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EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Mr A J Engel	**AND**	Ministry of Justice

Heard at: Birmingham Employment Tribunal **On**: 30 July 2018

Before: Employment Judge S J Williams (Sitting alone)

Representation
For the Claimant: In person
For the Respondent: Ms J Seaman (of Counsel)

JUDGMENT ON PRELIMINARY HEARING

The judgment of the tribunal is that:

1 the claimant's appointment as a deputy circuit judge was terminated on or about 1 January 1982;

2 the effect of the Courts Act 1971, as amended by the Senior Courts Act 1981, was to convert the claimant's appointment as a deputy circuit judge into an appointment as an assistant recorder on or about 1 January 1982;

3 the claimant's appointment as an assistant recorder came to an end in or about September 1984.

REASONS

1. This case forms part of the litigation in which judicial office-holders claim entitlement to pension by virtue of their fee-paid service. The claims are stayed pending the outcome of the appeals in **O'Brien v MoJ** and **Miller and others v MoJ**, save for certain preliminary issues which it is convenient to determine at this stage. This present claim raises such issues, one of which is before this tribunal.

2. By a complaint presented on 1 May 2013 the claimant contends that from 1978 to 1984 he worked as a deputy circuit judge and then as an assistant recorder. He claims entitlement to pension by virtue of that fee-paid service in reliance on the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ('the Regulations of 2000'). If the claimant ceased to be an assistant recorder in 1984, his claim under those Regulations presented in 2013 is some twenty-nine years out of time. However, the claimant contends that his appointments as deputy circuit judge and assistant recorder continued until his seventieth birthday on 10 May 2013, or possibly until his seventy-fifth birthday, despite the fact that he was not asked to sit in that capacity after 1984. The issue before this tribunal is whether the claimant's appointments continued as he contends, or whether they ended at some earlier, and if so what, date.

3. At a preliminary hearing held on 16 October 2017, at which he dealt with this and numerous other cases, Employment Judge Macmillan gave directions for the determination of the present issue at a preliminary hearing. It was contemplated that, depending on the outcome of this hearing, a further issue might arise, namely whether the tribunal considered it just and equitable to consider this claim notwithstanding its late presentation. The respondent contends that the effect of today's decision may go further and determine whether the claimant is entitled to any remedy under the Regulations of 2000 at all. Those issues are not for determination today. During his career the claimant has held other fee-paid judicial offices with which this tribunal is not concerned save that they form part of the factual matrix.

4. The claimant gave evidence in accordance with his witness statement dated 12 July 2018 and was cross-examined by Ms Seaman. The claimant also submitted a short statement from Mr Maskew, his former clerk. The respondent called no evidence. The claimant and Ms Seaman both prepared written skeleton arguments, and the claimant presented written submissions, on which they each expanded orally. The tribunal was provided with a bundle of documents containing pages 1-170, to which the claimant today added the obituary of Lord Browne-Wilkinson from The Times of 28 July 2018. I was also provided with a bundle containing relevant legislation and the cases of Starrs v Ruxton [2000] J.C. 208 and Shannan v Viavi Solutions [2018] EWCA Civ 681.

The Facts

5. The claimant was born on 10 May 1943. He was called to the bar in 1965 and after pupillage began to practise at the bar from chambers in Birmingham doing predominantly criminal work. In 1978 he applied to become a deputy circuit judge.

6. At that time section 24(2) of the Courts Act 1971, as amended by section 15 of the Administration of Justice Act 1973, empowered the Lord Chancellor 'if it appears to [him] that it is expedient as a temporary measure' to appoint deputy circuit judges from three categories of persons, one of which was 'any barrister or solicitor of at least ten years' standing'. The Lord Chancellor was empowered to appoint such persons 'during such period or on such occasions as he thinks fit'.

7. The claimant was appointed by the Lord Chancellor, acting through the Circuit Administrator of the Midland and Oxford Circuit, Clive Pratley, whose letter of 19 June 1978 refers to the relevant legislation, confirms the position and asks whether the claimant would be 'willing to sit from time to time as a deputy circuit judge in this circuit.' Thereafter the claimant did so.

8. In 1979 the claimant applied to be a recorder but was not appointed.

9. With effect from 1 January 1982 section 24 of the Courts Act was further amended by section 146 of the Supreme Court Act 1981. The effect of the amendment was, firstly, to limit appointments as deputy circuit judges to certain former judicial office-holders and, secondly, to empower the Lord Chancellor, 'if it appears to [him] that it is expedient as a temporary measure' to 'appoint to be an assistant recorder, during such period or on such occasions as he thinks fit, any barrister or solicitor of at least ten years' standing'. As a result of the amendment, persons in the claimant's category were thenceforth appointed as assistant recorders and no longer as deputy circuit judges. For practical purposes this was a change of name with no change of function.

10. There was no evidence before me concerning how the appointment of existing deputy circuit judges, such as the claimant, was 'converted' into appointment as assistant recorders, whether by fresh appointment or by letter or otherwise. Neither party could produce any relevant documentation on the point, nor does the claimant have any recollection of the matter. However, there is no doubt that the claimant continued to sit as and when required in the Crown Court and occasionally in the County Court until 1984, and that he was treated for all relevant purposes as an assistant recorder. He was, for example, referred to as such by the Court of Appeal in 1984 when giving judgment on an appeal against a sentence imposed by the claimant. I find therefore that by whatever necessary means his earlier appointment as a deputy circuit judge was 'converted' *de facto* and *de jure* into appointment as an assistant recorder on or soon after 1 January 1982.

11. In 1984 for personal reasons the claimant contemplated a change of career. On 10 May 1984 he wrote to Mr Legg of the then Lord Chancellor's Department informing him that he was planning to cease practice at the Bar and take up employment, probably as a prosecuting solicitor. He said that his prospective employer, West Midlands County Council, had agreed to allow him at least four weeks' extra unpaid leave so that he could continue sitting as an assistant recorder, and asked Mr Legg to confirm that that would be acceptable. In addition to the question of his possible future employment, the claimant also discussed with Mr Legg at a meeting on 20 June 1984 the matter of his outstanding application to be a recorder. Mr Legg told the claimant that the presiding judges had come to the conclusion that it was time a decision was made on his future, but that 'as things now stood, the case had not been made out that [he] should become a recorder' and that he 'should not count heavily on the prospects of a full-time judicial appointment'. This confirmed to the claimant that his decision to leave the independent Bar was the correct one.

12. Mr Legg confirmed in two letters dated 18 May and 3 August 1984 that if the claimant accepted the proposed appointment he would have to cease sitting as an assistant recorder because the Lord Chancellor's view was that it was undesirable for those employed full-time in prosecution work to sit in any judicial capacity whatsoever. By his letter of 25 August the claimant informed Mr Legg that he had accepted the post of prosecuting solicitor, and asked that the matter of his sitting be reviewed if the Lord Chancellor's policy should change.

13. On 3 September 1984 the Circuit Administrator of the Midland and Oxford Circuit, Mr Blair, wrote wishing the claimant well in his new post and noting from correspondence the claimant had sent him that 'you will not in future be able to sit as an assistant recorder'. Mr Blair thanked the claimant for the service he had given as a deputy circuit judge and an assistant recorder over the past six years.

14. The claimant worked as a prosecuting solicitor and, briefly, in the new Crown Prosecution Service from September 1984 until 1986 when he left to work in the legal department of Lloyd's of London until 1989. Whilst at Lloyd's the claimant enquired of the Lord Chancellor's Department whether he might resume sitting as an assistant recorder, but was told that the Lord Chancellor's policy was that employed lawyers were not permitted to sit in a judicial capacity. The claimant understands that that policy later changed.

15. In 1988 the claimant was consulted by the Home Office on the case of a prisoner whom he had sentenced to life imprisonment and whose case was to go to the Parole Board. The claimant is referred to as 'Trial judge: Assistant Recorder Engel'. In his response he stated that he was an employed barrister and did not refer to himself as an assistant recorder.

16. In 1989 the claimant left Lloyd's to work for a firm of solicitors but was effectively made redundant after six months. In 1990 he re-joined the Crown Prosecution Service. In 1992 the claimant spoke by telephone to Mr Heritage of the Lord Chancellor's Department enquiring about the prospects of appointment to the circuit bench. Mr Heritage said that if the claimant remained with the Crown Prosecution Service he could not sit in the Crown Court, referring to the Lord Chancellor's policy outlined above. This could sensibly only refer to sittings as an assistant recorder. Mr Heritage went on to say that if the claimant returned to private practice he would have to 're-establish [himself] before [he] could be considered', but that the chances were not good. Whilst it is not absolutely clear from the claimant's note of the conversation, I take that to be a reference to possible appointment to the circuit bench.

17. In 1996 the claimant accepted an early retirement package from the Crown Prosecution Service and in 1997 he resumed practice at the Bar. He said that he immediately set about re-establishing himself and 'getting up to speed' with Crown Court work with a view to resuming his sitting and applying to become a circuit judge. Between 1997 and 2000 the claimant obtained a number of fee-paid tribunal appointments which he enjoyed and, though he maintained that he still regarded himself as an assistant recorder (and his clerk, Mr Maskew, regarded him as such), he took no steps to resume sitting in that capacity by, for

example, informing the relevant circuit or court administrators or presiding judges that he was again available to sit.

18. Although appointment as deputy circuit judge and, from 1982, assistant recorder was relatively informal, at the latest from 1994 it was made clear that the 'Lord Chancellor expects serving assistant recorders from time to time to attend residential "refresher" seminars arranged by the Judicial Studies Board as well as annual one-day circuit sentencing conferences arranged by the presiding judges'. The Claimant was never invited to attend such courses. It is inevitable that, as a practising barrister, the claimant would have known of these events from colleagues at the bar.

19. In 2000 the Lord Chancellor's Department wrote to existing assistant recorders stating that the Lord Chancellor had decided that no sensible purpose was served by maintaining the distinction between assistant recordership and recordership, and inviting assistant recorders to confirm that they were willing to accept appointment as recorders on terms notified to them. The Departmental Report of March 2001 makes clear that these changes were a response to the decision in Starrs v Ruxton. The claimant was not sent such a letter and was accordingly not notified of the terms of service of recorders. The respondent produced lists of former assistant recorders who were appointed as recorders by this process, which lists do not include the claimant's name. The claimant contends that there are errors in the lists. The respondent also refers in this context to a briefing by James Murrell to the Lord Chancellor dated 10 June 2011 stating that '[w]ith effect from 18 July 2000 all those holding the office of assistant recorder ... were automatically converted to recorder and the post of assistant recorder (although still in statute) fell into abeyance'. The claimant accepts that he was never appointed a recorder, nor was he offered such appointment.

20. Part 7 of Schedule 13 to the Crime and Courts Act 2013, headed 'Abolition of Office of Assistant Recorder', at paragraph 89, removed the power to appoint assistant recorders. The respondent contends that this was a cleaning-up provision because the office of assistant recorder had been defunct since 2000.

21. The latest reference to the claimant as an assistant recorder which I have seen is the 1988 consultation document referred to above (see paragraph 15) referring to his having been the trial judge in 1983. The latest date on which the claimant sat as an assistant recorder was before September 1984.

22. The respondent produced a printout dated 2011of a judicial office-holder database which purports to list the claimant's various appointments. It makes no reference to his being either an assistant recorder or a recorder. The claimant maintains that the document is inaccurate in a number of respects.

23. In 2009 the claimant ceased practice at the independent Bar. He reached his 70th birthday on 10 May 2013.

Discussion and Conclusions

24. It is not in dispute that the claimant was appointed a deputy circuit judge in June 1978. The first question is what happened to that appointment in the years that followed. The claimant argues that it was not time-limited, that it was never terminated and that it subsisted until his seventieth birthday in 2013, or possibly even later. The respondent, on the other hand, argues that the claimant's appointment as a deputy circuit judge lasted until 1 January 1982 when it was in effect converted into an appointment as an assistant recorder.

25. Section 24(2) of the Courts Act 1971, as amended by the Administration of Justice Act 1973, provided for deputy circuit judges to be appointed from three categories of persons of which one included the claimant, namely 'any barrister or solicitor of at least ten years' standing'. Pursuant to that provision the claimant was appointed a deputy circuit judge in 1978.

26. Section 24 of the 1971 Act was further amended by the Courts Act 1981from 1 January 1982 with the effect that barristers and solicitors of at least ten years' standing could henceforth be appointed assistant recorders, but no longer deputy circuit judges. From that date new appointments would be made accordingly. Whilst no formal steps appear to have been taken in relation to those barristers and solicitors previously appointed to sit in the Crown and County courts, I have no doubt that the intention of the legislature, and the understanding of all concerned, was they also would from 1 January 1982 be called assistant recorders. Contemporary documentary evidence clearly establishes that this was the claimant's understanding also. On 10 May 1984 the claimant wrote to Mr Legg 'I have been sitting as an assistant recorder since 1978 ...', and on 22 June 1984 in a note which the claimant did not dispute he is reported as asking Mr Legg 'if he could be told how he had been getting on as an assistant recorder. He had been sitting for six years and had had no feedback about his performance.' The claimant clearly believed he had been an assistant recorder since his original appointment in 1978, which, by the change of nomenclature referred to above, he had.

27. The evidence before me is inconsistent with the claimant's contention in these proceedings that his appointment as deputy circuit judge subsisted after 1 January 1982 and continued concurrently with his appointment as assistant recorder. I am satisfied that it came to an end on or immediately before 1 January 1982 and was replaced by, or converted into, an appointment as assistant recorder from that date.

28. The second question is what happened to the claimant's appointment as assistant recorder. The claimant argues that it was not time-limited, that it was never terminated and that it also subsisted until his seventieth birthday, or possibly longer. The respondent argues that it ended in 1984 after which the claimant did not sit, or, alternatively, that it ended at the latest in 1987, being the end of an assumed three-year renewal of his appointment in 1984.

29. The most contemporary documentary evidence touching this matter is found in the correspondence between the claimant and Mr Legg of the Lord Chancellor's Department and in the minutes of their meeting of 22 June 1984. Some confusion is introduced into these minutes by the fact that several distinct subjects were being discussed: the claimant's application to be a recorder; his prospects of a full-time judicial appointment in future; and the effect of his proposed change of career on his sittings as an assistant recorder.

30. The minute of 22 June sets out that from 1981 the policy had been that people should sit as assistant recorders for three to five years and then a decision should be made: either they would stop sitting or be made recorders. The minute also notes that the presiding judges had concluded that it was time a decision was made in the claimant's case. I infer from that that, had nothing else happened, the claimant would either have been made a recorder or not asked to sit in future. Mr Legg then advised the claimant that, as things stood, the case had not been made out that he should become a recorder. If one were to stop at that point, one might conclude that it was likely the claimant would no longer be asked to sit as an assistant. However, two other matters are relevant: Mr Legg said that the process (of making a decision in each case) was being applied backwards and would take time; he also said that the wide-ranging enquiries that had been made did not, as yet, give the claimant the backing required. I infer from the context that this referred to the claimant's prospects of appointment as a recorder.

31. In summary, I conclude from the matters set out above, and particularly the phrase 'as yet', that it is probable that – again in the absence of any other event - a decision would have been made in the claimant's case that he should continue as an assistant recorder for a further period of, probably, three years, before a final decision was reached about recordership.

32. Following this meeting and the exchange of correspondence around mid-1984, however, there is no evidence that any decision of the kind contemplated was actually taken about the claimant's case; he was not made a recorder, nor told that he would no longer be asked to sit, nor was his appointment as assistant recorder extended. From this the claimant submits that I should conclude that his appointment as assistant recorder simply continued notwithstanding the fact that he never sat again in that capacity.

33. However, a further important event intervened: the claimant left the bar. In my judgment, the most probable reason for no formal decision being made about the claimant's future is that his departure from the bar in 1984 pre-empted any such decision. He knew that, as the policy then stood, he would no longer be able to sit as an assistant recorder and he informed the Circuit Administrator accordingly. In his letter of 3 September Mr Blair thanked the claimant for his past service with an unmistakeable air of finality. I think the proper inference to be drawn from Mr Blair's response is that he understood that the claimant's service as an assistant recorder was then at an end.

34. It is clear from section 24 of the 1971 Act as amended that appointment as assistant recorder is not, as the claimant submitted, for an unlimited term. It is 'during such period or on such occasions' as the Lord Chancellor thinks fit. The claimant knew in 1984 that the Lord Chancellor did not think it fit that in his changed circumstances he should sit at all and that, as things then stood, he would not be asked to do so in future.

35. That did not mean that the claimant might not at some future date be asked to sit again, but that would require the lord chancellor of the day to appoint him afresh. And after a lengthy break, as the claimant acknowledged, that would require him first to re-establish himself at the bar. The claimant returned to the bar in 1997, initially with the intention of doing just that. He says that he always regarded himself as an assistant recorder and intended to resume his sittings with a view to possibly seeking a full-time appointment. I accept that the claimant contacted the Lord Chancellor's Department in the late 1980s to enquire whether he could resume sitting and was told that employed lawyers were not permitted to sit. The striking thing is that in the period from 1997 onwards, when he was once more at the bar, the claimant took no step at all in that direction. Neither he, nor his clerk on his behalf, contacted the circuit administrator or presiding judges with a view to resuming his sittings. In the light of that inactivity by the claimant I cannot accept his evidence that he believed in 1997 that he still held appointment as an assistant recorder. I find that he knew that his appointment had ended some considerable time earlier and that he would have to re-establish himself and then seek re-appointment before sitting in the Crown court again. In the event he changed his mind about where his legal interests lay and elected to pursue a judicial career through fee-paid tribunal appointments instead.

36. There is no reference in any contemporary document to the claimant being an assistant recorder after 1984; the document of 1988 (see paragraph 15 above) is a historic reference only. I accept the possibility that later documents produced by the respondent might contain errors, but I find that the omission of the claimant's name from those assistant recorders to be made recorders in 2000, and the absence on the 2011 judicial office-holder database of any reference to his being an assistant recorder were not errors. Had the claimant been regarded as an assistant recorder after continuing training requirements were introduced in the 1990s he would have been amongst those invited, and required, to attend. He must have known of those requirements but did not suggest at that time that his name had been omitted in error.

37. In my judgment it is not possible to sensibly construe Schedule 13 to the Crime and Court’s Act 2013 as meaning, or implying, that appointments as assistant recorder survived until 2013. All assistant recorders were appointed recorders in 2000. The reference to abolition of the office of assistant recorder refers to its abolition in 2000, and was no more than or ‘tidying-up’ provision.

38. In the light of the considerations set out above I find that the claimant's appointment as an assistant recorder was terminated in 1984 when he left the bar. There is no evidence to support the respondent's alternative submission that the claimant's appointment was extended by three years to 1987.

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Employment Judge S J Williams

Dated: ……13 September 2018……..……..

Judgment and Reasons sent to the parties on:

…….14 September 2018.....

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For the Tribunal Office