

Ministry of Justice Statement in Fee-paid Judicial Cases

Update No. 4 (2019)

Overview

This update from the Ministry of Justice (MOJ) provides a further progress report on the work the department is doing to respond to the Court of Justice of the European Union's (CJEU) judgment of 7 November 2018 in O'Brien No.2, which deals with the question of pre 7 April 2000 fee-paid judicial service. MOJ has since confirmed to the Employment Tribunal (ET) that eligible claimants, who have already established a successful claim for a pension remedy in respect of a fee-paid appointment, would be entitled to further *pension* remedy in respect of claimed pre 7 April 2000 service in that appointment. The CJEU judgment does not entitle claimants to make *pay* claims for pre 7 April 2000 service.

This update should be read in conjunction with earlier communications published on the *GOV.UK* website on 18 February, 20 March and 16 May 2019:

- <https://www.gov.uk/government/publications/ministry-of-justice-statement-in-fee-paid-judicial-litigation-february-2019>
- <https://www.gov.uk/government/publications/ministry-of-justice-statement-in-fee-paid-judicial-litigation-march-2019>
- <https://www.gov.uk/government/publications/ministry-of-justice-statement-in-fee-paid-judicial-litigation-may-2019>

Judicial Claims Team

We have made good progress in establishing a Judicial Claims Team (JCT) to handle the claims of eligible claimants. This team will be responsible for gathering relevant data, helping to establish the pre 7 April 2000 pensionable service history of eligible claimants, and building pensionable service records, once sufficient data is available.

Recruitment is well advanced, with staff now in post, and we are developing training and procedures to ensure that we are able to process claims efficiently, in due course. We have set aside secure storage space for hard-copy evidence and records, more details of which can be found below.

Remedy Design – Calculation of Pension Entitlement

A key part of remedy design is the methodology by which we calculate pension entitlement. The CJEU judgment confirms that MOJ has a legal obligation to provide eligible fee-paid judges with pension entitlement for their fee-paid service prior to 7 April 2000. In order to do this, MOJ will provide eligible fee-paid judges with credit for their pre 7 April 2000 service by reference to the benefits provided to the appropriate salaried judge.

There are multiple pension schemes covering the pre 7 April 2000 period; which scheme a salaried judge joined depended on, for example, their date of appointment and the type of judicial office held. Our approach must put all potential eligible judges as close as possible to the position they would have been in had they been able to be members of the relevant scheme, and had that scheme made provision for part-time working.

Eligible judges whose fee-paid service began on or after 31 March 1995

The remedy to O'Brien No.1, the Fee-paid Judicial Pension Scheme (FPJPS), was designed as a fee-paid equivalent of the Judicial Pensions and Retirement Act (JUPRA) scheme, which came into effect on 31 March 1995. Currently under this scheme, the earliest date a fee-paid judge can begin to accrue pension entitlement for their fee-paid service is 7 April 2000.

Following the CJEU judgment, we propose that, as FPJPS is the fee-paid equivalent of JUPRA, the current provisions of FPJPS be extended to cover the entire time period during which the appropriate salaried judge would have joined JUPRA (from 31 March 1995, onwards). Eligible judges whose service began on, or after, 31 March 1995 will therefore have their entire pension entitlement calculated through the current FPJPS methodology.

Eligible judges whose fee-paid service began before 31 March 1995

For eligible judges first appointed before 31 March 1995, simply extending FPJPS to cover such service may, in some cases, not be sufficient where the appropriate salaried judge would have had access to any of the Judicial Pensions Act 1981 schemes, or another relevant scheme, and did not opt for a transfer into JUPRA. These pre 31 March 1995 schemes often made no provision for part-time service, making it difficult to calculate fee-paid pension entitlement through them.

In developing our proposed approach for eligible judges whose service began before 31 March 1995, we have kept certain key criteria in mind. First, the need, consistent with a compliant remedy under the Part Time Workers Regulations, to put eligible judges as close as possible to the position they would have been in had they been able to be members of the relevant scheme, and had that scheme made provision for part-time working. Second, to be consistent, as far as possible, with the remedy provided in O'Brien No.1. Third, to apply the pro rata principle in a fair way, reflecting the part-time nature of fee-paid judges' service.

In order to put eligible judges with pre 31 March 1995 service into the position they would have been had they been able to be members of the relevant scheme, we propose to give eligible judges a choice between A) having their pension entitlement based on the relevant scheme, or B) taking service credits in FPJPS.

A) Calculation through the relevant scheme

To calculate pension entitlement based on the relevant judicial pension scheme for judges whose service began before 31 March 1995, we propose a two-step process:

We would first calculate the pension entitlement of the appropriate salaried judge, with the same length of time in post, in accordance with the rules of the relevant scheme (including salary definition and accrual rate).

We would then pro-rate the pension entitlement of the appropriate salaried judge by reckonable service as a proportion of qualifying service. Reckonable service is the total number of sitting days undertaken, expressed as years (and part years) of service using divisors from the FPJPS regulations. Qualifying service is the length of time from date of appointment to point of retirement, expressed as years (and part years) of service. Both reckonable and qualifying service would be capped at the service cap of the relevant scheme. The lump sum received would be calculated in accordance with the rules of the relevant scheme.

We favour this approach because, by taking the pension entitlement of the appropriate salaried judge as its starting point, it matches as closely as possible the position of the appropriate salaried judge; it applies the pro rata principle in a fair way, reflecting the part-time nature of fee-paid judges' service; and, it is consistent with the pro rata principle as applied under FPJPS, differing only in that pension entitlement is based on the pension of the appropriate salaried judge, rather than the final annual salary.

B) Service credits in FPJPS

It is important to note that salaried full-time members of pre 31 March 1995 schemes (i.e. pre JUPRA schemes) also have the option of bringing their accrued service into JUPRA at any time using the mechanism of service credits in JUPRA, as set out in the Judicial Pensions (Transfer Between Judicial Pensions Schemes) Regulations 1995. We therefore propose to give eligible judges with pre 31 March 1995 service the option of transferring their pensionable service into service credits in FPJPS (the fee-paid equivalent of JUPRA), mirroring the choice available to the appropriate salaried judge. The lump sum received would be calculated in accordance with the rules of FPJPS.

The value of the two pension entitlements detailed above will differ between judges, depending on the service history of each individual. For some judges, calculating pension entitlement through the relevant pre 31 March 1995 scheme may be less beneficial than taking service credits in FPJPS, and vice versa.

In determining the final pension entitlement for each eligible judge, any figures reached with these calculations would be further subject to any deductions due to employee contributions which the judge would have paid as a member of the relevant pension scheme, and any interest or pension increases accrued since retirement.

We will now be working with the Government Actuary's Department to develop worked examples, based on the above methodologies, which will aim to give eligible judges a clearer indication of how these methodologies will work in practice.

We intend to submit a paper to the ET setting out these examples by the end of August 2019.

Records of fee-paid service pre 7 April 2000

In the meantime, work progresses on establishing an evidence base upon which to build pensionable service records. As an absolute minimum, in order to make a pensionable service record for each eligible claimant according to the proposed pension calculation methodology above, the following information is required:

- evidence of sitting days;
- dates of appointment and end of service;
- the final annual salary of the appropriate salaried judge; and
- fee rates received (in order to calculate employee contribution deductions).

As we mentioned in our last update, we hold very limited data on pre 7 April 2000 fee-paid service, owing to the length of time that has passed, and the fact that we do not routinely hold payroll data for more than seven years. We have therefore been working to identify sources of information, build records, and identify gaps in our evidence base.

We have gathered relevant data from across MOJ, including HMCTS, and are working with HMRC, in particular the National Insurance Contributions Office, to investigate the possibility of accessing individual payment records. We will continue to explore these and other different avenues to build our evidence base, but we expect that these investigations will not provide all the data to the standard that we require. For example, we have been able to gather little data on the fees paid to holders of posts in tribunals where they were previously under the auspices of other government departments..

We therefore invite judges who have evidence of their pre 7 April 2000 service to submit that evidence to us from 1 September 2019. This will help us to build service records for individual judges, and build a general record of fee-paid service. We ask that judges do not begin submitting evidence before 1 September, as the Judicial Claims Team will not be equipped to begin building pensionable service records before that date. The list below outlines the types of documentation which will be accepted as supporting evidence:

- Copies of letters/e-mails from/to the court or tribunal that served as confirmations of sittings, training etc.
- Relevant copy extracts of personal/clerking diaries (manual diary & electronic diary) showing specific sitting days/training days/writing up activity.
- Copies of Payslips/P60s.
- Receipts for training activities/booking confirmations/copies of CPD training records.
- Statement of fitness to work/medical certificates.
- Bank statements with an explanation as to relevant credits/debits.

Owing to the expected volume and complexity of claims, and consistent with the approach we took in O'Brien No.1, the following evidence will not be accepted:

- Boxes of unsorted documents without an index or covering letter or explanation as to what the documents are and what they are supporting.
- Manuscript calculations and covering letters which are difficult to read.
- Unfiltered evidence e.g. copy sets of diaries with no indication as to where or what the team is to look for.

- Copies of written judgments. The team do not require a copy of each written judgment; however, a list of judgments with any relevant information would be useful.

We strongly encourage submission of documents in digital form (e.g. as scanned copies of paper documents) to enable us to build pensionable service records as swiftly as possible. From 1 September, judges can submit their evidence to the Judicial Claims Team inbox:

JudicialClaimsTeam@justice.gov.uk

We do, though, recognise that in some circumstances certain claimants will not be able to provide evidence in electronic form. In these cases, claimants can submit hard-copy evidence to the following address:

FAO Judicial Claims Team, c/o Legal Aid Agency

Unit B8, Berkley Way

Viking Business Park

Jarrow, NE31 1SF

It is our intention to seek legislative changes to pension regulations to provide a sustainable, long-term remedy, consistent with our legal obligations. However, legislative changes will take time to implement, and we therefore intend to make voluntary payments in lieu of pension to eligible retired judges. We are asking judges to submit details of their service record in order to help us build an evidence base to inform this process. We will provide further details of our proposal for payments in lieu of pension in due course.

18 July 2019