal currently before the Supreme Court

which may have the effect of allowing pensions to be backdated beyond April 2000 to the date on which claimants first took up their appointments.

6. Mr Engel's contentions are available to him only because, when determining that he and his fellow RPTS Judges were being less favourably treated than a comparable full time worker by being excluded from the judicial pension scheme, I held that their work was broadly similar to the work of a Tax Judge in the First Tier Tribunal (FTT). This at first sight rather surprising approach to the question of less favourable treatment was necessitated by the fact that there were no full time judicial office holders within RPTS at the same level as Mr Engel and his fee paid colleagues, and the respondents accepted that it was permissible in those circumstances for him to look beyond the jurisdiction to which he was appointed for a comparator. The issues identified for determination in this hearing arise because and only because the remuneration package enjoyed by Tax Judges was significantly better than that enjoyed by RPTS chairs and included an entitlement to a JUPRA pension which reflected the entirely of their service, the JUPRA pension being more beneficial in its terms than those available in RPTS. This is reflected in Mr Engel's Limb B. Whilst the respondents contend that the figures to be used in the calculation of his pension should reflect only fees actually paid to him plus any other sums that have become payable to him pursuant to decisions of this Tribunal and the appellate courts in the Judicial Pension Scheme litigation, Mr Engel contends that the pension should also include the differential between the rates of pay enjoyed by him and his fellow RPTS Judges and those enjoyed by his comparators.

7. Before I turn to the issues, I must make an observation about the written submissions. Whilst the respondents' written submissions adhere to the questions that were identified at the preliminary hearing and address each in turn, Mr Engel's does not. Having set out his own summary of what the 'which pension' issue means, he then goes on to address his own analysis of the issue rather than the questions specifically identified for determination at the preliminary hearing. This makes it much more difficult for me to follow his arguments in the context of the issues as they have been agreed. I have endeavoured to identify the passages in his written submissions which are applicable to each of the agreed issues, but it is possible that I have failed to correctly link a submission with the issue (as defined in the case management order) to which it is most applicable.

**The law**

8. Before turning to the agreed issues, I need to remind myself of the statutory framework. These claims have been brought under the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000. Regulation 5 defines the circumstances in which less favourable treatment for the purposes of the Regulations occurs. So far as material it provides:-

> (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 in 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.
>
> (3) In determining whether a part time worker has been treated less favourably than a comparable full time worker, the pro rata principle shall be applied unless it is inappropriate.

9. Regulation 8 has the cross heading 'Complaints to employment tribunals etc'. Again so far as material it provides:

…

(6) Where a worker presents a complaint under this regulation, it is for the employer to identify the ground for the less favourable treatment or detriment.

(7) Where an employment tribunal finds that a complaint presented to it under this regulation is well founded, it shall take such of the following steps as it considers just and equitable –

(a) making a declaration as to the rights of the complainant and the employer in relation to the matters to which the complaint relates;

(b) ordering the employer to pay compensation to the complainant;

(c) …

…

(9) Where a tribunal orders compensation under paragraph 7 (b), the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances … having regard to –

(a) the infringement to which the complaint relates; and

(b) any loss which is attributable to the infringement having regard, in the case of an infringement of the right conferred by regulation 5, to the pro rata principle, except where it is inappropriate to do so.

(10) The loss shall be taken to include –

(a) any expenses reasonably incurred by the complainant in consequence of the infringement; and

(b) loss of any benefit which he might reasonably be expected to have had but for the infringement.

**Issue 1**

Is the RPTS Judge entitled to a pension calculated on the same basis as a Tax Chamber Judge, no further analysis of whether the difference in treatment is because of part time status being justified?

10. The respondents submit that this issue has already been decided in their favour in the context of a number of appeals involving RPTS Judges. On 17 December 2014, I rejected an application by the respondents to formally amend their grounds of resistance to raise what has now become the 'which pension' issue. More formally, it was a contention that it would not be just and equitable for RPTS Judges to be entitled to the same pension as a full time Tax Chamber Judge because of the less generous pensions in payment to the more senior judicial office holders (the Vice-Presidents) in RPTS. I refused that application on the grounds that it was a liability rather than a remedy issue and liability had already been determined, but my decision was successfully appealed by the respondents to the Employment Appeal Tribunal (*MoJ v Edge and Burton UK EAT/0247/15*). The respondents' contention was that the reason why the fees and salaries and consequently the pensions in payment in RPTS were lower than in other tribunals such as the Tax Chamber was not because of the part time status of the recipients of those payments, but the differing origins and histories of the jurisdictions. I explored this issue in *Thompson, Barron and Burton v MoJ*, in which I held that the less favourable treatment was due to the 'haphazard growth of tribunals and the independence of Ministers and Government Departments to set the terms and conditions of their own department tribunals'. This has become referred to over time as the 'reason why' point.

11. In *MoJ v Edge and Burton* Laing J said at para 43: The decision in **O'Brien** [the case which gave rise to the JPS litigation] does not seem to me to entail that every part time judge is entitled to the same pension as the person he chooses as his full time comparator. It will depend in any case on the application to the facts of the test in regulation 8.

12. In paragraph 42 she had said:
The reason for the less favourable treatment that was decided at the liability stage does not shut out the advancing at the remedy stage of a concurrent reason for the treatment. The concurrent reason for the treatment is irrelevant at the liability stage if part time status played a more than trivial part in the less favourable treatment and the respondent conceded that part time status did play such a role in the less favourable treatment. But that concession is not a concession that there was no other reason in play concurrently. In my judgment there was no obligation at the liability stage to bring forward a case on a concurrent cause of the treatment if the respondent was conceding that the discriminatory reason played a legally significant part in the less favourable treatment.

13. At the liability hearing, the respondents had conceded that the predominant reason for the less favourable treatment was part time status. At the remedy hearing, following *Thompson, Barron and Burton* they wished to contend that the reason why pensions in RPTS were lower than those in the Tax Chamber was for the historical reasons already identified.

14. The correct approach to Issue 1, the respondents submit, derives from the wording of reg 8(9). If compensation is awarded the Tribunal must have regard to the loss which is attributable to the infringement. That, the respondents contend, involves an enquiry as to what pension Mr Engel would have had had if pensions been provided in RPTS to fee paid judges. The answer is clearly not the pensions in payment to Tax Judges.

15. Mr Engel submits that the 'reason why' issue is no longer relevant as it only concerns liability and not remedy and he cites *MoJ v Edge and Burton* as the authority for that proposition. Mr Engel further submits that 'the reason' why defence now fails in respect of pension because the line of authorities in these proceedings which gave rise to it has been overruled by the Supreme Court case of *Essop v Home Office* and *Naeem v Secretary of State for Justice* [2017] UK SC27. Those cases held that the 'reason why' defence fails in respect of indirect discrimination claims and Mr Engel submits that his case is one of indirect discrimination. In the alternative, if he is wrong and his case is one of direct discrimination, then *Essop* and *Naeem* require that the application of the reason why defence to direct discrimination claims must be re-examined.

**Conclusions on Issue 1**

16. Mr Engel is plainly and unarguably wrong to contend that the 'reason why' issue concerns only liability. *MoJ v Edge and Burton* says precisely the opposite as the passages which I have quoted from the judgment of the EAT above make clear. He is also plainly wrong to contend that this is a case of indirect discrimination. Less favourable treatment has been afforded to him because of his status as a part time worker, which is classic direct discrimination (Equality Act 2010 s. 13). Indirect discrimination has precisely the opposite starting premise: the treatment afforded to the claimant and the comparator is ostensibly the same. Indirect discrimination occurs (roughly) when two people have the same provision, criterion or practice applied to them but the provision, criterion or practice places a person with a protected characteristic at a disadvantage when compared with others who do not share that characteristic (Equality Act s. 19). *Naeem* and *Essop* therefore have no application.

17. I therefore agree with the respondents' submissions that the answer to the first question must be 'No'. That conclusion inevitably emerges from the judgment of Laing J in *MoJ v Edge and Burton*. The respondents are at liberty to contend that while the primary 'reason why' a person was denied a pension may have been part time status, a different 'reason why' is in play when the question of the remedy to which that person is entitled as a result of that less favourable treatment falls to be considered. Further analysis of the difference in treatment is therefore necessary.

**Issue 2**

The issues concerning the 'reason why' defence and discrimination etc, set out at point 7 of Mr Engel's written submissions dated 13 September 2017 and at paragraphs 10 – 19 and 25 – 41 of his written submissions dated 16 January 2017.

18. At paragraph 7(1) of his submissions of 13 September 2017 Mr Engel states "The figures used in respect of the calculation of my pension should include the differential in the rates of pay of part time RPTS Judges and full time Tax Judges. Regulations 1(2) and 8(9)(b) (of the PTWR) so require. In the alternative it is just and equitable." This appears to be a restatement of Issue 1, although couched in different language and must therefore fail for the same reason.

19. At paragraph 7(2) he claims that the 'reason why' issue is not relevant to remedy and that the 'reason why' defence fails in respect of pension because of *Essop* and *Naeem*. I have already dealt with these points under Issue 1; Mr Engel is wrong on both counts.

20. At paragraph 10 of his submissions of 16 January Mr Engel contends: It is clear that the MoJ's proposed methodology will result in the less favourable treatment of myself compared with my full time comparator (a Tax Judge) because:-

    1. My comparator had higher pro rata remuneration than myself which would feed into pension calculation; and

    2. My comparator is entitled to pension under a judicial pension scheme in which all service counts for pension – whereas the MoJ proposes that my pension should – in respect of most of my years of service in the RPTS – be calculated under a scheme comparable to a Civil Service Scheme, which would be much less favourable than a judicial pension scheme.

21. In paragraph 11, he contends:-

    1. Thus if the MoJ's proposal was adopted, I would be doubly penalised for the failure of my appeal(s) concerning "the reason why" issue which would be unjust and inequitable.

    2. It would be unlawful for reasons given by the European Court of Justice in *Magorrian & Cunningham v Eastern Health and Social Services Board (C246/96)* and *Preston & Others v Wolverhampton NHS Trust & Others (C78/98).*

22. In his written submissions for this hearing, Mr Engel does not develop the last point and does not explain why he submits that *Magorrian* and *Preston* render the MoJ's proposals unlawful. His only reference to them is by way of something of a footnote concerning the reason for the disapplication of regulation 8(8) which has been amended out of the PTWR. If, as the respondents surmise, the reason for the reference to *Magorrian* and *Preston* is the ruling that prohibits the application of national rules that make reliance on EC law impossible, the point clearly does not arise in this case. Again, so far as I can tell from Mr Engel's written submissions, he does not develop the double penalty point either. I do not entirely understand the

point he is trying to make. The 'reason why' point has been decided in respect of liability and in *MoJ v Edge and Burton* it was held that a different 'reason why' point could apply to remedy as well. The MoJ's proposals simply reflect that position. If it were otherwise Mr Engel would have found a way to defeat the judgments against him of both the EAT and the Court of Appeal when he unsuccessfully appealed the 'reason why' point.

23. Paragraphs 12 to 19 of Mr Engel's written submissions of 16 January 2017 have the general cross heading "MoJ's suggested application of the reason why point". They run to 4 pages and I will therefore only summarise his various points in these reasons. He submits (paragraphs 12 to 14) that the respondents' contention that the appropriate pension credit should be calculated by reference to the pension regimes that existed within RPTS is unsupported by reasons and is in complete contradiction to the findings of this Tribunal in *Edge and Others v MoJ*. Mr Engel is wrong on the first count as the hearing bundle shows that numerous reasons have been given (the fact that Mr Engel may not agree with them does not mean they have not been given). His second point appears to be the one developed in para 14(2).

24. In para 14(2) Mr Engel contends that the MoJ should not be permitted to claim that the Vice-Presidents or Presidents of the RPTS should be his comparators for pension when they successfully persuaded this Tribunal in *Edge and Others* that the Vice-Presidents were not valid comparators for the purposes of the Regulations. This again appears to be an attack on the use of the 'reason why' point in connection with remedy. The comparison in *Edge and Others v MoJ* was in the context of the question whether lawyer chairs of RPTS and Vice-Presidents were engaged in broadly similar work, in other words whether the Vice-Presidents were comparable full time workers for the purposes of reg 5(3). It was therefore a liability issue. The issue now is the nature of the pension that would have been in payment absent the discriminatory exclusion of fee paid office holders in RPTS and the only guide to that, according to the respondents, is the pension actually paid to the Vice-Presidents. It is now a remedy issue and the judgment of EAT in *MoJ v. Edge and Burton* expressly contemplates the possibility of different 'reason why' points being in play at liability and remedy stages. Although the comparator here is the same as in *Edge and Others* the basis of comparison (the nature of their pensions as opposed to the nature of their work) is different. The respondents must therefore be free to rely on the Vice-Presidents in the way that they seek to do.

25. In paragraph 14(3) Mr Engel contends, in what appears to be yet another restatement of Issue 1, that having found that a comparator was a full time Tax Judge, it is "accordingly" just and equitable that the pension should be calculated on the same basis as that of Tax Judges. That contention must fail for the same reason that his contention at Issue 1 failed. At paragraph 14(4) he says that it is not just and equitable that his pension be calculated on the same basis as office holders, that is the Vice-Presidents of RPTS, whose work was not comparable to the work performed by RPTS chairs. He develops this point in his written submissions for this hearing and contends that the work of the Presidents and Vice-Presidents was largely administrative and straightforward and therefore of lower weight than the work done by the lawyer chairs. Even if this claim was justifiable - no evidence is advanced to support it, only the contention that the kind of cases (he cites only two) which he personally heard were of greater weight that the work done by the Vice-Presidents - it would be irrelevant. The issue here is the nature of the pension scheme that would have been afforded to all judicial office holders within the jurisdiction, not the weight of their respective roles. The claim overlooks the fact that in all jurisdictions which have salaried judges of different grades in their

structure, a judge who is promoted (say from salaried Employment Judge to Regional Employment Judge) and receives a sometimes substantial increase in remuneration to reflect the additional weight of her new role, remains in the same pension scheme: a better pension scheme is not part of the package[1]. I accept the respondents' submission that it would clearly not be just and equitable for judicial office holders at a lower level in a jurisdiction to enjoy a more beneficial pension scheme than those at a higher level in the same jurisdiction.

26. At paragraph 14(5) Mr Engel submits that the 'reason why' defence applies to defeat the contention by the respondents that his pension should be based on the pensions of Vice-Presidents in RPTS. He submits that this is so because the 'reason why' defence "applied due to the different histories leading to the pay differentials between full time Tax Judges and part time RPTS Chairs". His point here is presumably that as RPTS chairs and Vice-Presidents come from the same tribunal there is no room for arguments based on different histories. This seems to be an alternative way of putting the argument he advance in para 14(2) which I have dealt with at para 24 above and must fail for the same reason. The respondents advance, and are entitled to advance, different 'reason why' points in relation to liability and remedy.

27. At paragraph 14(6) he submits that it is only relatively recently that there have been any full time RPTS Vice-Presidents and Presidents: "The 'reason why' defence is dependent on reg 5(2)(a) which only comes into play when comparing full time workers with part time workers." I agreed with the respondents that this is an irrelevant point. Regulation 5(2)(a) is concerned with liability. We are now concerned with remedy under reg 8 and in particular reg 8(9). The issue under reg 8 is what would have happened in the absence of discrimination and what steps are required by way of remedy to rectify the discrimination. *MoJ v. Edge and Burton* has established that different 'reason why' arguments may be advanced for liability and remedy.

28. In paragraph 16 Mr Engel refers to what he categorises as the 'chequered history' of the litigation which he sets out in an extended chronology and also to the respondents' failure to alert him to the various consultations in relation to pensions for part time judiciary. He claims that both are relevant to lawfulness and what is "just and equitable" but he does not explain why. In his written submissions for this hearing under the heading 'Consultation', he expands slightly on the point by saying that if the consultations had indicated that he would receive a lower pension for his service in the RPTS, he would certainly have responded, objecting to what he submits where unlawful, unjust and inequable proposals. However, he appears to accept that such an indication does not emerge from the consultation and so the point is entirely academic. I accept the respondents' submission that there was no duty on the MoJ to notify Mr Engel personally of the consultations – Mr Engel does not claim that others were personally notified of the consultations - and that neither the history of the litigation, nor their failure to notify him is relevant to the remedy issues.

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[1] This point is subject to one slight qualification which does not affect its validity, namely that members of the 1981 Judicial Pensions Act scheme were required to transfer into the 1993 Judicial Pensions and Retirement Act 1993 scheme on promotion, while other members of the 1981 scheme could opt to remain in that scheme if it was more favourable for them to do so.

29. In paragraphs 17 and 18, Mr Engel returns to the work done by the Vice-Presidents and raises the issue that their work was less heavy than that done by the chairs. I have already dealt with this point. Even if justified which on the material before me it is not, it is not relevant for the purposes of the remedy hearing. In paragraph 19, Mr Engel submits that the respondents' methodology is flawed in a number of respects. The first has been overtaken by events as the Fee Paid Judicial Pension Scheme Regulations 2017 have now been approved by Parliament. Whilst the second is correct in that the methodology does not deal with chairs who were appointed prior to 7 April 2000, as the law currently stands, that is the cut-off date for qualifying service for pension purposes and so a failure to deal with earlier periods of service is irrelevant. There is no reason to doubt that if the so called year 2000 point is finally resolved in favour of the claimants (the appeal on the point is currently stayed before the Supreme Court pending the outcome of a reference to the CJEU) and their service becomes pensionable from the date of their appointment, the methodology which simply be extrapolated backwards to accommodate that change in the law.

30. In paragraph 19(3), Mr Engel contends that there is insufficient detail and explanation in the MoJ's offer. The respondents contend otherwise. In my judgment the point is irrelevant to the question whether the offer is compatible with the respondents' obligations under reg 8. In paragraph 19(4), Mr Engel states that it (the methodology) fails to specify the legislative authority for its assertions. Like the respondents I do not understand the point but I accept the respondents' contention that the basic requirement is for the compensation to comply with the PTWR.

31. At paragraph 19(5), Mr Engel complains that the methodology fails to specify how serving judges are affected. The respondent denies that this is the case but even if it was true it has no bearing on the remedy to which Mr Engel is entitled which is determined by reg 8 PTWR. Finally at paragraph 19(6), he submits that the methodology "fails to specify the basis on which pensions for Presidents and VP's of the RPTS have been calculated." I accept the respondents' submission that this is simply not the case. The methodology explains the nature of the schemes offered to Vice-Presidents and Presidents and identifies some of those schemes by name. Redacted pension calculations for existing Vice-Presidents were supplied to Mr Engel as long ago as 25 August 2016. It is therefore very difficult to understand precisely the nature of Mr Engel's complaint here. But in any event the point is irrelevant. What matters is not whether the respondents have failed to explain the basis on which the pensions for Presidents and Vice-Presidents have been calculated, but whether what the respondents are offering to Mr Engel is the same as that offered to the Presidents and Vice-Presidents. Mr Engel has nowhere asserted that it is not. His contention is different - that offering him the same as the Presidents and Vice-Presidents is the wrong way to approach the pension remedy issue.

32. In paragraphs 25 to 30, Mr Engel raises a number of points under the general heading "Other Judges of the First Tier Tribunal." His primary contention is in para 25: "It would not be 'just and equitable' if, in addition to receiving no extra back pay just because our comparator – from the same (First Tier) Tribunal – came from another jurisdiction, RPTS Judges also received reduced pensions compared with the vast majority of other judges of the First Tier Tribunal". This point is expanded at paragraphs 23 to 28 of his written submissions for this hearing under the heading "Equal Treatment". At paragraph 24 of those submissions he adds to the basic point: "This consideration is enhanced because the work in the RPTS was, on average, much heavier … than the work in, for instance, the Social Entitlement Chamber …". He submits that it would be unlawful to make different pension

provisions for different groups of part time judges and he relies on the opinion of Advocate General Kokott in *O'Brien v UK* (ECJU Case C393/10) page 90. Mr Engel again appears to ignore the judgment of the EAT in *Edge and Burton* on the 'reason why' issue and also reg 8(9) which requires regard to be had to the loss attributable to the infringement. The respondents are right that this contention also ignores the lack of justice or equity which would result from giving the judges in the RPTS a pension benefit which exceeds those of the Presidents and the Vice-Presidents in that jurisdiction. So far as the differential treatment of different groups of part timers is concerned, the point raised by AG Kokott was not dealt with by the CJEU as it did not arise in *O'Brien* and it has not yet arisen for determination. I accept the submission of the respondents that there is in fact no question of discrimination between different types of part time workers. The correct analysis is that full time workers in two different tribunals had different pension provisions and that necessarily affects the remedy available to part time claimants from those tribunals. This is the 'reason why' remedy point, the exact point that the respondents were given permission to argue by the Employment Appeal Tribunal in *MoJ v Edge & Burton*.

33. In paragraphs 29 and 30, Mr Engel raises two points arising out of the creation of the First Tier Tribunal (FTT) by the Tribunals, Courts and Enforcement Act 2007 into which both the RPTS and the Tax Tribunal were transferred. He submits that the MoJ's proposal to substantially differentiate between the pension entitlements of part time judges who are members of one particular tribunal is unjust and inequitable. He contends that judges may be transferred between different chambers and the different pension arrangements are likely to affect the willingness of part time judges to serve in particular chambers of the FTT. The answer appears to be the same as the answer to the previous points in this part of his contention. The problem here is not one of comparison between part timers being treated differently because of their part time status but because of their appointment to different, historically independent, jurisdictions prior to their transfer in to the FTT. Each claimant's remedy will be based on JUPRA for service from the date when their tribunal moved into the FTT. This gives fee paid judges parity with their salaried colleagues and that is the requirement under the PTWR. The respondents are also right when they submit that the historical arrangements in RPTS upon which their proposals are based have no relevance to the situation for judges going forward. In any event, Mr Engel's basic contention in paragraph 30 appears to be mistaken. Judges are appointed to the FTT not a particular chamber and may then be deployed to more than one chambers; they are not transferred between chambers.

34. In paragraphs 31 to 33, Mr Engel complains of age discrimination, a point which he develops at paragraphs 53 and 54 of his written submissions for this hearing with regard to Limb B (the figures to be used in the calculation of his pension) and at paragraphs 21 and 22 with regard to Limb A (how should his pension be calculated). The problem here is that whilst the pension of already retired RPTS chairs is or will be index linked to the pension generated by their RPTS earnings before they retired, the daily sitting fee for currently serving RPTS Judges is being increased at a significantly higher rate over a relatively short period of time to bring it into line with the daily sitting fee for other FTT Judges, meaning that when they retire their pensions will be somewhat higher being based on a higher level of fee paid income. This is age discrimination, Mr Engel submits because - almost ex hypothesi - all those who are adversely affected are already retired and therefore older than those still sitting. He also contends that those who were appointed on or after 1st October 2002 will be more favourably treated than those appointed before

1st October 2002, as demonstrated by an email from the respondents dated 10th May 2016.

35. The last point can be answered straightforwardly. As an historical fact, RPTS chairs who were appointed before 1st October 2002 would, had a pension been available to them, been offered the then current iteration of the Principle Civil Service Pension Scheme which was closed to new members regardless of their age from 1st October 2002. In consequence, an RPTS chair appointed after that date would have been offered the new iteration of the scheme or something similar. The respondents' proposal is therefore not age discrimination but an attempt to rectify the failure to provide pensions in the past by offering now what should – absent part-time worker discrimination – have been offered then. But 'what should have been offered then' is not a constant. In the RPTS it varied over time. On the first point, the respondents submit that pay increases in RPTS and their ongoing consequences for pension have nothing to do with age. I agree with the respondent that it is normal and unavoidable that those who retire before their working colleagues receive a substantial pay rise do not take any benefit from that rise. They do however get other benefits which their working colleagues do not including a generous lump sum payment and index linked annual incomes. It is interesting to record in this context that in several recent years retired judges have received annual index linked increases to their pensions at a time when judicial salaries have been at a standstill. Is this discrimination on the grounds of age, this time with younger serving judges being the recipients of the less favourable treatment?

36. The answer to Mr Engel's complaint appears to lie in sec 23 of the Equality Act 2010, comparison by reference to circumstances. Sub-section (1) provides: 'On a comparison of cases for the purposes of sections 13, 14 or 19 there must be no material difference between the circumstances relating to each case'. This is a case falling within sec 13 - direct discrimination. There is of course a fundamental difference in circumstances. The younger group of judges continue to work, the older group of judges have ceased work. Mr Engel's contention would seem to require that pay rises for those in work and pension increases for those who have retired from that work must always be the same, a proposition which, recent history suggests, seems likely to disadvantage those in index linked final salary schemes!

37. In paragraphs 34 to 41, Mr Engel contends that he has a legitimate expectation that he would be awarded a pension in respect of his RPTS service calculated on the same basis as the pensions awarded to judges who served in other chambers of the FTT. He develops the legitimate expectation argument extensively in paragraphs 29 to 43 of his written submissions for this hearing which include a 6 page summary of the 'chequered history' of this litigation which, he contends, gives rise to his legitimate expectation. In my judgement this contention is doomed to fail for two reasons. The first, as the respondents submit, is that legitimate expectation is a public law consideration which has no application in a private law complaint such as this. But, secondly, even if it had, it would fail because the conditions required for a legitimate expectation to arise are not met. Mr Engel refers at paragraph 34 of his written submissions to the case of *Infinis Energy v HM Treasury and HMRC* [2016] EWCA Civ 1030. In paragraph 35 he draws attention to the phrases which the Court of Appeal in *Innis* approve as constituting the basis for a legitimate expectation, the last being 'precise, unconditional and consistent assurances, originating from authorised reliable sources'. There is nothing in the history which Mr Engel has set out at such length to show that such assurances have ever been made and he does not point to any particular statement made by the MoJ as the alleged source of such an assurance. Clearly, earlier decisions of this Tribunal could not possibly constitute such an assurance. It may well be the

case that Mr Engel has concluded that he has such an entitlement and he may have come to that conclusion on grounds which were not entirely unreasonable, but that is a very different matter indeed from being able to show that, in effect, a promise has been made which is now being reneged upon.

**Conclusions on Issue 2**

38. For the reasons which I have already given, none of Mr Engel's contentions in Issue 2 succeed. They are either irrelevant to the central issue in a remedy hearing under the PTWR where the parameters of compensation are defined by the Regulations themselves, or attempts to circumvent his previous failure to successfully challenge the 'reason why' point with regard to liability and its extension by the EAT in *Edge and Burton* to remedy.

**Issue 3**

If the 2017 FPJPS Regulations on its face gives a full 100% pension then the just and equitable remedy under the PTWR should be the same amount.

39. At the preliminary hearing on 3 October 2017, I rejected an application by Mr Adrian Jack, one of the claimants affected by the 'which pension' remedy issue, that I should stay the 'which pension' remedy hearing because as a result of the 2017 FPJPS Regulations the issue had become entirely academic. On Mr Jack's reading of the Regulations, all RPTS Chairs had become entitled to a full judicial pension for the whole of their period of service post April 2000. I rejected the application because this Tribunal has no power to interpret the FPJPS in the claimants' favour in a way which would bind the respondents and therefore a stay would only be appropriate if the effect of the FPJPS was unambiguous and unchallenged, which it was not. Having regard to the overriding objective I felt it was important for the 'which pension' remedy issue to proceed to a hearing given the likelihood of a very lengthy delay before Mr Jack's contention could be authoritatively determined and the real possibility that the 'which pension' issue would still require determination in the future. I understand that Mr Jack is seeking to appeal that decision.

40. Mr Engel's point is rather different. It raises two questions. The first is do the FPJPS Regulations on their face give a full 100% JUPRA pension to RPTS judges? The second is, if so, would it then be just and equitable under the PTWR to award the same amount as compensation? Taking the second point first, the respondents must be right that even if it is plain on the face of the Regulations that they do give a full 100% JUPRA pension, it is a non sequitur to state that compensation under the PTWR should therefore be the same. These are two different statutory provisions addressing two very different issues; there is no cross over between them and this Tribunal only has jurisdiction to determine issues arising under the first. On the one hand, where claim is brought under the PTWR the Employment Tribunal must give and, importantly, can only give, an award which is commensurate with reg 8 of the PTWR. On the other hand, that award would have no impact on any entitlement which Mr Engel or any other RPTS Chair might have under the FPJPS Regulations if, as claimed, those Regulations do give him an entitlement to a 100% judicial pension.

41. The answer to the first part of the question then becomes academic. The respondents' position is, perhaps necessarily, somewhat guarded, but I understand it to be roughly this. If, which is denied, the Regulations have the meaning for which Mr Jack and Mr Engel contend, then they do so as a result only of infelicitous drafting which does not accurately reflect the proposals on which the MoJ consulted. If that is the case, again which is denied, it is the intention of the Respondent to amend them at the earliest opportunity so that they accurately reflect the proposal

consulted upon. The respondents therefore deny that it is clear on the face of the Regulations that they have the effect contended for: the situation is far more nuanced.

**Conclusions on Issue 3**

42. I reject the contention underlying Issue 3. Mr Engel has succeeded in a claim under the PTWR and his remedy entitlement is determined by, and only by, the PTWR, in particular regs 8(7) to 8(10). If Mr Engel is right about the FPJPS and in consequence his entitlement under the FPJPS is greater than his entitlement under the PTWR, that does not, and could not without amending legislation, give this Tribunal powers to award compensation under the PTWR which it currently does not have. Any award made by this Tribunal would clearly be without prejudice to Mr Engel's entitlement under the FPJPS for the same reason.

**Overall conclusions and the way forward**

43. None of the issues raised by Mr Engel have any merit for the reasons I have endeavoured to explain. They are, as the respondents submit, by and large a many faceted attempt to avoid the consequences of the 'reason why' point which has already been decided against him. Although I am not expressly asked to do so, it seems to me that there would be an unacceptable loose end if I did not bring this matter to a conclusion by making a declaration which reflects the findings set out above or, to be more precise, the consequences of those findings which is that Mr Engel has failed to establish that the proposal by the respondents to settle the pension element of the claims of RPTS Judges does not meet the requirements of the PTWR.

44. This remedy hearing is the culmination of a process which began with an offer by the respondents to settle the pension element of the claims of the fee paid judges in the four jurisdictions. A little later in the process I directed that any affected claimant who did not object to the offer and advance a positive alternative case by a certain date would be deemed to have accepted the offer. This hearing has therefore been about the merits of Mr Engel's positive alternative case rather than about whether the respondents' offer satisfies the requirements of reg 8 PTWR. The failure of Mr Engel's alternative case should not therefore lead automatically to a declaration that the respondents' original offer is the appropriate remedy in his case without further consideration of its terms.

45. A re-examination of the material provisions of reg 8 would be helpful at this stage.

(7) Where an employment tribunal finds that a complaint presented to it under this regulation is well founded, it shall take such of the following steps as it considers just and equitable –

(a) making a declaration as to the rights of the complainant and the employer in relation to the matters to which the complaint relates;
(b) ordering the employer to pay compensation to the complainant;
(c) …

(8)…

(9) Where a tribunal orders compensation under paragraph 7(b), the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances … having regard to –

(a) the infringement to which the complaint relates; and

(b) any loss which is attributable to the infringement having regard, in the case of an infringement of the right conferred by regulation 5, to the pro rata principle, except where it is inappropriate to do so.

(10) The loss shall be taken to include –
(a) …
(b) loss of any benefit which he might reasonably be expected to have had but for the infringement.

46. In my judgment it would be just and equitable to make a declaration as to Mr Engel's rights but not an order for compensation at this stage. Given the nature of pensions, the monetary value of a pension over a period of time (and in consequence the compensation for failure to provide one) cannot be ascertained until numbers relating to earnings during the period of pensionable service have been applied to a formula that produces the periodical pension payment and any lump sum. The declaration therefore needs to define that formula - the nature of the pension to which Mr Engel is entitled. An order with regard to compensation will only be necessary if the parties are then unable to agree either the loss which Mr Engel has sustained as a result of having been deprived of that pension between the date of his retirement and the date on which he begins to receive pension payments, or the amount of those payments themselves. Somewhat curiously perhaps, when approached in that way it becomes clear that in order to make the appropriate declaration I must first decide, in terms of principal rather than amount, the compensation which it would be just and equitable for Mr Engel to receive as a result of being wrongly deprived of a pension. I therefore need to consider regs 8(9) and 8(10).

47. What is the infringement to which the complaint relates? It is the failure to provide pensions to fee paid lawyer and valuer chairs sitting in the former Residential Property Tribunal Service (reg 8(9)(a)). What is the benefit which Mr Engel might reasonably be expected to have had but for the infringement (reg 8(10)(b))? It is at this point that the 'reason why' question enters the discussion. The reason why the terms and conditions of all judicial office holders in RPTS differed from those in other jurisdictions (and why the terms and conditions of judges in other tribunals ranged over a wide spectrum of fee levels and circumstances in which fees were payable) was because of the piecemeal growth of tribunals, each created by a different department of government and each of which historically set their own terms and conditions. It had nothing to do with part-time status. There is therefore no question of Mr Engel being able to claim that his daily sitting fee should have been £y rather than £x just because he could show that a salaried judge in another jurisdiction received the equivalent of £y per day. As the reason for the different rates of pay was not his part-time status no claim would lie under reg 5. For the same reason, the benefit which Mr Engel might reasonably be expected to have had but for the infringement was a pension arrangement of the same kind as those enjoyed by his more senior judicial colleagues within the same jurisdiction, not the pension arrangements made for other judges in other, historically independent, jurisdictions.

48. The offer which the respondents have made to settle the pension claims of the judges in the four affected jurisdictions is intended to reflect that reality. Mr Engel has not claimed that it does not do so, only that it is the wrong reality to reflect. We need to return as this point to the main question identified at the October case management hearing as being the question for determination at this remedy hearing: 'What is the appropriate methodology for assessing the pension provisions for Deputy Adjudicators (HMLR) and for RPTS members to provide a just and

equitable remedy?' For the reasons explored in the preceding three paragraphs it is clear that the answer to that question is – the methodology proposed by the respondent.

49. In my judgment it would be just and equitable to make a declaration that Mr Engel has the right to a pension which is of the same kind that he would have received had pensions been provided to fee paid judges in RPTS, namely a pension of the same type as those provided to his more senior colleagues in that jurisdiction, the Vice-Presidents. The wording of the declaration should therefore reflect the terms of the proposal set out in an email from the respondents dated 10 May 2016 and I invite the respondents, within 21 days from the date on which this Judgment and Reasons is sent to them, to submit a draft declaration for my approval which reflects those findings. The draft declaration is also to be sent to Mr Engel in the hope that he will be prepared to agree it. If he does not, he is to be permitted 14 days from the date the draft declaration is sent to him to comment on the draft. I emphasise that those comments are to be limited to the accuracy of the drafting of the declaration in the light of these findings; it is not an opportunity for Mr Engel to reopen the arguments he has already made as to why the respondents' proposal is not acceptable, nor to introduce fresh arguments. I repeat that his positive alternative case as identified at the October 2017 preliminary hearing did not include a claim that the respondents' calculations with regard, for example, to conversion factors were wrong or that what is on offer was not the kind of pension he would have received had the pension arrangements for Vice-Presidents been extended to fee paid judges.

Employment Judge Macmillan on 31st January 2018