Appeal No. UKEAT/0003/17/LA
UKEAT/0053/17/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 September 2017
Judgment handed down on 6 March 2018

Before

THE HONOURABLE LADY WISE

(SITTING ALONE)

MINISTRY OF JUSTICE APPELLANT

MR S BLACKFORD RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS CLAIRE DARWIN (of Counsel) Instructed by: Government Legal Department Employment Group One Kemble Street London WC2B 4TS
For the Respondent	MR JOHN CROSFILL (of Counsel) Instructed by: Kuit Steinart Levy LLP Solicitors 3 St Mary's Parsonage Manchester M3 2RD

SUMMARY

PART TIME WORKERS

The Claimant was a Barrister and worked part-time as a Recorder. His application for extension of office so that he could continue to sit beyond his statutory retirement age of 70 was refused by the Respondent, while a Circuit Judge, accepted as being a relevant full-time comparator, was permitted to work on as a part-time judicial resource. Having found that the Claimant was treated less favourably than his full-time comparator without justification, the question of compensation was determined at a separate remedy hearing. The Respondent appealed the Decisions on both liability and remedy.

On liability, the Tribunal's Judgment was not illustrative of any error of law or procedural irregularity such as would justify interference with it. There was ample material before the Tribunal in support of its conclusion that there was a business need for more fee-paid judiciary and that the Respondent had infringed Regulation 5 of the **Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000** by refusing the Claimant's application for an extension on the ground that he was a part-time worker.

The Tribunal's Remedy Judgment was also not susceptible to challenge. Separation of oral conclusions and a Written Judgment was permissible in the circumstances that arose, which had required parties to carry out an arithmetical calculation. The compensation awarded was justified by the available material and the Tribunal had not erred in its approach to the assessment of loss.

Appeal dismissed.

UKEAT/0003/17/LA
UKEAT/0053/17/LA

THE HONOURABLE LADY WISE

1. The Claimant (and Respondent in the appeal) is a Barrister who also held office as a Recorder until he reached the compulsory retirement age of 70, after which the Respondent (and Appellant) did not extend his tenure of office. In a Judgment and Reasons sent to parties on 14 October 2016 the Employment Tribunal at London Central (Employment Judge V Gay presiding) found that the failure to extend the Claimant's appointment as a Recorder was less favourable treatment of him on the ground that he was a part-time worker without objective justification. In a subsequent Remedy Judgment sent to parties on 6 December 2016 the Respondent was ordered to pay the Claimant £36,796.67 in compensation. The Respondent, the Ministry of Justice, appeals both Decisions. The Claimant was represented both before the Tribunal and on appeal by Mr J Crosfill of counsel. The Respondent was represented on both occasions by Ms C Darwin of counsel. I will in accordance with practice refer to the parties as Claimant and Respondent as they were in the Tribunal below.

2. The appeals against liability and remedy were heard together and there is some overlap in that two of the grounds against remedy raise issues that are related to the liability appeal. However, for convenience I will separate the two appeals so that it is clear what arguments were presented in each for my determination.

(I) Liability

The Applicable Legislative Provisions

3. It may be useful first to set out the applicable provisions on the relevant judicial appointments and retirements and also on the prevention of less favourable treatment for part-time workers at the outset. These are:

(i) Judicial Appointment and Retirement

The appointment of Recorders is dealt with in the **Courts Act 1971**. Section 21 provides that Recorders can be appointed to act as part-time Judges of the Crown Court and to carry out such other judicial functions as may be conferred on them. There is provision for the appointment of Deputy Circuit Judges in section 24 of that **Act** (as amended), which is also a part-time post.

Recorders and Circuit Judges are both relevant offices for the purposes of section 26 of the **Judicial Pensions and Retirement Act 1993** ("JUPRA") which provides:

> **"(1) Subject to the following provisions of this section, a person holding any of the offices for the time being specified in Schedule 5 to this Act (a "relevant office") shall vacate that office on the day on which he attains the age of 70 or such lower age as may for the time being be specified for the purpose in the enactments and instruments relating to that office, whenever passed or made.**
>
> **…**
>
> **(5) If, in a case where this subsection applies, the [appropriate person] considers it desirable in the public interest that the holder of a relevant office should continue in that office after his compulsory retirement date, he may authorise the person to continue in office, either generally or for such purpose as he may notify to the person, for a period not exceeding one year and not extending beyond the day on which the person attains the age of 75."**

Section 26(6) makes provision for further periods for continuation in office after the initial one year period but not extending beyond the day on which the person attains the age of 75.

(ii) Part-time Workers

The provisions of the **Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000** (SI 2000/1551) relevant to this appeal are contained in Regulation 5 and are in the following terms:

> **"(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) as 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.

(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."

The Tribunal's Judgment

4. The Tribunal's Judgment sets out in helpful detail the various types of judicial office holders that comprise the judicial establishment of England and Wales and there is no need to repeat that here. The present case involved comparison between a full-time salaried Circuit Judge and a part-time fee-paid Recorder. There is also a useful summary of the way in which the administrative system operates in terms of providing work to Recorders and how the various Circuits in England and Wales are allocated their sitting days, at paragraphs 27 and 28 of the Judgment. The basic facts of the case were not in dispute.

5. The Claimant was an experienced practitioner at the Bar who was first appointed as Assistant Recorder in 1996 and then Recorder. Between 2002 and 2015 more of his working time was spent in a judicial capacity as a Recorder than as a Barrister. While he was required to sit for a minimum of 15 days per year he, throughout his time as a Recorder, has sat far in excess of that, completing the equivalent of four full years in just under 20 years of appointment. The specific number of days he sat each year is set out by the Tribunal at paragraph 34.

6. When the Claimant was approaching his 70th birthday he wanted to continue sitting and wrote to the appropriate person in the Respondent's administrative team with that request. His application was notified to the team of Ms Amanda Brar. The process involved Ms Brar putting the matter on the agenda for a meeting of presiding Judges and deciding whether to tell

those Judges that a business case could or could not be made out. For the purpose of his claim, the Claimant identified a full-time Circuit Judge, HHJ Wilkinson, as a comparator. HHJ Wilkinson was a full-time Circuit Judge in the London region. His statutory retirement date was 72 rather than 70, although the Tribunal found nothing turned on that. He applied for one of two options available to retiring Circuit Judges, namely to be appointed as a Deputy Circuit Judge. In short, HHJ Wilkinson's application was granted, with reasons given to him at the time confirming that there was a strong business case for his appointment including that the Circuit had a shortfall of Judges in crime, that he was offering flexibility and was authorised to continue to hear serious sex cases (ET Liability Judgment paragraph 55).

7. The Claimant received a letter dated 17 November 2015 notifying him that the public interest test had not been met in his case for an extension of his appointment as Recorder. The reasons he was given included that the recent appointment of 15 new Circuit Judges would reduce current pressure on the Recorder pool, that 16 new Recorders had been appointed with an expectation that they would each sit for a minimum of 30 days and that whilst there remained a shortfall of Circuit Judges across the South East Circuit, competition for additional appointments would be launched in December 2015.

8. One difference between the Claimant and HHJ Wilkinson was that the latter held a serious sex offences ticket ("SSO ticket") and so was available to hear cases of that type. However, that difference was not a reason given to the Claimant for a refusal to extend his appointment and the relevant witness (Ms Brar) did not say in evidence that the difference was a significant one or that the lack of the SSO ticket weighed against the Claimant when the business case decision was made in respect of him. In any event, as the Tribunal records at paragraph 61, there was no evidence as to the percentage of Crown Court work which is SSO

ticketed work or any evidence as to whether over a period of time there was difficulty in covering that work. The Tribunal records further that the evidence was that general criminal trials were also not capable of being covered by the Circuit's existing judiciary and so there was an increasing backlog.

9. The Tribunal's conclusions on the issues identified are set out in paragraphs 72 to 89 of the Judgment with the conclusion given at paragraph 90. The Tribunal first recorded that it was not in dispute that HHJ Wilkinson was an appropriate comparable full-time worker as he and the Claimant were engaged on broadly similar work. So far as the treatment complained of is concerned, the Tribunal recorded that the Claimant was not enabled to work on at the Crown Court after compulsory retirement age in comparison with HHJ Wilkinson who was so enabled. That treatment was less favourable because, as the Tribunal recorded at paragraph 75 of the Liability Judgment, it meant the end of the Claimant's judicial career at his compulsory retirement age, contrary to his proposal to extend it, whereas HHJ Wilkinson's judicial career did not end at his compulsory retirement age.

10. Turning to the contentious question of whether the less favourable treatment was "on the ground that" the Claimant was a part-time worker, the Tribunal's Reasons for the conclusion that it was on that ground are expressed in the following terms:

> **"76. Ms Darwin submitted forcefully that the reason for the difference in treatment was that HHJ Wilkinson was a "different type of judicial resource" to the claimant. That was because: (1) he could do SSO ticketed work; and (2) he was available at short notice for longer and/or more complex cases and could do more work. We consider these in turn.**
>
> **77. We accept that the SSO ticked weighed in favour of the appointment of HHJ Wilkinson and that it was in the mind of the Presiding Judges and Ms Brar at the time when the decision was made to push him forward for appointment. It was a genuine, legitimate reason, not tainted by discrimination and not applicable to the claimant.**
>
> **78. However, it is far from clear that the lack of the SSO ticket weighed *against* the claimant. In particular:**
>
> > **78.1. It was not mentioned in the reasons which were put forward by Ms Brar at the 30 September 2015 meeting as demonstrating the lack of a business case for him.**

78.2. It was not mentioned in the letter notifying the claimant that he had been unsuccessful.

78.3. It was not asserted by Ms Brar (or anyone else) in evidence at this hearing.

If the SSO ticket were significant, and certainly if it were as significant as Ms Darwin now contends, it would have been a simple matter to tell the claimant. He might have had to accept it as an unarguable fact. The finding that it weighed for the comparator that he had the SSO ticket does not, in the circumstances here under consideration, persuade us that its absence was a factor which weighed against the claimant when his application came for decision on 30 September 2015. It might have been so, but it has not been established by evidence.

79. Has the respondent separately persuaded us that the SSO ticket was a pre-requisite of continued work as a judge in the Crown Court post-retirement age, even if not considered in respect of the claimant? In a sense, this goes to the justification defence, but it is also relevant to the determination of the ground for the different treatment. Our answer is: no. Cases are decided on the basis of evidence and there is a dearth of evidence that might persuade us that the SSO ticket was such a pre-requisite and that its absence would therefore be adversely determinative of the claimant's application in any event. As set out in our findings of fact, we had scant material about the difficulty of covering SSO cases: we do not know what percentage of sitting days are spent on them; we do not know what, if any, percentage of the then-increasing backlog they formed; we do not know whether in any financial year any SSO cases were delayed, not listed or put off. We did not hear that Circuit Judges were excessively required to hear SSO cases. The material which the claimant showed us (and about which he told us) demonstrated that there is a huge need for general crime to be covered at the last minute. If the SSO ticket were essential, we would have expected some clear evidence.

80. It follows that although we accept that the presence/absence of the SSO ticket was a distinction between the comparator and claimant, the respondent, which here asserts it, has not proved that it is a ground why the business case was not made out for the latter and thus why he was not re-appointed.

81. In respect of the distinction advanced by counsel and Ms Brar that HHJ Wilkinson would be more readily available, we find that this was based on a general assumption about full-time judges who were retiring from salaried office when compared to part-time judges who were expected to continue in practice. Given the amount that the claimant had sat as a Recorder in the six months leading up to his retirement, we concluded that it was not an assumption which could legitimately be made about him. That is, it seems to be incorrect. Further, decisions of this sort should properly be based on evidence and not on assumptions. If the issue were a neutral one, it might lie with the respondent to assert that it had made a mistake and that that mistake was itself the reason or ground for the less favourable treatment, but the assumption is not neutral: it is founded in the very distinction which is impugned, namely the preferential treatment of full-timers over part-timers. So if reliance were placed on this reason (which was also not mentioned at the meeting or notified to the claimant), it would fall under the next head in that it would be an unjustifiable assumption. For present purposes it tends to support the conclusion that the less favourable treatment of the claimant was on the ground that he was a part-time worker.

82. Was the ground for the more favourable treatment of HHJ Wilkinson that he could, because of his previous experience (rather than his availability or flexibility which we have dealt with above), deal with more complex cases? In the explanations given to us, this is linked, at least in part, to the notion that more complex cases tend to take longer and that Deputy Circuit Judges can do them because they can sit for longer. To that extent, it would again be on the ground that the claimant was a part-timer and there was an inappropriate assumption against him. On the other hand, we have accepted that the greater experience of a retiring Circuit Judge would mean that he was more likely to be an appropriate judge for the most complex cases if they could not be covered by the High Court or Circuit Judges in post. The claimant was not told of this reason. It is not reflected in the documents showing the decision against him. It is mentioned as a positive for HHJ Wilkinson. We were not told that these more complex cases were particularly difficult to cover. We conclude that if it were part of the ground on which the claimant were not retained, it was a small part, so trivial that we need not consider it further.

83. In summary in respect of Ms Darwin's submissions, we conclude that the claimant was not a significantly different judicial resource from HHJ Wilkinson. Once assumptions that were made in respect of part-timers are stripped out (limited flexibility; limited availability), there

is only the SSO ticket left and we have found that that does not explain matters in a manner which causes us to conclude that it was the only ground or even a significant ground for the difference in treatment.

84. We are influenced to a small extent in reaching our conclusion about the reason for the difference in treatment by the lack of evidence showing that any Recorder, with or without the SSO ticket, had been re-appointed at the compulsory retirement age. To a yet smaller extent we are influenced by the lack of any reference in the administrative Guidance (whether in its headnote, at paragraph 6 or in the titles of the templates at Annex A and Annex B) to the possibility of applications for re-appointment by Recorders and by the failure to provide a suitable template for a Recorder's business case. More generally we reach our conclusions because of our rejection of the reasons advanced by the respondent (through Ms Darwin's submissions and the evidence) for the difference in treatment. More overwhelmingly, we are influenced by the unexplained use of the same statistical material to make a business case for the comparator but against the clamant, summarised in (but not confined to) our findings at paragraph 67 above.

85. Conclusion: We are satisfied that a significant, material, effective ground for the difference in treatment between the claimant and the comparator was that the claimant was a part-time worker."

11. Having reached that conclusion, the Tribunal turned to questions of whether the less favourable treatment on the ground of part-time working had objective justification addressing the issues of business need, whether treatment was reasonably necessary and proportionality. Its conclusions on objective justification are in the following terms:

"Business need?

87. We accept, of course, that there was a business need for the respondent to cover the criminal (and civil) cases coming for hearing, to avoid an increasing backlog and to use its allocation of sitting days fully and efficiently, as Ms Joyce told us. We accept that dealing with SSO cases (which the claimant could not) was a priority. So too was dealing with bail cases and it was a priority in respect of which, at this time, the respondent was significantly falling behind. That was something with which the claimant could deal. These are all significant business needs, consonant with the delivery of criminal justice which, we accept, is the respondent's business.

Reasonably necessary?

88. We are not persuaded that the respondent has proved that it was reasonably necessary to require the claimant to hold the SSO ticket or that there was any other reasonable necessity for not making a business case for him. Our reasons are as follows:

88.1. The respondent has not persuaded us that there was a reasonable business need that judges kept on (which we use to include extensions, new appointments and re-appointments) after retirement age must have the SSO ticket. The mere fact that all recent Deputy Circuit Judges were so ticketed does not establish it: indeed, it might tend to a conclusion that the need was satisfied. The respondent could have so persuaded us, by provision of cogent evidence in the form of statistics about the number of cases; the number of sitting days; the backlog; the imbalance of SSO cases beyond judicial capacity. It did not do so.

88.2. Alternatively, it could have shown that no general crime cases were turned away or left uncovered by judges or adding to the backlog and so on. The fact that the bail case target was being missed tends to support the business case that the respondent made to the effect that it needed more Recorders and more Circuit Judges generally, while putting forward a business case for HHJ Wilkinson's new appointment. The complement of the criminal judiciary was short of what was required, we accepted

from the business case for HHJ Wilkinson. The criminal judiciary was hard pressed, but we have not been shown that it was so only or predominantly in respect of SSO cases. It appears to be across the board, including for general crime. That is indicated by the fact that the respondent was applying to lift the ceiling for which Recorders could sit, not said to be just in respect of SSO-ticketed Recorders.

88.3. Further, we find the reasons given to the claimant were incomplete and therefore partial or misleading. For the most part (save in respect of the SSO ticket) the same business case could have been made for the claimant as was made for HHJ Wilkinson, but instead identical facts were presented differently to support different conclusions. The claimant was in effect told that there was or would soon be no shortfall of judges to deal with the criminal caseload, but that was incorrect - at least, if, as we have accepted, what was put to the Lord Chancellor and Lord Chief Justice on behalf of HHJ Wilkinson was correct.

88.4. It is more difficult for the tribunal to accept that something is reasonably necessary when it would have been easy (and not in any way offensive or undermining offensive) to have told the claimant, but he was not so informed about the need for an SSO ticket, or dealing with more complex cases for that matter. Of course, as a matter of logic and precedent, it could still be reasonably necessary for continued appointment that the judge must have the SSO ticket, but cogent evidence should be provided if an account suggested, albeit ineffectively as we found, for the first time in witness statements (not having been put in contemporaneous internal notes, notified to the claimant or pleaded) is to be relied upon. There was no such cogent evidence.

88.5. We accept that good availability and flexibility with dates and as to where the Judge would sit, was reasonably necessary. We deduce that HHJ Wilkinson would not have been appointed if he were not so available. However, the respondent did not know about the claimant's position: rather, if it considered the matter at all, it did so on the basis of a discriminatory assumption. His history of sitting was not something which (if it were considered, as to which we are unsure) could properly have been used against him in view of the number of times that he had sat in the last half year. Further, it was not something that was reported to him.

88.6. Finally, under this head, we are not persuaded that it was shown to be reasonably necessary that the claimant be rejected because there was a sufficient judicial complement to use the region's sitting day allocation. We refer to our finding that a number of salaried criminal Circuit Judges in the South East region were applying to reduce their sittings from full-time to a lesser percentage at precisely the same date as the claimant sought re-appointment. A 10% reduction for one judge would have created a need for 21 additional sitting days per annum; a 20% reduction, 42 days. No reason has been suggested as to why the wishes of the salaried judiciary were rejected and they were compelled to work more days that they wanted to do, *at the very time when* the claimant who wished to work was not allowed to do so. The shortage of Circuit Judges, reduced pool of Recorders and backlog of cases in the Crown Court were the only factors recorded in respect of rejecting these applications. Each could equally have counted in favour of the claimant. Rather than tending to show the achievement of a reasonable business need for the non-appointment of the claimant (even without the SSO ticket), this appears to show, to use a phrase we suggested to Ms Brar, a lack of joined-up thinking. Ms Darwin submitted that this is not how the claimant had initially put his case. We agree that it was not. We are satisfied that that is because he is not here putting his case, but rather using material which became available to him in the course of the proceedings to undermine the respondent's assertion about the existence of a business need (not pleaded), that it could fully use its allocation of sitting days without re-appointing him.

Proportionality?

89. The claimant could do bail cases; he could do fraud cases; he had good availability and flexibility. The respondent had backlogs and a shortage of judicial resources. We have not found any basis on which we could say, in this case, that the respondent has established that it was a proportionate means of achieving the respondent's business aim that the claimant was refused a business case that would have enabled him to go on sitting. We make clear that we are deciding just this case. As our findings of fact and individual conclusions above make clear, we are substantially pushed towards the conclusion which we have reached by the lack of evidence about the need for SSO tickets upon which the respondent now relies so heavily.

> **The evidence we received tended to establish that there was no business need to refuse the claimant, because there was, on the respondent's own case as made out a few days later for the comparator, surplus work to be done and a shortage of judicial resources. Further, although, of course, it is for the respondent, not us, to make proper decisions and allocate its resources appropriately, if the respondent had enabled the claimant to be re-appointed, it could probably also have accommodated some full-time criminal Circuit Judges seeking to reduce their working percentage. The refusal to put forward the business case was the opposite of proportionate: the discriminatory effect on the claimant (the loss of his part-time work) has not assisted the respondent with any identifiable business aim and is not outweighed by any identifiable benefit."**

The Respondent's Arguments on Appeal

12. The first ground on which the Respondent challenges the Tribunal's Decision involves a claim of procedural impropriety. Ms Darwin contended that the Tribunal had determined the Claimant's case in his favour on grounds other than those relied on by the Claimant. She submitted that the Claimant's case at the liability hearing was that any extension of his appointment should be on the same terms and conditions as a Deputy Circuit Judge. There had been evidence about the basis on which the Claimant could hold office after the age of 70 and it was suggested to the Respondent's witness Ms Brar that he could be offered a "zero hours contract" such as that given to Deputy Circuit Judges rather on a Recorder's terms and conditions. The Tribunal appeared to accept the Respondent's position that the Claimant could not have had extended tenure on the same terms and conditions as a Deputy Circuit Judge but would have to have his office extended on the basis of being guaranteed 15 paid sitting days per year. Ms Darwin submitted that the Tribunal ought not to have tried to clarify this matter in the subsequent Remedy Judgment, but if the Liability Decision was to the effect that the Claimant's extension could only be on the terms and conditions of a Recorder, then the Tribunal ought to have considered the compatibility of section 26(5) of **JUPRA 1993** with the **Part-time Workers Directive**, something that had been foreshadowed during closing submissions. Counsel argued that the effect of the Tribunal's Decision as now understood, was that the Respondent was required to treat the Claimant more favourably than a full-time comparator, who had no guarantee of any sitting days. The purpose of the **Directive** and the **2000**

Regulations is to ensure that part-time workers are not treated less favourably, but it could not be said that the different treatment of a Claimant and his comparator is synonymous with less favourable treatment. The clear authority for that proposition could be found in **Chief Constable of West Yorkshire Police v Khan** [2001] ICR 1065.

13. So far as the test for interfering with a decision where procedural error or material irregularity is established is concerned, reference was made to **Connex South Eastern Ltd v Bangs** [2005] ICR 763. That case dealt with a different type of irregularity but it is clear from paragraph 43(7) that the correct approach is that where procedural error or material irregularity is established, the question is whether there is a real risk that a litigant has been denied or deprived of the benefit of a fair trial of the proceedings and where it would be unfair or unjust to allow the delayed decision to stand. Reference was made also to the detailed summary of cases concerned with procedural irregularity by HHJ Hand QC in the case of **NHS Trust Development Authority v Saiger & Others** UKEAT/0167/15/LA.

14. A secondary position was taken on the first ground which was that, even if the Tribunal was entitled to determine the Claimant's case on the basis that he should have been extended on the same terms and conditions as a Recorder as he had been previously, then regard should have been given to the Respondent's case that this would have rendered the Claimant a different kind of judicial resource from HHJ Wilkinson because he would have to be guaranteed 15 paid sitting days per annum and that this material difference explained any difference in treatment between the Claimant and his comparator and/or amounted to sufficient objective justification. Ms Darwin submitted that, as the Tribunal itself had recorded at paragraph 68, it decided to disregard this part of the Respondent's case despite having recorded that the argument was made in closing submissions. Ms Darwin referred to paragraph 6 of the Tribunal's Judgment

which she contended amounted to the Tribunal accepting the Claimant's argument on the interpretation of section 26 of **JUPRA**. She referred also to the Claimant's skeleton argument to the Employment Tribunal (at paragraphs 28, 29 and 38 thereof) on this issue and the notes of cross-examination of Ms Brar. She submitted that it was not the Claimant's case that he should continue as a Recorder; his case was that he wanted to work on the same terms and conditions as a Deputy Circuit Judge. As the Claimant realised that continuing on his current terms and conditions would illustrate a material difference between him and HHJ Wilkinson that mattered for causation and justification, it was a serious procedural irregularity for the Tribunal to decide the case as it did. In any event it was submitted that the Tribunal's reasoning in this section was inadequate.

15. The Respondent's case was essentially that Deputy Circuit Judges were appointed in preference to extending the work of Recorders who had attained statutory retirement age because the latter had to be given a minimum of 15 days sitting per year. That difference went clearly to the issue of why the Claimant was treated differently from his comparator and to justification. There was ample evidence on the matter and the Claimant was cross-examined about it, the Tribunal had erred to take into account the argument about guaranteed minimum days as a reason for different treatment and so had failed to address the Respondent's case.

16. The second ground of appeal relates to a large number of adverse findings made by the Tribunal about matters which the Respondent alleges had not been raised during the course of the hearing. Ms Darwin accepted that each example was insufficient on its own to merit interference, but cumulatively they could vitiate the Tribunal's Decision. Relying on the case of **Neale v Hereford and Worcester County Council** [1986] ICR 471 at page 486 it was submitted that it is potentially unfair for a Tribunal to rely on matters which occur to it after the

hearing and which have not been mentioned or treated as relevant without the party against whom the point is raised being given the opportunity to deal with it, unless the Tribunal could be entirely sure that the point is so clear that the party could not make any useful comment in explanation. Ms Darwin produced a list of 16 adverse findings with comments about what the Respondent's concern in relation to each was. She identified about five of those as particularly important. For example she stated that it was an adverse finding that the Tribunal had impliedly found (Liability Judgment paragraph 24) that the Respondent's main witness was not a truthful or honest witness. In that paragraph the Tribunal states only that two witnesses were impressive (the Claimant and Ms Joyce) and so one can infer that they were not impressed with Ms Brar. There was no direct attack on Ms Brar's credibility by the Claimant and so the Tribunal was wrong to make such an adverse finding. In **Doherty v British Midland Airways Ltd** [2006] IRLR 90, the EAT had found that a Tribunal misdirected itself if it made adverse findings relating to a witness' credit and honesty that were not put to her and were not advanced in argument. Ms Darwin submitted that the Tribunal here had fallen into the same error. Another example included the finding (at paragraph 27) that Deputy Circuit Judges are allocated sitting opportunities in the same way as Recorders. Ms Darwin pointed to certain passages in the evidence of Ms Joyce and Ms Brar to the effect that Deputy Circuit Judges are drawn on as needed in order to meet the business needs of the courts and are approached to sit as a last resort. Deputy Circuit Judges are not sent vacancy lists.

17. Counsel submitted that a particularly important adverse finding that she wished to challenge was that the Employment Tribunal found, particularly at paragraph 40, that the template provided by the Respondent and entitled "Business Case for the Application: Extension of Appointment" did not apply to Recorders and that the Respondent did not provide a suitable template for a Recorder's business case. She submitted that this finding was wholly

unjustified. She said that the unchallenged evidence of the Respondent's witnesses was that the template in question did apply to Recorders. There were two templates before the Tribunal - Annex A and Annex B - and the Tribunal appeared to have confused the two. The matter was particularly important as the Tribunal had noted (at paragraph 84) that it had been influenced in its decision by the Respondent's failure to provide a suitable template for a Recorder's business case.

18. Two other related findings challenged by Ms Darwin were the finding (at paragraph 43) that Ms Brar was the decision maker in relation to whether or not a business case for an application such as that made by the Claimant could be made out and at paragraph 44 that the approval of the Lord Chief Justice or Lord Chancellor was a technicality. She referred to parts of the notes of evidence where it appeared that Ms Brar was cross-examined on the matter and disputed that she was the decision maker. She advised the Presiding Judges who could support her view or not. It would have been unrealistic for those Presiding Judges to give evidence. In relation to the Lord Chief Justice and the Lord Chancellor, there was unchallenged evidence from Ms Joyce that business cases are considered by those two individuals who will take into account issues such as resources when determining whether the public interest test in section 26(5) **JUPRA** has been met.

19. Finally, a challenge was made to the Tribunal's finding (at paragraph 79) that there was scant evidence and/or a lack of clear evidence that the Respondent needed Judges with an SSO ticket to sit and related to that, that there was no evidence whether there was a difficulty in covering the SSO work. Ms Darwin referred to Ms Brar's evidence which, she said, had been unchallenged, that there were pressures listing SSO cases in the Crown Court, the Tribunal itself found (at paragraph 59) that getting SSO cases on for trial was a priority. Having

highlighted what she contended were the most serious adverse findings on matters not properly raised with the Respondent or the Respondent's witnesses during the hearing, it was submitted that taken together these illustrated a serious procedural error or in the alternative a failure to provide adequate reasons or alternatively were perverse findings.

20. No stand alone argument was presented in relation to the third ground of appeal which was a reasons challenge already addressed.

21. The fourth ground of appeal related to the issue of availability or flexibility on the part of Recorders and Deputy Circuit Judges as distinct. A central part of the Respondent's case on justification had been the contention that the Claimant and his full-time comparator HHJ Wilkinson were in a materially different position on this issue. It was accepted that all Deputy Circuit Judges are retired Circuit Judges and that in contrast Recorders are appointed from the ranks of practising Barristers or Solicitors and will usually continue to work as such. The Tribunal found (at paragraph 88) that HHJ Wilkinson, having just retired from a full-time role as Circuit Judge and having chosen to apply to be appointed as a Deputy Circuit Judge on his retirement had good availability to sit. However the Tribunal went on to hold (at paragraphs 66 and 77) that the Respondent's assumption that Deputy Circuit Judges would be available to sit at shorter notice and for longer cases than Recorders was a discriminatory assumption that favoured full-time workers. Accordingly the reliance on the greater availability of Deputy Circuit Judges was said to support the conclusion that the less favourable treatment of the Claimant was on the ground that he was a part-time worker. This ignored that the Respondent's case was predicated on objective experience which had been accepted by the Employment Tribunal and was unchallenged. It was not a discriminatory assumption but an actual undisputed difference between the two types of resource. The Tribunal had accordingly erred

in law in concluding that it was a discriminatory assumption and unjustifiable.

22. The sixth ground of appeal contended that the Tribunal had failed to have regard to the compulsory retirement age for Recorders and that it had wrongly conflated the Respondent's continued need for Recorders under that age to sit in crime with the existence of a business need for the Respondent to extend the appointment of Recorders over the age of 70. Ms Brar had given evidence that Recorders tended to want to sit more than the 30 days that is now the minimum and that there were many who had not yet managed to achieve the 30 day minimum. The Respondent has an obligation to provide the number of guaranteed minimum sitting days to Recorders but has no such obligation to retired Recorders. The Tribunal had erred in assuming that any Recorder keen to sit for at least 15 days would be provided with work. The Claimant had accepted in cross-examination that allocating sitting days to him would take away work from the next generation of Recorders, a more diverse group in terms of race and gender than him and his peers. In contrast Deputy Circuit Judges do not create any conflict in terms of inter-generational fairness because they are used as a last resort judicial resource. A finding that the Respondent needed both more Recorders and more Circuit Judges was only part of the picture.

23. Ms Darwin argued the fifth and seventh grounds of appeal together. These were attacks on the Tribunal's assessment of the Respondent's objective justification defence. First the Tribunal had erred in disregarding the Respondent's own assessment of the need for work to be done by the fee-paid and salaried judiciary during the relevant period as determined by the sitting day allocation, the informal operating model and the allocation of central funding to sitting days. The Tribunal had expressed the view that "nothing actually turns on" the criminal sitting day allocation and found (at paragraphs 79, 88.2, 87 and 89) that there was a need for

general crime to be covered at the last minute as support for its conclusion that there was work available for the Claimant and that not to extend his appointment was therefore not justified. Reliance on the demand for Criminal Judges and/or the potential work available was an irrelevant factor and such reliance on it had led the Tribunal to a perverse conclusion.

24. While earlier grounds of appeal had already raised a perversity challenge, Ms Darwin concluded her arguments in relation to the Liability Judgment by submitting that the Tribunal had erred in taking into account another irrelevant consideration, namely that the Respondent had rejected applications by some Circuit Judges to work part-time. In so far as this factor had influenced the Employment Tribunal in its overall decision, it was another reason why the Judgment could not stand.

25. Ms Darwin had presented her written argument and initially her oral argument on the basis that the Claimant had marked a cross-appeal in relation to the correct interpretation of the phrase "the treatment is on the ground that the worker is a part-time worker" within Regulation 5(2)(a) of the **2000 Regulations**. When I pointed out that there was no cross-appeal marked, something that Mr Crosfill confirmed was the position, Ms Darwin accepted that this was not a matter for my determination in this case. However, in light of conflicting authorities on the point, I was invited to make some comment on it.

The Claimant's Response in the Liability Appeal

26. Mr Crosfill submitted that in relation to ground 1 it was important to consider what the Tribunal was invited to decide. The Claimant, nearing retirement, had realised that he could ask for an extension of his appointment as a Recorder and submitted an appropriate application. He was told that there was no business case for extension as there would soon be plenty of

judicial resources. On discovery that HHJ Wilkinson was allowed the opportunity to work beyond retirement age in similar circumstances, it became clear to the Claimant that he had been treated less favourably as a part-time worker. There was no real dispute that the named full-time comparator was an appropriate one or that the Claimant had suffered less favourable treatment. The real issues were causation and justification. The Respondent's arguments about procedural irregularity had to be understood against that background. It was wrong to suggest that the only basis upon which the Claimant advanced his case was that he would be appointed on the terms and conditions of a Deputy Circuit Judge. It was the Respondent who submitted that the terms of any appointment of the Claimant would be the existing terms available to Recorders. That was accepted by the Tribunal as the correct position. No irregularity that created unfairness to the Respondent had been established.

27. In covering some of the issues raised by both the first and fourth grounds of appeal, counsel explained that there had been two aspects to the issue of flexibility put forward by the Respondent in oral submissions of the hearing. In particular it had been argued that a Recorder permitted to work beyond retirement age could only be offered the terms open to all Recorders and secondly that the Tribunal should accept Ms Brar's evidence that "Recorders do not make themselves available for longer". On the issue of the terms and conditions of any offer it was common ground that Deputy Circuit Judges' terms were truly "zero hours contracts" as there was no minimum guarantee of any work. The Respondent's argument that the Claimant could only be offered extension on his existing terms of no less than 15 sitting days per annum related to "contractual flexibility" and to a minimum obligation. The second argument for the Respondent concerned what Mr Crosfill referred to as "actual flexibility".

28. Both issues of contractual flexibility and actual flexibility were fully aired before the

Tribunal, which made appropriate findings and decided the matter in favour of the Claimant. The Respondent could not seek to establish contractual flexibility as a basis for the difference in treatment because that would fall foul of the Regulations. The Respondent was clearly wrong to put forward any argument that section 26(5) of **JUPRA** was incompatible with the **Part-time Workers Directive**. While it had not been accepted on behalf of the Claimant that the only terms that could be offered to him were a guaranteed 15 days minimum sitting and that position had been put to the Respondent's witness, it was open to the Tribunal to accept, as it did, that only extension as a Recorder could have been granted. No procedural irregularity arose as the whole issue had been ventilated in evidence. On actual flexibility, the Respondent's witness had not been cross-examined because the evidence was in relation to a general assumption only. In any event the Claimant had already emphasised his ability to work as flexibly as his comparator. If the Respondent's concern was in relation to actual flexibility that too would discriminate against the Claimant as a part-time worker. Any assumption that all members of a group would act in the same way exhibits a discriminatory thought pattern. Accordingly the evidence that in the Respondent's general experience Recorders were less flexible than Deputy Circuit Judges did not advance the Respondent's position.

29. It was clear from paragraph 68 of the Judgment that the Tribunal had considered the contractual flexibility issue and had understood that was not helpful to the Respondent. The potential cost to the public purse simply did not arise in this case because all of the evidence militated against any likelihood that a Deputy Circuit Judge would sit for less than 15 days per annum. HHJ Wilkinson was never going to be a cost free resource. Accordingly, on the factual circumstances of the case before it, the Tribunal did not have to decide the contractual flexibility point. In summary, there had been submissions in evidence on both types of flexibility and the Tribunal had been entitled to reach the decision that it did. The alternative

argument for the Respondent on the first ground was really the same point put a different way. No informed reader of the Judgment could conclude anything other than that the Tribunal had decided that the Claimant would have to be taken on as a Recorder on the same terms and conditions as previously and while that guaranteed a minimum of 15 days sitting, that difference in terms between him and his comparator did not present any relevant basis for a difference in treatment.

30. Mr Crosfill submitted that in relation to the argument about failing to take account of financial implications (the sitting day allocation argument), the Respondent's submissions failed to take into account that its own case in seeking to extend the comparator's work beyond retirement age was that they were short of judicial resources and so had to rely more on Recorders. If the Respondent had refused to extend the Claimant's appointment and had not allowed the comparator to work beyond retirement age because there was sufficient capacity using current resources, then no issue would have arisen. However on the facts led, the issue of sitting day allocation was an entirely neutral one as between the applications of the Claimant and his comparator. It was clear from the Judgment as a whole that the Tribunal understood the sitting day allocation issue.

31. In response to the submissions made in support of the second ground of appeal, Mr Crosfill dealt first with the contention that adverse findings about Ms Brar's honesty had been made. He accepted that, had the Tribunal done so, then the decision in **Doherty v British Midland Airways Ltd** [2006] IRLR 90 would be in point. However, the Tribunal simply had not made any finding of dishonesty in this case. It was clear from paragraph 24 that what the Tribunal had done was praise the particular honesty, integrity and truthfulness of one witness from each side, namely the Claimant and Ms Joyce. No finding of dishonesty on the part of Ms

Brar could be implied from that. Accordingly, the first so-called adverse finding relied on for the Respondent could be ignored.

32. The next example given by Ms Darwin had been the Tribunal's finding (at paragraph 27) which she had characterised as being that Deputy Circuit Judges are allocated sitting opportunities in the same way as Recorders. She had challenged that and pointed to evidence of Deputy Circuit Judges being drawn on only as a last resort. Mr Crosfill pointed out that paragraph 27 of the Judgment was related to the background findings on the administrative system. It did not contain any specific finding that Deputy Circuit Judges are allocated sitting opportunities in the same way as Recorders. It mentions only that Deputy Circuit Judges might be provided at the same time as Recorders with lists of cases which are to be heard asking whether they are willing to sit. In any event, this issue had no bearing on the central questions that the Tribunal had to decide. It was not a part of the Tribunal's reasoning.

33. So far as the issue about the template was concerned, the issue of whether there was a template designed for setting out a business case for an extension of appointment for a Recorder was all canvassed at the hearing before the Tribunal. The Respondent had contended that the template at Annex A would be appropriate for the Claimant but the Tribunal found (at paragraph 40) that the administrative staff had a different impression from the guidance and in any event that position did not accord with the headings on the templates. The Tribunal concluded that there was no relevant template for extension of appointment of a Recorder. That was a finding it was entitled to reach on the evidence and there had been evidence and submissions on it and so no irregularity arose. The issue was not so much whether one of the templates could have been used for an extension for a fee-paid Judge but rather that the guidance did not identify a relevant template. Again and contrary to Ms Darwin's submission,

this issue was not identified by the Tribunal as something that was relevant to their reasoning, which is clearly set out at paragraph 84.

34. There was also a response to the contention on behalf of the Respondent that the Tribunal had made findings that Ms Brar was the decision maker and that the Lord Chief Justice or Lord Chancellor's role was a technicality. Mr Crosfill submitted that one had to distinguish the question of where ultimate decision making power lay so far as appointing the Claimant or his comparator was concerned and the decision about whether or not there was business case to put forward in relation to an applicant. The Tribunal had been given no detail in relation to how a business case was considered and what weight was put on a recommendation that there was a business case. It had decided, perfectly correctly, that it was for Ms Brar alone to decide whether there was a business case to put forward. It was accordingly correct for the Tribunal to state (at paragraph 43) that "*whether or not a business case can be made out is Ms Brar's decision*". There was no evidence to contradict that conclusion. Ms Brar's witness statement spoke in terms of advising the Presiding Judges that "*… we were not able to put forward a business case*" and the Judges had agreed with her position. The uncontroversial evidence, therefore, was that a business case was the launch pad for any possible appointment and that Ms Brar alone decided whether a business case had been made out. As neither the Claimant nor his comparator could have been appointed without a business case having been made out, Ms Brar was effectively the one with the power to decide who would go forward. The Tribunal had also been correct to conclude that the Lord Chief Justice and Lord Chancellor did not make the decision as they had no role to play in deciding who was put forward in the sense of a business case having been made out. Accordingly the Respondent could have no complaint about these findings.

35. The last specific finding singled out for challenge by Ms Darwin was that the Tribunal found that there was scant evidence and/or a lack of clear evidence that the Respondent needed Judges with an SSO ticket to sit and also that there was no evidence whether over a period of time there was difficulty in covering the SSO work. Mr Crosfill submitted that as the Tribunal had already acknowledged in the Judgment that there was a value to having an SSO ticket and that there was a need to have SSO ticketed Judges, the Respondent's reliance on that factor as being one favourable to the comparator was not in question. The real issue was whether there was any evidence that there was in fact a shortage of SSO ticketed Judges in the existing pool and related to that, whether it could then be regarded as a pre-requisite for extension of appointment that a Judge held such authorisation. Mr Crosfill drew the analogy between a post for a Philosophy lecturer where a need for a need for a PhD in Philosophy rather than Sociology would be obvious. However if an advertised job was for a chef and the job happened to go to someone who held a Philosophy degree, the reason for that choice would be less obvious. It was for the Respondent in this case to establish a need for someone with an SSO ticket. That could not be done by assertion and so the Tribunal was correct in highlighting that there had been at best scant evidence on this point. Critically, as recorded at paragraph 61 of the Judgment, the Tribunal had raised the absence of evidence on this point with counsel for the Respondent and invited the submission of statistical or other significant relevant evidence. However as it was not forthcoming, the Tribunal was forced to decide the matter on the available information. Counsel for the Claimant submitted that none of the points raised by the Respondent in ground 2 were anything more than trivial and on examination could all be seen to be wrong or misleading. The overall ground was a complaint of a lack of a fair trial and the Respondent had failed to point to anything illustrative of unfairness.

36. While the Respondent had not presented a stand-alone reasons challenge but had

A interspersed comments about a lack of adequate reasoning into some of the grounds, Mr Crosfill submitted that there was simply no basis for contending that the essential requirement of reasons being sufficient to enable a party to know whether it had won or loss had not been complied with. The Tribunal had identified the issues, set out the applicable law and factual background, made appropriate findings in fact and set out their conclusions on each issue and the reasons for reaching those conclusions.

C 37. Turning to the sixth ground of appeal, Mr Crosfill argued that this ground was misconceived. The legislation does not permit or require the Claimant to compare his treatment with that of a younger part-time worker. Both the Claimant and his full-time comparator could D be described as "pale male and stale" so no relevant point about intergenerational fairness or of diversity arose. The context was the difference in treatment between two men over the age of 70. The clear evidence in the case was that there was a shortage of judicial resources and so the E impact on different types of judicial resource applied for work was the same. Again the obligation of the Respondent to provide a guaranteed minimum of sitting days for Recorders but not for Deputy Circuit Judges was of no significance because the comparator in fact worked for over 80 days in an eight month period once appointed as a Deputy Circuit Judge. More F importantly, the business case for HHJ Wilkinson was put on the basis that he would in fact work having made himself available to do so.

G 38. In responding to the issue of objective justification (ground 7) counsel noted that at paragraphs 14 to 16 of the Judgment the Tribunal had correctly self-directed on the proper test of justification. It had expressly accepted the Respondent's proposition that in assessing justification it must have regard to the business needs of the Respondent. There could be no H dispute that the Respondent had reasonable needs such as its obligations to Recorders under the

compulsory retirement age, whether it could meet the sitting day allocation from its existing judicial resources and so on. However, those reasonable needs could not justify the *prima facie* discrimination that was found to exist in this case. Providing examples of extensions having been given to previous full-time Circuit Judges and not to part-timers was not shown to be justified by the fulfilment of those reasonable needs. The Respondent had been unable to justify the difference in treatment between those full-timers and the Claimant and had never given any explanation for the discriminatory treatment. On the available evidence it was clear that if the Claimant was not permitted to extend his appointment then it would fall on the other Judges to complete the work he had done previously. If he was permitted to sit he could have continued to do that work as there was a shortage of Judges. There was no need for additional funding. There was evidence before the Tribunal that it was thought that the appointment of HHJ Wilkinson was cost neutral and there was no material distinction between him and the Claimant. There was an evidential basis for assuming that the Claimant would have been allocated at least 15 days of work if his appointment was extended because he had been doing in excess of that prior to his retirement date all within the sitting allocation. The Tribunal was entitled to take into account the evidence that some Judges were asking to work less and had been refused because of the shortfall in judicial resources. In all the circumstances the Respondent had failed to satisfy the test of justification.

39. In so far as perversity had been argued on behalf of the Respondent, Mr Crosfill submitted that not only had the high hurdle for perversity not been overcome, the **Practice Direction** had not been followed in that there was no detail given by the Respondent as to why specific findings in fact could be said to be perverse. The Respondent had been unable to point to any finding that had no basis in evidence whether in direct oral evidence, in documents submitted to the Tribunal or on inferences drawn from the primary facts. Any type of evidence

oral or written was available to support findings - **Hough and APEX v Leyland DAF Ltd** [1991] IRLR 194.

(II) Remedy

The Tribunal's Judgment

40. Following a remedy hearing, where both sides had the same representation as at the liability hearing, the Tribunal found that the Claimant would have sat for 98 days in the year from January 2016; that he would have been extended as a Recorder for a further year and he would have sat for 80 days in that second year. It was considered just and equitable to award him compensation for that loss and, having found that the Claimant had not failed to mitigate his loss, the sum due was calculated at £36,796.67. That sum was awarded after the Tribunal had informed parties of the conclusions in principle on the issues in dispute so that the arithmetic could be carried out.

41. The parts of the Tribunal's Remedy Judgment that are significant in terms of the remedy appeal include, first, the extent to which previous decisions on liability required clarification, secondly, the way in which loss had been assessed, and thirdly, the narrative in relation to informing parties of the conclusions separately from the Written Judgment. So far as the first of these is concerned, the relevant passages in the Remedy Judgment are in the following terms:

> **"2. It transpired during Ms Darwin's cross-examination of the Claimant that she appeared to have misunderstood our judgment on liability. We had held that the failure to extend the Claimant's appointment as a *Recorder* was less favourable treatment on the ground that he was a part-time worker. Ms Darwin started to question the Claimant on the basis that we had held that, if not the subject of unlawful discrimination, he would have been reappointed on the same terms as a Deputy Circuit Judge, at least to the extent that he would have had a zero hours' contract (that is, with no guaranteed minimum number of sitting days). We had not so held, as we thought we had made clear from our statement of the law at paragraph 6; description of how the matter was not pursued at paragraph 68; conclusion at paragraph 90.1; and the terms of reserved judgment. We had accepted that the only way that a Recorder could be reappointed was on a Recorder's terms. The detail changed recently, but for someone appointed when the Claimant was appointed, the terms both required and guaranteed a minimum of 15 days a year. We held that the Claimant would have been reappointed on his Recorder terms because:**

• We had accepted the law from Ms Darwin, as being that Recorders could only be extended as Recorders on their existing terms and could not be appointed on terms applicable only to current Circuit Judges or Deputy Circuit Judges;

• Had the defence been pursued at the liability hearing on the basis that the Recorder's 15-day guaranteed minimum was the reason for that different treatment as between the Claimant and the comparator District Circuit Judge, so that if reappointed it would have had to be on Deputy Circuit Judge terms, we would have had to make appropriate findings of fact. It would have been relevant to bear in mind that it was not mentioned when their respective applications were considered or in the letter notifying the Claimant that his application was rejected. However, if it were made out on the facts, then as recorded at paragraph 68 of the Reasons, we would have wanted to consider whether that reason for differential treatment was itself unjustifiably discriminatory. Since, after an initial exploration, Ms Darwin did not prosecute the defence on that basis, we did not decide the matter, making clear that the issue of the lawfulness and relevance of the different terms applicable to a Deputy Circuit Judge was not before us.

• The Claimant's case was pleaded on the basis of the existing law, namely that he should have been granted an extension as a Recorder - the only position for which he could apply. Paragraph 3 of the Particulars, recited that he had requested to extend his sittings *as a Recorder* and alleged that the decision to reject that request was part-time worker discrimination. His application for extension, written on 2 September 2015, was to extend his term of office as a Recorder. He had not applied to be and did not suggest that he had to be or should have been appointed as a Deputy Circuit Judge or on those terms.

• Further and alternatively, avoiding less favourable treatment of part-time workers does not mean that the Claimant and comparator have to be treated identically, but rather that the Claimant be treated *not less favourably* than the comparator.

3. Ms Darwin then advanced that appointment on Deputy Circuit Judge terms was the only way the Claimant had put his case at the liability hearing, referring to paragraphs 24 and 25 of the Claimant's Note (for closing submissions) to the effect that the Respondent could have limited any reappointment to the Claimant making himself available purely on an 'as and when required' basis. We did not understand and do not accept that that is how the Claimant was putting his case. Rather, his case was put as at the third bullet-point above and as at paragraph 18 of the Note to the effect that the Claimant was denied the possibility of sitting beyond his retirement whereas his comparator was afforded that possibility. At paragraphs 24 and 25, Mr Crossfill was responding to the Respondent's argument that the only basis upon which it could, in accordance with the law, have extended the Claimant's appointment was on the same terms and conditions as he already had as a Recorder. He was addressing, not accepting, an argument about how the Claimant was different from the comparator.

4. In further exchanges, Ms Darwin made clear that she still wished to cross-examine on the basis that the Claimant would only have been reappointed on Deputy Circuit Judge zero hour terms, contrary to our actual conclusion. For the Tribunal I proposed that while she could not by this method undermine the conclusion we had reached, she would be permitted to cross-examine and we would consider that position in the alternative, lest we be held to have been in error as to our primary finding. Ms Darwin requested an adjournment which we granted. When she returned, Ms Darwin informed the Tribunal that she would not '*at this time*' pursue her proposed line of questioning. We now urged her to do so: it did not seem reasonable or proportionate to plan to hold some point in reserve, possibly dependent upon the outcome of an appeal. If, as it now was, the dispute was identified to the Tribunal and if, as Ms Darwin appeared to wish to submit, it was relevant to remedy, it was reasonable, proportionate and therefore desirable for the Tribunal to be put in a position to make all relevant decisions. Ms Darwin resolutely declined to resume her former intended stance. She would not seek to advance the Respondent's case on any basis but that the Claimant would have been appointed as a Recorder on the terms applicable to Recorders in the legislation. Later she objected to some of Mr Crossfill's cross-examination on the basis that he appeared to be enquiring about the zero hours' position. We declined to stop him, explaining that since we had considered it reasonable, proportionate and therefore desirable for her to proceed on that basis, we could hardly deter the Claimant from doing so."

42. The findings of fact made by the Tribunal and relevant to the remedy appeal were in the following terms:

> **"16. If re-appointed, the Claimant would have sat as a Recorder as much as he could. He had ceased to sit as an Immigration Judge in March 2015 and did not apply to extend that role. He preferred to sit rather than to pursue the more exhausting role, as he experienced it, of a practicing barrister.**
>
> **17. The Claimant told us that the demand for Recorder sittings continued at a high level through 2015 and 2016. He had hearsay evidence, not challenged in cross-examination, that the volume of emails offering last minute sittings was as high now as when he was last working as a Recorder and two Listing Officers had informed him that there is a shortage of Recorders across the whole of the South East Circuit. We accept that the Claimant is giving a truthful account of what he had been told and we know of no reason why those of whom he enquired should have been untruthful.**
>
> **18. Ms Brar gave evidence of new Circuit Judge appointments, but, as indicated above, without taking into account retirements. There was a long list of retirees in the bundle. The result is that it is unclear whether the actual number of Circuit Judges available in the South East and London Crown Courts have gone up or down. We accept that the sitting day allocation for the South East and London has reduced by 2% this year (2016-17) and is likely to reduce again next year. We do not conclude that this necessarily means that the availability of fee-paid sitting days has reduced, because it would not have done so if the number of Circuit Judges (or the percentages at which some of them sat) had reduced.**
>
> **19. Considering these two accounts, we are not persuaded that there would have been any significant reduction in available sitting days for Recorders since the time when the Claimant retired, but we conclude that a probable 2% reduction is made out.**
>
> **20. Deputy Circuit Judge Wilkinson sat for 83.5 days in March to October 2016, 56 of them requiring an SSO ticket. Deputy Circuit Judge Eccles sat in Oxford Crown Court for 39 days in the five months from May to September 2016, thus averaging about eight days a month."**

43. Having then found that the Claimant's recent past sitting performance as a Recorder was a more realistic indicator of his likely future sitting performance than either his overall historic average from 2002 or the average of the sittings of other Recorders, the Tribunal made the following further findings:

> **"25. The system for allocating work to Deputy Court Judges is different. Ms Brar explained that they are not invited to book ahead and are not sent the emailed list of vacancies. Rather, if hearings are still uncovered after Recorders have had the opportunity to respond, Ms Brar's team telephones individual Deputy Circuit Judges with the uncovered hearings in mind and invites them to sit on a particular case. She did not tell us how the team selected which Deputy Circuit Judge would be phoned. It could contribute to the widely varied sitting figures which we saw. It might work less neutrally or even-handedly than the Recorder booking system, because individuals are chosen for offers of work. In any event, Deputy Circuit Judges are, at least in theory, at the bottom of the pecking order for sitting allocation. In order for DCJ Wilkinson to sit 83.5 days in seven months (pro-rating to 143 days per annum) at least that number of days were not covered by the regions' High Court Judges, Circuit Judges or Recorders.**
>
> **26. Ms Brar did not volunteer, but admitted in cross-examination, that the Respondent has less than its full complement of Circuit Judges in the regions with which we are here concerned. The complement is calculated by factoring the sitting days at 80% for salaried Circuit Judges and the rest for fee-paid judges (Recorders and Deputy Circuit Judges). On**

this basis, the complement is short of Circuit Judges by 2% for the South East region and 8% for the London region, where the comparator and Claimant could also sit. That means that a greater number of days have to be covered by fee-paid judges and, as we found at the liability hearing, there is also a reduced complement of Recorders."

44. In setting out its conclusions on the issues before it the Tribunal's reasoning is in the following terms:

> **"*How much would the Claimant have sat on initial reappointment?***
>
> **38. We have determined that absent discrimination the Claimant's post-retirement appointment would have been effective from mid-January 2016. In calculating how much he would have sat, we are satisfied that it does not assist to have regard to the average sittings of other Recorders and that it is unhelpful to consider the long history of the Claimant's sittings. We prefer to work with his recent sitting history which reflects what he was doing, wanted to do and would have gone on doing. We consider that we should bear in mind at least one full year of sittings, to allow for any seasonal variations or fluctuations. We have the figures for the last seven months and before that the figures for the previous full year. Pro-rating the last year appropriately produces an average of about 100 sittings per year. We factor in Ms Brar's figure of a 2% decline in sitting days and reduce that figure accordingly. So we conclude that in January - December 2016 the Claimant would have sat 98 days, spread proportionately across the year (which we mention to help with the calculations based on changes in the rate of Recorders' fees).**
>
> ***Would the Claimant have been reappointed?***
>
> **39. The Claimant would have been reapplying in September 2016 for a further year's sitting from January 2017. We are not persuaded that there would be any reduced business case for the Claimant. The comparator (at the bottom of the pecking order in terms of allocation of work) sat 83 days in 7½ months, averaging more than 10 days a month; DCJ Eccles averaged 8 days a month or 96 days for a full year. They were obviously ready, willing and able to sit as Deputy Court Judges and this information plus the Claimant's hearsay evidence shows that there is a lot of work for Recorders. It tends to show need. We accepted from Ms Brar that it is likely that the total number of sitting days allocated to the region will reduce again, although she was not in a position to indicate by how much and the Claimant has persuaded us that there continue to be shortages of Recorders across the circuit. It is not said that there would be no work or less work for judges without the SSO ticket. As at the present date, when the Claimant would be seeking reappointment, the position is not identifiably different from what it was at this time last year. We conclude that demand and business need are such that, absent discrimination, the Claimant would be reappointed for a second full year, effective from mid-January 2017.**
>
> ***How many days would the Claimant have worked in 2017?***
>
> **40. We recognise that we are engaging in a speculative exercise. If we were wrong in our determination that the Claimant would be reappointed as a Recorder, we would consider that there was an 80% prospect that he would be reappointed. It remains highly likely, because we know no reason why it is not. We consider that the way forward is by the alternative calculations:**
>
> > **• If reappointed in accordance with our conclusion at paragraph 39 above, the Claimant would, on the balance of probabilities, have sat for 80 days in the year. This takes account of some probable reduction in sitting days and the 30 day Recorders all coming fully online.**
> >
> > **• Alternatively, if we reduce the prospect of reappointment to 80%, we would feel it appropriate to reduce the other variables. So we would abide by the 98 days sitting that we forecast for the present year. Factored at 80%, this would again produce a total of 80 sitting days."**

45. The separation of the giving of conclusions from the Judgment is explained as follows:

> **"47. Having informed the parties of our conclusions, as at paragraphs 38 - 46 above, we invited them to do the arithmetic, bearing in mind the need to gross up sums above £30,000. They were unable to reach a conclusion on the day and undertook to notify the tribunal of the final amount by email, for incorporation into the Judgment. They have now done so and we record, by consent, that after calculations which reduced for taxation all save the first £30,000, then grossed up appropriately, the Respondent is ordered to pay £36,796.67 compensation to the Claimant."**

The Remedies Judgment

46. In presenting the appeal on remedy, Ms Darwin submitted that any compensation awarded by the Tribunal required to be in respect of losses attributable to any less favourable treatment of the Claimant in comparison with his actual full-time comparator on the ground that he was a part-time worker and was not justified. Regulation 8(9) of the **2000 Regulations**, which provides that the amount of compensation must be such as the Tribunal considers just and equitable having regard to (a) the infringement to which the complaint relates and (b) any loss which is attributable to the infringement must be applied against that background. The Tribunal's decision was flawed because it had awarded the Claimant compensation on the basis that he would have been treated like other part-time workers (Recorders under the compulsory retirement age) rather than on the terms and conditions on which his full-time comparator worked, which were the judicial equivalent of a "zero hours" contract. In compensating the Claimant beyond those losses which were attributable to an infringement of Regulation 5, the Tribunal had erred because compensation on the basis that he would be treated more favourably than his comparator had been awarded.

47. It was submitted that in the Remedy Judgment the Tribunal had effectively sought to amend its Liability Judgment. The Respondent did not accept that paragraphs 2 to 4 of the Remedy Judgment amounted to clarification and submitted that in so far as the Tribunal had gone beyond its Liability Judgment at the remedy hearing this was unfair and improper.

48. Ms Darwin argued that the Tribunal's Reserved Written Reasons on remedy in this case were a nullity. That was because, she said, the Tribunal had handed down its Reasons already at the remedy hearing and before the parties agreed on the quantum of damages that were payable to the Claimant. Accordingly, the Tribunal had purported to provide its Oral Reasons in their entirety and had not informed parties that Reasons were being reserved on some issues to be given in writing later. The Reasons later sent were described as "Reserved Reasons" rather than "Written Reasons" as is customary following an oral Judgment.

49. Reference was made to Rules 60 to 62 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** in relation to Decisions and Reasons of such Tribunals. In particular Rule 61 provides that where there is a hearing the Tribunal may either announce its Decision at the hearing or reserve it to be sent to the parties as soon as reasonably practicable in writing. The written record of any Decision announced at a hearing has to be provided to parties. Rule 62(1) provides that the Tribunal must give Reasons for its Decision on any disputed issues. Rule 62(2) provides that in the case of a Decision given in writing the Reasons shall also be given in writing and that where a decision is announced at a hearing the Reasons may be given either orally at the hearing or reserved to be given in writing later. Ms Darwin submitted that Rule 62(2) of the **ET Rules** is binary. The Tribunal is not entitled to both announce its Reasons orally at the end of the hearing and reserve them to be given in writing later, as the Tribunal in this case purported to do. For that reason, the Reserved Written Reasons were a nullity and were beyond what was permissible in the circumstances. Further, the Tribunal had improperly used the Written Reasons to advance arguments in defence of its own previous Liability Judgment.

50. Counsel confirmed that paragraph 47 of the Remedy Judgment was correct to the extent

A that what the Tribunal had done was announce its conclusions at the end of the hearing. She acknowledged that the pillars of the decision had been identified to allow parties to conduct the arithmetic but, as they had been unable to agree, they submitted figures later. She argued that the Tribunal had wrongly sought to supplement Reasons given on the day with far more detailed Written Reasons later. As the Reserved Reasons differed significantly from the conclusions given at the hearing, the Tribunal had supplemented its oral Judgment to an unacceptable level. In summary, the Tribunal had acted improperly in two respects: namely in seeking to "clarify" a Liability Judgment in a Remedies Judgment which was described as a serious procedural irregularity, and in giving Oral Reasons and purporting also to reserve Judgment.

51. On the substance of the Tribunal's assessment of the Claimant's losses, it was acknowledged that these overlap with some of the issues raised in the liability appeal. In essence the Tribunal had erred in finding that there was an unlimited amount of potential work for Recorders to do and had compensated the Claimant on the basis that he would have been able to sit as a Recorder in retirement whenever he wished to make himself available to undertake work. It was on that basis that the total number of days that he would have sat in the two years post retirement was calculated. In doing so the Tribunal had erred in failing to take into account a number of highly relevant considerations including:

(1) The Respondent's own assessment of the need for work to be done by the fee-paid and salaried judiciary as determined by the sitting day allocations. Ms Brar's evidence was that the sitting allocation had reduced for the financial year 2016-17 with further anticipated reductions in the following financial year.

(2) The ways in which the Respondent allocates the pool of available work between different types of judicial resources. Reference was made again to the "informal

operating model" in terms of which 80% of the allocation was met by Circuit Judges and only 20% by Recorders. The Tribunal had erred in finding that the reduction in sitting day allocation did not mean that the availability of fee-paid sitting days had reduced in any event, sitting days had to be fairly distributed between all Recorders particularly with a view to ensuring that they all have an opportunity to undertake their guaranteed minimum sitting days. The position of other Recorders is highly relevant to the number of days when the Claimant was likely to sit and so the Tribunal had erred in finding it was meaningless, the Respondent was entitled to give preference to Recorders under the compulsory retirement age.

(3) The Respondent's criteria for extending appointments and assessment that there was no business need for the extension of the Claimant's appointment.

(4) The increased number of salaried judicial resources that were available to the Respondent to undertake a reduced amount of work. There was evidence of the number of new Circuit Judges that were due to take up posts.

52. In essence, the Tribunal had failed in concluding that the Claimant's willingness to sit was determinative of the days he would have worked without balancing factors such as whether there was work to do, whether the Respondent had apportioned funding for that particular work, whether the work might be allocated to the Claimant rather than a Recorder who had not yet completed their guaranteed minimum sitting days, and whether the work would be allocated to the Claimant personally rather than other Recorders under compulsory retirement age. Accordingly the Tribunal had erred in determining the issue solely by reference to the narrow factor of the number of days the Claimant had sat in the previous 19 months. Even if the Tribunal was entitled to rely solely on the Claimant's own previous sitting pattern and disregard

all of the considerations referred to, the Tribunal should have had regard to the considerable fluctuation in the days that the Claimant had sat each year since 2005. In relation to the proposed second year of extension, the Tribunal had failed again to take into account relevant factors in considering whether there would have been a business case for a further extension of the Claimant's appointment. It had erred further in relying on the fact that DCJ Wilkinson and DCJ Eccles had undertaken work in determining the business need when the evidence illustrated that a significant portion of that work related to serious sex offences.

The Claimant's Response to the Remedy Appeal

53. In relation to the propriety or otherwise of the Tribunal "clarifying" its decision on liability in a subsequent Remedy Judgment, Mr Crosfill pointed out that the Tribunal explained in detail how it came about and that it was necessary to reiterate or clarify what had been said in the Liability Judgment. In essence, the misunderstanding had been on the part of counsel for the Respondent and there had been no alteration in the Tribunal's position. On the issue of the difference between Reasons given on the day of the remedies hearing and in the Written Judgment, counsel accepted that the Written Reasons were far more detailed but submitted that all the Tribunal had done was to attempt to bring matters to a conclusion on the day of the hearing by giving its Decision in order to allow parties to do the arithmetic. There had been no departure from the Rules as this had been a decision given following a hearing and followed up with Written Reasons. Neither party had asked for Written Reasons because both parties understood that Written Reasons would be provided later. There was nothing in the Rules that prohibited the course taken by the Tribunal. In any event, even if the Tribunal's decision on the principal points in dispute on the day of the hearing did amount to "reasons", then the later provision of Written Reasons superseded those Oral Reasons. Reference was made to **Partners of Haxby Practice v Collen** UKEAT/0120/12/DM at paragraphs 14 to 17 in support of that

proposition. The Written Reasons were accordingly the preferable statement of what had been decided and why. In any event, the Respondent had not identified any prejudice by reason of the slightly unusual procedure that had been followed. There was no material difference between the brief summary of the decision given at the hearing and the Written Reasons that followed. There had been no change of heart on the part of the Tribunal, no inconsistency between the two. In the circumstances the Respondent was unable to establish any error of law in this regard.

54. In answering the arguments about the Tribunal's assessment of compensation in this case, Mr Crosfill submitted that the Claimant did not accept that the past behaviour was somehow not a good guide to the future. The Tribunal had recognised that the exercise of assessing loss involved a degree of speculation about events that had not happened. All that the legislation required was that the compensation should be such that is "just and equitable". The Respondent had not thought to argue before the Tribunal that the Claimant, if his appointment was extended, would not have been treated the same as other Recorders. There was no evidence before the Tribunal to that effect. The issue was simply how often the Claimant would have sat if he had carried on as before his retirement. Contrary to the Respondent's submissions, the Tribunal had expressly made findings about the fall in the sitting day allocation (paragraphs 18 and 19) and then applied those findings to discount the likely number of days for which the Claimant would have sat (paragraph 38). It had been common ground between the parties that there had been a wide variance in sitting opportunities but that pointed towards rather than against the need to look at the most recent position.

55. The Respondent had overstated matters in submitting that the Claimant's willingness to sit was found to be "determinative". The Tribunal had made findings as to the present state of

judicial resources and to the decline in sitting day allocation. It was entitled to take into account also the Claimant's willingness to sit. The Tribunal's assessment of the available evidence was a proper one that could not be faulted. The Tribunal had been correct to reject the suggestion that the average sittings of all Recorders was the best guide as to how often the Claimant would have sat if his appointment had been extended. The evidence was that had an extension been given the Claimant would have been in the pool of Recorders and treated the same as others. As he had established a pattern of sitting much more than the average, the use of an average figure was indeed meaningless. There was no reason for the Tribunal not to have regard to the most recent sitting pattern of the Claimant rather than taking into account the position in 2005. Its reasons for doing so had been properly explained.

56. The arguments about a business case had been dealt with primarily in the liability appeal. The fact that the sitting day allocation could be met by heavy dependence on Recorders did not mean that a business case could not be made out. In HHJ Wilkinson's case there was no evidence that his work could not have been met within existing resources. In all the circumstances the Remedy Judgment was sound and should not be interfered with.

DISCUSSION

(I) Liability

57. The first two grounds of appeal advanced by Ms Darwin relate to the issue of procedural irregularity/unfairness. The contention is that in at least two different ways the Tribunal acted in an irregular manner that was serious enough to give rise to unfairness to the Respondent such that the decision cannot stand. There was no dispute between counsel as to the applicable law in this area. The approach must be to ascertain first whether there was any irregularity and if so, to examine whether unfairness has resulted. All of that must be done in the context of the

evidence before the Tribunal as a whole and tested against what the issues in the case were. The thrust of both of the first two grounds of appeal is that the Tribunal did not address matters along strictly adversarial lines, that it decided the manner on a basis not put forward by the Claimant and that it made adverse findings against the Respondent that had no foundation in the evidence in circumstances in which the relevant matters had not been raised or raised properly with the Respondent's witnesses during the course of the hearing. The authorities on various types of procedural irregularities and the unfairness that can be created were analysed by HHJ Hand QC in **NHS Trust Development Authority v Saiger & Others** UKEAT/0167/15/LA. The context in that case was the failure to put a material fact to a witness. HHJ Hand QC concluded that:

> **"102. … The extent to which there has been procedural unfairness is not necessarily a matter of simply scrutinising what actually was put. It will involve a consideration of all of the evidence, how the matter stood at the end of all of the evidence and what the parties and the Tribunal should have recognised from that material was still in issue in the case. I do not accept that every failure to put every particular aspect of a case amounts to a serious procedural failure. The context may suggest that looked at overall it was perfectly fair, everybody knew where they were heading, what was at issue, what the case being put forward was and what the answer to it should be."**

58. Turning first to the issue of whether the Tribunal determined the Claimant's case in his favour on grounds other than those relied on by him, it seems to me that all that occurred was that the Tribunal resolved an argument about the terms and conditions upon which the Claimant could have had his term of office extended by accepting the position contended for by the Respondent. The Claimant had not conceded that he could continue to work only as a Recorder and had suggested that he could be offered the same terms and conditions as a Deputy Circuit Judge. As the Respondent had drawn attention to the fact that section 26(5) **JUPRA** does not permit a Recorder to change office upon his compulsory retirement but only to remain or continue in that office, the Tribunal was in my view correct to accept the Respondent's argument. There was no question of the Tribunal deciding the matter on a basis that was not before it in evidence or in argument on this particular point. The Respondent had clearly made

A the argument about the inability to change office - see paragraph 6 of the Liability Judgment. Accordingly, no unfairness to the Respondent was created as this was simply one aspect of the case in which the argument put forward by one side was preferred over the other.

B

59. Further, I am of the view that it does not follow from the Tribunal's acceptance of that position that any question of the incompatibility of section 26(5) of **JUPRA** with the **Part-time Workers Directive (Council Directive 97/81/EC)** arose in a way that required determination by the Tribunal. The Respondent contends that, as Recorders such as the Claimant were guaranteed a certain number of days minimum sitting (15 for the Claimant but 30 for other, more recently appointed Recorders) as opposed to Deputy Circuit Judges who work on effectively a "zero hours contract" basis, the legislation effectively treats part-time workers more favourably than full-time workers. In the event, the Tribunal did not require to address that issue because on the evidence before it there was ample work for a Recorder keen to sit for at least 15 days and there was also sufficient work such that a Deputy Circuit Judge would sit more than that. Accordingly, on the facts of this particular case, the Respondent would have been able to treat both the Claimant and his full-time comparator equally and no question of treating the part-time worker more favourably than the full-time comparator would arise. It is clear from paragraph 69 of the Liability Judgment that the Tribunal decided the matter on that basis. In any event, the guaranteed minimum sitting days is a matter of contract between the Respondent and Recorders and does not emanate from any statute governing their appointment.

G

60. The central issue in this case was whether the Claimant, as a part-time worker engaged in similar work to his full-time named comparator, had been treated less favourably without objective justification when he was not permitted to work on after his compulsory retirement age. That central issue was adequately canvassed in evidence and in oral submissions before

A the Tribunal, and detailed Reasons for rejecting the Respondent's submission that the Claimant was a significantly different judicial resource from HHJ Wilkinson were given. The Tribunal put aside general discriminatory assumptions made by the Respondent in respect of part-timers (that they were less flexible and available) and so I reject the intention that the Tribunal did not have regard to the Respondent's argument in that respect. Accordingly, I reject both bases relied on by the Respondent in support of the first ground of appeal.

C 61. Turning to the second ground of appeal, this relates to matters which the Respondent claims had not been raised to any material extent at the hearing and of which the Tribunal appears to make adverse findings. In **Neale v Hereford and Worcester County Council** D [1986] ICR 471 the Court of Appeal emphasised that it would be unwise and potentially unfair for a Tribunal to rely upon matters which occur to its members after the hearing that have not been mentioned or treated as relevant, without a party against whom the point is raised being E given the opportunity to deal with it unless no useful comment in explanation could be anticipated. The Court went on (at page 486) as follows:

> **"… Further, if a point has not been mentioned, or if little or no weight has been attached to it, the tribunal is entitled to and should have regard to the point according to their own assessment of it but, in forming that assessment, the … tribunal should … pay careful and proper attention to the course of the hearing and the way in which and the extent to which a point has been made or relied upon. …"**

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62. The Respondent's written submissions refer to a total of 16 adverse findings complained about. However it was accepted by Ms Darwin that many of these were relatively insubstantial G or involved a degree of overlap.

63. On the main arguments presented, there is first the question of whether the Tribunal H impliedly found (at paragraph 24) that the Respondent's main witness, Ms Brar, was untruthful or somehow dishonest. The stated concern was said to be that there was no particular attack on

Ms Brar's credibility in evidence and that it was not raised at the submission stage. It was accepted by Mr Crosfill on the authority of **Doherty v British Midland Airways Ltd** [2006] IRLR 90 that such an adverse finding on credibility and reliability would be a misdirection if not put to the witness or advanced in argument. However, in my view paragraph 24 of the Liability Judgment makes no such attack on Ms Brar's credibility and reliability. That paragraph makes clear that the only attack that required to be noted by the Tribunal was one made by Ms Darwin on the Claimant. The Tribunal had to deal with that and rejected the criticisms she had made. The Tribunal went on to earmark both the Claimant and one of the Respondent's witnesses as being particularly impressive in terms of their honesty and integrity. The specific mention of those two witnesses and the absence of any mention of another witness cannot be taken as the Tribunal impugning the credibility of the unmentioned witness, Ms Brar. Reading the Tribunal's Judgment as a whole, it is clear that where the Tribunal does not accept some of the evidence of Ms Brar it is on the basis she and the Respondent may have based some of their views on general assumptions about full-time Judges and part-time Judges that the Tribunal did not accept as a relevant consideration. That does not in any way go to credibility. A witness may be found to be wrong or mistaken or have approached a point from an incorrect angle, but that is not tantamount in any way to a finding of dishonesty. In short, there simply is no adverse finding of the type Ms Darwin claimed had been identified and so the Tribunal cannot be said to have erred in this respect.

64. Taking together the adverse findings made in relation to whether the Respondent provided an appropriate template to Recorders seeking extension and the role of Ms Brar on the one hand and the Lord Chief Justice or Lord Chancellor on the other in respect of the decision making process, these all raise the question of whether the Tribunal erred by making important findings on matters on which there was either insufficient evidence or no evidence at all. It

seems to me that these findings go to the fairness or otherwise of the process for applying for further work as between a full-time Circuit Judge and a part-time Recorder. The argument was presented by Ms Darwin on the basis that the Tribunal was wrong to find that the template Annex B did not apply to Recorders. In fact, a fair reading of paragraph 40 of the Tribunal's Judgment illustrates that the Tribunal did not find that there was no template at all that a Recorder could use but rather that neither template A nor B was on the face of it were suitable for applications for the extension of a fee-paid appointment such as a Recorder. The Tribunal considered that there was confusion between the Respondent's stated position that one of the templates would be appropriate for the Claimant and what the administrative staff were informed by the relative guidance. It was never suggested that there was no mechanism through which the Claimant could apply for an extension as he did so apply. The Tribunal's conclusion was that the templates were clearly designed to fit those who had been Circuit Judges rather than part-time workers such as Recorders. In any event, even if the Tribunal's conclusion on this point could be regarded as slightly overstated, the overall conclusion was influenced only to a very small extent by the absence of reference in the administrative guidance to the possibility of applications for reappointment by Recorders and the lack of a suitable template - see paragraph 84. Any error was accordingly not a material one such as would justify interference with the overall decision.

65. On the question of who made the decisions in relation to extension of fee-paid workers or redeployment of full-time workers, I consider that the Tribunal was entitled to make a finding that whether or not a business case can be made out is Ms Brar's decision (paragraph 43). As Mr Crosfill pointed out, the decision about whether or not there was a business case to put forward in relation to an applicant did lie solely with Ms Brar. If no business case could be made out, then no appointment could be made. Accordingly Ms Brar played a very significant

role in the decision making process. Further, in the absence of any evidence that the Lord Chief Justice or Lord Chancellor played an active role in relation to the decision making process, the Tribunal was correct to regard those high judicial office holders as making the final decision only "technically" (paragraph 44). The Tribunal noted that there was no evidence that those office holders ever disagreed or refused to appoint if a business case had been put forward. It seems to me that the Tribunal well understood that, rather like the situation where a Judicial Appointments Commission or Board puts forward recommendations for judicial appointment but the power to make that appointment is ultimately said to be by Ministers or the Crown, the real power to determine the pool of candidates put forward for appointment and so appointed in consequence of those recommendations, does not lie with the ultimate named decision maker. So it was in this case that Ms Brar held the power to propose or refuse to propose a business case for the Claimant and/or his comparator. I reject the contention that the Tribunal erred in making any of these three findings and/or that any unfairness resulted from them.

66. The final matter identified as one for which there was said to be no evidence was the Tribunal's finding that there was scant evidence or at least a lack of clear evidence that the Respondent needed Judges with an SSO ticket to sit or particular pressure on covering SSO work. In my view, it is important to look at the context of what the Tribunal was addressing in paragraph 79. The Respondent had sought to advance an argument that the SSO ticket was effectively a pre-requisite of continued work for the Judge in the Crown Court post-retirement age. The Tribunal rejected that contention and gives reasons for doing so. One reason was the lack of any direct evidence to support it. The Tribunal did not suggest there was no material at all in relation to the difficulty in covering SSO cases simply that it was "scant". The passage of evidence referred to by Ms Darwin is consistent with that finding. The Tribunal's concern was clearly that in the absence of statistical evidence or other relevant material there was an

insufficient basis for the Tribunal to conclude that the Respondent had established a particular need for someone with an SSO ticket. It had not been disputed that having an SSO ticket was of some value, but the evidence appeared to fall far short of forming a basis for a conclusion that it was a pre-requisite.

67. While the Respondent challenged certain other findings made by the Tribunal, it was accepted that these were not significant on their own or at least were covered by issues raised in the other grounds of appeal. For example, criticism was made of paragraph 63 where the Tribunal states that "*Circuit Judges are appointed from the ranks of Recorders*" when Ms Brar's evidence had been to the effect that they were mostly appointed from the ranks of Recorders but did not go so far as stating that they were exclusively so appointed. While this finding is of interest as part of the general background, nothing turned on it. In any event this issue, like all of the other matters challenged in the second ground of appeal, was fully ventilated in evidence and the Tribunal made findings. As the second ground of appeal is directed at procedural unfairness, the Respondent would be required to show both that it was correct that some of these issues had not been raised with the Respondent or the Respondent's witnesses during the course of the hearing and that unfairness had resulted.

68. Having considered submissions and the material relied on in this chapter of the appeal, I am satisfied that, other than on insignificant details such as whether Circuit Judges are mostly or exclusively taken from the ranks of Recorders, the Tribunal cannot be said to have erred at all. On the single matter of the relevant templates, there may be an error in the way in which it was expressed, but the substance of the decision (that the templates were directed at full-time salaried judiciary) was sound. On each and every issue identified, there was a basis in the evidence for the Tribunal's finding. Adequate reasons were given for each and the Respondent

cannot now complain that the Tribunal did not find in its favour on issues (such as the pre-requisite of an SSO ticket) on which insufficient evidence was led for the Tribunal to make a finding favourable to the Respondent.

69. Turning to the fourth ground of appeal and issues of flexibility and availability, the Respondent had contended that the Claimant and his full-time comparator, HHJ Wilkinson, were in materially different positions. The Tribunal had before it evidence that HHJ Wilkinson, having just retired from a full-time role as a Circuit Judge and having chosen to apply to be a Deputy Circuit Judge, had good availability to sit. However, the Tribunal had evidence from the Claimant, challenged in cross-examination, on the issue of his own position. Accordingly, there was clear evidence, for the Tribunal to accept or reject, that the Claimant was also available and flexible for the reasons he gave. All the Respondent could then rely on was a general assumption that any Recorders, because they combine judicial sittings with their main career as a Barrister or a Solicitor, are less likely to be available at short notice or for lengthy cases than Deputy Circuit Judges who have retired. This general assumption, quite apart from being discriminatory against part-time workers, was of no assistance to the Tribunal given that it had before it direct evidence of the particular availability and flexibility of the two individuals being compared. Evidence that there are some Recorders who are unable or reluctant to sit even for the guaranteed minimum sitting days illustrated only that the Claimant could not be treated on the basis of any general assumption. I have already commented on the Respondent's further argument in relation to Deputy Circuit Judges being used only as a last resort judicial resource. The clear evidence before the Tribunal was that there was ample work for both Deputy Circuit Judges and Recorders. I consider that the Tribunal was entitled to conclude (at paragraph 81) that the assumption that the Claimant would be less willing to sit could not be made legitimately on the evidence. In any event, as the Tribunal also noted, this type of

availability was not a reason given to the Claimant or mentioned at the relevant meeting in relation to the applications.

70. The fifth and seventh grounds of appeal centred on the question of the Respondent's objective justification defence. In essence the Respondent contended that, as the Tribunal was obliged to have regard to the reasonable needs of the Respondent and as those reasonable needs included the sitting day allocation, the Tribunal had been wrong to attach no weight to the evidence about the criminal sitting day allocation and had erred in substituting its own view of the Respondent's needs and policy priorities. In my view, attacks such as those made under these grounds of appeal fail to acknowledge the careful analysis given by the Tribunal at paragraph 88 of the Judgment. Six enumerated reasons are given for the conclusion that the Respondent had failed to prove that it was reasonably necessary to require the Claimant to hold an SSO ticket or that there was any other reasonable necessity for not making a business case for him. The sitting day allocation issue is dealt with as the sixth numbered reason. The problem for the Respondent was that the accepted case in relation to the extension of HHJ Wilkinson's tenure was that there was a shortage of judicial resources and a consequent increased reliance on Recorders. There was sufficient material for the Tribunal to reject any argument that there was a sufficient judicial complement to use the region sitting day allocation. The refusal to allow a number of salaried criminal Circuit Judges to reduce their sittings illustrated that there was a shortage of Circuit Judges. There was evidence of a reduced pool of Recorders and a backlog of cases in the Crown Court and those had all been factors in refusing the applications of salaried Judges to work less than full-time. All of these militated against the idea that there was objective justification for refusing to appoint the Claimant to sit beyond retirement age. There was no suggestion at the appeal hearing that the Tribunal had been wrong to record (at paragraph 28) that in the South East the number of days actually sat

exceeded the sitting day allocation in each year. Absent a challenge to that finding, it is easy to see why the Tribunal went onto conclude that the region needed more rather than fewer judicial resources. I reject the contention that any of the passages relied on for these grounds is illustrative of an error of law, far less perversity.

71. This was a difficult case for the Tribunal and it seems to me that all of the issues on liability have been addressed as comprehensively as possible standing the evidence led. The Respondent having led no statistical or other evidence illustrative of a requirement only for Judges who held SSO tickets, the Tribunal was left with evidence that the Respondent had given reasons to the full-time comparator for the extension of his appointment that would also have provided justification for the extension of the Claimant's tenure as a Recorder. Further, it is important to continue to bear in mind that the comparison being made was between a full-time Circuit Judge and a part-time Recorder and not between a (part-time) Deputy Circuit Judge and a Recorder. The substance of the decision that the Respondent required to make was whether there was a sufficient business need for fee-paid judiciary. If there was such a need, two workers that were able and willing to assist in meeting it were the Claimant (a part-time worker at the material time) and HHJ Wilkinson (a comparable full-time worker at the material time). There was ample evidence on which the Tribunal was entitled to conclude that there was a need for fee-paid judiciary in the relevant region with experience of criminal case work. Notwithstanding that business need, the Respondent treated the Claimant's application to sit on less favourably than that of his full-time comparator without objective justification. Many of the points taken at appeal appear to relate more to disappointment that the Respondent's arguments had not found favour with the Tribunal than being illustrative of any substantive legal dispute. The case for both sides was fully aired and examined and neither the Tribunal's approach nor its conclusions are illustrative of error or unfairness.

72. Accordingly I do not consider that any of the Respondent's arguments in relation to the liability appeal identify any errors that would justify interference with the Decision overall.

73. However, I consider it appropriate to make brief mention of the issue about the correct interpretation of the phrase "the treatment is on the ground that the worker is a part-time worker" within Regulation 5(2)(a) of the **2000 Regulations**. The approach of the Tribunal was to follow the approach in **Carl v University of Sheffield** [2009] IRLR 616 so that the interpretation is consistent with the same phrase in other domestic legislation. This required, in the present context, part-time work to be the effective and predominant cause of the less favourable treatment but it need not be the only cause - **O'Neill v St Thomas More School** [1996] IRLR 372. The Respondent agrees that the form of words used at paragraph 85 of the Tribunal's conclusion, namely that the fact that the Claimant was a part-time worker was a "*significant, material, effective ground*" for the difference in treatment is consistent with that approach. As already indicated, Ms Darwin had wrongly assumed that the Claimant had cross-appealed in relation to the interpretation of the test, but he had not. The Respondent, had the Claimant cross-appealed, would have sought to advance an argument that following the cases of **McMenemy v Capita Business Services Ltd** [2007] IRLR 400 and **Engel v Ministry of Justice** [2017] ICR 277, Regulation 5(2)(a) should be interpreted more narrowly such that a part-time worker such as the Claimant must establish that the employer has treated him less favourably on the sole ground that he is a part-time worker. As there is no cross-appeal before me, it is unnecessary to express a view on this point in the present litigation, but I note that there remains a direct conflict between the approach in **Carl v University of Sheffield** and the cases of **McMenemy** and **Engel**. The Claimant's argument that the correct approach was to interpret the phrase "on the ground that" in the same way as it had been for protected disclosure cases - **Fecitt v NHS Manchester (Public Concern at Work intervening)** [2012] ICR 372 -

was not pursued by him on appeal.

(II) Remedy

74. It is appropriate first to address Ms Darwin's argument that it was unfair and improper of the Tribunal to use the remedy hearing to amend its Liability Judgment. The Respondent contends that this was not a mere "clarification of the Liability Judgment" but was an attempt to elaborate on or give further Reasons for the Decision on liability. It is somewhat unorthodox for an Employment Tribunal to seek to clarify an earlier Liability Judgment in giving Reasons on remedy. However, paragraphs 2 to 4 of the Remedy Judgment set out the circumstances in which this unusual course was taken. It arose only because counsel for the Respondent appeared to have misunderstood the Liability Judgment on the issue of the basis on which the Claimant would have been reappointed but for the discrimination. She had attempted to cross-examine the Claimant on the basis that the decision was that he would have been reappointed effectively on a zero hours contract with no guaranteed number of sitting days. That approach flew in the face of what the Tribunal had stated at paragraphs 6 and 68 of the Liability Judgment. The Claimant had initially suggested that he might be taken on with the same terms and conditions as a Deputy Circuit Judge but the Tribunal, as already explained in the liability section of this Judgment, had accepted the Respondent's argument that he could only be given work as a Recorder because section 26(5) does not allow a Recorder to change office upon compulsory retirement only to remain or continue in his current office. It was common ground that for the Claimant that meant a guaranteed minimum of 15 days sitting per year. I consider that the Tribunal's Liability Judgment is unequivocal and succinct in the way it dealt with this matter. In light of all the evidence the Tribunal had heard, no issue arose or could arise about the Claimant being treated more favourably than his full-time comparator because the evidence illustrated that there was ample work for both.

75. There is absolutely nothing in the Liability Judgment that could justify the misunderstanding that appears to have arisen. Accordingly, I consider that there was no need for the Tribunal to clarify matters the way that it did in the Remedy Judgment. The passages in paragraphs 2 to 4 of that Judgment are primarily a narration of a set of circumstances that arose at the remedy hearing and how those circumstances were dealt with by the Tribunal. Ultimately they had no bearing on the issue of compensation as the basis on which the Claimant's office would have been extended had already been decided. No unfairness resulted from the Tribunal seeking to set out what had occurred and why it regarded counsel's reading of the Liability Judgment as wrong.

76. The second alleged procedural irregularity arising from the Remedy Judgment is the way in which the Tribunal gave its Reasons. Counsel agreed that what had occurred was that the Tribunal had given its conclusions only at the remedy hearing after what was described as a "long and combative day". This allowed parties to agree the arithmetic on damages. The Tribunal then produced a Written Judgment with Reasons attached. The issue for determination on this ground is whether Rule 62(2) of the **Employment Tribunal Rules 2013** is binary such that Reasons must be given either orally at the hearing or reserved to be given in writing later. The Respondent's position is that the Tribunal in this case sought to follow both routes such that the reserved Written Reasons are a nullity. Rule 62(2) of the **2013 Rules** is in the following terms:

> **"(2) In the case of a decision given in writing the reasons shall also be given in writing. In the case of a decision announced at a hearing the reasons may be given orally at the hearing or reserved to be given in writing later (which may, but need not, be as part of the written record of the decision). Written reasons shall be signed by the Employment Judge."**

77. While counsel who appeared both before the Tribunal and on appeal appeared unable to agree whether it was understood following the remedy hearing that Written Reasons would be

provided later, I have decided that it is sufficient for disposal of this point that there is nothing in the terms of Rule 62(2) which would preclude a Tribunal announcing its conclusions orally at the end of a hearing and providing a Written Judgment containing its Reasons later. More importantly, even if the Tribunal is regarded as having given first Oral Reasons and then later Written Reasons in slightly different terms to those Oral Reasons, it is the later Written Reasons that prevail and not the earlier oral statement. While the context was slightly different, in the case of **Partners of Haxby Practice v Collen** UKEAT/0120/12/DM Underhill J expressed the following view:

> **"15. It will be apparent from what I have already said that I agree that the Judge's reasoning did differ as between the oral reasons, at least as recorded by Ms Alistari, and the written Reasons. But I do not accept that this is a ground for allowing the appeal. The short point is that if, as I have held, the Judge's conclusion was unquestionably right it should be upheld whatever the errors in either set of reasons. But the point is one which I have seen raised in other appeals, and it may be useful if I make clear my view that a divergence between a tribunal's oral and written reasons would never, without more, give rise to a valid ground of appeal. I set out below what I consider to be the status of oral reasons in circumstances where written Reasons are subsequently requested and supplied.**
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> **16. I accept that normally any written Reasons supplied pursuant to r 3(3) will closely correspond to the oral reasons given at the conclusion of the hearing. The usual practice is that the oral reasons are recorded on tape and that if a request for written Reasons is made a transcript will be provided to the Judge and will constitute, in effect, the first draft of the written Reasons. There will almost always, however, be some degree of editing. Often that will involve no more than "topping and tailing" and/or correcting infelicities of language or expression. But the editing process may, depending on the circumstances of the case and no doubt on the temperament of the Judge, be more substantial. Even then, the essential reasoning would normally be retained. But every now and then there will be cases where the process of revision is so extensive that, whether the Judge appreciates it or not, the reasoning expressed in support of the conclusion differs in substance from the oral reasoning: sometimes the difference may be patent, but sometimes the difference may only be apparent on a careful analysis. There is no shame in this. Giving oral reasons is in principle a healthy practice, which is economical of resources (including the invaluable resource of time) and helpful to the parties; but the Judge will necessary have less time to prepare what is said than if reasons are reserved, and it is unsurprising that the process of producing written Reasons will occasionally modify his or her detailed thinking.**
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> **17. I do not believe that such a departure from the initially expressed reasoning involves any error of law. The scheme of the Rules seems to me to be that where written Reasons are supplied they constitute the sole authoritative statement of the tribunal's reasons and the oral reasons are superseded. It would be unfortunate if the tribunal were irrevocably committed to its first thoughts as to the route by which the result is most appropriately reached; and I can see no reason in law why that should be so. What ultimately matters is not to have an accurate reflection of the processes by which, as a matter of history, the tribunal reached its conclusion but that in the definitive reasons provided for by the Rules the parties and others (including this tribunal) should have the benefit of its most considered justification for the decision which it has reached. …"**

78. In the present case, no significant material difference between the conclusions given

orally and the Written Judgment was actually identified on appeal. It seems to me that the rationale of the **Partners of Haxby Practice** case applies equally to a situation where, for an easily understood pragmatic purpose, the Tribunal had stated its conclusions with brief Reasons at the hearing while otherwise reserving Judgment. But for the approach taken by the Tribunal in this case, it would have been the Tribunal rather than parties that would have been required to embark upon the arithmetical exercise following the decision in principle. I conclude that the Tribunal's approach is not illustrative of any error of law or impropriety and that the Remedy Judgment issued is a valid one.

79. Turning to the substantive issue raised in the remedy appeal, the Tribunal was said to have erred in finding that there was essentially an unlimited amount of potential work for Recorders to do and that the Claimant would have been able to sit as a Recorder in retirement whenever he wished to make himself available. Considerable reliance was placed on the issue of sitting day allocation and the evidence that it had reduced for the financial year 2016-17 with further anticipated reductions and also the evidence about how the pool of available work was split between different types of judicial resources and the increased number of salaried judicial resources. In assessing losses attributable to an infringement of Regulation 5 of the **2000 Regulations**, Regulation 8(9) thereof provides:

> **"(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."**

80. It seems to me that in determining what compensation would be just and equitable, the Tribunal had to address how often, on balance of probabilities, the Claimant would have sat if

he had carried on working as a Recorder after compulsory retirement age. I reject the contention that the Tribunal went beyond a calculation of those losses attributable to the infringement of Regulation 5 by using the Claimant's work as a Recorder as a guide. The available evidence illustrated that the "zero hours contract" under which the Claimant's comparator required to operate had no relevant consequences given the availability of work. As the Claimant held only the office of Recorder, his loss had to be assessed on the basis that he would have sat in that role. What matters is that it is his loss of earnings, insofar as attributable to the discriminatory treatment, which was relevant. In the absence of evidence supporting a conclusion that there would not have been sufficient work for him to continue to sit, the Tribunal was entitled to assess compensation on the basis that, but for the infringement of Regulation 5 he would have continued to earn broadly at the level he had prior to reaching compulsory retirement age. The material used by the Tribunal to determine the issue was the evidence of the Claimant's earnings prior to age 70 together with his evidence about what he understood the demand had been for Recorders sittings during 2015 and 2016. As the Tribunal notes at paragraph 17 of the Remedy Judgment, his evidence about the high volume of emails offering last minute sittings to Recorders was unchallenged and the Tribunal was entitled to accept what he said about the shortage of Recorders across the whole of the South East circuit. While Ms Brar for the Respondent had given evidence about new Circuit Judge appointments, she accepted in cross-examination that the Respondent has less than its full complement of Circuit Judges in the relevant regions. Against that background, while the evidence about the sitting day allocation was relevant material, there was sufficient other evidence to justify the conclusion that the availability of fee-paid sitting days had not reduced. Further, the Respondent's requirement to effect some sort of fair distribution of sitting days between all Recorders, that obligation would only affect the Claimant's loss if it was shown that the consequence would have been that fewer sitting days were offered to someone in the

A Claimant's position. There was no evidence to that effect.

81. Contrary to the submission made by Ms Darwin, the Tribunal did not actually determine the issue of compensation solely by reference to the number of days that the Claimant had sat in the preceding 19 months. A deduction was made to factor in the evidence of a 2% decline in sitting days (see paragraph 38 of the Remedy Judgment). In my view the Tribunal was entitled to regard the more recent sitting pattern of the Claimant as a Recorder as a better guide to his loss than historic figures from 2005. So far as the issue of how much he would have sat in the second year of extension is concerned, the Tribunal's conclusion at paragraph 39 is one that it was entitled to reach on the available evidence. In the years leading up to his attaining compulsory retirement age, the Claimant had tended to sit as a Recorder far more often than the average. The reasons for that were explored in evidence and understood by the Tribunal.

82. I reject also the contention that the Tribunal failed to take material considerations into account in assessing compensation in this case. Having been impressed by the Claimant's honesty, the Tribunal was entitled to rely on the hearsay evidence he gave from colleagues as to the ongoing high level of demand for Recorders. Finally, I do not consider it to be an error for the Tribunal to have relied on the amount of work undertaken by DCJ Wilkinson and DCJ Eccles regardless of the type of such work. That evidence served to support the conclusion that, but for the unlawful discrimination against him as a part-time worker, the Claimant could have continued sitting much as he had done in the years prior to 2016. Again the Tribunal's approach on the substance of the Remedy Judgment is not illustrative of any error in law or in approach.

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DECISION

83. For the reasons given the appeals against both liability and remedy fail and will be dismissed.

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