EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102481/2013

Held in Edinburgh on 17, 18, 19 and 20 June 2019

Employment Judge: Laura Doherty

Mr C McEachran	**Claimant** **Represented by:** **Mr Fairley - QC**
The Scottish Ministers	**Respondent** **Represented by:** **Mr MacNeill - QC**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant and his comparators were not engaged in work which was the same or broadly similar under Regulation 2 (4) (a) (ii) of the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 and the claim is dismissed.

REASONS

1. This claim of less favourable treatment under the Part Time Workers (Prevention of less Favourable Treatment) Regulations 2000 (the Regulations) was presented in March 2013.

2. The claimant, who was the President of the Pension Appeal Tribunal for Scotland (PATS) from May 1995 until January 2013, brings a claim under the Regulations on the basis that he was treated less favourably than a relevant full-time comparator as regards a term of his contract, in that he was not paid a pension.

3. The claimant identifies as his comparators Lord McGhee who from 7 October 1996 held the role of President of the Lands Tribunal for Scotland (LTS) and Chair of the Scottish Land Court (SLC), and John Wright who from 1 January 2005 held the role of legal member of the LTS.

4. This claim has a long procedural history.

5. At an earlier Preliminary Hearing (PH) the Tribunal determined that the claimant and his chosen comparators were employed by the same employer under the same type of contract for the purposes of Regulation 2 (4) (a) (i).

6. This PH was fixed to consider whether the claimant had identified relevant comparators for the purposes of Regulation 4 (a) (ii), and in the event the Tribunal was satisfied that there was less favourable treatment, whether it could be justified on objective grounds.

7. The issues for the Tribunal were therefore whether the claimant and his comparators were engaged in the same or broadly similar work with regard, where relevant, to whether they had a similar level of qualification, skills and experience.

8. The Tribunal also has to consider whether Lord McGhie was a full-time worker or had two part-time positions. If the respondents succeed on their argument on this point, then the period for comparison commences with the full employment of Mr Wright, on 1 January 2005.

9. The respondents accept that the claimant was not paid a pension and his comparators were. The Tribunal has to consider whether in the event it finds that the disparity in treatment was on the grounds that the claimant was a part-time worker, such treatment was objectively justified.

The Hearing

10. The claimant gave evidence on his own behalf, and evidence was given on his behalf by Marion Caldwell, QC, who was the current president of PATS. For the respondent's evidence was given by:

    (i) Lord McGhie;

(ii) John Wright;

(iii) David Inglis, secretary to PATS from 1 November 2012;

(iv) Neil Tainsh, Clerk to the LTS;

(v) Steven D'Arcy, statutory and governance at the Judicial Office at the Scottish Courts and Tribunal Service (SCTS); and

(vi) Jeff Owenson, senior policy advisor in the finance pay policy (FPP) team with the Scottish government.

11. Evidence in chief was given by way of witness statements, which were taken as read, with supplementary questions asked.

12. The Tribunal did not hear oral evidence from Lord McGhie, Mr Wright, or Mr Owenson, their witness statements being taken as their evidence for the purpose of this hearing.

13. The parties passed up agreed statement of facts, and an agreed joint minute. There was a joint bundle of documents produced.

Findings in Fact

PATS

14. Appeals in relation to pension awards made, or not made, by the UK government to servicemen are dealt with in Scotland by the Pension Appeal Tribunal for Scotland (PATS). Appeals are dealt with under a UK wide scheme, with separate tribunals in Scotland, England and Northern Ireland. There are three separate Presidents appointed to these Tribunals. The President of PAT in England performs the same role as the claimant performed.

15. The composition of PATS is provided for by the schedule to the Pension Appeals Tribunals Act 1943.

16. The President of PATS wears two hats, firstly as a president of PATS, and secondly, as a legal chair for the purposes of hearing appeals (section 3 of the 1943 Act). PATS hears appeals from residents in Scotland.

17. The jurisdiction of PATS is determined by statute and, in particular, is regulated by the Pension Appeals Tribunal Act 1943 and the Pension Appeal Tribunals (Scotland) Rules 1981 and considers the Armed Forces and Reserved Forces Compensation Scheme (AFRFCS) Order 2005, and AFRFCS Order 2011 and the Service Pensions Order 2006 (SPO).

18. The SPO deals with injuries suffered prior to 5 April 2005. The Armed Forces Compensation Scheme (AFCS) provides for injuries sustained on or after 5 April 2005. The AFCS scheme was introduced in 2006. The scheme which has been in force since 2011, is essentially the same scheme; the frameworks and principles are the same as the earlier scheme.

19. PATS also has jurisdiction for other schemes such as those which make provision for nursing and axillary services, civil defence volunteers, civilians disabled during military action during the second world war, and merchant seamen, however these schemes are encountered less often.

20. Under the SPO, PATS considers the following:

    (i) appeals against decisions of the Secretary of State for Defence for refusing entitlement to war pension;

    (ii) appeals against assessment decisions of disablement accepted as due to service;

    (iii) appeals against decisions relating to supplementary allowances.

21. Under AFCS, PATS hears appeals against decisions refusing an award on the grounds that it was not caused by service or against the decision to place an injury accepted as due to service and in particular a level on the scheme tariff scheme.

22. Under both schemes, PATS is looking at case afresh, and is not simply determining whether the Secretary of State has erred. PATS has the power

to go over fresh evidence and can call for additional evidence. It has in most cases it has the same powers as the Secretary of State regarding decisions on the claim.

23. In 2011, the government introduced a tariff scheme which scheduled injuries into categories for the purposes of making awards. PATS requires to apply this tariff scheme in making awards.

24. PATS is not a tribunal of last resort. Appellants may appeal decisions made by the tribunal on a point of law to an Upper Tribunal.

25. The President decides upon applications for leave to appeal to the Upper Tribunal. If the President's decision is appealed, then a senior member of PATS will deal with that.

26. Initially, claims made by servicemen are handled by the Secretary of State through Veterans UK (VUK) an agency of the MoD. VUK determines an application under the applicable scheme and what, if any, benefits the applicant is entitled to. In the event the applicant is unsatisfied with the decision, he has the right of appeal to PATS under the 1943 Act.

27. PATS is independent of the MoD and the VUK.

28. Applications under the Service Pension Order 2006 (SPO 2006) are made by service personnel after they leave the forces. An application is made automatically on their behalf it they have been medically discharged. The applicant must prove on the balance of probabilities that he/she has the condition or injury for which he/she claims.

29. If the applicant for pension is made within 7 years of leaving the forces, the burden of proof lies with the Secretary of State to prove beyond reasonable doubt the injury which is the subject of the application was neither attributable to nor aggravated by service. If an application for pension is made after 7 years from leaving the service, the applicant has to prove attribution or aggravation.

30. In terms of SPO 2006, PATS determines whether or not the appellant is entitled to a disablement pension as determined by the Secretary of State or whether the percentage which has been assessed by VUK as regards the applicant's disablement should be higher or lower, and whether the appellant is entitled to supplementary or additional allowances and supplements.

31. For injuries which occur after April 2005, dealt with under the AFCS scheme, applications for pension may be made while the applicant is still serving. A different burden of proof applies. The appellant has to establish on the balance of probabilities, that the injury was caused wholly or predominantly by service in the forces. If VUK decides the injury was not caused wholly or predominantly by service an appeal lies to PATS. If the injuries are accepted as due to service, then VUK will select what it considers to be appropriate tariff from list of descriptors in the AFCS Order. If the claimant disagrees with the tariffs selected, then an appeal is sent to PATS.

32. Very occasionally, PATS considers cases which involve an assessment of whether there had been serious negligence on the part of the appellant which caused or contributed to the injury.

33. PATS hearings are conducted by a legal chair, a medical member, and an experienced member of the armed forces. The average hearing lasts approximately 60 to 90 minutes but can sometimes be longer, especially if complex issue and evidence requires to be considered. Very occasionally if complex issues are involved the hearing will be set down for one or two days.

34. A claimant in PATS is appealing against a decision of the state. In the main claimants are represented by the Royal British Legion (Scotland), or the RAF Veterans Associations, but on occasion they can be unrepresented, or legally represented.

35. In terms of the SPO 2006, awards which can be made by PATS range from £3,000 to £11,462. In relation to pensions, PATS has power to award an annual pension of between £1,935 and £9,474 per annum. Supplementary allowances can top up these pension levels. The tariff scheme under AFCS

runs from £1,236 to £650,000. PATS can also award a one off payment or give guaranteed income payments.

36. PATS hearings take place in an informal setting. Evidence is not taken on oath. The claimant and sometimes the person who accompanies him to the hearing, can be asked questions by his representative, the representative of the Secretary of State, and the PATS panel members.

37. PATS rely on expert opinion evidence, usually written medical evidence. Medical evidence can be advanced by the claimant and the Secretary of State and can on occasion be conflicting. It is open to PATS to obtain independent expert evidence and on occasion they do so.

38. PATS is supported in the exercise of its functions by a secretary, currently David Inglis and office staff.

39. Papers are sent to the Tribunal members two or three weeks in advance; these papers are not always in order. There is reading time involved in preparation for the hearing.

40. PATS hearings are conducted by the appellant or his representative presenting first, and the Secretary of State then proceeds in presenting their case. The panel then asks questions, and there is summing up from the party. The panel then has a private discussion, and decisions are usually given on the day. If there is a disputed issue of facts, then the tribunal have to determine that.

41. Written decision, which are generally fairly brief, are then issued, normally within 2 to 3 weeks thereafter.

The Lands Tribunal

42. The Lands Tribunal Act 1949 provided for the creation of Land Tribunal England and Wales and made provision for one in Scotland. However, the Lands Tribunal Scotland (LTS) did not come about until 1971 when the Conveyancing and Feudal Reform (Scotland) Act 1970 required a body to

determine applications for the discharge or variation of land obligations under that legislation. It is supported by its own administrative staff.

43. The LTS has since gained many more jurisdictions over the years, and it is likely that there are likely more than 100 pieces of legislation which make provision for reference to the LTS. The LTS has a number of main jurisdictions. These are:

    (i) Variation in discharge of title conclusions;

    (ii) Valuation for commercial rating;

    (iii) Questions of disputed compensation following compulsory purchase and other statutory land compensation claims;

    (iv) Referrals and appeals against the keeper of the Register of Scotland; and

    (v) Tennent's rights to buy.

44. There are many other miscellaneous statutory jurisdictions, for example under the Flood Prevention (Scotland) Act 2009 and the Coal Mining Subsistence Act. The Tribunal can also accept a voluntary reference under the Lands Tribunal Act 1949 in which case the LTS has essentially an arbitration type role, however voluntary referrals are in practice uncommon.

45. When the LTS was created in or around 1970/71, the Chairman of the Land Court took on the role of president of LTS. The LTS and the Land Court are distinct bodies, but they are joined at the head by the President/Chair. The LTS is supported by three members of administrative staff.

46. The LTS is not a Tribunal of last resort, and in the majority of cases, appeal lies to the Inner House of the Court of Session. Valuation appeals lie to the Land Valuation Appeal court (in practice, the equivalent of the Inner House). Some appeals proceed by statutory appeal, and some by way of stated case. As a matter of a general application, leave to appeal need not be obtained.

47. Cases before the LTS are party v party. In some cases, the Scottish government or a local authority and will be one of the parties, for example in disputed compensation cases, however applications to the LTS are not appeals against a decision of the state.

48. Applications to LTS are made in writing. Different types of applications are made in different forms. Some applications will be statutory applications, others are made on 'in house' forms, failing which a particular statute which is applicable will state what must be achieved from the application to the LTS, and the applicant that will produce a written application based on the statutory provisions.

49. Statutory fees are payable when an application is submitted. The fee payable varies depending on the type of application but can range from £150 to £500.

50. When an application is received, the administrative team responsible for LTS will research the case to make sure it meets the essential requirements and is competent on the face of it under the relevant statutory provisions. The application is intimated by the administrative team on the appropriate respondent or potential respondents. In relation to title condition cases the respondent party can be any number of owners of benefited properties with title. For example, in applications seeking to discharge a burden, the administration intimates the application to all who are benefited proprietors with title. This can on occasion involve a large number of owners. Administration issue notices in statutory form. The legal member of LTS is involved if there is an issue as to who should receive such intimation.

51. A period of around 3 or 4 weeks is normally allowed for representations to be made by the respondent for party or parties. At that point, another interlocutor is issued allowing the appellant to adjust his statutory application in light of the representations made. Again, generally three weeks is given.

52. Once this has been done, the respondent will be given the opportunity of adjusting their pleadings and that process will continue until both parties have fully pled their case on paper, or the LTS brings the adjustment process to a close.

53. A referral to the legal member of LTS will be been made during this process if a procedural point (e.g. an application for a debate on a legal point, a motion for additional time, or an application to sist) has been made. All opposed motions or application are dealt with by the Legal Member. On occasion LTS will fix a hearing to deal with an opposed procedural application. Written judgments are issued in opposed procedural points. Case management can be conducted before the hearing takes place, and in complex cases, it is common for the LTS to engage in case management in individual cases in advance of the hearing

54. When the pleadings have been finalised pleadings, LTS administration fix a hearing. A case can be determined on parties' written submissions, but only if all the parties agree to this.

55. In the event that this agreement is to proceed by way of written submissions, then the case proceeds on that basis, but a site inspection will still take place.

56. If there is no agreement to proceed by written submissions, then a hearing is fixed. The length of the hearing reflects the parties estimates as to the to its duration. LTS does not schedule more than one hearing on a particular day. The average time for a hearing is two days, but hearings can take much longer for example, on occasion hearings can take one or two weeks.

57. The LTS is normally composed of a legal and a surveyor member, although the composition can vary. It can however sit with only one legal member, or with two legal members if required.

58. Members of the LTS are provided with the papers in advance of the hearing, which can include expert witness reports and precognitions.

59. LTS hearings take place in a formal court room if possible. The LTS, and the SLC, use the same room in George House in Edinburgh when LTS is sitting in Edinburgh. LTS does however sit all over Scotland.

60. It is common for the parties is to be legally represented, and often Senior and or Junior council , or solicitors with specialist knowledge are involved. Parties

can also however represent themselves or be represented by a surveyor which in practice occurs more often in low value land valuation cases.

61. The hearing process is a formal adversarial one. Witness evidence is taken on oath. Evidence in chief is usually given by way of witness statements, followed by cross examination and re-examination. Expert witnesses are commonly used in LTS cases. The proceedings are held in public and are recorded. On the close of evidence legal submissions are made. Overall the procedure adopted at the hearing is close to what occurs in a civil court.

62. Site inspections, which generally take place after the hearing, are a feature of almost all LTS applications. The inspection often involves discussion regarding the evidence between the LTS members, with reference to plans or other productions which are considered on site.

63. The LTS takes cases to avizandum and an oral decision are never given at the conclusion of the hearing. Decisions are written by a legal member, with input from a surveyor member. The legal member and surveyor member are equal members of the tribunal. Decisions are generally quite lengthy, most than average is around 15 pages, but can be significantly longer in complex cases.

64. LTS can award expenses and can provide for certification of expert witnesses and sanction for counsel. LTS rules in this regard are similar to civil courts. Expenses applications are generally the subject of a hearing, after which a written decision is issued, and a referral can be made to the auditor for taxation .

65. Cases before the LTS often involve large sums of money or high valuations which are the subject of dispute. There is however significant variation in the sums involved, for example from telecoms cases worth tens of millions of pounds, to much less significant amounts. In some instances, no financial value is placed in the dispute; for example, subject to buildings being erected on a neighbouring property.

66. The LTS jurisdiction of variation on title conditions, involve mainly burdens on title which prevent people from doing certain things, like building extensions etc. These cases are conducted in a similar way to civil cases in court and involve written pleadings and hearings which normally last one or two days. If the parties agreed, they can be decided without a hearing on the basis of are pleadings, productions and a site inspection.

67. Valuation of commercial property for rating cases tend to be more involved. LTS deal with properties of any value, however some cases involve a very high monetary value. These cases are dealt with in a similar way to Court of Session litigation with written pleadings, expert witnesses, and three to four days on average in the hearing and are often of the same complexity. Assessors have schemes in place for most types of commercial property, but some properties are not covered by the schemes and in these claims LTS deals with disputes about how a property should be fitted in under a scheme. Examples of the cases dealt with by LTS included Gleneagles Hotel, Ikea, Fergus Oil Terminal, Lismore Quarry, Dounray during decommissioning, and Weatherspoons pubs. Such disputes were usually very high value claims.

68. Valuation of property for compulsory purchase claims dealt with by LTS are of a similar scale but are concerned with assessment of capital value. These cases typically involve written pleadings adjusted over a period of months and the hearing lasting at least a few days. Some of these valuations exceed £1m, and many were multi-million-pound disputes

69. Valuation for rating (non-domestic properties) cases only come to the LTS if they satisfy the test of complexity. The Valuation Committees decide on ordinary or standard rating appeals. Cases which reach the LTS are technical appeals against valuations. If the Valuation Committee decides that the case was not complex enough to be considered by LTS, then the losing party could appeal against that. The parties in such cases are the occupier on one side, and the assessor of the property on the other.

70. The Housing (Scotland) Act 1987 gave LTS jurisdiction to deal with references and disputes relating to the rights of public sector tenants to purchase their

homes. This quite often dealt with by LTS at debate level activity, (akin to debates in the Sheriff Court) where there was no dispute regarding the facts. These cases however can involve complex conveyancing issues regarding title. LTS does not deal with a significant volume of this type of work, although it has dealt with several cases brought by firemen and police officers regarding the right to buy a house, a house attached to a fire/police station, which set important precedents.

71. Appeals against the decision of the keeper involve a full rehearing of the dispute. These disputes usually involve technical conveyancing issues. For practical purposes these are often disputes over small portions of garden or rough ground where the boundary has been moved, but they can involve more significant disputes e.g. a dispute between two supermarket chains involving a mistake as the boundary is in the middle of a river, or a claim concerning common interest in residual land in a residential development.

72. LTS decisions typically have a bearing on a significant number of similar or related disputes and are important as setting binding precedent.

73. The Lands Tribunal Act 1949 provides that the LTS shall appoint a President and legal members as the Scottish Ministers may determine. The Act also provides that the Lord President may appoint persons appearing to him to be suitably qualified by the holding of a judicial office or by experience as an advocate or solicitor; and others shall be persons who have experience in the valuation of land, appointed after consultation with the Chairman of the Scottish branch of the Royal Institute of Chartered Surveyors. Appointments are made to the LTS by the Lord President.

Scottish Land Court

74. The Scottish Land Court is a court of law. It ranks after the Court of Session and before the Sheriff Court. It comprises of three lay members with experience in farming and crofting. After 2003 the SLC was given jurisdiction to deal with appeals and decisions of the Scottish Ministers in relation to farming subsidies, which had the effect of increasing the workload of the SLC quite dramatically, and it was necessary to appoint a Deputy Chairman, in

addition to the Chair of the SLC. The SLC is supported by its own administrative staff.

75. The historical role of the SLC was limited to disputes between landlords and tenants of agricultural subjects. It began as a court to protect the rights of crofters and that has continued to be its important role. In about 1886 crofters were given security of tenure and the right to have rents fixed. The SLC was set up to regulate matters. Many crofting cases were of little monetary value but were hard fought because of crofters' strong attachments to their land. The SLC was subsequently given a limited jurisdiction to determine disputes between landlords and tenants of farmers under the Agricultural Holdings legislation.

76. The SLC tends to have its jurisdiction divided between 'croftings' and 'holdings'. Many of the holding disputes dealt with by the SLC are concerned with whether a landlord can put the tenant out or prevent entry by successors and recover possession of the farm. The SLC also deals with a lot of complex disputes regarding fixed equipment on farms. The 'holdings' cases generally involve consideration of a complex area of law, particularly after The Agricultural Holdings (Scotland) Act 2003 came into effect.

77. Prior to the 2003 Act coming into effect, most agricultural holdings disputes had been referred to statutory arbitration. The effect of the 2003 Act was to amend The Agricultural Holdings (Scotland) Act 1991 and it conferred wide new powers on the SLC. These included for example power to decide whether a tenancy of an agricultural holding existed or had been terminated and covered any question of difference between the landlord and tenant of a holding, other than the matter relating to the question of who was entitled to succeed to the estate of a deceased person. Specific new powers were conferred on the SLC under the 2003 Act, for example, the power to grant a Decree of Interdict.

78. The SLC also has jurisdiction to deal with appeals against decisions of the Scottish Ministers in relation to rural payments (EU subsidies), under The Rural Payments (Appeals) (Scotland) Regulations 2009. These cases are

complicated black letter law cases involving elaborate EU Regulations which regularly changed, and consideration of decisions of the European Court as well as English decisions.

79. Some of the cases within the remit of the SLC involved predominately factual disputes for example, the SLC deals with disputes regarding boundaries. These claims often raised wider issues such as whether a specific area was part of a croft or part of a common grazing; the SLC also regularly deals with disputes over rent.

80. One of the specific jurisdictions of the SLC is to answer questions referred to by the Crofting Commission. This is a complex jurisdiction. Crofting law has a number of conflicts of concepts arising from the basic position that it was conceived to regulate matters between landlord and tenant. This underlying aim which runs through the scheme of legislation, without proper recognition of the changes required when tenants were given a right to buy their land. This underlying concept can give rise to difficult issues of law which require to be determined by the SLC.

81. Many crofting cases determined by the SLC require inspections of the land in question, and more complex legal issues require full debate, which often takes place over several days.

82. The Chairman of the SLC has the same power as the Lord Ordinary to punish for contempt of court .

83. The SLC has three lay members who formerly would sit as a “divisional court” to deal with factual crofting disputes. Lay members are chosen for their agricultural experience and their ability to deal with cases in a proper judicial manner. The Divisional Court can deal with renting and boundary disputes and had the capacity to sit on their own with a solicitor as clerk. Divisional court decisions can be appealed on a point of law to the SLC. More recently Divisional courts have become uncommon.

84. Most cases, including crofting cases, are heard by the SLC consisting of the Chair, or the Deputy Chair, and one or two expert members. The Chair occasionally sits on his own.

85. It is common for cases management to take place before the hearing, in order to identify the issues for the parties and the Court.

86. Cases are presented to the SLC by way of written pleadings, which can be lengthy and elaborate. Hearings often take several days, with witnesses giving evidence on oath and being open to cross examination. There are full closing submissions.

87. Site inspections are nearly always required unless the dispute is purely on a legal point.

88. Hearings take place in a court room. Occasionally crofting cases can be heard in local halls or hotels. On occasions the SLC has to sit at odd hours to suit flight or ferry times or to accommodate particular witnesses.

89. Written decisions, which are often lengthy, are issued by the SLC.

90. Appeal against their decision lies to the Court of Session.

The Claimant

91. The claimant, whose date of birth is 14 January 1940, holds a BA (Oxon) LLB (Glasgow), and JD (Chicago). After university, the claimant completed a solicitor's apprenticeship, and then spent a year in fellowship in Chicago, before returning to work with a law firm in Glasgow. The claimant was called to the bar in 1968. He did a variety of both civil and criminal work. In 1974, he was appointed as an Advocate Depute, and conducted a series of serious criminal trials. As was the custom, the claimant left the Crown Office after three years. He became the standing junior to the Department of Trade from 1976 to 1979. He took silk in 1982. The claimant was a member of the Scottish Legal Aid Board from 1990 to 1998. The claimant had considerable experience of conducting personal injury and medical negligence litigation while at the bar.

92. On 11 January 1994, the then Lord President, Lord Hope, appointed the claimant as a legal member of the PATS with immediate effect. The claimant filled his role on a part-time basis.

93. Judicial appointments were relatively informal, and on 10 May 1995, Lord Hope appointed the claimant to be President of PATS with immediate effect. This was a role which the claimant fulfilled until 13 January 2013, when he retired, at all times on a part-time basis. The claimant does not receive payment of a pension.

94. The selection process which resulted in the claimant's appointment as a legal member, and as President of PATS, was informal. The claimant was invited to attend an interview with the Lord President and asked if he was prepared to be appointed. He was not issued with terms and conditions of appointment. The Lord President made appointments based on his own direct knowledge of the experience, qualifications and skills of the claimant.

95. The Pension Tribunal Act 1943 provided that a legal member of PATS must be a barrister or solicitor with not less than seven years standing. In 2007, this legislation was amended to reduce the seven year requirement to five years.

96. The main aspect in terms of time of the claimant's role as President of PATS was to hear cases and issue decisions. When hearing cases, the claimant would sit with one medical member and one ex-service member.

97. In advance of the hearing, the claimant received the papers for the three or four cases which was scheduled to take place. When the claimant commenced as President, some 6 to 8 cases were listed and scheduled for hearing per day, but latterly four cases at the most the most would be scheduled, and by the time of the hearing date itself, that number had often further reduced.

98. All of these papers contained a statement of claim or appeal and any relevant medical evidence. On occasions the papers were not in order.

99. The claimant required to read the papers, in advance of the hearings and identify the issues.

100. The hearing would then take place, which the claimant chaired. This was an informal hearing, which was not recorded, and evidence was not taken on oath. The claimant was asked questions by his representative and could also be asked questions by the Secretary of State, and the panel. On occasion a friend or relative of the claimant who accompanied him to the hearing, was also asked questions in this way.

101. The claimant's representative, and the Secretary of State made submissions at the end of the hearing.

102. The panel then adjourned, the claimant would discuss the decision with the members. Occasionally there could be lengthy discussions. In his capacity as Chair, the claimant on occasions required to explain the relevant tests which applied, and the burden of proof.

103. The hearing was then reconvened, and the claimant conveyed the decision orally to the party.

104. It was then the responsibility of the claimant to write the decision. Writing the decision took the claimant longer than hearing the case. Reasons had to be approved by the members of the panel, and once the reasons were approved by all the panel members, the decision was issued to the parties.

105. The decisions issued by the claimant, were generally fairly short, although longer decisions were on occasion issued. Examples of the written decisions issued by the claimant are produced at tab 51 of the bundle, and at 848 to 868.

106. The bread and butter of the decisions which the claimant heard were appeals from servicemen, or their families in the case of deceased service persons, against decisions pertaining to their entitlement to war pensions and the quantification of their pension. This involved the claimant assessing whether the claimant had an injury, and whether the injury could be attributed to military service, and if so, what was the appropriate level of the award.

107. After 2011, when a tariff scheme was introduced which scheduled injuries into categories for the purpose of making awards, the claimant required to consider this, as part of his function of hearing cases.

108. The claimant on occasion sat on complex and difficult cases, for example, cases involving the cancer risk to naval personnel exposed to atomic tests at Christmas Island, and the gradual emergence and recognition of Post-Traumatic Stress Disorder (PTSD) as an injury. The claimant also dealt with cases of bullying, which could present difficult issues of causation.

109. The claimant was assisted in his consideration of the claims before PATS and particularly these types of claims, by the experience which he had gained at the bar in personal injury and medical negligence work.

110. The claimant normally sat in Edinburgh, but PATS had the power to hold domically hearings to hear from an applicant who was too ill to attend a hearing and very infrequently the claimant undertook domiciliary visits.

111. In addition to his work Chairing PATS, and in his capacity as President of PATS, the claimant also carried out additional duties. He considered applications for late appeal and leave to appeal. On Occasion he considered if more medical evidence was required in a case, and the case needed to be postponed to obtain this. The claimant took decisions as to whether an applicant's request for a domiciliary visit should be granted. This type of interlocutory work was carried out on a case by case basis.

112. On a more general basis in his capacity as President the claimant discussed with the clerk the number of claims before PATS and how the organisation should hear the cases.

113. In his capacity as President of PATS, the claimant was an ex officio member of the Scottish Tribunal Forum, which involved him attending and participating in two meetings a year. The claimant was involved in some policy work in particular changes and updates to the PATS Rules and procedures, and he was consulted about these.

114. The claimant encouraged PAT members to attend training events organised by the English PATS, and he also organised a training day in Scotland for PATS members.

115. The claimant was asked to provide on an annual basis, a comment on the performance of the PAT Secretary, who was a full-time civil servant.

116. About half way through his time as President, the claimant introduced appraisals for panel members, the appraisal process took the claimant approximately one to two days a year. The claimant in his capacity as President took part in 6 or 7 recruitment exercises during his tenure as President.

117. The claimant could be consulted about secondary legislation affecting war pensions, however not take up a good deal of his time.

118. The claimant spent approximately 10% of his time on duties which did not involve direct case work. He spent 50% of his time reading papers and writing decisions; 25% of his time sitting in hearings; and 15% of his time on case management.

John Wright

119. Mr Wright qualified as a solicitor in 1973 and worked for approximately six years as a solicitor. He then took three years out of private practice, and among other things, became Chairman of the Industrial Tribunal. In 1982 he went to the bar and took silk 1993. Whilst at the bar, he specialised in employment and valuation of commercial property for rating, as well as having a general practice. From 1997, he was a part-time Social Security Commissioner, a role which he carried out latterly, as an Upper Tribunal Judge. Prior to taking up his role with the LTS, Mr Wright was a temporary sheriff from around 1990 to 1997.

120. In 2001, Mr Wright was appointed to the role of part-time legal member of LTS, and he continued to perform that role on a part-time basis until 1 January 2005, when he became a full-time member.

121. The role of legal member in the LTS is a full time salaried post and came with a judicial pension. Mr Wright retired from his post on 31 March 2014.

122. When Mr Wright was recruited to the LTS he underwent a recruitment process and was interviewed by a panel which included the President of the LTS, and a representative of the Lord President. A recommendation of appointment was accepted by the Lord President.

123. The main bulk of Mr Wright's duties related to sitting, alone, or with a surveyor member, to conduct hearings and prepare decisions. He sat on cases of the type described above under *The Lands Tribunal.* This work took up the bulk of his time. He took responsibility for much of the day to day work of the LTS and he worked with administrative staff on a variety of issues which arose in relation to the primary stages of the cases.

124. Mr Wright normally sat with one surveyor member, but he sometimes sat with two surveyor members, and very occasionally, sat with Lord McGhie.

125. Almost all the cases on which he sat required a site visit.

126. The hearings which Mr Wright conducted were similar to ones in the civil courts. Witnesses gave evidence under oath and were cross examined; once all the evidence was concluded, the parties or their representatives delivered submissions.

127. The cases he dealt with involved detailed legal pleadings and productions, including experts' reports, which he read and considered prior to every hearing.

128. The type of evidence which Mr Wright heard in conducting cases, varied from case to case

129. Oral evidence was recorded, but Mr Wright took his own notes.

130. In the majority of cases in which Mr Wright sat the parties were legally represented by counsel, senior counsel, or a solicitor, often a solicitor with specialist knowledge. There were also some cases in which litigants

undertook their own representation, and on occasion specialist surveyors represented parties, normally in low value land valuation cases.

131. The majority of the cases which Mr Wright sat on, took one to two days, but they could take longer. His experience was it was unusual for a hearing to last more than two weeks.

132. After conducting the hearing, in the majority of cases, Mr Wright carried out a site inspection. In conducting these site inspections, Mr Wright looked at the pertinent areas of the property, and he could also be asked to look at specific parts or areas. In addition to inspecting the property itself he sometimes assessed matters such as light and shade and views. If it was a valuation case, he would look at the particular area of the property which was in issue.

133. On average Mr Wright attended a site inspection every two weeks.

134. The LTS could sit throughout Scotland, and generally sat in Edinburgh, however one third of the cases which Mr Wright conducted were in locations other than Edinburgh.

135. The biggest part of Mr Wright's role commenced after the hearing and site inspection, and that was writing the decision and reasons. Depending on the particular case, discussion would take place between Mr Wright and the surveyor member, this would take place over a period of time until they had reached the decision and agreed on it and the reasons for it. In some cases, Mr Wright would ask the surveyors to produce drafts of the decision, mostly in relation to the facts, however he did the majority of the drafting, and he was the person who pulled the decision and reasons together. It took Mr Wright weeks, and in some occasions months to write decisions.

136. Mr Wright's decisions were generally around 15 pages but could be significantly longer in complex cases.

137. The LTS dealt with comparatively fewer cases than the civil courts, and this gave Mr Wright time to write his decisions.

138. Mr Wright conducted approximately 80% of the cases before the Land Tribunal. Cases were referred to Mr Wright on the basis of capacity, rather than complexity.

139. Mr Wright also carried out case management duties. The majority of cases did not have any procedural issues, but where procedure was an issue, or a party made a procedural motion, then he would issue a written decision to deal with the point. Most procedural matters were resolved in this way, however he also dealt with disputes regarding procedure at procedural hearings at which the parties could be present or represented , following which he would issue a written decision.

140. In the complex or high value cases which Mr Wright dealt with, it was common for him to engage in case management in advance of the hearing. In cases which requited case management his input was significant. It was his practice to look at every case individually in order to determine what needed to be done. In some cases, he would, via the clerk write to parties in advance of the hearing in an attempt to focus the issues in dispute. In some cases, Mr Wright wrote to the parties to advise LTS wished to be addressed on certain matters which were not addressed in the pleadings or productions.

141. Mr Wright regularly sat on complex and difficult cases.

142. In addition to conducting hearings, interlocutory work, and case management work, and making decisions, Mr Wright had a number of other duties. He had no formal role in delivery of training but on the job training took place, and he had regular contact with the LTS surveyor member and an informal role in relation to the management and approach of cases before the LTS. On occasion he would write a general note on a specific issue of interest, for example procedure on particular points which arose in a case.

143. Mr Wright had no management responsibilities for support staff, but he did have regular discussions with the clerk regarding best practice for the management of the LTS cases. He also shared occasional procedural notes with the clerk's office and had regular discussions with the clerk and his team regarding cases before the Tribunal.

144. There was no formal mentoring programme in place at LTS, but in practice, members informally mentored each other. Mr Wright worked closely with his support staff and was regularly in touch with them regarding the conduct of cases. In judicial matters, he sometimes directed the support staff regarding what to do.

145. Mr Wright advised the clerk and his staff on procedure from time to time, for example in relation to applications for extension of time.

146. Mr Wright did have a role in communicating with groups of Tribunal users, and he liaised with the Compulsory Purchase Association and had meetings with representatives of those responsible for rating cases in order to discuss the timetabling for hearings and other matters.

147. Mr Wright, and the President were regularly consulted on proposed law changes both by the Law Commission and the government. He represented LTS at the Scottish Parliament's Justice Committee on two occasions.

148. Mr Wright had some involvement in discussions regarding the set-up of the Scottish Tribunal Service, which included attending the two meetings of the Justice Committee.

149. Mr Wright occasionally attended meetings with people from other Tribunals, and on occasion he deputised for Lord McGhie at the Scottish Tribunals Forum.

150. He prepared a written submission in August 2013 for the Justice Committee on LTS's position with respect to the Tribunals (Scotland) Bill.

151. Mr Wright had some involvement in other areas of property law reform and had some meetings over the years with the Scottish Law Commission or a particular government team dealing with the specific areas.

152. LTS received letters from civil servants regarding particular proposals, and Mr Wright considered those proposals and responded to them with a view. He was consulted on the re-writing of the Land Registration (Scotland) Act.

153. Mr Wright was consulted on the rewriting of the Land Registration (Scotland) Act, and legislation on the abolition of for the feudal system and the Act on title condition. He was consulted on compulsory purchase compensation, and on two occasions, he was asked to advise the Scottish Parliament on areas that fell within the LTS's jurisdiction, once on the impact of title condition reform on the work of the LTS, and once on Scottish Tribunal reform.

154. Mr Wright had no formal role in recruitment, or appraisal.

155. Mr Wright's average working week was 40 to 50 hours per week. He estimated that he spent approximately 10% of his time in hearings, 50% spent in preparation, site inspections and consideration and writing decisions, including cases in which there was no hearing; 20% on other Tribunal work, for example case management; and 20% in relation to other functions, e.g. consultation, user groups scheduling cases etc.

Lord McGhie

156. Between 1969 and 1986, Lord McGhie was a practising member of the Faculty of Advocates. He was admitted as a member of the Faculty in 1969 and took silk in 1993. He was an Advocate Depute for a period, and he also sat on a Medical Appeals Tribunal, and the Criminal Injuries Compensation Board on a part-time basis prior to 1996.

157. On 7 October 1996, Lord McGhie was appointed to the roles of President of LTS, and Chair of SLC. He was appointed to SLC by way of Royal Warrant, and to LTS by the Lord President. Each body is governed by different legislation and deals with different jurisdictions. The combined posts dated historically from the 1970's when the building at 1 Grosvenor Crescent could provide accommodation for both bodies, which allowed the former LTS premises to be sold.

158. Lord McGhie was never provided with any terms and conditions. Lord McGhie described himself as working part-time in each post, simply to make clear to third parties the detailed staffing of each body. He considered in theory it would have been accurate to say he had two full-time posts.

159. In practice Lord McGhie worked from one office and dealt with the whole workload of the two bodies as if it were a single full-time job covering both.

160. In 2012, Lord McGhie also sat from time to time as a temporary Judge in the Court of Session, sitting in the Inner House. He did not receive additional remuneration for this work.

161. SLC is a court in terms of the Scottish Land Court Act 1993, and in terms of section 1(3) of that Act, the Chairman of the LC has the same rank and tenure of office as if he had been appointed a Judge of the Court of Session.

162. Lord McGhie retired from both posts on 14 October 2014.

163. The remit of the LTS and SLC is entirely separate. They two bodies are supported by different administrative staff. The work Lord McGhie carried out for the two bodies varied from time to time, and there was rarely a 50/50 split in the work which he did. Laterally the majority of the work which he carried out was with the SLC, and Mr Wright as full-time Deputy at LTS, coped with most of the LTS work, although Lord McGhie continued to be involved in some of the bigger cases. Over the course of his 18-year tenure with LTS and LCS, the split of Lord McGhie's work was on average 50% LTS and 50% LCS, although this varied from year to year.

164. Lord McGhie was paid one salary which covered both his roles. This salary was considered by the senior salary review body, and his two appointments were, together, assessed as equivalent to Sheriff Principal for pay purposes, with the status of a Court of Session Judge. Lord McGhie received a single judicial pension for the two appointments under the Judicial Pension and Retirement Act.

165. In terms of day to day working, Lord McGhie did not analyse the work which he did in terms of there being two part-time roles for two distinct bodies. In practical terms, he had one in tray and one out tray, one office diary, and in relation to each post, on any given day, he did the work which had to be done in the order in which he saw fit.

166. Lord McGhie was appointed Chairman of SLC under the Scottish Land Court Act 1993. He was appointed by warrant from Her Majesty. Section 1(3) of that Act provides that the Chairman shall be have not less that 10 years standing an advocate, solicitor, Sheriff, or Sheriff Principal.

167. In terms of the qualification required for the role of President of the LTS, the Land Tribunals Act 1949 provides the President shall be a person appearing to the Lord President to be suitably qualified for the holding of judicial office or by experience as an advocate or solicitor. Lord McGhie was appointed to the role pf President on that basis,

168. ***In Lord McGhie's capacity as President of LTS*** - There were a number of aspects to Lord McGhie's role as President of LTS.

169. Firstly, he sat on cases under the jurisdictions of the LTS of the type described above. When hearing cases, Lord McGhie always sat with one surveyor member and very occasionally, sat with Mr Wright and a surveyor member.

170. In advance of the hearings which he conducted, Lord McGhie would consider the pleadings, and any productions in detail. The hearings he conducted were comparable procedurally, to the hearings conducted in the Court of Session. He considered detailed legal pleadings, and heard evidence taken under oath. Most parties were legally represented, as described above. While there were some party litigants in the cases which he heard, legal representation with expert witnesses were the norm for the hearings which he conducted.

171. At the conclusion of evidence parties would make their submissions, and in most cases, Lord McGhie then carried out a site inspection with the surveyor. The site inspection sometimes involved him in a considerable amount of travel, and an overnight stay.

172. After the site inspection, Lord McGhie then commenced the decision making process. He discussed the matters to be decided, and the decisions and the reasons for the decision with the surveyor member. He wrote the decision and reasons, which were detailed.

173. Examples of Lord McGhie's judgments are produced in the bundle at documents 42 to 45.

174. In the event of an appeal against the decision, Lord McGhie required to prepare a stated case, which set out the facts proved, and allowed the parties to identify the issues of law arising from the facts.

175. On a typical case, Lord McGhie would spend at least six times more writing the decision than sitting hearing the case.

176. Lord McGhie also carried out interlocutory work on a case by case basis.

177. Lord McGhie on average sat on around 12 cases per year for LTS, although the LTS processed many more.

178. In addition to the direct case work, Lord McGhie also carried out other duties in his capacity as President of LTS.

179. A large amount of his time was spent dealing with the early stages of the new Tribunals Act and advising on that. He participated in the Scottish Tribunal's Forum, which included all the Chairs or Presidents of the Scottish Tribunals, including PATS.

180. He conducted several informal discussions about the special status of LTS, and he wrote several papers about the position of LTS and the new Tribunal system. He had input into the establishment of the Scottish Tribunals Service, and after this was in place, he attended one or two meetings per year to discuss the targets, aims and funding of STS. Lord McGhie took decisions about work policy.

181. Lord McGhie was responsible for legal policy issues, and he dealt with changes in LTS rules, or routine procedure. He was responsible for the content of the LTS website; the revision of the website, took about a week of his time when this was done. Lord McGhie and John Wright had regular meetings to discuss training, but these were informal.

182. The surveyor members were provided with on the job training, and Lord McGhie produced legal summaries for them and provided them with annotations of suitable law students' legal textbooks.

183. There was no formal appraisal system in LTS, and Lord McGhie had no direct management role for the support staff role worked in LTS. Lord McGhie did have a role in the recruitment of members of LTS, both legal member and surveyor member. He was responsible and involved in the recruitment of John Wright, and his successor, Ralph Smith. He was also involved in the recruitment of the surveyor members as and when they were needed. It was his responsibility to draft the person specification for the role, the recruitment advertisement, select the candidate for the short leet, and help identify members of the interview panel. He also sat on the final panel for interview.

184. When Lord McGhie was involved in the recruitment exercise it accounted for about a weeks' worth of work for each post. There was no particular pattern as to when members would be recruited. In his last year as President of the LTS, Lord McGhie was involved in three recruitment panels.

185. Lord McGhie was also heavily involved in the revision and drafts of primary legislation. He was not involved in policy decisions, but he was involved in the nuts and bolts of legislation, mainly in relation to procedural matters and how new legislation impacted upon LTS's jurisdiction. This role required a combination of legal understanding and an awareness of the practical issues involved. Lord McGhie was involved in legislation concerning the abolition of the feudal situation. His discussions on this commenced in around 1997, and these concluded, with the abolition of The Feudal Tenure (Scotland) Act 2000.

186. Lord McGhie worked with the Scottish Law Commission and title conditions, which culminated in the Title Conditions (Scotland) Act 2003. On one occasion Lord McGhie appeared before a Parliamentary Committee and the issue was whether a particular jurisdiction in relation to crofting should be dealt with by SLC. Lord McGhie was asked on at least six occasions to prepare papers for civil servants to address Parliament on specific issues, some of which were quite complex.

187. Lord McGhie on average, estimated that he spent 10% of his time sitting in hearings at LTS; 20% preparing for cases, providing advice to the clerk, and commenting on case management of live cases; 50% in making decisions and reasons; and 20% on the additional non-case related activities detailed above.

188. ***In his capacity as Chair of the SLC****,* Lord McGhie heard cases of the type described above under *Scottish Land Court.* The change in the law introduced by the Agricultural Holdings (Scotland) Act 2003 expanded the jurisdiction of the SLC, to include subsidy appeals had the effect of increasing the workload of the SLC dramatically in the mid-2000. And a consequence of this of this Lord McGhie's SLC workload increased and by the time he retired, he spent more time on SLC matters, than LTS matters.

189. In conducted hearings he considered the papers in advance. The cases were based on written pleadings, which could be lengthy and elaborate. The hearings he conducted often took several days to complete. Witnesses gave evidence under oath and were open to cross examination. The hearings concluded with submissions, after which site inspections were nearly always carried out.

190. The hearings took place in a court room. If not sitting in Edinburgh, the SLC used local sheriff courts, but had also sat in local venues, to allow flexibility of hours in terms of hearings.

191. Lord McGhie was closely involved in defended cases throughout the process. He commonly wrote detailed letters to the parties involved with the clerk identifying the challenges they would face, and the points which the court needed to be addressed upon. He had a proactive approach towards these cases

192. In terms of the hearings which Lord McGhie conducted in the SLC, on average it took him two weeks per day to write decisions. This was because 2003 Act required definitive interpretation and guidance for the agricultural profession, and Lord McGhie endeavoured to ensure that what he said and

the decisions which he issued, would fit everything, and not just the case which he was hearing.

193. Lord McGhie found this work demanding, and more complex than he had experienced when sitting as a Judge in the Court of Session.

194. In addition to his duties involving direct casework, Lord McGhie had several other duties. In the context of fixing rents for farms, he addressed the Tenants Farming Forum; wrote papers for them and attended their annual meeting. He met with the Scottish Agricultural Arbiters Association to discuss relevant issues. Lord McGhie had a role in law reform. He was consulted regarding proposed changes to the legislation which involved him, among other things, in writing 49 points review for just one of the Crofters Bills. When conducting this exercise, this was a full-time activity. Approximately six months of work over his tenure, was taken up with this kind of work. Lord McGhie rewrote the rules of the SLC for consideration by the Parliamentary draftsman.

195. A significant amount of the SLC's work concerned appeals against decisions of the Scottish Ministers concerning farming subsidy. These were EU funded subsidies and a strict system of control was required. Lord McGhie worked with civil servants in the drafting of regulations for these appeals. There was a need for a robust process of appeal or review within the relevant government department, before the matter was considered at the SLC, and Lord McGhie was heavily involved in the development of an internal appeal structure. He gave lectures to the officials who heard the appeals, on about how to deal with them, and he also lectured on the needs of the SLC in relation to these internal appeals. He provided written guidance on these matters.

196. Lord McGhie had a role in recruitment which was similar to the recruitment role which he carried out in LTS. The SLC recruitment was in the context of agricultural expert members. He was involved in drafting the specification and advertisement as a member of the panel for interview which panel then made the recommendation to the First Minister for appointment.

197. Lord McGhie carried out annual appraisals for the Principal Clerk of the SLC.

198. Lord McGhie sat in a Judicial Council in his capacity as Chairman of SLC. He was heavily involved in the Judicial Ethics Committee.

199. On average, Lord McGhie spent 10% of his time sitting in hearings, 50% of his time writing decisions and reasons, 10% of his time in administration, and 20% on advising regarding the running of cases/ case management, and 10% on law reform in the broadest sense.

200. Lord McGhie regularly sat on complex and difficult cases both in SLT and SLC.

Pay/Pension Provision

201. The claimant was remunerated on a daily fee paid basis. In terms of the Scotland Act 1998 (Transfer of Function to the Scottish Ministers Etc) Order 1999 (the TOF Order) Article 2, Schedule 1, the functions of determining the pay remuneration to members of PATS, including the claimant, were transferred from HM Treasury to the respondent with effect from 1 July 1999. Accordingly, from 1 July 1999 until January 2013, the claimant was remunerated by the respondent at a rate determined by the respondent. The claimant was not entitled to payment of a pension.

202. When Mr Wright carried out his judicial activities as a full-time member of LTS, between 1 July 1999 and 31 March 2004 the remuneration he was paid as a member of LTS was determined by the Secretary of State with the approval of the Treasury. Such remuneration was charged on the Scottish Consolidated Fund. Determination of his remuneration was a reserved matter in terms of the Scotland Act 1998, section 30 and Schedule 5, section L1. His entitlement to a pension was also a reserved matter in terms of section F3 of that Schedule. Mr Wright's entitlement to a pension emanates from the Judicial Pensions Retirement Act 1993.

203. Between his appointment, both to the positions of Chair of the SLC, and President of the LTS, until his retirement, Lord McGhie's salary was determined by HM Treasury. The salary was charged out of the Scottish Consolidated Fund. Determination of remuneration was a reserved matter in

terms of the Scotland Act 1998, section 30 and Schedule 5, section L1. Lord McGhie's entitlement to a pension was also a reserved matter in terms of section F3 of Schedule 5. His entitlement to a pension emanates from the Judicial Pensions and Retirement Act 1993.

204. The Scottish Ministers had, and from 2016, the Scottish Courts and Tribunals Service has responsibility for the mechanics of arranging payment of salary to members of the judiciary, including legal members and the President of the LTS, and Chair of the SLC.

205. The salary of the position of a legal member of LTS, President of LTS, and Chairman of the SLC is determined by the UK Government. It is a reserved matter under the Scotland Act 1998. The respondents do not have any say in which posts receive a judicial salary under the Judicial Pensions and Retirement Act 1993.

206. Judicial salaries which are reserved to the UK Government, including those of legal members and the President of the LTS and Chairman of the Land Court, are subject to review and assessment by the SSRB.

207. The UK Government responds to the recommendations of the SSRB and makes the final decision regarding salary scales for the judiciary.

208. The post of Chairman of the SLC/President of the LTS has been consistently placed at salary Grade 5 on the Ministry of Justice judicial salary scales.

209. On the judicial salary scales from 1 April 2016, the position of President of First Tier Tribunal (War Pension and Armed Forces Compensation Chamber), which was the English equivalent of the position held by the claimant as President of PATS, was placed at salary scale 6.1. In the same year, the surveyor member of the Lands Tribunal was placed at salary scale 6.2.

210. In 2008 the SSRB report placed the President of the Pension Appeals in on salary group 6.2, which is the same salary group as members of the Land Tribunal.

211. The SSRB report for 2011, placed the President of War Pensions and Armed Forces Compensation Chamber in England, at salary group 6.2, which was the same group as a member of the Lands Tribunal in Scotland.

212. Lord McGhie's post was placed in group 5 in both of these reviews.

213. The SSRB report for 2013 placed the President of the War Pensions and Armed Forces Compensation Chamber in England, in salary group 6.2, and a surveyor member of the Lands Tribunal in salary group 6.2.

214. In respect of the posts within the SSRB remit, the respondents have no say whatsoever in whether the recommendations made by the SSRB are ultimately accepted by the UK Government or not. Once a decision has been made by the UK Government, the respondents are advised by the Ministry of Justice where each of the judicial posts falls in the salary scale for the judiciary, and the respondents are then instructed to pay them a specified salary. The respondents cannot deviate from those decisions and instructions as they are a matter which is reserved to the UK Government.

215. It is a matter for the respondents to determine the remuneration payable to posts created by the Scottish Ministers, and the Scottish Ministers will on occasion ask SSRB to include some devolved judicial posts within its remit.

216. The Scottish Consolidated Fund (SCF) was established by section 64 of the Scotland Act 1998.

217. Payment out of the SCF is controlled by section 65 of the Scotland Act 1998. A sum would be paid out of the SCF for meeting expenses of the Scottish administration, or for meeting expenditure payable out of SCF under any enactment. Section 2(10) of the Lands Tribunal Act 1949 provides that remuneration of LTS shall be charged out of SCF. Paragraph 3(3) of Schedule 1 to the Scottish Land Court Act 1993 provides that the payment of salary to the Chairman of SLC is charged on SCF.

218. The remuneration of Mr Wright and Lord McGhie was therefore paid out of the SCF under an enactment for the purposes of section 65(1)(a) of the Scotland Act 1998.

219. A payment from the SCF for meeting expenses in the Scottish administration where there is no such enactment, is subject to the approval of the Scottish Parliament via the Annual Budget (Scotland) Act as provided for in section 65(1)(c) as read with section 65(2) of the Scotland Act 1998.

220. The claimant's fees are payable from the SCF in terms of section 65(1)(c) of the Scotland Act 1998.

221. The respondents have a Scottish Government Public Sector Pay Policy (PSPP), which deals with various public bodies regarding the staff pay proposals and recovers remuneration of Chief Executive's daily fees paid to public appointments made by the Scottish Ministers. The respondents' Finance Pay Policy Team has developed a Technical Guide which relates to the appointments of Chairs and members of public bodies. The Technical Guide to the Pay Policy for Senior Appointments, sets out what public bodies can and cannot do in terms of daily fees for Chairs and members.

222. There is a presumption that any public body which operates under the auspices of the respondents will be subject to PSPP. The respondents decide whether a particular body falls within or outwith PSPP. Within the Tribunal band the President of a particular tribunal will be within the band under "Chairs". A legal member will be in the specialist skills band only. The introduction of any fees or reviews of daily fees are required to go through the Scottish Government Remuneration Group, which has delegated authority from the Scottish Ministers to approve pay proposals in line with PSPP.

223. PATS sits in the ad hoc list of bodies covered by PSPP, and Scottish Ministers therefore determine the daily fees of members and the President of PATS.

224. Paragraph 6.35 of the Technical Guide deals with pensions and provides; "*Given the relatively short terms of appointment, the limited number of days in which appointees actually serve on bodies and the general non-executive nature of their duties, approval is not usually given to offering pension arrangements to Chairs or members. However, in exceptional circumstances, pension arrangements may be considered but the approval of the Remuneration Group must be obtained before proposals are implemented.*

Any such proposal must be supported by a business case which clearly demonstrates why offering a pension is necessary".

225. The reason why the claimant was not paid a pension was because of his part time status.

Note on Evidence

226. The Tribunal heard oral evidence from the claimant, Ms Caldwell, Mr Inglis and Mr Tainsh. The Tribunal had before it a Joint Minute of Agreement, which provided that the written statements which it had from Lord McGhie, Jeff Williamson, and John Wright QC, were to be taken as substitutes for the oral evidence of those witnesses, albeit that there was no agreement that any part of the evidence of those witnesses should be accepted by the Tribunal as agreed evidence.

227. The Tribunal did not consider there were any significant material conflicts in evidence which it had to resolve. Mr Inglis was challenged in cross examination on some of the opinions which he expressed, for example his opinion that personal injury cases are less cut and dry than the cases which PATS deals with, or his opinion on the standardised nature of PATS. The Tribunal however did not consider that a great deal turned on this. These were simply expressions of opinion, and ultimately there was no material conflict between procedures described by Mr Inglis, the claimant and Miss Caldwell, in terms of the procedure adopted by PATS, and how hearings were conducted, which are relevant for the consideration of this claim.

228. There were similar attacks on Mr Tanish's evidence in cross examination, on the basis of some of the opinions he expressed, however the same consideration applies- these were only expressions of opinion. Mr Tanish's evidence in his capacity as clerk of the LTS, was consistent with the evidence given by Mr Wright and Lord McGhie as to the procedure adopted by LTS, the manner in which cases were heard, the payment of fees, and the extent to which cases were subject to case management, the type of representation and evidence which was considered in cases before LTS.

229. The Tribunal concluded for reasons which are dealt with below, that the claimant on occasion sat on complex and difficult cases. It concluded that Mr Wright and Lord McGhie regularly sat on complex and difficult cases.

230. The Tribunal was satisfied, taking into account the terms of the Technical Guide at 6,35 set out above, that the reason why the claimant was not paid a pension was because he was engaged on a part time basis.

List of Authorities

The Tribunal had before it the following authorities;

1. *EU Council Directive 97/81/EC*
2. *O'Brien v Ministry of Justice (2012)ICR 955*
3. *O'Brien v Ministry of Justice (2013) 499 Supreme Court*
4. *Sita UK Ltd V Hope UK EAT/0787/04*
5. *Mathews v Kent Medway Towns Fire Authority (2006) ICR 365 (Hof L)*
6. *Mathews v Kent and Medway Towns Fire Authority-12 November 2007*
7. *Moultrie v Ministry of Justice (2015) IRLR 364*
8. *Advocate General for Scotland v Barton (2016) 210*
9. *Hudson v University of Oxford (2007) EWCA Civ 336.*

Submissions

231. Both parties helpfully produced written submissions, which they supplemented with oral submissions.

Claimant's Submissions

232. Mr Fairley took the Tribunal to the law, and the issues which the Tribunal had to determine. He referred to the judgment of Lord Hope in ***Matthews v Kent and Medway Towns Fire Authority*** (2006) ICR 365, and in particular, the judgment of Lord Hope, and Baroness Hale. Mr Fairley submitted that in Lord Hope's judgment in particular it was helpful in understanding the task which the Tribunal must undertake in considering the level of qualification, skills and experience exercised by the claimant and his comparator in carrying out their respective roles.

233. Mr Fairley also referred to the case of ***Sita UK Limited v Hope*** UKEAT/0787/04, which is authority for the proposition that where the claimant carries out all the tasks that the comparator undertakes, and also carries out additional duties which the comparator does not, the existence of the additional duties cannot result in a conclusion that the claimant and the comparator are not undertaking the same or broadly similar work, and this arises from the purpose of interpretation which requires to be given to the Directive the purpose being *inter alia* the removal of discrimination.

234. Mr Fairley then analysed the evidence and made submissions as to what he said would amounted to the similarities between the work carried out by the claimant and his comparators. In relation to the complexity of the cases, he submitted that the relevant question was the skills, qualifications and experience used to perform the respective roles. He acknowledged that the decisions of PATS tended to be more concise and shorter than those issued by the LTS but submitted that that was no reflection on the complexity of the issues which arise for determination. The job description for the LTS member identifies a practical experience of compensation in Compulsory Purchase Order Cases or rating as advantages, but not critical and states that sound legal ability and a facility to work with numbers are more important. This was akin to the Lord President having a duty to have regard to the desirability of appointing to PATS 'person with knowledge and experience of matters in relation to disability of persons' (Pension Appeal Tribunals Act 1943).

235. In practice all the individuals appointed tended to come from similarly experienced litigation backgrounds. The Tribunal should take care in making subjective judgments about alleged differences and levels of skill qualifications and experience required to perform their respective roles where the subject matter of their tribunals are inevitably different. In practice, the level of skills, qualification and experience required in the claimant's role and the role of his comparator was the same or very similar. Mr Fairley found support for this evidence not just for the claimant and his comparators, but also of Mr Tanish; he acknowledged that the claimant and the comparators were all very experienced QCs.

236. Mr Fairley made reference to the difficult types of cases which are dealt with by the claimant, which was supported by Ms Caldwell's evidence. Mr Fairley submitted it was by reference to these difficult cases that the Tribunal had to judge qualifications, skills and experience. Even if the claimant in his work dealt with cases which were less complex, the fact was that the claimant had to be able to perform the work required of demanding cases. It was this which the Tribunal should take into account in considering the test of the same or broadly similar work.

237. Mr Fairley also referred to the placement on the judicial pay scale, of the President of PATS from England, following a recommendation of the SSRB. The job he performed was the same as that performed by the claimant; the pension grade was the same as a member of the Lands Tribunal and the Tribunal should attach weight to this. It was submitted that while this was not of itself determinative it tends to indicate that that PWC saw nothing immaterial in 4 of the 5 criteria which they apply to distinguish the complexity of cases or the judicial skills required to determine LTS and PAT cases respectively.

238. Mr Fairley then dealt with the differences in the work performed by the claimant and that of Mr Wright, submitted that there were two main of distinction. PATS dealt with the War Pension Scheme and Armed Forces Compensation Scheme, the LTS with valuations issue, and 'right to buy'. He referred to the differences in procedure and the relative informality of PATS. He and submitted in site inspections could be regarded as being akin to domiciliary visits which PATS carried out appellants.

239. Mr Fairley submitted the important question was whether any of these factors affected the relative levels of contribution to the core activity of the enterprise (per Baroness Hale at paragraph 44). He identified the enterprise in which the claimant was engaged as PATS; Mr Wright in the LTS; and Lord McGhie at the LTS and SLC. Mr Fairley did not accept that any of the factors affected the core contribution which the comparator made to the core work of the enterprise.

240. Mr Fairly submitted that in the work performed by the claimants could be regarded as more difficult, given that they did not have the benefit of written pleadings to focus the issue.

241. Mr Fairley accepted that the comparison with Lord McGhie was potentially a more difficult one for the claimant. However, he submitted that it was still a relevant comparison, and the process of comparison with Lord McGhie was broadly the same as set out above in relation to John Wright. He accepted however that Lord McGhie's role was a joint one covering two specialist Tribunals rather than one, and that he was consistently assessed at a higher level on the judicial salary scale.

242. Mr Fairley then dealt with the justification and he referred to Advocate General's opinion in ***O'Brien*** (2012) ICR 955, page 697, and the ECL in Obrien (2012) ICR page 979. He also referred to the UK Supreme Court in ***O'Brien*** and the joint judgment of Lord Hope and Lady Hale at paragraph 43 to 46.

243. Mr Fairley submitted that there were two aspects the Tribunal had to consider. Firstly, he submitted that it was clear from the respondent's pay policy and Technical Guide that the treatment of the claimant was on the grounds of his part-time status. He submitted there was no evidence of any genuine need, and it was clear that there was no obstacle or practical impediment to the respondent making pension provision for the claimant, and he referred in this connection to the evidence of Mr Owenson, which was to the effect that the respondents made the decision about payment, and he did not recall pension being raised. Mr Fairley submitted that the different treatment of the comparators does not arise for an appropriate and necessary response to a genuine need but from an" arbitrary domestic norm" in terms of the 1993 Act.

The Respondent's Submissions

244. Mr MacNeill also took the Tribunal to the relevant law, and the evidence, which he analysed in some detail. He addressed the Tribunal on the similarities, and the differences in the work which was performed by the

claimant and his comparators, and he also took the Tribunal to the case of ***Matthews***, and the judgments of Lady Hale and Lord Hope.

245. Mr MacNeill referred to Harvey at paragraph 143, which suggested, that the question for the Tribunal as to whether work is the same or broadly similar is a matter of degree, impression and judgment but that that judgment must be carried out within the parameters described by Lady Hale.

246. Mr MacNeill referred the Tribunal to paragraph 18 of ***Matthews***. He submitted that the focus must be on the work actually done, the Tribunal should not fall into the trap which would be the converse of ***Matthews*** and conclude that similar levels of skills and experience (even in different legal disciplines) make it more likely that the work is the same or broadly similar without coming to that conclusion by looking at the work itself.

247. Mr MacNeill also referred to the case of ***Moultrie v Ministry of Justice*** 2015 IRLR 264, paragraph 26 of that judgment, which Mr MacNeill submitted paraphrased what was said by Lady Hale in ***Matthews*** as follows:

> *(1)* "*The fact that the work which the claimants and the comparator do is exactly the same must be of great importance;*
>
> *(2) If a large component is exactly the same the question is whether any differences are of such importance as to prevent the work being regarded as overall, the same or broadly similar;*
>
> *(3) The fact that the work which is the same is also of importance is of great importance to the assessment of whether the claimant and comparators are doing the same or broadly similar work;*
>
> *(4) To that end, particular weight is to be given to the extent to which the work is the same and the importance of that work to the enterprise as a whole."*

248. In ***Moultrie***, the claimant and comparators were sitting in the same tribunals.

249. Mr MacNeill submitted that on a fair assessment, at no point could it be said the work of the claimant and his comparators was exactly the same. None of

the work could be described as identical, and the differences are such that the claimant has not met the test of this part of the Regulations.

250. Mr MacNeill went on make submissions to the effect that Lord McGhie was not a full-time worker. He referred to the manner in which Lord McGhie was appointed, the fact that he had two separate statutory appointments, and the separate nature of the work performed. He accepted however that the unitary nature of payment was an indicator away from his position that Lord McGhie held two different part time posts.

251. Mr McNeil submitted that in the event the claimant succeeded in establishing that his work was the same or broadly similar to his comparators, the respondents could rely on a defence of objective justification.

252. The respondents have responsibility for paying the President of PATS. It is their political decision to decide how much to allocate out of public funds to judicial office holders. They have formulated their own pay policy for doing so.

253. The UK government have responsibility for deciding what the comparators should be paid. Payment of their pension is as a result of a UK statute. It is a pollical decision within their exclusive competence.

254. Mr McNeil referred to the judgement of Lord Hope at paragraph 69 in **O'Brien** in support of his position. He submitted that the difficulty for the claimant is that he seeks to compare himself with individuals outside the system within which he operated. He is making a demand that the respondents make the same allocation of resources as the UK government make for the remuneration of the comparators. For the Tribunal to find in his favour would amount to an assault on the democratic process.

Consideration

Relevant Legislation

255. Regulation 2 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (the Regulations) provides:

(*1) A worker is a full-time worker for the purposes of these Regulations if he is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is identifiable as a full-time worker.*

(2) A worker is a part-time worker for the purposes of these Regulations if he is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is not identifiable as a full-time worker.

……

(*4) A full-time worker is a comparable full-time worker in relation to a part-time worker if, at the time when the treatment that is alleged to be less favourable to the part-time worker takes place—*

(a) both workers are—

(i) employed by the same employer under the same type of contract, and

(ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience.

Regulation 5 provides:

5.*—(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.

(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.

256. It has already been established by the Tribunal that the claimant and his comparators are employed by the same employer under the same type of contract in terms of Regulation 2 (4)(a)(i) of the Regulations.

257. It is accepted by the respondents that they treated the claimant and his comparators differently, in that the claimant was not awarded a pension, and the comparators were.

258. The next issue for the Tribunal, is therefore to consider whether the claimant and his comparators were engaged in work which was the same or broadly similar in terms of Regulation 2 (4)(a)(ii).

Lord McGhie- Relevant Comparator?

259. Before considering this however, there was a preliminary issue in relation to whether Lord McGhie was a relevant comparator, the respondents' position being that Lord McGhie was not a full-time worker in terms of Regulation 2(1).

260. In support of this position Mr MacNeill pointed to the fact that Lord McGhie was the holder of two judicial offices, not one. He referred to the different methods of appointment (appointment to the SLC by Warrant of Appointment, and to the LTS by the Lord President). There was a different statutory basis for appointment. His appointment to the SLC was in terms of the Scottish Land Court Act 1993, and to the LTS, the appointment was under the Lands Tribunal Act 1949.

261. There were different criteria for appointment to the post. The Chairman of the Land Court required to be an advocate, a sheriff principal, or a solicitor with rights of audience in the Court of Session of not less than 10 years standing.

The appointment to the SLC is made on the recommendation of the First Minister after consultation with the Lord President. The person appointed is someone appearing to the Lord President to be suitably qualified by the holding of judicial office or experience as a solicitor or advocate.

262. Mr MacNeill also relied upon the fact as a matter of law, that the two positions are heads of separate judicial bodies with different jurisdictions, and as a matter of practice, they had different staff, and he referred to the evidence in to support this position.

263. Mr McNeil referred to *Harvey* 133.02 and a passage on the definition of full-time and part-time workers. He referred in particular to the case of ***The Advocate General for Scotland v Barton*** (2016) IRLR 210. Mr MacNeill submitted that ***Barton*** had established that the comparator must meet the *statutory* definition of being full-time, and that if a comparator does not meet that test, then they cannot be used, even if as a part-timer they work longer hours than the claimant and receive preferential treatment.

264. Mr MacNeill submitted that the holder of two part-time positions with the same employer who effectively works full-time may, or perhaps always is, within the definition of a part-time worker for the purposes of the Regulations. He referred in this connection to the case of ***Hudson v University of Oxford*** (2007) EWCA Civ 336 and the judgment of of Sir Anthony Clark MR at paragraph 22 as follows:

> "*This is a comparator with an unusual case because Mr Hudson was employed under two part-time contracts. It follows he was a part-time worker within the meaning of regulation 2(2).*"

Taking all these factors into account, Mr MacNeill submitted that Lord McGhie, albeit engaged full-time on two sets of duties, fell within the definition of a part-time worker.

The Tribunal considered the terms of Regulation 2(1), which defines a full-time worker, and Regulation 2(2), which defines a part-time worker, the terms of which is set out above. Both provisions make specific reference to a worker

being full or part-time "*if he is paid wholly or in part by reference to the time he works and having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract…'.*

Relevant factors for the Tribunal to take into account are therefore how the worker is paid in reference to the time worked, and the custom and practice of the employer in relation to workers employed under the same type of contract.

In considering whether Lord McGhie fell within Regulation 2(1) or 2(2), the Tribunal attached weight to the factors identified by Mr MacNeill. It took into account the fact that Lord McGhie held two different statutory appointments, the method of appointment to each post, and the jurisdictions over which he presided were quite separate.

Against that however, it took into account the fact that Lord McGhie was paid a single salary for the work which he did, and it has been the custom and practice since the 1970s, for one individual to hold both the posts which he held. The custom and practice for over the last thirty years was therefore for one individual to hold two posts and to be paid a single salary for the work performed. There was no attempt in terms of how the posts were remunerated or how Lord McGhie was paid to identify elements of payment for work performed under for one contract or the other.

The Tribunal also take into account that although the work that Lord McGhie performed for each body was quite separate, there was no clear division of his time in the performance of the duties which he carried out for one body or the other. It was his unchallenged evidence that the work which he performed for the two bodies varied from time to time and there was rarely a 50/50 split of the work which he did. His evidence was laterally the major part of his work was with the SLC, but and that over his 18-year tenure, his work may well have been averagely split 50/50, however some years did much more for one body than the other, depending on the demand for the work to be done.

The Tribunal considered these were factors which it was entitled to attach significant weight to in applying the relevant statutory test.

265. The Tribunal took into account the factors identified by Mr McNeil, however it was satisfied that the fact that it was the custom and practise for one individual to hold both posts and the unitary nature of remuneration, and the fact that the work which Lord McGhie performed under the contracts was a matter for him, and was demand driven, meant that Lord McGhie fell within the statuary definition of a full-time worker in terms of Regulation 2(1).

266. The Tribunal found support for its conclusion, in the view expressed by Toulson LJ, in the ***Barton*** case, referred to by Mr MacNeill where in paragraph 20 he states;

267. '*I think it is at least arguable that where an employee has two part-time contracts with the same employer, performing contractual duties which are in practice so closely related that it would be difficult to say at any given moment whether he was performing his duties under one or the other contract or both, it is necessary in considering the application of the Regulations to have regard simultaneously to both part-time contracts for the purpose of considering under Regulation 5 whether he had been treated less favourably than a comparable full-time worker carrying out all of his contractual duties'.*

268. The Tribunal clearly recognise that in Lord McGhie's case he was not performing contractual duties which were in practice so closely related that it would be difficult to say at any given moment whether he was performing his duties under one contract or the other, but it was entirely at his discretion how he managed his time between the performance of his duties under one contract or the other, and this, together with the manner in which he was paid and the custom and practice of appointing the same person to both posts and paying one salary for the work performed allowed the Tribunal to reach the conclusion which it did, as to Lord McGhie's position as a full-time worker.

269. The consequence of this conclusion is that the claimant is able to compare himself for the purposes of this claim, with Lord McGhie, from 7 October 1996,

and with John Wright, from 12 January 2005 until the claimant's retirement in January 2013.

Comparison with John Wright

270. The Tribunal began by considering whether the work carried out by John Wright was the same or broadly similar to that performed by the claimant in terms of the Regulations. The Tribunal considered it was appropriate to commence the comparative exercise with Mr Wright as on the basis of the facts found, Lord McGhie carried out work in addition to the work which was carried out by Mr Wright.

271. The Tribunal began this exercise by considering what was said in the leading case of *Matthews v Kent and Medway Towns Fire Authority (2006)* ICR 265. In particular, the Tribunal had regard to the judgments of Lord Hope paragraphs 14 and 15 and 18, and Lady Hale at paras 43 and 44 as follows:

Lord Hope

"*14. The wording of regulation 2(4)(a)(ii) identifies the matters that must be inquired into. One must look at the work that both the full-time worker and the part-time worker are engaged in. One must then ask oneself whether it is the same work or, if not, whether it is broadly similar. To answer these questions, one must look at the whole of the work that these kinds of worker are each engaged in. Nothing that forms part of their work should be left out of account in the assessment. Regard must also be had to the question whether they have a similar level of qualification, skills and experience when judging whether work which at first sight appears to be the same or broadly similar does indeed satisfy this test. But this question must be directed to the whole of the work that the two kinds of worker are actually engaged in, not to some other work for which they may be qualified but does not form part of that work.*

15. It is important to appreciate that it is the work on which the workers are actually engaged at the time that is the subject matter of the comparison. So the question whether they have a similar level of qualification, skills and experience is relevant only in so far as it bears on that exercise. An

examination of these characteristics may help to show that they are each contributing something different to work that appears to be the same or broadly similar, with the result that their situations are not truly comparable. But the fact that they may fit them to do other work that they are not yet engaged in, in the event of promotion for example, would not be relevant."

18 (The tribunal's) reasons show that they failed to appreciate that the question whether the two kinds of worker had a similar level of qualification, skills and experience was relevant only in so far as it bore on the exercise of assessing whether the work that they were actually engaged in was the same or broadly similar. They did not ask themselves whether these characteristics showed that they were each contributing something different to that work. They treated the fact that there were differences in the level of the qualification and skills as an additional factor leading to the conclusion that comparability could not be stablished, without assessing the extent to which those differences affected the work that the two different kinds of worker were actually engaged in…

Lady Hale

"[43] … *The sole question for the tribunal at this stage of the inquiry is whether the work on which the full-time and part-time workers are engaged is "the same or broadly similar". I do not accept the applicants' arguments, put at its highest, that this involves looking at the similarities and ignoring any differences. The work which they do must be looked at as a whole, taking into account both similarities and differences. But the question is not whether it is different but whether it is the same or broadly similar. That question also has to be looked at in the context of Regulations which are inviting a comparison between two types of worker whose work will almost inevitably be different to some extent.*

[44] In making that assessment, the extent to which the work that they do is exactly the same [original emphasis] must be of great importance. If a large component of their work is exactly the same, the question whether any differences are of such importance as to prevent their work being regarded overall as "the same or broadly similar". It is easy to imagine workplaces

where both full- and part-timers do the same work but the full-timers have extra activities with which to fill their time. This should not prevent their work being regarded as the same or broadly similar overall. Also of great importance in this assessment is the importance of the same work which they do to the enterprise as a whole. It is easy to imagine workplaces where the full-timers do the more important work and the part-timers are brought in to do the more peripheral tasks: the fact that they both do some of the same work would not mean that their work was the same or broadly similar. It is equally easy to imagine workplaces where the full-timers and part-timers spend much of their time on the core activity of the enterprise: judging in the courts or complaints-handling in an ombudsman's office spring to mind. The fact that the full-timers do some extra tasks would not prevent their work being the same or broadly similar. In other words, in answering that question particular weight should be put given to the extent to which their work is in fact the same and to the importance of that work to the enterprise as a whole. Otherwise one runs the risk of giving too much weight to differences which are the almost inevitable result of one worker working full-time and another working less than full-time."

272. What the Tribunal takes from this case is that when engaging in the exercise of considering whether the work of a claimant and comparator for the purposes of the Regulations is the same or broadly similar, the work which they carry out as a whole, taking into account both the similarities and the differences must be looked at. The Tribunal is mindful that in the context of the Regulations, that such an exercise will be likely to involve a comparison between two types of worker whose work will almost inevitably be different to some extent.

273. The approach advocated by Mr Fairley was that applying what was said by Lord Hope, the Tribunal has to do is adopt a two-stage process. If the Tribunal is satisfied that the work is the same or broadly similar, (as Mr Fairley submitted it was here), it should then, following what was said by Lord Hope in paragraph 14 of his judgment, have regard to whether the claimant and his

comparator exercised a similar level of qualification, skills and experience in the performance of that work.

274. Mr Fairley made submissions and an extensive list of what he submitted were undisputed similarities between the role of the claimant, and of Mr Wright. These were:-

> "Both were very experienced Q.C.s when appointed (historically, Q.C.s have been appointed to both positions)
>
> - Both were appointed by the Lord President
> - Both exercised a judicial function as a part of a statutory Tribunal which determined civil rights and liabilities
> - Both were members of a specialist Tribunal
> - Both sat in a Tribunal the jurisdiction of which was limited by subject matter rather than by value of claim and exercised no common law powers
> - Both sat with skilled lay members to reach decisions
> - Both exercised case management functions
> - Both heard evidence at oral hearings
> - Both were part of a fact-finding judicial body
> - Both considered skilled evidence and, where necessary, resolved disputes between experts
> - Both applied the law to the evidence to reach a reasoned decision
> - Both issued decisions in writing
> - Both dealt with complex issues of fact and law
> - Both required to exercise judicial fairness and impartiality in the decision-making process

- Both required to have the legal and judicial skills of:
  - sound judgment
  - intellectual and analytical ability
  - ability to marshal facts and competing arguments and reason logically to a balanced conclusion
  - an ability to write well-reasoned decisions
  - good communication skills
  - ability to control meetings and explain complex issues clearly and simply
  - ability to command respect of those appearing before the Tribunal and the public generally
- Both were consulted about on proposed changes to legislation or procedures
- Both dealt with third party inquiries and user groups.

275. The Tribunal had no difficulty in accepting that elements identified by Mr Fairley were common to the work performed by the claimant and Mr Wright. A number of those similarities are common to all judicial appointments, for example the list identified under *legal and judicial skills*.

276. A number of the similarities emanate from the fact that both the claimant and comparator made decisions at first instance e.g. hearing evidence at oral hearings; being part of a fact-finding judicial body; where necessary resolving disputes between experts; applying the law to the evidence to reach a reasoned decision; and dealing with complex issue of fact and law.

277. A similarity emanates from the fact that the claimant and his comparator were both members of a specialised statutorily composed Tribunal in that they both sat with a non-legal member.

278. The Tribunal however was not persuaded that similarities which are common to all judicial officeholders, or all judicial officeholders who make first instance decisions, or who are appointed to a statutorily composed specialist Tribunal, are a sufficient basis upon which to conclude that the claimant and his comparator were engaged in work which was the same or broadly similar.

279. To reach such a conclusion on that basis, it appeared to the Tribunal, was to ignore the guidance provided by Lady Hale in paragraphs 43 and 44 of her judgment, in which she made clear that the work must be looked at as a whole, taking into account both similarities and differences. Significantly, in paragraph 44, Lady Hale states that in making the assessment as to whether work is the same or broadly similar the extent to which the *work that they do is exactly the same must be of great importance.*

280. The Tribunal took into account the similarities between the work of the claimant and Mr Wright. They both sat as Chairmen of specialist statutory tribunals, where they sat with skilled lay members. Both conducted oral hearings, and they heard oral evidence, and they both performed a fact-finding role, which involved them in considering and resolving disputed matters of skilled evidence. They both had to apply the law in order to reach a decision, and they had to produce a written decision. Both had to bring the judicial skills alluded to by Mr Fairley in his submissions, to their performance of their role.

281. There were however, very considerable differences between the actual work performed by the claimant, and Mr Wright.

282. The claimant and Mr Wright sat in the tribunals which presided over entirely different jurisdictions. There is nothing in common between the jurisdictions considered by PATS and LTS. The cases the claimant and Mr Wright dealt with considered entirely different areas of law. The work they performed required them to be skilled in entirely different areas of the law and use their skills in these different areas of the law in order to the determine the cases before them and issue their written decisions. Mr Wright in the performance of his role as a member of LTS did not exercise any skills or experience in

medical negligence or personal injury law, and that in his capacity as President of PATS the claimant did not exercise any skills or experience in conveyancing or contract law which might be associated with claims about variation of title conditions, valuations for commercial rating or compulsory purchase, tenants right to buy or appeals against decisions of the Keeper.

283. The claimant in his role as a legal member of PATS prepared and conducted hearings to determine claims made by a party against the State, a single body, as to an entitlement to pension out of public funds in accordance with a set scheme. Latterly during the currency of his tenure, a tariff scheme was introduced for the assessment of compensation which he had to consider.

284. Although claimants in PATS could be legally represented, there was rarely legal representation, and there were specialist representatives for the claimant and the respondent to the appeal. Evidence was not taken on oath, and although the claimant could be asked questions by the Secretary of State, there was no formal cross examination of witnesses, as there might be in a court, or in LTS. It was only ever the claimant, and on occasion, a friend or relative, who gave evidence at the hearing, which was conducted in a very informal manner. There was no written record kept of the proceedings. Even when evidence given when the hearing has generally lasted less than an hour, and extemporary judgments were then delivered. Judgments, while on occasion dealing with complex issues, were generally fairly short.

285. The claimant in his work as a member of PATS on occasion dealt with difficult and complex points of fact and law, and he required to consider these, and issue written decisions in relation to them. These related to toxic exposure, PTSD, and bullying.

286. The claimant did not have to decide on issues of liability, or quantum, but had to decide upon the application of the relevant scheme, (either the Armed Forces Reserve Forces Compensation Scheme Order 2005, the AFRFCS Order 2011, and the Service Pension Order 2006).

287. The work which Mr Wright carried out as a member of the Lands Tribunal is set out the findings in fact. In contrast to the claimants work this involved him

in considering cases under a considerable number of different jurisdictions; primarily cases involving variation of title and conditions, valuations for commercial rating, valuations for compulsory purchase, tenant's right to buy cases, and appeals against the decisions of the Keeper of the Register of Scotland in relation to registration of title. This was a much wider remit that the claimant dealt with in PATS in a completely different area of the law to PATS.

288. Unlike the claimant ,the cases Mr Wright dealt with were party against party, often involving him in dealing with cases where both parties were represented by junior or senior counsel or solicitors with specialist knowledge.

289. Unlike the claimant ,the cases which Mr Wright sat on involved him in considering were written pleadings, often expert witnesses, taking witness evidence on oath and hearing cross examination and formal submissions, with a written record of the hearing being taken. Unlike the hearing over which the claimant presided which generally lasted about one hour, and hearings which Mr Wright presided over lasted on average two days but could take much longer. He almost always conducted a site visit before issuing a judgment. The Tribunal did not accept Mr Fairly suggestion that a domiciliary visit in PATs was akin to a site visit. Site visits involved inspection of the site and was an integral part of Mr Wrights decision making ; it occurred in almost every case. Domiciliary visits were to accommodate an applicant who was ill, and the claimant very rarely undertook them.

290. Unlike the claimant, Mr Wright dealt with disputed procedural applications and expenses applications and issued written judgments following determination

291. The impression which the Tribunal formed, based on the formality of the procedure in LTS, the types of the cases which were determined by it, the level of representation which these cases attracted, and the amount of money which was at stake in some of the cases, the issues which were at stake, and the length of the judgments issued, was that Mr Wright regularly dealt with cases which raised complex issues of fact and law. This was again different the claimant. There is no doubt that from time to time he dealt with difficult

and complex matters, but the Tribunal did not form the impression that he did so on a regular basis. Over his period of tenure, the claimant gave three examples of difficult types of cases he encountered (toxic exposure, PTDS and bullying), which did not suggest to the Tribunal that he regularly sat on complex cases. The Tribunal is fortified in this conclusion in that the claimant was dealing with one UK wide scheme for the award of pension to military personnel, unlike Mr Wright who was dealing with a significant number of statutory jurisdictions.

292. Mr Wright spent 20% of his time on individual case management. Unlike the claimant, this involved him in giving detailed directions and could involve him in conducting procedural hearings. Unlike the claimant it was common for Mr Wright to engage in case management in order to focus the issues with the parties prior to the hearing taking place.

293. Mr Wright's work on case management was therefore quite different to that performed by the claimant, his capacity as a member or President of PATS. The claimant's involvement in case management, extended to allowing late appeals, or ordering the production of additional medical evidence or granting applications for domiciliary visits. In his capacity as President the claimant performed the additional case management task of managing the case load of the Tribunal, but collectively, the work which he performed in terms of case management was different from the work done by Mr Wright, in engaging with the parties as to the issues which the Lands Tribunal would ultimately have to determine in advance of the hearing taking place and dealing with contested issues.

294. The Tribunal took into account Mr Fairley's submission as to the significance which should be attached to the differences in the work performed. Mr Fairley identified those as differences as the subject area of jurisdiction and relative formality of the procedure in each tribunal, but emphasised the important question was whether or not any of these factors affected the relative levels of contribution to the '*core activity of the enterprise'*, (Lady Hale's speech at paragraph 44). Mr Fairley submitted that none of the differences which existed meant that the contribution which the comparator made to the core

work was materially different to the claimant's contribution (***Matthews*** paragraph 14-Lord Hope).

295. The Tribunal had no difficulty in accepting the contribution which the claimant and Mr Wright made to their respective enterprises was equally valuable to those enterprises. It was however accepted by Mr Fairly that the claimant and his comparator were carrying out work for different enterprises. Mr Fairley submitted that the enterprise the claimant worked for was PATS, and the enterprise which Mr Wright worked for the LTS. This it seemed to the Tribunal, underpinned the differences in the work which the claimant and Mr Wright performed.

296. On Mr Fairley's analysis having stood back and assessed the work which was performed as the same or broadly similar the Tribunal then had to analyse that work with reference to the skills, qualification and experience. None of the differences he submitted reflected the skills qualification and experience necessary to do the job. He relied on paragraph 14 of Lord Hope's judgment in support of this submission. There could not, Mr Fairley submitted be was any material difference in the skills, qualifications and experience of the two individuals, given Mr McEachran's background, experience, and skills which he brought to the work at PATS. Furthermore he submitted, what has to be taken into account is the fact that the claimant and his comparator are both called on to deal with complex cases and both have the ability to do so albeit in different jurisdictions. In making this submission, Mr Fairley placed particular emphasis on paragraph 14 of Lord Hope's judgment, which is set out above.

297. The difficulty with that approach, as the Tribunal saw it, was that it ignored what was said by Lord Hope at paragraph 15, when he emphasised that it was important to appreciate that it is the *work on which the workers are actually engaged* which is the subject matter of the comparison. Lord Hope goes on to state that whether they have similar levels of qualifications, skills and experience is relevant only relevant in so far as it bears on that exercise.

298. The Tribunal had no difficulty concluding that the claimant, and Mr Wright, and Lord McGhie, all had equivalent qualifications. They were experienced QCs and had extensive and impressive experience in their chosen fields. The Tribunal was also satisfied that they exercised judicial skills in the conduct of the work. They were however skilled in completely different areas of the law, and the work they performed required them to use those different skills. Further on the basis of the extensive differences in procedure, the claimant and his comparators sat on different kinds of hearings, issued judgments on entirely different subject matters, and conducted different types of case management

299. The Tribunal also took into account that Lady Hale at paragraph 44 of **Mathews** makes specific reference to judging in the courts as an example of workplaces where full-timers and part-timers could spend much of their time on the core activity of the enterprise. Lady Hale did not elaborate on that statement in the judgment, and the Tribunal was not persuaded that it could be read as a statement to the effect that all first instance judges are to be treated as carrying out work which is the same or broadly similar for the purposes of the Regulations. To treat it as such could potentially lead to the conclusion that a Magistrate sitting on a part-time basis in the District Court, is carrying out work which is the same or broadly similar to that of a judge sitting in the Outer House of Court of Session, and the Tribunal doubted that that was the intention of Lady Hale's statement.

300. Both the claimant and Mr Wright carried out work which was not directly case related, as set out in the findings in fact. Mr Wright had spent 20% of his time conducting these activities, and the claimant 10% of his time. There were some similarities in the additional duties which both performed, to the extent they were both were engaged in dialogues with external agencies and had discussions with the Scottish Tribunal Forum and had an input into procedures. The Tribunal however did not attach significant weight to this, given that only 10% of the claimant's time was taken up with his duties, and 20% of Mr Wright's time. The degree of similarities in the additional duties

over and above direct case work were insufficient to render the work which the claimant and his comparator carried out the same or broadly similar.

301. The Tribunal considered that following the guidance in ***Matthews*** it had look at the work performed by the claimant and comparator as a whole taking into account similarities and differences and that in making its assessment the extent to which the work which they do is exactly the same must be of great importance. That is the exercise which the tribunal has endeavoured to perform.

302. For the reasons given above, the Tribunal was satisfied there was some elements of the claimants and comparators work, in particular features which are common to the exercise of all judicial functions or the function of sitting as a first instance judge in a specialist Tribunal, and some of their work which was not directly case related, which were similar. It concluded however that given the significant difference in the type of cases before PATS and LTS, and the significant differences in procedure adopted by the two bodies and types of hearing conducted by them, that the differences in the work which was performed between the claimant and his comparator were such that it went beyond the inevitable differences referred to by Lady Hale, in paragraph 43 of ***Matthews*** and that the bulk of the work carried out by the claimant and Mr Wright, could not be said to be exactly the same as envisaged by Lady Hale in ***Mathews.***

303. Given the importance which attaches to this element in the exercise which it has to carry out under Regulation 2(4) the Tribunal concluded that the claimant and Mr Wright could not be said to carry out work which was the same or broadly similar.

304. In reaching its conclusion, the Tribunal also took into account Mr Fairley's submission as to the significance of the SSRB rating or the position of the President of PATS in England. It accepted that the President of PATS in England performed the same job, albeit on a full-time basis, as the claimant performed in Scotland. The Tribunal however did not consider that too much weight could be attached to the fact that the President of PATS in England,

and members of the Land Tribunal attracted the same pay grade, following an SSRB recommendation.

305. The Tribunal here is not analysing whether the work performed by the claimant and his comparators is of equal value, where such a factor may be significant, but rather is engaged in an exercise considering if the work is the same or broadly similar as defined by the Regulations. The SSRB rankings was not a factor therefore to which the Tribunal attached significant weight.

306. The Tribunal also took into account Mr Fairley's submission that the work of the SLT may be made easier by the fact that it benefited from formal written pleadings, in comparison to the work of the claimant had to deal with, in that in some cases the bundle of documents which was not presented in an orderly fashion. That is a subjective judgment, but it one the Tribunal did not have to make, as it is not engaged in an exercise of job evaluation.

Lord McGhie

307. The claimant also identified Lord McGhie as a comparator. The conclusions which applied to comparison between the work performed by the claimant and Mr Wright, also applied to the work performed by the claimantand Lord McGhie, to the extent that Lord McGhie sat as a member of LTS.

308. In addition to sitting as a member of the LTS, Lord McGhie held the role as President LTS and Chairman of SLC, and therefore performed work in addition to that carried out by Mr Wright. The activities which Lord McGhie carried out in those capacities are recorded in the findings in fact.

309. The Tribunal was not persuaded that the bulk of the work performed by the claimant and Lord McGhie was exactly the same. The same difference existed between his work sitting on SLT as existed between the work carried out by Mr Wright in that capacity and the claimant.

310. The work which Lord McGhie carried out in the SLC, involved considering disputes between party and party. The types of cases he dealt with were entirely different to those heard by the claimant in PATS and required him to be skilled in a completely different area of the law. His case work involved

the consideration of written pleadings, there was often specialist representation, evidence was taken in a formal manner on oath, there was cross examination of witnesses, and that the judgments produced were lengthy, and often dealt with complex areas of law. He issued lengthy written decisions, in some of which he sought to give guidance on the law. This accounted for 60% of his work across two different jurisdictions. For the reasons outlined above in relation the Mr Wright the case management Lord McGhie conducted was also different to that carried out by the claimant

311. Around 10% of Lord McGhie's of his workload involved him being engaged in a contribution to law making. This did not form part of the claimant's workload.

312. The claimant and Lord McGhie both held judicial office, and both brought to bear on that exercise of that office the judicial skills and abilities required of it. There were also similarities in some of the non-case related work which they both carried out, e.g. involvement in recruitment, appraisal , and dialogue with the Scottish Tribunal Forum. This however did not take up a significant percentage of their time. Those similarities that was not sufficient in the Tribunal's assessment to allow it to conclude that the jobs performed by the claimant and Lord McGhie were the same or broadly similar.

313. The Tribunal therefore was not satisfied that the claimant had identified a relevant comparator for the purposes of Regulations.

314. The effect of this conclusion is that the claim cannot succeed, and it is dismissed.

Objective Justification

315. For the sake of completeness, and in the event that the Tribunal is wrong in its conclusions set out above, it also dealt with the issue of objective justification, which was part of the remit of this hearing.

316. Regulation 5(2) provides the right conferred by paragraph 5(1) applies only if –

(a) the treatment is on the ground that the employee is a part time worker and

(b) *the treatment is not justified on objective grounds*.

317. Mr Fairley and Mr MacNeill both helpfully set out the law as stated in ***O'Brien.***

318. Mr Fairley set out the Advocate General's opinion in ***O'Brien*** (2012) ICR page 955 at page 697 paragraph 61 to 63 as follows;

"*61. Under clause 4.1 of the framework agreement, however… different treatment can be considered compatible with the principle of non-discrimination if it is justified on objective grounds.*

62. The unequal treatment at issue must therefore be justified by the existence of precise, concrete factors, characterising the employment condition concerned in its specific context and on the basis of objective and transparent criteria for examining the question whether that unequal treatment responds to a genuine need and whether it is appropriate and necessary for achieving the objective pursued: see ***Del Cerro Alonso [2008] ICR 145*** *, para 58, and* ***Angé Serrano v European Parliament*** *(Case C-496/08P) [2010] ECR I-1793 , para 44.*

63. The concept of "objective grounds" must be understood as not permitting a difference in treatment between part-time and full-time workers to be justified on the basis that the difference is provided for by a general, abstract norm. Rather, the unequal treatment must respond to a genuine need, be appropriate for achieving the objective pursued and be necessary for that purpose: see ***Del Cerro Alonso****, paras 57–58, and* ***Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol*** *(Case C-486/08) [2010] ECR I-3527 , para 44."*

319. Mr Fairly also referred to the judgment of ECJ in O'Brien page 979, paragraphs 63 to 66;

"63. According to clause 4 of the framework agreement and the principle of non-discrimination, the different treatment of a part-time worker compared

with a comparable permanent worker can only be justified on objective grounds.

64. In those circumstances, the concept "objective grounds" within the meaning of that clause must be understood as not permitting a difference in treatment between part-time workers and full-time workers to be justified on the basis that the difference is provided for by a general, abstract norm. On the contrary, that concept requires the unequal treatment at issue to respond to a genuine need, be appropriate for achieving the objective pursued and be necessary for that purpose: see, by way of analogy with clause 5.1(a) of the Framework Agreement on Fixed-term Work, ***Del Cerro Alonso [2008]*** *ICR 145 , paras 57 and 58…*

…66. It must be recalled that budgetary considerations cannot justify discrimination: see, to that effect, ***Schönheit v Stadt Frankfurt am Main (Joined Cases C-4/02 and C-5/02) [2003] ECR I-12575*** *, para 85, and* ***Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol*** *(Case C-486/08) [2010] ECR I-3527 , para 46."*

320. The Tribunal also had regard to the UK Supreme Court's decision in ***O'Brien***, paragraph 69, referred to by Mr McNeil.

> [*69] Hence the European cases clearly establish that a member state may decide for itself how much it will spend on its benefits system, or presumably upon its justice system, or indeed upon any other area of social policy. But within that system, the choices it makes must be consistent with the principles of equal treatment and non-discrimination. A discriminatory rule or practice can only be justified by reference to a legitimate aim other than the simple saving of cost. No doubt it was because the Court of Justice foresaw that the ministry would seek to rely upon considerations of cost when the case returned to the national courts that is took care to reiterate, at para 66, that "budgetary considerations cannot justify discrimination".*

321. Mr MacNeill submitted that from July 1999 the respondents had been responsible for determining the pay and remuneration of the President of

PATS. Prior to that, the Treasury had that responsibility, but the 1999 Transfer of Functions Order had the effect of transferring responsibility to the respondents. Mr MacNeill submitted that since July therefore, it had been in the power of the respondents to decide how much to allocate out of public funds for the remuneration of judicial officeholders for whom they had responsibility. He submitted this was a political decision which was within the exclusive competence of the respondents to make. The respondents decide how to allocate funds, and they had their own means of doing so. He referred in this connection to the respondents' pay policy for senior appointments.

322. This, Mr McNeil submitted was in contrast to the position for both comparators. HM Treasury and the UK Government have responsibility for determining the remuneration of both comparators and the payment to them of a pension is the result of UK statute. Determination of their pay and pension are reserved matters. The respondents have no rights or obligations in connection with this, albeit they perform the administration associated with paying salary to individuals. It is within the exclusive competence of the UK Government to decide how much to allocate out of public funds to pay judicial office holders, for whom they have responsibility. This a political decision for the UK government to decide and to allocate public funds for the remuneration of judicial officeholder.

323. In this connection Mr MacNeill submitted European cases clearly established that a Member State may decide for itself its benefits system, or presumably upon its criminal justice system or indeed any other area of social policy. The difficulty which Mr MacNeill submitted the claimant had was that he sought to compare himself with individuals who are outside the system within which he operated. This was different to **O'Brien**, where all decisions regarding remuneration rested with the UK Government.

324. Mr MacNeill submitted that the claimant's demand is that the respondent should make the same allocation of resources to him as the UK Government and the Westminster Parliament have made regarding the comparators but for the Tribunal to make such an order would be an assault on the democratic process, the devolution settlement in the 1999 transfer of powers.

325. Mr Fairley on the other hand submitted firstly, that it was clear from the terms of the respondent's pay policy Technical Guide, that non-provision of a pension was directly and solely related to the part-time status of the position which the claimant held.

326. The Tribunal was satisfied that this is correct. Such a conclusion is clearly supported by paragraph 6.35 of the Technical Guide, referred to by Mr Fairley in his submissions, which states that given the relatively short terms of appointment, and the number of days in which appointees actually serve on bodies and the general non-Executive nature of their duties, approval is not usually given to offering pension arrangements to Chairs or members other than in exceptional circumstances. This, it seems to the Tribunal, supports the conclusion that that the reason why the claimant was not paid a pension, was because of the nature of his part-time appointment.

327. The claimant would therefore have overcome the first element of the test in Regulation 5(2).

328. Mr Fairley went on to submit that there is no evidence of any genuine need to which the less favourable treatment was an appropriate and necessary response. He submitted that it was clear from the decision in ***O'Brien***, both the ECJ and the Supreme Court, that there has to be a genuine need, and there was no evidence to support the conclusion that there was a genuine need.

329. The respondent's position as the Tribunal understands it is effectively is that they are entitled to make a political decision about how they pay judges. That is no doubt correct. However, the Tribunal considered that paragraph 69 of Lord Hope's judgment in ***O'Brien***, made clear that the decisions made by the state must be consistent with the principles of equal treatment and non-discrimination.

330. Mr MacNeill placed a good deal of emphasis on the fact that in ***O'Brien*** Lord Hope refers to '*within that system'*, and the fact the relevant political systems were separate and distinct in this case. It appeared to the Tribunal however that that is to read too much into the phrase '*within that system'* in the context

of this case where the claimant and his comparators are found to have the same employer the purposes of Regulation 2(4)(a)(i).

331. Lord Hope makes clear in paragraph 69 that a discriminatory rule or practice can only be justified by reference to a legitimate aim other than that of simply saving cost. The respondents have responsibility and power to make decisions as to how they spend public funds, including remuneration of judicial officeholders. However, the choices which it makes, must be consistent with the principles of equal treatment and non-discrimination. It did not appear to the Tribunal that a decision the effect of which was discriminatory, could be justified on the basis purely that it was a political decision. There was no evidence before the Tribunal to support a conclusion there was a genuine need on the part of the respondents to make that decision.

332. The Employment Tribunal recognises that the claimant and his comparators' remuneration is decided upon by different regimes, but they are employed by the same employer, and for the purposes of Regulation 2(4)(a)(i).

333. Had the claimant succeeded in establishing that his comparators were engaged in work which was the same or broadly similar, then the Tribunal would not have upheld the justification defence advanced by the respondents.

334. For the reasons given above however the claim did not succeed and is dismissed.

Employment Judge: Laura Doherty
Date of Judgment : 27 July 2019
Date sent to parties: 31 July 2019