

IN THE LONDON CENTRAL EMPLOYMENT TRIBUNAL

BETWEEN:

Miller and Others

Claimants

-and-

THE MINISTRY OF JUSTICE

Respondent

WITNESS STATEMENT

I, Annabel Burns, of 102 Petty France, SW1H 9AJ, WILL SAY AS FOLLOWS:

1. I make this statement to update the Tribunal in relation to the Ministry of Justice (“MoJ”)’s intention to defer its proposed amendments (“the amendments”) to the Fee-Paid Judicial Pensions (Fee-Paid Judges) Regulations 2017 (“the regulations”) for a period of 12 months. This means that the coming into force date for the amendments is expected to be 1 April 2023 instead of 1 April 2022.
2. The amendments are required to provide pension benefits for fee-paid judges for eligible service before 7 April 2000.

Background and relevant litigation

3. The Fee-Paid Judicial Pension Scheme (FPJPS) commenced on 1 April 2017 following a decision in February 2013 by the Supreme Court in *O'Brien v Ministry of Justice* [2013] UKSC 6 that fee-paid judges had been treated less favourably than relevant full-time salaried judges because they had not been entitled to a pension (“*O'Brien 1*”).

4. Pension benefits under FPJPS presently only accrue for fee-paid judicial service on or after 7 April 2000, the date by which the United Kingdom was required to transpose the Part-time Work Directive (PTWD) into domestic law.
5. In November 2018, the Court of Justice of the European Union handed down judgment in the case of *O'Brien v Ministry of Justice* (Case C-432/17), concluding that part-time work undertaken before the deadline for transposing the PTWD on 7 April 2000 must be taken into account for the purposes of calculating a retirement pension ("*O'Brien 2*").
6. In December 2019 in the linked case of *Miller and others v Ministry of Justice* [2019] UKSC 60, the Supreme Court held that the three month time limit under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTWR) for claims to be made in relation to *O'Brien 1* and *O'Brien 2* runs from the date of a claimant's retirement from all judicial offices, and not from the end of each fee-paid appointment ("*Miller*").
7. On 24 June 2020 MoJ published a consultation on its proposed amendments to the Fee-Paid Judicial Pension Scheme which ran until 18 September 2020. The proposals received broad support, and the Government Response was published on 10 December 2020¹.

Interim payments arrangements

8. In the period before 1 April 2017 and the commencement of the regulations, MoJ put in place arrangements to process claims from fee-paid judges and to make payments in lieu of pension (PiLs) to retirees and dependants who were in scope of the *O'Brien 1* remedy. These included both lump sums and ongoing periodic payments, together with payment of arrears and compensation of an interest like nature where applicable. The regulations provided for a subsequent reconciliation adjustment when PiLs were replaced by pension payments when the regulations commenced on 1 April 2017.
9. Following the *O'Brien 2* and *Miller* judgments, MoJ put in place further PiLs arrangements for retirees and dependants pending the amendments to the regulations to provide pension benefits for fee-paid judges for eligible service before 7 April 2000.
10. MoJ has provided regular updates to the Tribunal on the progress of interim payments, with the most recent update accompanying this witness statement. The MoJ Judicial Claims Team,

¹ <https://www.gov.uk/government/consultations/fee-paid-judicial-pension-scheme-amendments>.

which alone consist of some 52 full time equivalent staff, expects to have agreed all service records in respect of retirees (and surviving dependants) by mid-2021, and in respect of active service records, by the end of 2021.

Timetable for amendments

11. MoJ previously proposed that the amendments should come into force on 1 April 2022. This would coincide with separate legislative changes in relation to a remedy for the *McCloud* litigation² and the introduction of a reformed judicial pension scheme from 1 April 2022 (subject to the passage of the necessary legislation through Parliament).

12. MoJ now proposes that the amendments to FPJPS should come into force on 1 April 2023. Due to the announced closure of existing judicial pension schemes pursuant to the *McCloud* remedy, the (amended) FPJPS would still be closed to any new accruals from new or existing members, after 31 March 2022, with fee-paid judges becoming eligible for membership of a reformed judicial pension scheme from 1 April 2022. All accruals in FPJPS up to and including 31 March 2022 would be protected, with a reconciliation between interim and formal entitlements applied once the regulations are amended.

Reasons for change to timetable

13. Having considered the responses received to its consultation, and commenced detailed work on the new pension provisions, MoJ is now able to better assess the complexities associated with the detailed design and drafting of the amendments. These include, in particular:
 - The pension entitlements for eligible fee-paid service before 31 March 1995 when relevant salaried judges were entitled to benefits under the Judicial Pensions Act 1981.
 - The interactions between pre-31 March 1995 provisions and those for eligible service on or after that date, including requirements and elections for periods of service to be transferred between those sets of provisions.
 - The handling of retroactive impacts on existing pension benefits when the period of eligible service is extended back in time, for example in relation to the calculation of death benefit lump sums.
 - The options that need to be offered in respect of new FPJPS membership eligibility including those relating to final salary links and the purchase of additional reckonable years.

² December 2018 - the Court of Appeal in *McCloud* [2018] EWCA Civ 2844.

- The reconciliation of contribution payments within an aggregate 20-year cap.
- The requirement to determine whether further offices (including some in Scotland, Wales, and Northern Ireland) should be added to the Schedule to the regulations and, if so, the basis on which entitlements should be obtained (“which pension” offices), particularly those in such offices with service before 31 March 1995 where the remedy is not referable to benefits under the Judicial Pensions Act 1981.
- The possible need to consult further on the issues above.

14. MoJ also needs to ensure that the amendments interact correctly with the roll out of the *McCloud* remedy and the introduction of the reformed pension scheme which are both of great importance to the judiciary and which are aligned to some extent with parallel processes for the wider public service. These will involve changes to primary legislation, as will the introduction of a facility to allow fee-paid judges to sit in retirement.

15. MoJ considers that 12 months is the shortest possible period of deferral necessary to ensure that it can deliver the amendments in a comprehensive and effective way that is robust to the scrutiny associated with the affirmative procedure for statutory instruments. In reaching this view MoJ has taken account of the significant level of government wide calls on the required specialist policy and legal resources which have been aggravated by the impacts of the Covid 19 pandemic.

16. MoJ does not think it would be possible or beneficial to stage the amendments, for example by providing for service back to 31 March 1995 initially.

Implications of deferral and mitigation measures

Delayed eligibility for formal entitlements

17. MoJ is cognisant that some retired judges and dependants of deceased judges have been waiting a long time for the formalisation of pension entitlements relating to eligible service before 7 April 2000, and that some individuals might pass away during the period of deferral. There will also be a number of judges who reach pension age during the deferral period.

18. During the period of deferral MoJ will continue to make PiLs payments to eligible judges, including those reaching retirement age, and dependants. Where possible MoJ will refine the calculation of PiLs payments to minimise the reconciliation adjustments required when the

amendments are made. MoJ will continue to provide regular updates to the Tribunal on the processing of PiLs claims and payments.

19. MoJ will liaise with the devolved governments with respect to PiLs payments for eligible office holders in Scotland, Wales, and Northern Ireland.

20. MoJ will continue to work with XPS, the FPJPS scheme administrator, on PiLs development and to improve response times in relation to member queries.

Delayed updates to FPJPS Schedule

21. On 1 April 2021 a number of fee-paid judicial offices, already known to be missing from the Schedule to the regulations, were added by the Judicial Pensions (Fee-Paid Judges) (Amendment) Regulations 2021³.

22. However, the deferral will mean that some further fee-paid offices, identified as being potentially eligible for a judicial pension for historic and/or ongoing eligible service, will not be added to the FPJPS Schedule until April 2023 where that proves necessary. MoJ intends to include these offices in the PiLs arrangements where appropriate.

Delayed opportunity to purchase additional years in FPJPS

23. The deferral will mean that MoJ will not be able to offer eligible *O'Brien 2* claimants opportunities to purchase additional reckonable years by joining the Fee Paid Judicial Added Years Scheme (FPJAYS) until after the amendments have been made in April 2023. This includes *Miller* claimants who only have eligible service before 7 April 2000. MoJ will consider providing an interim FPJAYS purchase opportunity to *Miller* claimants with eligible service between 7 April 2000 and 5 April 2006.

24. Claimants with eligible service whose offices were added to FPJPS by The Judicial Pensions (Fee-Paid Judges) (Amendment) Regulations 2021 will be provided with an opportunity to purchase additional reckonable years in FPJAYS in accordance with Regulation 5 of those regulations.

³ <https://www.legislation.gov.uk/ukdsi/2021/9780348219197/contents>

25. There will also be a deferral of the opportunity for existing FPJAYS members to review their previous purchases. However, MoJ will ensure that the opportunities set out in our consultation proposals are made available in due course to all those who would have been eligible. MoJ will also continue to compensate judges for reasonable tax costs consistent with previous relevant judgments in this litigation incurred because of delayed purchase opportunities⁴.

Updating judges on the position

26. MoJ will inform the judiciary of the deferral by providing information to Judicial Office, relevant judicial associations, and other representatives. MoJ will do this through both written communications and by offering to make presentations at meetings and events.

The facts contained in this statement are, to the best of my knowledge and belief, true.

Signed: 

Dated: 4th May 2021

⁴ Annex C in the FPJPS Scheme Guide refers:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643917/fpjps-scheme-booklet.pdf