

Appeal No. UKEAT/0279/18/LA  
UKEAT/0280/18/LA

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal  
19<sup>th</sup> March 2019  
Judgment handed down on  
13 June 2019

**Before**

**THE HONOURABLE MRS JUSTICE SLADE DBE**

**SITTING ALONE**

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MR A J ENGEL

APPELLANT

(1) MINISTRY OF JUSTICE  
(2) DEPARTMENT FOR COMMUNITIES  
AND LOCAL GOVERNMENT

RESPONDENTS

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

For the Appellant

MR A J ENGEL  
(The Appellant in Person)

For the Respondents

MR CHARLES BOURNE QC  
(one of Her Majesty's counsel)

MS JENNIFER SEAMAN  
(of counsel)  
Instructed by:  
Government Legal Department  
Employment Group  
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## SUMMARY

### **PART TIMEWORKERS**

By Regulation 8(9) of the **Part Time Workers Regulations** (“the PTWR”) **2000** an Employment Tribunal awards compensation which they consider just and equitable having regard to the infringement to which the complaint related and to any loss attributable to the infringement having regard to the pro rata principle except where it is inappropriate to do so. The Employment Judge did not err in holding that the computation of loss by the Respondent which was based on the pension of Vice-Presidents in the Residential Property Tribunal Service (“RPTS”) where the Claimant was a part time fee paid legally qualified Chair represented the loss suffered by the Claimant rather than compensation based on the different pension paid under the different scheme of which his full time Tax judge comparator was a member. The Employment Judge did not err in failing to apply the pro rata principle to a pension scheme which did not form the basis for calculating loss.

The Employment Judge did not err in holding that the Tribunal did not have jurisdiction under the **PTWR** to determine whether the Claimant had an entitlement to a JUPRA pension from 7 April 2000 by reason of the Judicial Pensions (Fee-Paid Judges) Regulation 2017 or to take these into account when awarding compensation. Appeals from the Remedy Judgment and the Declaration dismissed.

**A** THE HONOURABLE MRS JUSTICE SLADE DBE

**B** 1. These appeals concern the remedy for less favourable treatment contrary to Regulation 5  
of the **Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000**  
("the **PTWR**"). The breach was established by Mr Engel ("the Claimant"), a retired part-time  
Legal Chair of the Residential Property Tribunal Service ("RPTS"). His was one of many claims  
**C** brought following the litigation in O'Brien v Ministry of Justice [2013] UKSC 6 by part-time  
judicial office holders whose terms unlike those of full-time comparators did not provide them  
with a pension. The Claimant represented himself before the Employment Appeal Tribunal. The  
two Respondents, who will be referred to collectively as the Respondents, were represented by  
**D** counsel, Charles Bourne QC and Jennifer Seaman.

**E** 2. Mr Engel has been involved in several appearances before Employment Tribunals, the  
Employment Appeal Tribunal and on an unsuccessful oral permission to appeal application in the  
Court of Appeal as well as a successful appearance before the Court of Appeal.

**F** 3. These appeals are from two decisions of the Employment Tribunal, Employment Judge  
Macmillan sitting alone ("the ET"). By a decision sent to the parties on 1 February 2018 ("the  
Remedy Judgment") the ET ruled that "the appropriate methodology for assessing the pension  
provisions for former chairs of the Residential Property Tribunal Service ("RPTS") is that  
**G** proposed by the respondents." The pension credit proposed by the Respondents was set out in  
an email of 10 May 2016. In summary it proposed that pension credit for claimants in the RPTS  
such as the Claimant was to be based on service in a scheme "that was by analogy with the Classic  
**H** iteration of the Principal Civil Service Pension Scheme (PCSPS)." This was less beneficial than

**A** that received by First Tier Tax Chamber Judges (“the FTT Judges”), the Claimant’s comparators.  
The FTT Judges were in the scheme established under the **Judicial Pensions and Retirement Act 1993 (“JUPRA”)**. By analogy with the Classic scheme the Respondents proposed that every  
**B** full-time equivalent year of service converts to 0.5 years credit under the Fee Paid Judicial Pension Scheme (‘FPJPS’).

**C** 4. The Claimant also appeals from the declaration under **PTWR** Regulation 8 (7) (a) made by the ET and sent to the parties on 19 July 2018 that the Claimant would receive a 50% equivalent **JUPRA** pension in respect of his service from 7 April 2000 to 30 June 2013. By reason of the **Judicial Pensions (Fee-Paid Judges) Regulations 2017 (‘the FPJ Regulations’)**  
**D** the Claimant was entitled to 100% **JUPRA** pension in respect of service from 1 July 2013.

**E** 5. Employment Judge Macmillan has heard and determined many of the proceedings concerning claims by part-time judicial holders under the **PTWR**. Mr Bourne QC referred to some of these decisions as being relevant to the current appeals.

**F** 6. By a decision sent to the parties on 13 March 2014 in the claims of Mr Edge, Mr Humphreys, Mr Thompson and Mr Humphries (“**Edge**”), Employment Judge Macmillan held at paragraph 68 that the work of valuer chairs of the RPTS was broadly similar to that of Tax judges in the First Tier Tribunal. At paragraph 67 EJ Macmillan held that the work of valuer chairs was  
**G** not broadly similar to that of Vice-Presidents of the RPTS. The terms of the full-time Tax judge comparators included the entitlement to a pension.

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**A** 7. In light of the decision in Edge, by email of 10 April 2014 the Respondents accepted that legal chairs in the RPTS had a valid Tax Chamber comparator both in respect of their pension and pay claims. Although not then conceded the Respondents later stated that they would not assert objective justification to resist liability for those claims.

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**C** 8. In Edge and Mrs Burton v Ministry of Justice before the ET the Respondents sought to amend their grounds of resistance, if such were needed, to contend that the difference in pension between the claimants, and that of their comparator, a salaried full-time judge of the First Tier Tax Tribunal was explained by the different origins and histories of the jurisdictions of those Tribunals. Mr Edge was a retired valuer chairman of the RPTS.

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**E** 9. Mr Bourne QC who has acted for the Respondents in most if not all of these cases, contended that no amendment was necessary as this was a remedy point going to the issue of what it would be just and equitable to award the claimants by way of compensation. It was contended as EJ Macmillan recorded at paragraph 6 of his Judgment of 23 December 2014 that had the claimants been salaried full-time chairs in the RPTS they would still not have been members of the Scheme established under **JUPRA** but would have been treated the same as the Vice-Presidents, by inclusion in an individually designed pension scheme which varied over time being a so called “by analogy scheme.” EJ Macmillan held that the “reason why” defence was only relevant to liability and not to remedy.

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**G** 10. By a decision sent to the parties on 27 May 2015 in the claims of Mr Thompson, Mrs Barran and Mrs Burton, taking the case of Mrs Burton as the lead claim in respect of the daily fee, EJ Macmillan held that neither the Vice-Presidents nor the valuer and lawyer chairs of the

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A former RPTS were treated less favourably in the matter of either pay or pensions than their salaried full-time comparators because of their part-time status. Their complaints under the **PTWR** therefore failed. Mrs Burton was like the Claimant, a lawyer chair of the RPTS. Mr Thompson and Mrs Barran were part-time Vice-Presidents in the RPTS who were provided with a pension less beneficial than their Tax judge comparators. EJ Macmillan held at paragraph 55:

“...although I have previously found in Edge and others that the RPTS chairs were engaged in broadly similar work to that of Tax Judges in the FTT neither group has the right not to be treated less favourably than the comparator group because the reason why their terms and conditions with regard to both rates of pay and pensions was less favourable than their comparators was wholly unconnected with their part-time status.”

11. By a Judgment of 5 April 2016 Mrs Justice Laing sitting in the EAT allowed an appeal by the Respondents from the refusal of Employment Judge Macmillan to grant permission to raise a ‘reasons why’ argument on remedy. The Respondents in the claims of Mr Edge and Mrs Burton were therefore permitted to contend that the pension to which the claimants were entitled was not **JUPRA** or an equivalent but that of Vice-Presidents in the RPTS, the scheme by analogy with the PCSPS.

12. By a Judgment of 4 October 2016 in an appeal brought by the Claimant, HH Judge Richardson held that EJ Macmillan did not err in dismissing the complaints of Mrs Burton in respect of pay. Nor did the EJ err in refusing the Claimant’s application under **ET Rule 36(3)** for an order that the decision in Mrs Burton’s case was not binding upon him.

13. The Claimant sought to appeal from the decision of HH Judge Richardson. That decision concerned his daily rate of pay. His renewed oral application was heard by Lord Justice Underhill; [2016] EWCA Civ 1313. The Claimant contended that the “different origins of the terms and conditions of the judges of the RPTS and their comparators is a legal irrelevance.” In

A rejecting the Claimant’s application for permission to appeal, Lord Justice Underhill held at paragraph 9:

“The Respondent will only be liable if it is established that the Applicant’s part-time status is (to a significant extent) the reason why his remuneration is, pro rata, less than that of his comparator. That necessitates an enquiry as to how the differential came about.”

B Lord Justice Underhill continued at paragraph 12:

“The terms and conditions for RPTS judges and their comparators developed in different silos and the fact that the latter acquired terms which were pro rata more favourable than the former does not by itself justify the inference that the difference between them was that one group was full-time and the other part-time.”

C Permission to appeal was refused. The refusal therefore concluded the claim by the Claimant for a daily fee pro rata to the salary of a full-time Tax Tribunal judge against him. The remedy for his pension claim remained to be determined. Lord Justice Underhill observed at paragraph 18:

D “I suspect also that if there is really an arguable point on the ‘reason why’ case which I have failed to identify in the submissions made by the Applicant, the claimants affected by it in the pension cases would rather it was argued by counsel charged with the conduct of that case, and in the context of the facts of that case (which may not, though I am in no position to form a view, be identical), even at the cost of some delay.”

### Relevant Statutory Provisions

E 14.

“Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000

Regulation 5

5.—

F (1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker—

(a) as regards the terms of his contract; or

(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

G (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.

H Regulation 8

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.....

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

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

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

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.....

.....

(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 (subject to paragraph (8)) 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.

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.....”

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**The Remedy Decision 31 January 2018 on issues relevant to the Amended Grounds of**

**Appeal**

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15. By the time of the Case Management Hearing on 3 October 2017 the proposal put forward by the Respondents to settle the pension claims had been accepted by all the judges who were RPTS claimants but for the Claimant and one other. The proposal was described by the EJ in paragraph 2:

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“.... Those pension arrangements differed from the mainstream of judicial post holders in that they were not, and did not accurately mirror, the statutory Judicial Pension Scheme. Instead they were something of a mish-mash of so called ‘by analogy’ schemes – schemes analogous to the various iterations of the Principal Civil Service Pension Scheme...”

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16. The Claimant claimed at paragraph 4:

“.....

(1) A full or 100% JUPRA (Judicial Pensions and Retirement Act) equivalent pension calculated in accordance with the Judicial Pension (Fee Paid Judges) Regulations 2017 (FPJPS), in respect of all of his service in RPTS since April 2000; or

.....”

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**A** The Respondents conceded that the Claimant was entitled to a full 100% **JUPRA** equivalent pension in respect of his service in the RPTS from 1 July 2013 up to the date of his retirement on 10 May 2014.

**B** 17. Issue 1 to be determined was:

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

**C** ...”

18. The EJ held at paragraph 17 that as was held by Laing J in **MOJ v Edge and Burton**:

**D** “... The respondents are at liberty to contend that while the primary ‘reason why’ a person was denied a pension may have been part time status, a different ‘reason why’ is in play when the question of the remedy to which that person is entitled as a result of that less favourable treatment falls to be considered...”

**E** 19. Issue 2 concerned the ‘reason why’ defence and that the methodology proposed by the Respondents would result in less favourable treatment compared with his full-time comparator Tax judge.

**F** 20. The EJ referred to point 7 of the Claimant’s written submissions dated 13 September 2017 and summarised paragraphs 10-19 and 25-41 of his written submissions dated 16 January 2017.

**G** 21. The ET held:  
“22...The ‘reason why’ point has been decided in respect of liability and in *MOJ v Edge and Burton* it was held that a different ‘reason why’ point could apply to remedy as well. The MOJ’s proposals simply reflect that position....”

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**A** The EJ observed at paragraph 23 in respect of paragraphs 12 to 19 of the Claimant's submissions of 16 January 2017 that the Respondents had given reasons for their proposed pension credit.

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22. As for paragraph 14 (2) of the Claimant's contentions, the EJ held at paragraph 24 that they failed to recognise that the question of whether the Vice-Presidents of the RPTS were comparable full-time workers for the purposes of Regulation 5(3) is different from the issue on remedy. The issue on remedy was:

**C**

“.... the nature of the pension that would have been in payment absent the discriminatory exclusion of the fee paid office holders in RPTS....”

**D** The Respondents contended that the only guide to that question is the pension actually paid to the Vice-Presidents of the RPTS.

**E** 23. The EJ answered the argument raised by the Claimant that his remedy could not be based on the pension for full-time Vice-Presidents as there were none in post at the relevant time. The EJ held that the remedy is concerned with what would have happened in the absence of discrimination, not with whether the Vice-Presidents were comparators.

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24. In paragraph 27 the EJ held that Regulation 5(2)(a) upon which the Claimant relied to contend that as there were no full-time Vice-President workers in post when he was, therefore his remedy should not be based upon the pension they would have received was not relevant to remedy which was to be calculated by applying Regulation 8(9). Regulation 5(2)(a) is concerned with liability. Regulation 8(9) is concerned with remedy and what would have happened in the absence of discrimination. Further the EJ rejected the contention of the Claimant that the 'reason

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A why' defence applied to Regulation 5(2)(a) but not to Regulation 8(9). The EAT in MOJ v Edge and Burton had established that the 'reason why' defence did apply to remedy.

B 25. As for the Claimant's complaint that the offer of the Respondents in the email of 10 May 2016 did not explain their methodology the EJ held at paragraph 31:

"...What matters is not whether the respondents have failed to explain the basis on which the pensions for Presidents and Vice-Presidents have been calculated, but whether what the respondents are offering to Mr Engel is the same as that offered to the Presidents and Vice-Presidents...."

C 26. At paragraph 32 the EJ considered the Claimant's contention that it would not be just and equitable that in addition to receiving no extra back pay just because his comparator came from another jurisdiction, RPTS judges also received reduced pensions compared with the vast majority of other judges of the First Tier Tribunal. The EJ held:

".... The correct analysis is that full time workers in two different tribunals had different pension provisions and that necessarily affects the remedy available to part time claimants from those tribunals. This is the 'reason why' remedy point, the exact point that the respondents were given permission to argue by the Employment Appeal Tribunal in *MOJ v Edge and Burton*."

E The EJ continued at paragraph 33:

"...The problem here is not one of comparison between part timers being treated differently because of their part time status but because of their appointment to different, historically independent jurisdictions prior to their transfer in to the FTT. Each claimant's remedy will be based on JUPRA for service from the date when their tribunal moved into the FTT...."

F 27. At paragraph 38 the EJ concluded that none of the Claimant's contentions on Issue 2, the 'reason why' defence, succeeded. The Respondents had established that the reason why the Claimant was entitled to a pension prorated with Vice-Presidents of the RPTS and not to Tax judges of the FTT was not his part-time status.

H 28. Issue 3 was the contention of the Claimant that:

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“If the 2017 FPJPS Regulations on [their] face give[s] a full 100% pension then the just and equitable remedy under the PTWR should be the same amount.”

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29. The Claimant contended that under **the FPJ Regulations** all RPTS Chairs had become entitled to a full 100% JUPRA pension from the beginning of their employment. The Respondents did not accept this. The EJ held at paragraph 40 that even if **the FPJ Regulations** conferred an entitlement to a full 100% JUPRA pension, it was a non sequitur to state that compensation under the PTWR should therefore be the same. The ET only had jurisdiction to determine issues arising under PTWR not **the FPJ Regulations**. He observed that the ET award would have no impact on any entitlement the Claimant may have under the FPJPS Regulations if, as claimed, those Regulations did give him an entitlement to a 100% **JUPRA** pension from the beginning of his employment.

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30. In rejecting the contention underlying Issue 3, the EJ held that the remedy the ET was empowered to give was under PTWR Regulations 8(7) to 8(10). It did not have power to award compensation under the FPJPS which it currently does not have.

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#### **The Declaration Judgment of 19 July 2018**

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31. In consequence of his decision on remedy the ET made a declaration under **PTWR** Regulation 8(7)(a). On a reconsideration of his original declaration of 8 May 2018 the EJ held:

“2. Tribunal declares that under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, the claimant’s pension in respect of his service as an RPTS (Residential Property Tribunal Service) Chairman and Judge is to be a 100% JUPRA (Judicial Pensions and Retirement Act 1993) equivalent pension in respect of his service from 1 July 2013 to 10 May 2014 and a 50% JUPRA equivalent pension in respect of his service from 7 April 2000 to 30 June 2013. The figures to be used to calculate the claimant’s pension are not to include the differential between the rates of pay of Tax Judges and RPTS Chairs/Judges.”

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**A**     The Grounds of Appeal

**B**     Ground 1

**C**     32.     The Claimant submitted that the EJ erred in law in failing to have regard to the pro-rata principle as required by **PTWR** Regulation 8(9) or state why it was inappropriate to apply the principle. The Claimant contended that if the pro-rata principle had been applied he should have been awarded compensation based on the appropriate percentage of the pension of his full-time Tax Tribunal judge comparator from the commencement of his employment. This would have been a percentage of the **JUPRA** pension.

**D**     33.     The Claimant submitted that the EJ failed to rule on the question he was required to consider under **PTWR** Regulation 8(9)(b), whether it was inappropriate to have regard to the pro-rata principle.

**E**     34.     Further the Claimant contended that the Respondents provided no justification for deciding that compensation based on the pensions payable to Vice-Presidents was “just and equitable” rather than on those paid to Tax judges.

**F**     35.     The Claimant pointed out that Vice-Presidents of the RPTS were not his comparators. They had management functions and only about half of them were legally qualified. There were no full-time Vice-Presidents until 1 July 2013.

**G**     36.     The EJ had described the pension to which the Vice-Presidents were entitled as a ‘mish-mash’. They were given the ‘classic’ iteration of the PCSPS entitlement. This translated into half of the **JUPRA** pension. The Claimant contended that as part-time Tax judges have the same

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**A** comparator as his, full-time Tax judges, he should be entitled to the same pension, compensation based on 100% of the **JUPRA** pension. The Claimant commented that he like the Tax judges was a First Tier Tribunal judge.

**B**  
37. Counsel pointed out that the Claimant had no comparator in his own Tribunal. He could not have a hypothetical comparator. The Claimant contended that as his work was comparable to that of a full-time Tax Tribunal judge he was entitled to rely on full-time Tax judges as a  
**C** comparator for the purpose of remedy under Regulation 8.

38. Mr Bourne QC submitted that the issue of remedy under Regulation 8 involved different  
**D** considerations from those under Regulation 5. They concerned what was just and equitable compensation “in relation to the matters to which the complaint relates.” The complaint under **PTWR** is by a part-time worker of less favourable treatment than that of a full-time worker. The  
**E** right applies where the treatment complained of is on the ground that the worker is a part-time worker.

39. The Claimant accepted that the question of whether part-time judges in the RPTS were  
**F** entitled to compensation based on the pay of their Tax Tribunal judges had been conclusively determined against them. The reason for the difference in pay was not part-time status but that their pay had developed “in different silos”. A similar observation applied to pension provision.  
**G** Accordingly, the EJ did not err in concluding that the answer to the relevant question under Regulation 8 was that compensation is to be based on what pension the Claimant would have received had he been a full-time worker in the RPTS. On the evidence before him and in light of  
**H** the decision that part-time judges of the RPTS were not entitled to the rate of pay of the full-time

**A** Tax Tribunal judge comparators as their terms and conditions were developed in ‘different silos’ the EJ did not err in failing to hold that the Claimant was entitled to compensation based on a pro-rata Tax Tribunal judge’s pension.

**B** **Discussion and conclusion on Ground 1**

**C** 40. It is correct as the Claimant submitted in Ground 1 that the EJ did not refer to the pro-rata principle in Regulation 8(9)(b) in his conclusion on Issue 1. However, what the EJ had to do was to apply Regulation 8(9) in deciding the amount of compensation to be awarded for the infringement of the right conferred by Regulation 5.

**D** 41. The right conferred for a part-time worker is not to be treated less favourably than the employer treats a full-time worker. By Regulation 5(2) the right conferred by paragraph (1) applies only if the treatment is on the ground that the worker is a part-time worker in that part-time status played a part that was significant in their exclusion from the benefit and the treatment is not justified on objective grounds.

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**F** 42. By Regulation 8(9)(a) the compensation to be awarded is such as the Tribunal considers just and equitable having regard to the infringement to which the complaint relates and by (b) to any loss which is attributable to the infringement having regard to the pro-rata principle except where it is inappropriate to do so. The EJ has to determine the loss attributable to that infringement. In this case the breach of Regulation 5 was less favourable treatment by the Respondents not giving the Claimant a pension because he worked part-time whereas his full-time comparator was entitled to a pension. The EJ considered and determined the loss attributable to the Claimant’s part-time status. In deciding the quantification of the loss an ET considers what

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A the Claimant would have received but for his part-time status. As Mrs Justice Laing held in **Ministry of Justice v Edge and Burton** at paragraph 41:

“... if there was a non-discriminatory reason for the treatment as well as the discriminatory reason, that could be relevant to the question of remedy.”

B The non-discriminatory reason advanced by the Respondents was that terms and conditions of Tax judges and judges of the RPTS had different origins which resulted in different terms.

C 43. In the Judgment of the EAT in which the Claimant had sought to contend that he was not bound by the decision in the case of **Burton v MOJ** HH Judge Richardson observed at paragraph 18:

D “As Mr Charles Bourne QC and Ms Kamm put it in their skeleton argument, the purpose of the legislation is not to redress any and all injustices that may exist; it is to redress the less favourable treatment of part-time workers if and only if that treatment occurs because they are part-time workers.”

E To that observation I would respectfully add that the purpose of Regulation 8 is to award such compensation if and to the extent that loss is attributable to the Claimant’s part-time status.

F 44. In refusing permission to appeal from the decision of HH Judge Richardson on the claim for pro-rata pay with Tax judge comparators Lord Justice Underhill held:

“9...The Respondent will only be liable if it is established that the Applicant’s part-time status is (to a significant extent) the reason why his remuneration is, pro rata, less than his comparator. That necessitates an enquiry as to how the differential came about...”

...

G 12...The terms and conditions for RPTS judges and their comparators developed in different silos and the fact that the latter acquired terms which were, pro rata, more favourable than the former does not by itself justify the inference that the difference between them was that one group was full-time and the other part-time. In any event a judgment of that kind is one which a specialist tribunal is well placed to make; and this Court would be very slow to interfere.”

H 45. The EJ correctly directed himself at paragraph 24 on the approach to determining remedy:

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“24.... The issue now is the nature of the pension that would have been in payment absent the discriminatory exclusion of fee paid office holders in RPTS and the only guide to that, according to the respondents, is the pension actually paid to the Vice-Presidents. ...The respondents must therefore be free to rely on the Vice-Presidents in the way they seek to do.”

46. At paragraph 26 the EJ recorded:

“At paragraph 14(5) Mr Engel submits that the ‘reason why’ defence applies to defeat the contention by the respondents that his pension should be based on the pensions of Vice-Presidents in RPTS. He submits that this is so because the ‘reason why’ defence applied due to the different histories leading to the pay differentials between full time Tax Judges and part time RPTS chairs.”

47. The EJ applied Regulation 8(9)(a) to the undisputed evidence. He held at paragraph 47:

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

48. The Claimant was entitled to a pension as the reason why unlike his full-time Tax judge comparator he did not have a pension was because he worked part-time. The EJ was to award compensation for loss having regard to whether and to what extent that loss was attributable to working part-time. The Respondents and the Claimant asserted that the reason why those working in the RPTS received less generous terms than Tax judges was attributable to the different histories and derivation of those terms. Pensions for full-time RPTS Vice-Presidents were awarded on a different basis from that of Tax judges. The Respondents calculated the Claimant’s entitlement to compensation for loss on the basis of the pension he would have received had he not worked part-time before there were full time appointments to the post of

**A** Vice-President. Vice-Presidents were not comparators for the purposes of establishing liability under Regulation 5. However, the EJ did not err on the unchallenged findings of fact in basing compensation for loss of pension under Regulation 8 on that given to Vice-Presidents in the RPTS.

**B**

49. The EJ had to apply the pro rata principle to a particular pension scheme. He did not err in holding that the loss of pension which was to form the basis for the calculation was that applicable to Vice-Presidents. The calculation made by the Respondents in their email of 10 May 2016 applied pro rata to that scheme. The EJ held that this was a correct methodology for calculating loss. In doing so the EJ did apply the pro rata principle to the loss of pension.

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50. Ground 1 is dismissed.

**E**

**Ground 2**

51. The Claimant submitted that the EJ erred in failing to award compensation which is “such as the Tribunal considers just and equitable in the circumstances” as required by Regulation 8(9).

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52. The Claimant asserted that the Respondents provided no justification for asserting that the pensions payable to Vice-Presidents were just and equitable or why it was just and equitable to base his pension on those who were not his comparators. He asserted that their work was less demanding than that of legal chairs of the RPTS. It was contended that the EJ erred in accepting the Respondents’ submissions that their method of calculating pensions loss resulted in just and equitable compensation.

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A 53. The Claimant also submitted that the rates of pay of legal chairs in the RPTS were “stingy” and that compensation based on “stingy” rates cannot be just and equitable.

B 54. Mr Bourne QC contended that the reason why Vice-Presidents of the RPTS were not in JUPRA was explored by the same EJ in **Thompson, Burton and Barran**, by a decision sent to the parties on 27 May 2015. He held at paragraph 50 that the reason Vice-Presidents in the RPTS were not members of JUPRA had nothing to do with part-time status.

C “It was to do with the haphazard growth of tribunals and the independence – the drive for greater delegated authority – of ministers and government departments to set terms and conditions of their own departmental tribunals...”

D 55. Further, counsel relied upon the finding in the Claimant’s case on remedy that the loss attributable to his part-time status was loss of membership of the pension scheme of which Vice-Presidents in RPTS were members until becoming members of the JUPRA scheme from 1 July 2013. Contrary to the Claimant’s submission it was immaterial that there were no full-time Vice-Presidents until 2013.

E 56. Regulation 8(9) gives an ET discretion to award compensation which they consider just and equitable having regard to the relevant infringement and to any loss attributable to the infringement.

F 57. The EJ held that the loss to the Claimant attributable to his exclusion from a pension scheme as a part-timer was that caused by exclusion from the scheme which applied to Vice-Presidents in the RPTS before they became members of the JUPRA scheme from 1 July 2013. It is immaterial that there were no full-time pensionable Vice-Presidents until 2013. An ET has to determine loss attributable to a breach of Regulation 5 on the evidence before them. As has been

A found the EJ did not err in concluding that loss was to be based on the pension applicable within the RPTS not that applicable to Tax judges. Accordingly it is difficult for the Claimant to contend that the EJ erred in concluding at paragraph 49 that

B “...it would be just and equitable to make a declaration that Mr Engel has the right to a pension which is of the same kind that he would have received had pensions been provided to the fee paid judges in RPTS, namely a pension of the same type as those provided to his more senior colleagues in that jurisdiction, the Vice-Presidents.”

C The Claimant clearly feels that fee paid legal chairs in the RPTS service were badly remunerated compared with other judges. However as HH Judge Richardson observed it is not the function of the ET in determining compensation under Regulation 8(9) to ‘redress any and all injustices that may exist. It is to redress the less favourable treatment of part-time workers if and only if that treatment occurs because they are part-time workers.’

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58. Appeal Ground 2 is dismissed.

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### Ground 3

F 59. The Claimant contended that the EJ erred in law in declining to take into account Regulation 3 and the Schedule to the **Judicial Pensions (Fee-Paid Judges) Regulations 2017**. He contended that the EJ erred in law in declining to take this legislation into account. It was said that the EJ was obliged to construe this legislation and that it gave the Claimant an entitlement to a full **JUPRA** pension for all his service in the RPTS since 2000 (and before if the Supreme Court decided the ‘2000 point’ in his favour).

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60. The Claimant contended that the post of legally qualified Chair of the RPTS fell within the category of First-Tier Tribunal Judge (where a legal qualification is a requirement of appointment) in the Schedule to **the FPJ Regulations**. Accordingly by reason of Regulation 8

**A** he was entitled to a 100% **JUPRA** pension from 7 April 2000. He contended that legal chairs of the RPTS were not a Member (Chair only) First-Tier Tribunal (Property Chamber) Residential Property who were only entitled to a **JUPRA** pension in relation to service from 1 July 2013.

**B**  
61. It was submitted that the EJ erred in not construing the Schedule to **the FPJ Regulations** in accordance with the Claimant's submissions. Further the Claimant contended that compensation awarded under Regulation 8 should have reflected this entitlement as it was not  
**C** just and equitable not to do so.

**D** 62. The Claimant also advanced a 'double penalty' point. He contended that it was a double penalty not only to base compensation on 50% **JUPRA** entitlement up to 1 July 2013 but also to calculate it on his actual rate of pay rather than pro rata to that of Tax judges.

**E** 63. Mr Bourne QC contended that the EJ did not err in holding in paragraph 40 that even if it were plain on the face of **the FPJ Regulations** that they give an entitlement to a full 100% **JUPRA** pension from 7 April 2000, it was a non sequitur that compensation should be awarded under **PTWR** to reflect that entitlement. The ET only had jurisdiction to determine compensation  
**F** under the **PTWR**. It could not determine entitlement under **the FPJ Regulations**.

**G** 64. Mr Bourne QC sought to argue that if **the FPJ Regulations** were to be construed in the way submitted by the Claimant that was the result of "infelicitous drafting."

**H**

A 65. Mr Bourne QC contended that the “double penalty” point was conclusively decided against the Claimant by the dismissal of the claim that he was entitled to the same pro rata pay as Tax Judges. His pension entitlement was rightly calculated on the basis of the pay he received.

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**Discussion and Conclusion**

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66. **The FPJ Regulations** give fee paid judicial office holders membership of the pension scheme referred to. By reason of Regulation 8(1), subject to qualifying conditions and express exclusions those holding or who held posts in the Schedule would be entitled to membership of the scheme from 7 April 2000 if they were in post on or after that date. If the Claimant’s interpretation of the Schedule is correct subject to satisfying qualifying conditions he could seek to claim a pension in respect of service from that date. If the Respondents’ interpretation of the Schedule is correct such entitlement is only in respect of service from 1 July 2013.

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67. **The FPJ Regulations** give an entitlement to membership of a pension scheme, not to compensation. If the construction of the Schedule advanced by the Claimant is correct he would arguably be entitled to membership of the pension scheme in respect of a period earlier than that set out by the Respondents in their email of 10 May 2016. If the Claimant is correct he would suffer no loss of pension from that date by reason of his part-time status. If he is not correct in his construction of the Schedule he has suffered no loss under **the FPJ Regulations**.

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68. In my judgment the EJ did not err in holding that the jurisdiction of the ET in the claim under the **PTWR** was to determine such compensation as was just and equitable for loss attributable to discrimination by reason of the Claimant’s part-time status. The EJ did not err in deciding that the ET only had jurisdiction to determine compensation under **PTWR** Regulation

**A** 8. His task was not to determine the Claimant’s entitlement to membership of a judicial pension scheme conferred by **FPJ Regulations**.

**B** 69. As for the “double penalty” point, the EJ did not err in holding to be just and equitable compensation based on the Claimant’s pay in the RPTS rather than that of his Tax judge comparator. A claim for pay at such rate had been conclusively determined against him. The EJ did not err in failing to hold that it would be just and equitable to base compensation for pension payments on a rate of pay to which the Claimant had failed to establish a claim.

**C** 70. Ground 3 of the Appeal is dismissed.

**D** **Disposal**

71. Notwithstanding the careful and courteous submissions of the Claimant his appeals are dismissed.

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