Appeal No. UKEAT/0303/18/LA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 11 June 2019
Judgment handed down on 13 August 2019

Before

THE HONOURABLE DAME ELIZABETH SLADE DBE

(SITTING ALONE)

MR A J ENGEL — APPELLANT

MINISTRY OF JUSTICE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ENGEL (The Appellant in Person)
For the Respondent	MISS JENNIFER SEAMAN (of counsel) Instructed by: Government Legal Department Employment Group One Kemble Street London WC2B 4TS

SUMMARY

JURISDICTIONAL POINTS – Claim in time and effective date of termination

The Employment Judge did not err in holding that the appointment of the Claimant as Deputy Circuit Judge came to an end on the coming into force of the re-amendment to section 24 of the **Courts Act 1971** by section 146 of the **Supreme Court Act 1981** on 1 January 1982. From that date barristers were no longer qualified for appointment as Deputy Circuit Judges but could be appointed Assistant Recorders. The Claimant did not hold an office as a Deputy Circuit Judge. His appointment under Section 24 of the **Courts Act 1971** as amended was for such period as the Lord Chancellor saw fit. The Employment Judge did not err in deciding that serving Deputy Circuit Judges who did not fulfil the revised criteria were no longer regarded by the Lord Chancellor as qualified to remain in post and that on the coming into force of the re-amendment to section 24 the Claimant became an Assistant Recorder on the terms of that provision.

The Employment Judge did not err in holding that the Claimant's appointment as Assistant Recorder came to an end on 3 September 1984 in accordance with the Lord Chancellor's power under section 24 of the **Courts Act 1971** as re-amended to make appointments for such period as he saw fit and his policy that those employed in a Prosecution Department could not sit. The Claimant also ceased to hold the office of Assistant Recorder on that date as he was not able to fulfil the functions of the office.

DAME ELIZABETH SLADE DBE

1. Mr Engel ("the Claimant") brought claims alleging less favourable treatment contrary to Regulation 5 of the **Part-Time Workers (Prevention of Less Favourable treatment) Regulations 2000** ('the **PTWR**'). The breach alleged concerns not being provided with a pension in respect of his part-time fee paid posts of Deputy Circuit Judge and Assistant Recorder.

2. The Claimant presented his complaints on 23 April 2013. He asserted that his appointments as Deputy Circuit Judge and Assistant Recorder continued until his 70 birthday on 10 May 2013 or possibly until his 75 birthday despite the fact that he was not asked to sit in these capacities after 1984. Although the ET3 Response of the Ministry of Justice ("the Respondent") was not ordered to be included in the Appeal Bundle, it appears that they contended that the Claimant's claims were lodged out of time. It was said that his appointment as a Deputy Circuit Judge came to an end on 1 January 1982 and that of Assistant Recorder in about September 1984 or 1987. Following a closed Preliminary Hearing on 16 October 2017 Employment Judge Macmillan ordered that there be a Preliminary Hearing to determine whether the Claimant's appointments continued until 10 May 2013 or whether they ended at some earlier date, and if so, what date.

3. By a Judgment with reasons sent to the parties on 14 September 2018 ("the judgment") Employment Judge Williams ("the EJ") held that the Claimant's appointment as a Deputy Circuit Judge was terminated on or about 1 January 1982 and that his appointment as an Assistant Recorder came to an end in or about September 1984. The Claimant appeals from this Judgment. The Claimant appeared in person. The Respondent was represented by Miss Seaman.

A **Outline Relevant Facts**

4. The Claimant was born on 10 May 1943. He was called to the Bar in 1965 and after pupillage practiced at the Bar from chambers in Birmingham doing predominantly criminal work.

B

5. The Claimant wished to sit part-time in a judicial capacity. By letter of 19 June 1978 from the Circuit Administrator the Claimant was informed that whilst "no office of Deputy Circuit Judge exists as such" the Lord Chancellor can appoint members of the Bar and Solicitors

C to sit as Deputy Circuit Judges when no judge or Recorder is available. The Claimant was told:

> **"The power of appointment is in section 24(1) of the Courts Act 1971 as amended by section 15 of the Administration of Justice Act 1973."**

D The power of appointment was exercised by the relevant Circuit Administrator. The Claimant was asked to let the Circuit Administrator know whether he would be willing to sit from time to time as a Deputy Circuit Judge on the Midlands Circuit.

E

6. The **Courts Act 1971** subsection 24(2) as amended by the **Administration of Justice Act 1973** section 15 provided:

> **"24(2) If it appears to the Lord Chancellor that it is expedient as a temporary measure to make an appointment under this section in order to facilitate the disposal of business in the Crown Court or a county court he may appoint to be a deputy circuit judge during such period or on such occasions as he thinks fit–**
>
> **(a). any barrister or solicitor of at least ten years' standing."**

F

7. With effect from 1 January 1982 section 24 of the **Courts Act 1971** was further amended

G to provide:

> **"24(1) If it appears to the Lord Chancellor that it is expedient as a temporary measure to make an appointment under this section in order to facilitate the disposal of business in the Crown Court or a county court or official referees' business in the High Court, he may–**
>
> **(a). appoint to be a deputy Circuit judge, during such period or on such occasions as he thinks**
>
> H **fit, any person who has held office as a judge of the Court of Appeal or of the High Court or as a Circuit judge; or**
>
> **(b). 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."**

8. After the amendment, barristers who had not held specified judicial offices were no longer qualified to sit as Deputy Circuit Judges but could sit as Assistant Recorders.

9. The EJ held at paragraph 10:

> **"…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."**

10. The EJ continued:

> **"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.**
>
> **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."**

11. A note of a meeting the Claimant had on 20 June 1984 with Thomas Legg, Head of Judicial Appointments at the Lord Chancellor's Department, records that the Claimant was told that if he:

> **"was to join the Prosecuting Department of the West Midlands County Council, the position at the moment was clear i.e. that full-time members of Prosecuting Solicitor Departments were not allowed to sit by the Lord Chancellor."**

12. The Claimant worked as a prosecuting solicitor 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. The EJ held:

> **"14. 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."**

13. After a short time at a firm of solicitors in 1990 the Claimant re-joined the Crown Prosecution Service. The EJ held:

> **"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."**

14. In 1997 the Claimant resumed practice at the independent Bar. The EJ recorded 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. He took other fee paid judicial appointments and stated he still regarded himself as an Assistant Recorder as did his clerk. The EJ held that the Claimant took no steps to resume sitting as an Assistant Recorder by informing the relevant Circuit Administrator that he was available to sit. Nor did he attend seminars arranged by the Judicial Studies Board.

15. Included in the papers before the EJ was a standard letter of 19 July 1994 of authorisation to sit as an Assistant Recorder. There was no evidence that the Claimant was sent such a letter. The letter stated that the Lord Chancellor expected Assistant Recorders to make themselves available to sit at least 20 days a year and to attend residential refresher seminars. The letter stated that an Assistant Recorder can normally expect to sit as such for between three and five years before being considered for appointment as a Recorder. If the Assistant Recorder is not thought to measure up to that standard they will be so informed and will not be invited further to sit as an Assistant Recorder.

16. The EJ recorded at paragraph 19 that in 2000 the Lord Chancellor's Department wrote to existing Assistant Recorders stating:

> **"that no sensible purpose was served by maintaining the distinction between assistant recordership and recordership."**

17. Assistant Recorders were invited to confirm that they were willing to accept appointment as Recorders on terms notified to them. These changes were a response to the decision in **Starrs v Ruxton** [2000] JC 208.

18. Part 7 of Schedule 13 to the **Crime and Courts Act 2013** removed the power to appoint assistant Recorders.

19. The EJ noted that the last reference to the Claimant as Assistant Recorder was a document in 1988 referring to his having been the trial Judge in 1983 in an unsuccessful appeal in 1984 by the defendant to the Court of Appeal.

20. In 2009 the Claimant ceased practice at the independent Bar.

The Decision of Employment Judge Williams

21. By letter dated 19 June 1978 the Claimant was informed that 'Although no office of Deputy Circuit Judge exists as such' he was appointed to sit as required in the Crown Court or in the County Court. The power of appointment was in section 24(2) of the **Courts Act 1971**.

22. From 1978 until 1982 the Claimant sat from time to time as a Deputy Circuit Judge.

23. Having referred to the amendment to the **Courts Act 1971** by the **Supreme Court Act 1981** the EJ held at paragraph 10:

> **"by whatever necessary means his [the Claimant's] 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."**

24. At paragraph 26 the EJ concluded from the evidence before him and from the relevant statutory provisions:

> **"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."**

On 10 May 1984 the Claimant wrote to Mr Legg 'I have been sitting as an Assistant Recorder since 1978'. Further the EJ held at paragraph 26:

> **"…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."**

25. The EJ concluded at paragraph 27 that on the evidence the Claimant's appointment as a Deputy Circuit Judge had not subsisted after 1 January 1982. It was replaced by or converted into an appointment as an Assistant Recorder from that date.

26. On the evidence of the minute of 22 June 1984 of the meeting between the Claimant and Mr Legg the EJ concluded at paragraph 31:

> **"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 [from June 1984] before a final decision was reached about recordership."**

27. At paragraph 32 the EJ held that there is no evidence that any decision was taken about the Claimant's case. He was not made a Recorder, nor told he would no longer be asked to sit, nor was his appointment as Assistant Recorder extended.

28. The EJ inferred at paragraph 33 that:

> **"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."**

29. The EJ concluded at paragraph 38:

> **"I find that the claimant's appointment as an assistant recorder was terminated in 1984 when he left the bar."**

In reaching that conclusion the EJ additionally relied upon the following observations:

(1) '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.' [para 35];

(2) From 1997 onwards when he returned to the Bar the Claimant took no step to resume sitting as an Assistant Recorder [para 35];

(3) In the light of the inactivity of the Claimant the EJ could not accept his evidence that he believed in 1997 that he still held appointment as an Assistant Recorder. The EJ found 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.

(4) The absence of any reference in records to the Claimant being an Assistant Recorder after 1984.

30. The EJ held in paragraph 34 that it was clear from section 24 of the **Courts Act 1971** as amended that appointment as Assistant Recorder was not for an unlimited term. It was during such period or on such occasions as the Lord Chancellor thought fit. In 1984 the Lord Chancellor did not think it fit in his changed circumstances that the Claimant should sit.

31. In paragraph 37 the EJ held that it was not possible to construe Schedule 13 to the **Crime and Courts Act 2013** as meaning or implying that appointments as Assistant Recorder survived until 2013.

The Grounds of Appeal

Appeal from decision that appointment as a Deputy Circuit Judge was terminated on or about 1 January 1982

32. The Claimant contended that the EJ erred in law in failing to deal with his submission that he held office as a Deputy Circuit Judge on 23 April 2013 when his claim was presented. Further he submitted that the EJ erred in failing to deal with his alternative submission that he had "reserved rights" to a pension if his appointment as a Deputy Circuit Judge had come to an end on 1 January 1982.

33. Miss Seaman submitted that the EJ did not err in law in holding that the Claimant's appointment as a Deputy Circuit Judge came to an end on the coming into force of the amendment to section 24 of the **Courts Act 1971** by section 146 of the **Supreme Court Act 1981**. From that date, 1 January 1982, only those who had held office as a judge of the Court of Appeal, the High Court or as a Circuit Judge could be appointed to be a Deputy Circuit Judge. The Claimant was therefore no longer qualified to sit as a Deputy Circuit Judge although by virtue of the amended section 24(1)(b) he was qualified to sit as an Assistant Recorder.

34. As for the alternative contention of the Claimant that if his appointment came to an end on 1 January 1982 he had preserved rights to a pro rata pension as a result of his service as a Deputy Circuit Judge, Miss Seaman pointed out that the implementation date of the **Part Time Workers' Directive 97/81/EC** was after 1 January 1982. Therefore, as it had come to an end before that date the Claimant's part time service as a Deputy Circuit Judge did not give rise to any entitlement to a pension.

Discussion and Conclusion

35. The EJ stated at paragraph 2 the issue to be determined at the Preliminary Hearing to be:

> **"Whether the claimant's appointments continued as he contends, or whether they ended at some earlier, and if so what date."**

36. The issue to be determined gave rise to questions of the terms of appointments and status of the Claimant as Deputy Circuit Judge and Assistant Recorder and how could his tenures be lawfully terminated.

37. Pursuant to section 24(2) of the **Courts Act 1971** the Lord Chancellor had the power if it appeared convenient as a temporary measure to appoint qualified persons to be a Deputy Circuit Judge during such period or on such occasions as he thinks fit. The Claimant was asked by letter of 19 June 1978 from the Circuit Administrator of the Midland and Oxford Circuit whether he would be willing to sit from time to time as a Deputy Circuit Judge in the Circuit. The Claimant said yes and did so.

38. The power to appoint and terms of appointment of a Deputy Circuit Judge were derived from statute. Section 24(2) of the **Courts Act 1971** gave the Lord Chancellor the discretion of such appointment.

A 39. There is no evidence to support a contention that the appointment of the Claimant as Deputy Circuit Judge was for any other or any specific period. Further the Claimant was told that the appointment as Deputy Circuit Judge was not an appointment to an office.

B 40. The amendment to section 24 of the **Courts Act 1971** under which the Claimant was appointed a Deputy Circuit Judge was amended with effect from 1 January 1982 by section 146 of the **Supreme Court Act 1981**. From that time only, persons who had held certain salaried C judicial office were qualified to sit as Deputy Circuit Judges. The Claimant did not hold such an office and was no longer qualified for appointment as a Deputy Circuit Judge.

D 41. The terms of appointment of the Claimant as a Deputy Circuit Judge made it clear that the appointment was not as an office holder. It was to perform specified functions for such periods or on such occasions as the Lord Chancellor determined. The Lord Chancellor E determined by the amendment to section 24 of the **Courts Act 1971** that practicing barristers such as the Claimant could no longer be appointed to such a post. Although the statute refers to qualification for appointment rather than qualification to sit as a Deputy Circuit Judge, as the Lord Chancellor had a discretion under statute to determine the periods of such an appointment F and a Deputy Circuit Judge was not an office holder in my judgment the Lord Chancellor through the Circuit Administrator was entitled to discontinue that appointment.

G 42. On 19 June 1978 the Midland and Oxford Circuit Administrator wrote to the Claimant:

> **"Although no office of deputy Circuit judge exists as such, the Lord Chancellor can appoint members of the Bar and Solicitors to sit as deputy Circuit judges either in the Crown Court or in County Courts when no judge or Recorder is available. The power of appointment is in section 24(1) of the Courts Act 1971 as amended by section 15 of the Administration of Justice Act 1973.**
>
> H …
>
> **I should be grateful if you would let me know whether you would be willing to sit from time to time as a deputy Circuit judge in this Circuit."**

43. Two matters are apparent from this letter. First that there was no office of Deputy Circuit Judge. Second that qualification to be appointed and therefore sit as a Deputy Circuit Judge was determined by section 24 of the **Courts Act 1971** as amended. On the re-amendment of section 24 of the **Courts Act 1971** by section 146 of the **Supreme Court Act 1981**, it was only those who had held office as a judge of the Court of Appeal or of the High Court or as a Circuit Judge who were qualified to sit as a Deputy Circuit Judge. Barristers, like the Claimant, were not qualified to sit as a Deputy Circuit Judges from 1 January 1982, the coming into force of the re-amendment

44. The Claimant had been informed that sitting as a Deputy Circuit Judge was not appointment to an office. His appointment was in exercise of powers of the Lord Chancellor under section 24 of the **Courts Act 1971** as amended. When, with the amendment of section 24 with effect from 1 January 1982, the Claimant was no longer qualified to be appointed to sit as a Deputy Circuit Judge he could no longer be called upon to do so.

45. By section 24 of the **Courts Act 1971** as amended the appointment of the Claimant as a Deputy Circuit Judge was during such period or on such occasions as the Lord Chancellor sees fit. The re-amendment to section 24 was the statutory implementation of the view of the Lord Chancellor that previously qualified barristers and solicitors should no longer be appointed to sit as Deputy Circuit Judges.

46. The EJ did not err in holding at paragraph 10 that the Claimant's appointment as a Deputy Circuit Judge was converted to that of Assistant Recorder on or about 1 January 1982 and that his appointment as a Deputy Circuit Judge terminated on that date.

47. The **Part Time Workers Directive 97/81/EC** had not been adopted let alone extended to the United Kingdom by **Directive 98/23/EC** by 1 January 1982 the date the appointment of the Claimant as a Deputy Circuit Judge had come to an end. Although he did not deal with this argument that even if his appointment as a Deputy Circuit Judge had come to an end on 1 January 1982 the Claimant had preserved rights to a pension, the EJ did not err in failing to hold that he had such rights. The argument is only susceptible to one conclusion, that the Claimant did not have preserved rights based on a **Directive** which had not been adopted by the time his appointment came to an end.

Appeal from the Decision that the Claimant's Appointment as Assistant Recorder came to an end in or about September 1984

48. The Claimant contended that his appointment as Assistant Recorder was an appointment to an office and was unlimited in time. He submitted that the EJ erred in failing to hold that the appointment was to an office. Whilst he did not sit as an Assistant Recorder after September 1984 he contended that he remained in office until his 70th birthday. The Claimant submitted that it would have been necessary for the Respondent to give him notification that his appointment as Assistant Recorder had been terminated. He was given no such notification. Accordingly, the Claimant submitted that the EJ erred in holding that his appointment as an Assistant Recorder came to an end in or about September 1984.

49. Further, the Claimant contended that the finding that his appointment as an Assistant Recorder came to an end in or about September 1984 was contrary to the finding in paragraph 31 that having regard to the minutes of the meeting he had with Mr Legg on 20 June 1984:

> **"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."**

50. The EJ based his decision that the Claimant's appointment as Assistant Recorder came to an end on 'his departure from the bar in 1984.' The Claimant rightly contended that he had not left the Bar. He had left the independent bar. Employed barristers were not precluded from holding the office of Assistant Recorder. If, as he did, they became employed full-time in prosecution work, the Lord Chancellor's view was that it was undesirable that they sit in any judicial capacity. The Claimant contended that this had the consequence of his not being able to sit but not terminating his holding the office as Assistant Recorder in September 1984.

51. The Claimant referred to the Respondent's alternative submission that his appointment as Assistant Recorder was extended by three years to 1987 as showing uncertainty as to when his appointment came to an end. This showed that the Respondent would have had to give him notification of its termination.

52. The Claimant contended that the EJ erred in relying on the absence of any document referring to his being an Assistant Recorder after 1984. Neither the Respondent's view nor his determined whether or not his appointment as Assistant Recorder had come to an end in 1984.

53. The Claimant did not challenge the finding of the EJ in paragraph 19 that existing assistant Recorders had been written to in 2000 stating 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. The Claimant was not sent such a letter.

54. The Claimant contended that the office of Assistant Recorder remained until the implementation of Part 7 of Schedule 13 to the **Crime and Courts Act 2013**. It was submitted

that the EJ erred in holding in paragraph 37 that it was 'not possible to sensibly construe Schedule 13 to the **Crime and Courts Act 2013** as meaning, or implying that appointments as Assistant Recorder survived until 2013.' The Claimant referred to the Explanatory Note to that provision which stated that the office of Assistant Recorder was abolished by that Act. Accordingly, the Claimant submitted that he continued as an Assistant Recorder in office until shortly after he submitted his claim.

55. Miss Seaman agreed that the appointment of the Claimant as Assistant Recorder was for a period and did not come to an end at the end of each sitting session. This view was inevitable having regard to the note of the meeting between the Claimant and Mr Legg on 20 March 1984.

56. Miss Seaman also rightly stated that statutorily there could be Assistant Recorders after 2000 until the coming into force of the **2013 Act** when that office ceased to exist.

57. Miss Seaman contended that appointment as Assistant Recorder carries with it a requirement that the individual sits. From the 1990s there was a minimum sitting requirement. The Claimant was told and recognised that the policy of the Lord Chancellor was that those who were employed by a prosecuting authority could not sit as an Assistant Recorder. Accordingly, the EJ did not err when he held that the Claimant's appointment as an Assistant Recorder came to an end when he accepted employment with a prosecuting authority in September 1984.

58. Counsel submitted that the EJ was entitled to make his findings of fact in paragraphs 35 and 36 and to rely upon them to find that the Claimant understood that his appointment as Assistant Recorder had come to an end in 1984.

59. In summary, whilst Miss Seaman accepted that there were some errors in the judgment, such as stating that the Claimant left the Bar in 1984, counsel contended that he did not err in concluding that when he could no longer sit as an Assistant Recorder in September 1984 his appointment to that position came to an end.

Discussion and Conclusion

60. No letter of appointment of the Claimant as Assistant Recorder was before the EJ. The terms of appointment were set out in statute, section 24 of the **Courts Act 1971** as amended by section 146 of the **Supreme Court Act 1981**. As with appointments as a Deputy Circuit Judge, the appointment was by Lord Chancellor "for such period or on such occasions as he thinks fit". Therefore, the Lord Chancellor had a discretion to determine the period of the appointment.

61. Unlike the appointment of the Claimant as Deputy Circuit Judge he was not informed that no office of Assistant Recorder existed. The statutory materials suggest that an Assistant Recorder was an office holder. Assistant Recorder is included in Schedule 5 of the **Judicial Pensions and Retirement Act 1993** ('**JUPRA**'). Section 26 refers to those posts listed in Schedule 5 as offices. Although after the decision of the court in Scotland in **Starrs** in 2000 it was the policy of the Lord Chancellor to make no further appointments to the office of Assistant Recorder and from 18 July 2000 to invite most holders of that post to become Recorders, the office was not formally abolished until the coming into force of Part 7 of Schedule 13 of the **Crime and Courts Act 2013** which was after the Claimant lodged his ET1. Part 7 is headed "Abolition of office of Assistant Recorder". Part 7 paragraph 89(1) repeals section 24(1)(b) of the **Courts Act 1971**, the power to appoint Assistant Recorders. In addition to the removal of "Assistant Recorder" from other statutory provisions the entry of that office is removed from Schedule 5 to **JUPRA**. I therefore do not accept the submission of Miss Seaman that the

amendments effected by the **Crime and Courts Act 2013** were merely a "clearing up exercise" and that the post of Assistant Recorder had ceased to exist in 2000. Accordingly, the EJ erred in holding in paragraph 37 that:

> **"The reference to abolition of the office of assistant recorder refers to its abolition in 2000, and was no more than a 'tidying-up' provision."**

62. The question therefore arises of when the Claimant's holding of the office of assistant Recorder lawfully terminated. The Claimant contended that it came to an end on his attainment of his 70 birthday on 10 May 2013, the Respondent contended that the EJ did not err in holding that it came to an end in September 1984 when the Claimant left the independent bar to become a Prosecuting Solicitor for West Midlands County Council.

63. The EJ made findings of fact concerning discussions and communications the Claimant had with representatives of the Lord Chancellor's Department in 1984. The EJ erred in holding in paragraph 33 that when he became employed by the prosecution service of the West Midlands County Council in September 1984 he left the Bar. He did not leave the Bar. He left the independent bar. The other findings of fact are not challenged.

64. In accordance with provisions then in force employed barristers were eligible for appointment as Assistant Recorders. The period of their appointment was at the discretion of the Lord Chancellor.

65. The Claimant was not appointed as a Recorder. Section 21(3) of the **Courts Act 1971** provides that the appointment as a Recorder shall specify the term for which the Recorder is appointed and the frequency and duration of the occasions during that term on which they will be required to be available. In accordance with the policy of the Lord Chancellor, Recorders

were expected to sit for not less than four working weeks a year and to attend sentencing conferences which would count towards the sitting requirements. By the **Courts Act 1971** section 21(6) the Lord Chancellor could if he thought fit, terminate the appointment of a Recorder on grounds including failure to comply with any requirement specified under subsection (3) in the terms of their appointment.

66. It is clear from the statutory provisions that the Lord Chancellor could terminate the appointment of a Recorder for not being available to fulfil their duties. The sitting requirements were specified by the Lord Chancellor. If the Recorder did not make themselves available to fulfil those requirements the appointment would be terminated.

67. Section 21(5) makes it clear that the appointment of a Recorder is for a term specified in the terms of appointment. It is not until retirement age. Section 21(5) merely specified that any continuation of appointment would not be beyond the year of service in which the holder attended retiring age.

68. As there was no letter of appointment of the Claimant as Assistant Recorder the EJ had to decide when the appointment came to an end on the basis of the relevant statutory provisions and the evidence before him. Section 24 of the **Courts Act 1971** as amended provided by section 24(1)(b) that the appointment was to be during such period as the Lord Chancellor saw fit.

69. A note of an interview the Claimant had with Mr Legg of the Lord Chancellor's Department on 20 June 1984 records:

> **"If Mr Engel was to join the Prosecuting Department of the West Midlands County Council, the position at the moment was clear ie that full-time members of Prosecution Solicitors Departments were not allowed to sit by the Lord Chancellor."**

A The Claimant wrote to Mr Legg on 25 August 1984:

> **"…I write to inform you that I have accepted the post offered to me in the Prosecution Department of the West Midlands County Council and I start there on 3rd September 1984.**
>
> **If the policy of the Lord Chancellor in relation to members of prosecution departments sitting in a judicial capacity changes, I trust that my 'case' will be reviewed."**

B By letter of 3 September 1984 the Chief Administrator of the Midlands and Oxford Circuit wrote to the Claimant thanking him for his service as a Deputy Circuit Judge and as an Assistant Recorder.

C

70. After a period working for prosecuting authorities and as an employed barrister elsewhere the Claimant returned to the independent Bar. He did not sit or offer himself to sit as an Assistant Recorder or attend any related training sessions.

D

71. Whilst the omission of the Claimant's name from lists of Assistant Recorders after 1984 referred to by the EJ in paragraph 36 may not be a material factor in determining whether the E appointment of the Claimant had come to an end on 3 September 1984, in my judgment the findings of fact made by the EJ support his conclusion that the appointment of the Claimant as Assistant Recorder came to an end on 3 September 1984. That conclusion cannot be said to be one to which the EJ could not reasonably have reached on the evidence before him.

F

72. Save in certain circumstances, in my Judgment it would be difficult to say that a particular office can continue to be held if the appointee can no longer fulfil the functions of that office. G There may be circumstances such as ill health, maternity leave, and by express consent the holder of the office of Assistant Recorder could continue to hold that office during periods when he or she was unable to fulfil the functions of that office. However, that is not this case. The office H was held for such period as determined by the Lord Chancellor. On the evidence it appears that for the Claimant this was for an indeterminate period subject to statute and as thought fit by the

Lord Chancellor. The Lord Chancellor did not think it fit for those employed full-time in Prosecuting Solicitor's departments to sit as Assistant Recorders. In accordance with the unchallenged policy of the Lord Chancellor the Claimant was no longer eligible to sit as an Assistant Recorder after 3 September 1984. In these circumstances, it cannot be said that the Claimant continued to hold the office of Assistant Recorder although he was unable to fulfil the duties of that office. The EJ did not err in so concluding.

Disposal

73. The appeal is dismissed.

Appeal No. UKEAT/0303/18/LA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 11 June 2019
Judgment handed down on 13 August 2019

Before

THE HONOURABLE DAME ELIZABETH SLADE DBE

(SITTING ALONE)

MR A J ENGEL — APPELLANT

MINISTRY OF JUSTICE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ENGEL (The Appellant in Person)
For the Respondent	MISS JENNIFER SEAMAN (of counsel) Instructed by: Government Legal Department Employment Group One Kemble Street London WC2B 4TS

SUMMARY

JURISDICTIONAL POINTS – Claim in time and effective date of termination

The Employment Judge did not err in holding that the appointment of the Claimant as Deputy Circuit Judge came to an end on the coming into force of the re-amendment to section 24 of the **Courts Act 1971** by section 146 of the **Supreme Court Act 1981** on 1 January 1982. From that date barristers were no longer qualified for appointment as Deputy Circuit Judges but could be appointed Assistant Recorders. The Claimant did not hold an office as a Deputy Circuit Judge. His appointment under Section 24 of the **Courts Act 1971** as amended was for such period as the Lord Chancellor saw fit. The Employment Judge did not err in deciding that serving Deputy Circuit Judges who did not fulfil the revised criteria were no longer regarded by the Lord Chancellor as qualified to remain in post and that on the coming into force of the re-amendment to section 24 the Claimant became an Assistant Recorder on the terms of that provision.

The Employment Judge did not err in holding that the Claimant's appointment as Assistant Recorder came to an end on 3 September 1984 in accordance with the Lord Chancellor's power under section 24 of the **Courts Act 1971** as re-amended to make appointments for such period as he saw fit and his policy that those employed in a Prosecution Department could not sit. The Claimant also ceased to hold the office of Assistant Recorder on that date as he was not able to fulfil the functions of the office.

DAME ELIZABETH SLADE DBE

1. Mr Engel ("the Claimant") brought claims alleging less favourable treatment contrary to Regulation 5 of the **Part-Time Workers (Prevention of Less Favourable treatment) Regulations 2000** ('the **PTWR**'). The breach alleged concerns not being provided with a pension in respect of his part-time fee paid posts of Deputy Circuit Judge and Assistant Recorder.

2. The Claimant presented his complaints on 23 April 2013. He asserted that his appointments as Deputy Circuit Judge and Assistant Recorder continued until his 70 birthday on 10 May 2013 or possibly until his 75 birthday despite the fact that he was not asked to sit in these capacities after 1984. Although the ET3 Response of the Ministry of Justice ("the Respondent") was not ordered to be included in the Appeal Bundle, it appears that they contended that the Claimant's claims were lodged out of time. It was said that his appointment as a Deputy Circuit Judge came to an end on 1 January 1982 and that of Assistant Recorder in about September 1984 or 1987. Following a closed Preliminary Hearing on 16 October 2017 Employment Judge Macmillan ordered that there be a Preliminary Hearing to determine whether the Claimant's appointments continued until 10 May 2013 or whether they ended at some earlier date, and if so, what date.

3. By a Judgment with reasons sent to the parties on 14 September 2018 ("the judgment") Employment Judge Williams ("the EJ") held that the Claimant's appointment as a Deputy Circuit Judge was terminated on or about 1 January 1982 and that his appointment as an Assistant Recorder came to an end in or about September 1984. The Claimant appeals from this Judgment. The Claimant appeared in person. The Respondent was represented by Miss Seaman.

A **Outline Relevant Facts**

4. The Claimant was born on 10 May 1943. He was called to the Bar in 1965 and after pupillage practiced at the Bar from chambers in Birmingham doing predominantly criminal work.

B

5. The Claimant wished to sit part-time in a judicial capacity. By letter of 19 June 1978 from the Circuit Administrator the Claimant was informed that whilst "no office of Deputy Circuit Judge exists as such" the Lord Chancellor can appoint members of the Bar and Solicitors

C to sit as Deputy Circuit Judges when no judge or Recorder is available. The Claimant was told:

> **"The power of appointment is in section 24(1) of the Courts Act 1971 as amended by section 15 of the Administration of Justice Act 1973."**

D The power of appointment was exercised by the relevant Circuit Administrator. The Claimant was asked to let the Circuit Administrator know whether he would be willing to sit from time to time as a Deputy Circuit Judge on the Midlands Circuit.

E

6. The **Courts Act 1971** subsection 24(2) as amended by the **Administration of Justice Act 1973** section 15 provided:

> **"24(2) If it appears to the Lord Chancellor that it is expedient as a temporary measure to make an appointment under this section in order to facilitate the disposal of business in the Crown Court or a county court he may appoint to be a deputy circuit judge during such period or on such occasions as he thinks fit–**
>
> **(a). any barrister or solicitor of at least ten years' standing."**

F

7. With effect from 1 January 1982 section 24 of the **Courts Act 1971** was further amended

G to provide:

> **"24(1) If it appears to the Lord Chancellor that it is expedient as a temporary measure to make an appointment under this section in order to facilitate the disposal of business in the Crown Court or a county court or official referees' business in the High Court, he may–**
>
> **(a). appoint to be a deputy Circuit judge, during such period or on such occasions as he thinks**
>
> H **fit, any person who has held office as a judge of the Court of Appeal or of the High Court or as a Circuit judge; or**
>
> **(b). 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."**

8. After the amendment, barristers who had not held specified judicial offices were no longer qualified to sit as Deputy Circuit Judges but could sit as Assistant Recorders.

9. The EJ held at paragraph 10:

> **"…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."**

10. The EJ continued:

> **"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.**
>
> **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."**

11. A note of a meeting the Claimant had on 20 June 1984 with Thomas Legg, Head of Judicial Appointments at the Lord Chancellor's Department, records that the Claimant was told that if he:

> **"was to join the Prosecuting Department of the West Midlands County Council, the position at the moment was clear i.e. that full-time members of Prosecuting Solicitor Departments were not allowed to sit by the Lord Chancellor."**

12. The Claimant worked as a prosecuting solicitor 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. The EJ held:

> **"14. 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."**

13. After a short time at a firm of solicitors in 1990 the Claimant re-joined the Crown Prosecution Service. The EJ held:

> **"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."**

14. In 1997 the Claimant resumed practice at the independent Bar. The EJ recorded 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. He took other fee paid judicial appointments and stated he still regarded himself as an Assistant Recorder as did his clerk. The EJ held that the Claimant took no steps to resume sitting as an Assistant Recorder by informing the relevant Circuit Administrator that he was available to sit. Nor did he attend seminars arranged by the Judicial Studies Board.

15. Included in the papers before the EJ was a standard letter of 19 July 1994 of authorisation to sit as an Assistant Recorder. There was no evidence that the Claimant was sent such a letter. The letter stated that the Lord Chancellor expected Assistant Recorders to make themselves available to sit at least 20 days a year and to attend residential refresher seminars. The letter stated that an Assistant Recorder can normally expect to sit as such for between three and five years before being considered for appointment as a Recorder. If the Assistant Recorder is not thought to measure up to that standard they will be so informed and will not be invited further to sit as an Assistant Recorder.

16. The EJ recorded at paragraph 19 that in 2000 the Lord Chancellor's Department wrote to existing Assistant Recorders stating:

> **"that no sensible purpose was served by maintaining the distinction between assistant recordership and recordership."**

17. Assistant Recorders were invited to confirm that they were willing to accept appointment as Recorders on terms notified to them. These changes were a response to the decision in **Starrs v Ruxton** [2000] JC 208.

18. Part 7 of Schedule 13 to the **Crime and Courts Act 2013** removed the power to appoint assistant Recorders.

19. The EJ noted that the last reference to the Claimant as Assistant Recorder was a document in 1988 referring to his having been the trial Judge in 1983 in an unsuccessful appeal in 1984 by the defendant to the Court of Appeal.

20. In 2009 the Claimant ceased practice at the independent Bar.

The Decision of Employment Judge Williams

21. By letter dated 19 June 1978 the Claimant was informed that 'Although no office of Deputy Circuit Judge exists as such' he was appointed to sit as required in the Crown Court or in the County Court. The power of appointment was in section 24(2) of the **Courts Act 1971**.

22. From 1978 until 1982 the Claimant sat from time to time as a Deputy Circuit Judge.

23. Having referred to the amendment to the **Courts Act 1971** by the **Supreme Court Act 1981** the EJ held at paragraph 10:

> **"by whatever necessary means his [the Claimant's] 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."**

24. At paragraph 26 the EJ concluded from the evidence before him and from the relevant statutory provisions:

> **"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."**

On 10 May 1984 the Claimant wrote to Mr Legg 'I have been sitting as an Assistant Recorder since 1978'. Further the EJ held at paragraph 26:

> **"…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."**

25. The EJ concluded at paragraph 27 that on the evidence the Claimant's appointment as a Deputy Circuit Judge had not subsisted after 1 January 1982. It was replaced by or converted into an appointment as an Assistant Recorder from that date.

26. On the evidence of the minute of 22 June 1984 of the meeting between the Claimant and Mr Legg the EJ concluded at paragraph 31:

> **"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 [from June 1984] before a final decision was reached about recordership."**

27. At paragraph 32 the EJ held that there is no evidence that any decision was taken about the Claimant's case. He was not made a Recorder, nor told he would no longer be asked to sit, nor was his appointment as Assistant Recorder extended.

28. The EJ inferred at paragraph 33 that:

> **"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."**

29. The EJ concluded at paragraph 38:

> **"I find that the claimant's appointment as an assistant recorder was terminated in 1984 when he left the bar."**

In reaching that conclusion the EJ additionally relied upon the following observations:

(1) '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.' [para 35];

(2) From 1997 onwards when he returned to the Bar the Claimant took no step to resume sitting as an Assistant Recorder [para 35];

(3) In the light of the inactivity of the Claimant the EJ could not accept his evidence that he believed in 1997 that he still held appointment as an Assistant Recorder. The EJ found 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.

(4) The absence of any reference in records to the Claimant being an Assistant Recorder after 1984.

30. The EJ held in paragraph 34 that it was clear from section 24 of the **Courts Act 1971** as amended that appointment as Assistant Recorder was not for an unlimited term. It was during such period or on such occasions as the Lord Chancellor thought fit. In 1984 the Lord Chancellor did not think it fit in his changed circumstances that the Claimant should sit.

31. In paragraph 37 the EJ held that it was not possible to construe Schedule 13 to the **Crime and Courts Act 2013** as meaning or implying that appointments as Assistant Recorder survived until 2013.

The Grounds of Appeal

Appeal from decision that appointment as a Deputy Circuit Judge was terminated on or about 1 January 1982

32. The Claimant contended that the EJ erred in law in failing to deal with his submission that he held office as a Deputy Circuit Judge on 23 April 2013 when his claim was presented. Further he submitted that the EJ erred in failing to deal with his alternative submission that he had "reserved rights" to a pension if his appointment as a Deputy Circuit Judge had come to an end on 1 January 1982.

33. Miss Seaman submitted that the EJ did not err in law in holding that the Claimant's appointment as a Deputy Circuit Judge came to an end on the coming into force of the amendment to section 24 of the **Courts Act 1971** by section 146 of the **Supreme Court Act 1981**. From that date, 1 January 1982, only those who had held office as a judge of the Court of Appeal, the High Court or as a Circuit Judge could be appointed to be a Deputy Circuit Judge. The Claimant was therefore no longer qualified to sit as a Deputy Circuit Judge although by virtue of the amended section 24(1)(b) he was qualified to sit as an Assistant Recorder.

34. As for the alternative contention of the Claimant that if his appointment came to an end on 1 January 1982 he had preserved rights to a pro rata pension as a result of his service as a Deputy Circuit Judge, Miss Seaman pointed out that the implementation date of the **Part Time Workers' Directive 97/81/EC** was after 1 January 1982. Therefore, as it had come to an end before that date the Claimant's part time service as a Deputy Circuit Judge did not give rise to any entitlement to a pension.

Discussion and Conclusion

35. The EJ stated at paragraph 2 the issue to be determined at the Preliminary Hearing to be:

> **"Whether the claimant's appointments continued as he contends, or whether they ended at some earlier, and if so what date."**

36. The issue to be determined gave rise to questions of the terms of appointments and status of the Claimant as Deputy Circuit Judge and Assistant Recorder and how could his tenures be lawfully terminated.

37. Pursuant to section 24(2) of the **Courts Act 1971** the Lord Chancellor had the power if it appeared convenient as a temporary measure to appoint qualified persons to be a Deputy Circuit Judge during such period or on such occasions as he thinks fit. The Claimant was asked by letter of 19 June 1978 from the Circuit Administrator of the Midland and Oxford Circuit whether he would be willing to sit from time to time as a Deputy Circuit Judge in the Circuit. The Claimant said yes and did so.

38. The power to appoint and terms of appointment of a Deputy Circuit Judge were derived from statute. Section 24(2) of the **Courts Act 1971** gave the Lord Chancellor the discretion of such appointment.

A 39. There is no evidence to support a contention that the appointment of the Claimant as Deputy Circuit Judge was for any other or any specific period. Further the Claimant was told that the appointment as Deputy Circuit Judge was not an appointment to an office.

B 40. The amendment to section 24 of the **Courts Act 1971** under which the Claimant was appointed a Deputy Circuit Judge was amended with effect from 1 January 1982 by section 146 of the **Supreme Court Act 1981**. From that time only, persons who had held certain salaried C judicial office were qualified to sit as Deputy Circuit Judges. The Claimant did not hold such an office and was no longer qualified for appointment as a Deputy Circuit Judge.

D 41. The terms of appointment of the Claimant as a Deputy Circuit Judge made it clear that the appointment was not as an office holder. It was to perform specified functions for such periods or on such occasions as the Lord Chancellor determined. The Lord Chancellor E determined by the amendment to section 24 of the **Courts Act 1971** that practicing barristers such as the Claimant could no longer be appointed to such a post. Although the statute refers to qualification for appointment rather than qualification to sit as a Deputy Circuit Judge, as the Lord Chancellor had a discretion under statute to determine the periods of such an appointment F and a Deputy Circuit Judge was not an office holder in my judgment the Lord Chancellor through the Circuit Administrator was entitled to discontinue that appointment.

G 42. On 19 June 1978 the Midland and Oxford Circuit Administrator wrote to the Claimant:

> **"Although no office of deputy Circuit judge exists as such, the Lord Chancellor can appoint members of the Bar and Solicitors to sit as deputy Circuit judges either in the Crown Court or in County Courts when no judge or Recorder is available. The power of appointment is in section 24(1) of the Courts Act 1971 as amended by section 15 of the Administration of Justice Act 1973.**
>
> H …
>
> **I should be grateful if you would let me know whether you would be willing to sit from time to time as a deputy Circuit judge in this Circuit."**

43. Two matters are apparent from this letter. First that there was no office of Deputy Circuit Judge. Second that qualification to be appointed and therefore sit as a Deputy Circuit Judge was determined by section 24 of the **Courts Act 1971** as amended. On the re-amendment of section 24 of the **Courts Act 1971** by section 146 of the **Supreme Court Act 1981**, it was only those who had held office as a judge of the Court of Appeal or of the High Court or as a Circuit Judge who were qualified to sit as a Deputy Circuit Judge. Barristers, like the Claimant, were not qualified to sit as a Deputy Circuit Judges from 1 January 1982, the coming into force of the re-amendment

44. The Claimant had been informed that sitting as a Deputy Circuit Judge was not appointment to an office. His appointment was in exercise of powers of the Lord Chancellor under section 24 of the **Courts Act 1971** as amended. When, with the amendment of section 24 with effect from 1 January 1982, the Claimant was no longer qualified to be appointed to sit as a Deputy Circuit Judge he could no longer be called upon to do so.

45. By section 24 of the **Courts Act 1971** as amended the appointment of the Claimant as a Deputy Circuit Judge was during such period or on such occasions as the Lord Chancellor sees fit. The re-amendment to section 24 was the statutory implementation of the view of the Lord Chancellor that previously qualified barristers and solicitors should no longer be appointed to sit as Deputy Circuit Judges.

46. The EJ did not err in holding at paragraph 10 that the Claimant's appointment as a Deputy Circuit Judge was converted to that of Assistant Recorder on or about 1 January 1982 and that his appointment as a Deputy Circuit Judge terminated on that date.

47. The **Part Time Workers Directive 97/81/EC** had not been adopted let alone extended to the United Kingdom by **Directive 98/23/EC** by 1 January 1982 the date the appointment of the Claimant as a Deputy Circuit Judge had come to an end. Although he did not deal with this argument that even if his appointment as a Deputy Circuit Judge had come to an end on 1 January 1982 the Claimant had preserved rights to a pension, the EJ did not err in failing to hold that he had such rights. The argument is only susceptible to one conclusion, that the Claimant did not have preserved rights based on a **Directive** which had not been adopted by the time his appointment came to an end.

Appeal from the Decision that the Claimant's Appointment as Assistant Recorder came to an end in or about September 1984

48. The Claimant contended that his appointment as Assistant Recorder was an appointment to an office and was unlimited in time. He submitted that the EJ erred in failing to hold that the appointment was to an office. Whilst he did not sit as an Assistant Recorder after September 1984 he contended that he remained in office until his 70th birthday. The Claimant submitted that it would have been necessary for the Respondent to give him notification that his appointment as Assistant Recorder had been terminated. He was given no such notification. Accordingly, the Claimant submitted that the EJ erred in holding that his appointment as an Assistant Recorder came to an end in or about September 1984.

49. Further, the Claimant contended that the finding that his appointment as an Assistant Recorder came to an end in or about September 1984 was contrary to the finding in paragraph 31 that having regard to the minutes of the meeting he had with Mr Legg on 20 June 1984:

> **"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."**

50. The EJ based his decision that the Claimant's appointment as Assistant Recorder came to an end on 'his departure from the bar in 1984.' The Claimant rightly contended that he had not left the Bar. He had left the independent bar. Employed barristers were not precluded from holding the office of Assistant Recorder. If, as he did, they became employed full-time in prosecution work, the Lord Chancellor's view was that it was undesirable that they sit in any judicial capacity. The Claimant contended that this had the consequence of his not being able to sit but not terminating his holding the office as Assistant Recorder in September 1984.

51. The Claimant referred to the Respondent's alternative submission that his appointment as Assistant Recorder was extended by three years to 1987 as showing uncertainty as to when his appointment came to an end. This showed that the Respondent would have had to give him notification of its termination.

52. The Claimant contended that the EJ erred in relying on the absence of any document referring to his being an Assistant Recorder after 1984. Neither the Respondent's view nor his determined whether or not his appointment as Assistant Recorder had come to an end in 1984.

53. The Claimant did not challenge the finding of the EJ in paragraph 19 that existing assistant Recorders had been written to in 2000 stating 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. The Claimant was not sent such a letter.

54. The Claimant contended that the office of Assistant Recorder remained until the implementation of Part 7 of Schedule 13 to the **Crime and Courts Act 2013**. It was submitted

that the EJ erred in holding in paragraph 37 that it was 'not possible to sensibly construe Schedule 13 to the **Crime and Courts Act 2013** as meaning, or implying that appointments as Assistant Recorder survived until 2013.' The Claimant referred to the Explanatory Note to that provision which stated that the office of Assistant Recorder was abolished by that Act. Accordingly, the Claimant submitted that he continued as an Assistant Recorder in office until shortly after he submitted his claim.

55. Miss Seaman agreed that the appointment of the Claimant as Assistant Recorder was for a period and did not come to an end at the end of each sitting session. This view was inevitable having regard to the note of the meeting between the Claimant and Mr Legg on 20 March 1984.

56. Miss Seaman also rightly stated that statutorily there could be Assistant Recorders after 2000 until the coming into force of the **2013 Act** when that office ceased to exist.

57. Miss Seaman contended that appointment as Assistant Recorder carries with it a requirement that the individual sits. From the 1990s there was a minimum sitting requirement. The Claimant was told and recognised that the policy of the Lord Chancellor was that those who were employed by a prosecuting authority could not sit as an Assistant Recorder. Accordingly, the EJ did not err when he held that the Claimant's appointment as an Assistant Recorder came to an end when he accepted employment with a prosecuting authority in September 1984.

58. Counsel submitted that the EJ was entitled to make his findings of fact in paragraphs 35 and 36 and to rely upon them to find that the Claimant understood that his appointment as Assistant Recorder had come to an end in 1984.

59. In summary, whilst Miss Seaman accepted that there were some errors in the judgment, such as stating that the Claimant left the Bar in 1984, counsel contended that he did not err in concluding that when he could no longer sit as an Assistant Recorder in September 1984 his appointment to that position came to an end.

Discussion and Conclusion

60. No letter of appointment of the Claimant as Assistant Recorder was before the EJ. The terms of appointment were set out in statute, section 24 of the **Courts Act 1971** as amended by section 146 of the **Supreme Court Act 1981**. As with appointments as a Deputy Circuit Judge, the appointment was by Lord Chancellor "for such period or on such occasions as he thinks fit". Therefore, the Lord Chancellor had a discretion to determine the period of the appointment.

61. Unlike the appointment of the Claimant as Deputy Circuit Judge he was not informed that no office of Assistant Recorder existed. The statutory materials suggest that an Assistant Recorder was an office holder. Assistant Recorder is included in Schedule 5 of the **Judicial Pensions and Retirement Act 1993** ('**JUPRA**'). Section 26 refers to those posts listed in Schedule 5 as offices. Although after the decision of the court in Scotland in **Starrs** in 2000 it was the policy of the Lord Chancellor to make no further appointments to the office of Assistant Recorder and from 18 July 2000 to invite most holders of that post to become Recorders, the office was not formally abolished until the coming into force of Part 7 of Schedule 13 of the **Crime and Courts Act 2013** which was after the Claimant lodged his ET1. Part 7 is headed "Abolition of office of Assistant Recorder". Part 7 paragraph 89(1) repeals section 24(1)(b) of the **Courts Act 1971**, the power to appoint Assistant Recorders. In addition to the removal of "Assistant Recorder" from other statutory provisions the entry of that office is removed from Schedule 5 to **JUPRA**. I therefore do not accept the submission of Miss Seaman that the

amendments effected by the **Crime and Courts Act 2013** were merely a "clearing up exercise" and that the post of Assistant Recorder had ceased to exist in 2000. Accordingly, the EJ erred in holding in paragraph 37 that:

> **"The reference to abolition of the office of assistant recorder refers to its abolition in 2000, and was no more than a 'tidying-up' provision."**

62. The question therefore arises of when the Claimant's holding of the office of assistant Recorder lawfully terminated. The Claimant contended that it came to an end on his attainment of his 70 birthday on 10 May 2013, the Respondent contended that the EJ did not err in holding that it came to an end in September 1984 when the Claimant left the independent bar to become a Prosecuting Solicitor for West Midlands County Council.

63. The EJ made findings of fact concerning discussions and communications the Claimant had with representatives of the Lord Chancellor's Department in 1984. The EJ erred in holding in paragraph 33 that when he became employed by the prosecution service of the West Midlands County Council in September 1984 he left the Bar. He did not leave the Bar. He left the independent bar. The other findings of fact are not challenged.

64. In accordance with provisions then in force employed barristers were eligible for appointment as Assistant Recorders. The period of their appointment was at the discretion of the Lord Chancellor.

65. The Claimant was not appointed as a Recorder. Section 21(3) of the **Courts Act 1971** provides that the appointment as a Recorder shall specify the term for which the Recorder is appointed and the frequency and duration of the occasions during that term on which they will be required to be available. In accordance with the policy of the Lord Chancellor, Recorders

were expected to sit for not less than four working weeks a year and to attend sentencing conferences which would count towards the sitting requirements. By the **Courts Act 1971** section 21(6) the Lord Chancellor could if he thought fit, terminate the appointment of a Recorder on grounds including failure to comply with any requirement specified under subsection (3) in the terms of their appointment.

66. It is clear from the statutory provisions that the Lord Chancellor could terminate the appointment of a Recorder for not being available to fulfil their duties. The sitting requirements were specified by the Lord Chancellor. If the Recorder did not make themselves available to fulfil those requirements the appointment would be terminated.

67. Section 21(5) makes it clear that the appointment of a Recorder is for a term specified in the terms of appointment. It is not until retirement age. Section 21(5) merely specified that any continuation of appointment would not be beyond the year of service in which the holder attended retiring age.

68. As there was no letter of appointment of the Claimant as Assistant Recorder the EJ had to decide when the appointment came to an end on the basis of the relevant statutory provisions and the evidence before him. Section 24 of the **Courts Act 1971** as amended provided by section 24(1)(b) that the appointment was to be during such period as the Lord Chancellor saw fit.

69. A note of an interview the Claimant had with Mr Legg of the Lord Chancellor's Department on 20 June 1984 records:

> **"If Mr Engel was to join the Prosecuting Department of the West Midlands County Council, the position at the moment was clear ie that full-time members of Prosecution Solicitors Departments were not allowed to sit by the Lord Chancellor."**

A The Claimant wrote to Mr Legg on 25 August 1984:

> **"…I write to inform you that I have accepted the post offered to me in the Prosecution Department of the West Midlands County Council and I start there on 3rd September 1984.**
>
> **If the policy of the Lord Chancellor in relation to members of prosecution departments sitting in a judicial capacity changes, I trust that my 'case' will be reviewed."**

B By letter of 3 September 1984 the Chief Administrator of the Midlands and Oxford Circuit wrote to the Claimant thanking him for his service as a Deputy Circuit Judge and as an Assistant Recorder.

C

70. After a period working for prosecuting authorities and as an employed barrister elsewhere the Claimant returned to the independent Bar. He did not sit or offer himself to sit as an Assistant Recorder or attend any related training sessions.

D

71. Whilst the omission of the Claimant's name from lists of Assistant Recorders after 1984 referred to by the EJ in paragraph 36 may not be a material factor in determining whether the E appointment of the Claimant had come to an end on 3 September 1984, in my judgment the findings of fact made by the EJ support his conclusion that the appointment of the Claimant as Assistant Recorder came to an end on 3 September 1984. That conclusion cannot be said to be one to which the EJ could not reasonably have reached on the evidence before him.

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72. Save in certain circumstances, in my Judgment it would be difficult to say that a particular office can continue to be held if the appointee can no longer fulfil the functions of that office. G There may be circumstances such as ill health, maternity leave, and by express consent the holder of the office of Assistant Recorder could continue to hold that office during periods when he or she was unable to fulfil the functions of that office. However, that is not this case. The office H was held for such period as determined by the Lord Chancellor. On the evidence it appears that for the Claimant this was for an indeterminate period subject to statute and as thought fit by the

Lord Chancellor. The Lord Chancellor did not think it fit for those employed full-time in Prosecuting Solicitor's departments to sit as Assistant Recorders. In accordance with the unchallenged policy of the Lord Chancellor the Claimant was no longer eligible to sit as an Assistant Recorder after 3 September 1984. In these circumstances, it cannot be said that the Claimant continued to hold the office of Assistant Recorder although he was unable to fulfil the duties of that office. The EJ did not err in so concluding.

Disposal

73. The appeal is dismissed.