Case Numbers: 2204470/2021, 2204471/2021, 2204472/2021, 2204473/2021, 2204474/2021

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EMPLOYMENT TRIBUNALS

Claimants		***Respondents***
Mrs Katherine Southby Mrs C Hirschhorn Mrs K Armstrong Ms A Evans Ms A Bowen	**AND**	Ministry of Justice

Heard at: London Central **On**: 3, 4, 5, 6 & 7 October 2022

Before: Employment Judge S J Williams (Sitting alone)

Representation
For the Claimants: Mr Sugarman, of Counsel
For the Respondent: Mr Line, of Counsel

RESERVED JUDGMENT

The judgment of the tribunal is that:

1 the respondents have treated and continue to treat the claimants less favourably than comparable full-time workers on the ground that the claimants are part-time workers;

2 the question of remedy is adjourned to a date to be fixed.

REASONS

The Claim

1. This is a claim by part-time workers who allege that by comparison with comparable full-time workers they have been subjected by the respondent, which for these purposes is regarded as their employer, to unlawful discrimination, contrary to the Part-time Workers (Prevention of Less Favourable Treatment)

Regulations 2000. The claimant fee-paid judges allege that the respondent treats them less favourably than full-time judges because it does not pay them for pre-reading case papers or for writing up decisions after the hearing, tasks for which there is no time, or insufficient time, on the day of hearing.

2. The hearing of this matter on the above dates was concerned with the question of liability only. Judgment was reserved.

3. The parties have consented to this matter being heard and determined by an employment judge sitting alone.

4. All witnesses produced witness statements containing their evidence in chief. Mr Sugarman adduced the oral evidence of the five claimants as well as that of Judge Lloyd-Lawrie. Mr Line adduced the oral evidence of Judge Meleri Tudur and Jane Sigley. All those witnesses were cross examined. Additionally, written statements of evidence were admitted from Jason Greenwood and Judge Jane McConnell. The tribunal was provided with a bundle containing pages 1-8821, of which pages 580-7605 comprised diary entries, and a further supplementary bundle containing pages 1-963. A small number of additional documents was submitted during the hearing. The tribunal was provided with a bundle of authorities.

5. Both counsel presented their closing submissions in writing, in the course of which they referred to further authorities.

The Facts

6. The Special Educational Needs and Disability Tribunal ('SEND'), in its current form, was created by the Tribunals, Courts and Enforcement Act 2007 and forms part of the Health, Education and Social Care Chamber ('HESC') of the First-tier Tribunal ('F-tT'). Judge Tudur is a Deputy Chamber President of HESC with responsibility for three jurisdictions: SEND, Care Standards and Primary Health Lists. A second deputy chamber president has responsibility for the HESC's mental health jurisdiction. Judge McConnell is a salaried judge in HESC and has specific leadership responsibility for fee-paid judicial office-holders in SEND. She is the only one of the claimants' comparators from whom I had direct evidence.

7. Unlike some other tribunals the jurisdiction of SEND is described as 'national', that is to say that it is not divided into regions; rather, SEND judges may be assigned to deal with cases arising anywhere in England and Wales. Historically, therefore, SEND judges were required to travel extensively to hearing locations. Prior to 2008 the judiciary of SEND consisted entirely of fee-paid part-time judges. From 2008 salaried judges began to be appointed to SEND, and there are currently 12.7 full-time equivalent salaried judges and 113 fee-paid judges in the jurisdiction.

8. The claimants are fee-paid tribunal judges, assigned for some, or all, of their judicial time to SEND. Some of the claimants sit also in other jurisdictions.

(i) Katherine Southby was appointed as a chair of the Rent Assessment Panel on 30th June 2011. On 30th June 2013 she became a fee-paid F-tT judge assigned to the Property Chamber as a result of jurisdictional re-organisation. She was assigned to the Agricultural Land and Drainage Tribunal in 2014 (which is also part of the Property Chamber). On 3rd November 2017 she was assigned to the SEND jurisdiction of HESC.

(ii) Claire Hirschhorn was appointed as a fee-paid judge of the F-tT on 30th June 2011, assigned to the Social Entitlement Chamber. On 3rd November 2017 she was assigned to the SEND jurisdiction of HESC.

(iii) Katherine Armstrong was appointed as a fee-paid judge of the F-tT on 4th May 2020, assigned to the SEND jurisdiction of the HESC. On that date, she was also appointed as fee-paid judge of the Employment Tribunal. On 27th April 2020, she was appointed as a deputy district judge (North Eastern Circuit).

(iv) Ann Evans was appointed as a fee-paid judge of the F-tT in September 2002, assigned to the Mental Health jurisdiction of HESC. In May 2018 she was assigned to the Social Entitlement Chamber. In September 2019 she was assigned to the SEND jurisdiction of HESC.

(v) Angela Bowen was appointed as a fee-paid judge of the predecessor of the SEND jurisdiction of HESC on 31st August 1999. Between 11th March 2010 and 1st September 2019 she was assigned to the Social Entitlement Chamber. On 28th April 2014 she was assigned to the Mental Health jurisdiction of HESC. She also became a recorder in October 2020 and a circuit judge in July 2022.

9 Schemes for the payment of fees to fee-paid tribunal judges across the various chambers of the First-tier Tribunal are not uniform. A daily sitting fee is calculated by dividing the salary of a full-time salaried judge by 220, being the sittings expected of a full-time judge each year. In SEND fee-paid judges are paid according to the following structure:

(a) a half day sitting fee where a judge spends less than 6 hours travelling from home to a hearing venue, undertaking the hearing, then travelling home;

(b) a full day sitting fee where a judge spends more than 6, but less than 12, hours travelling from home to a hearing venue, undertaking the hearing, then travelling home;

(c) one and a quarter day’s sitting fee where a judge spends more than 12, but less than 15, hours travelling from home to a hearing venue, undertaking the hearing, then travelling home;

(d) one and a half day's sitting fee where a judge spends more than 15 hours travelling from home to a hearing venue, undertaking the hearing, then travelling home.

Where a daily sitting fee is uplifted to reflect time spent travelling, the element of the fee attributable to travelling is not pensionable. The respondent is currently conducting a review into the pay structure for fee-paid tribunal judges.

10 From about March 2020, consequent upon the restrictions imposed on the courts and tribunals by the covid-19 pandemic, SEND ceased in practically all cases to hold face-to-face hearings. Instead, hearings were held remotely using the tribunals' Cloud Video Platform. Notwithstanding the end of the pandemic, that remains the overwhelmingly dominant practice to this day. Face-to-face hearings continue to be extreme rarities. Moreover, there is currently no plan in SEND to revert to the former practice. Thus, whereas, historically, SEND judges, both salaried and fee-paid, travelled widely to conduct cases at hearing locations around the country, that method of working has been replaced in almost all cases by hearings conducted remotely. Consequently, since March 2020 it has been only on extremely rare occasions that SEND judges have been required to travel to conduct hearings.

11 SEND judges are required to prepare for the hearing of a case by pre-reading the bundle of documents. In their training, Judge McConnell writes, SEND judges are counselled to read the bundle three times: firstly a skim-read, secondly an in-depth reading taking notes, and thirdly a further read though of specific evidence or reports on outstanding matters with cross referencing. The size of the hearing bundle of course varies considerably. Typically, however, a bundle will be of the order of 300-400 pages. The time taken to read bundles naturally also varies, dependent on obvious factors such as length of bundle and reading speed. However, the claimants did not seriously disagree with the assessment of Judge McConnell that pre-reading the hearing bundle required 1-6 hours, with about 3 hours being the average. If a hearing bundle exceeds 500 pages, Judge Tudur has discretion to allow an additional fee, though it appeared that this discretion was not widely understood by the claimants.

12 In the SEND jurisdiction there is no provision for oral decisions. All decisions in contested cases must be written and are expected to be issued within ten working days of the hearing. This applies equally to salaried and fee-paid judges. Depending on the type of decision and the number of issues in play, as well as factors peculiar to the individual judge, Judge McConnell estimates that an experienced judge would need between at least three and at least six hours to write up a decision and to edit the working document.

13 Unsurprisingly, the evidence of the claimants – some more and some less experienced – and that of Judge Tudur, a very experienced judge, varied on the length of time needed for reading and writing-up. Judge McConnell is an experienced salaried judge who, through her leadership role, is closely acquainted with the work of fee-paid judges in SEND, and whose evidence, moreover, is presented by the respondent and not challenged by the claimants. I

am satisfied that Judge McConnell's evidence on reading and writing-up times presents a fair and balanced picture which, I am confident, is reliable.

14 From those typical reading times and the requirement to read the bundle more than once, it follows necessarily that the pre-reading must be done before the day of the hearing. Judge McConnell states it is her practice to 'read the bundle in depth over the two or three days before the hearing.' I have no doubt that that is what she would advise fee-paid judges to do also. When SEND judges were travelling to hearings, the third read might possibly be done on a longer train journey if circumstances permitted, but that would be impossible if the judge were driving or travelling on a commuter train. Salaried judges were issued with screen protectors to ensure privacy when reading on public transport, but these were not available to fee-paid judges. But in any event, as has been noted above, SEND judges now almost never travel to hearings.

15 Similarly, it is inevitable that following a contested hearing there will be insufficient time to write up a decision on the same day. Any exceptions to that proposition would be extremely rare. Writing-up must therefore necessarily be done on a day or days following the hearing.

16 As in most jurisdictions, hearings in SEND cases sometimes go short. They may be completed earlier than expected, compromised, adjourned part-heard or adjourned for other reasons, thus leaving time available on the hearing day which the judge may use for other purposes. If it is difficult to measure accurately the amount of time required by a judge for reading and writing up, leading to reliance on the construction of necessarily somewhat impressionistic averages based on experience, such as Judge McConnell and the claimants have produced, then it is even more difficult to arrive at solid figures for the amount of time gained when hearings go short. That is no reflection on the evidence of witnesses in this case who, it is not in dispute, have done their honest best to assist the tribunal. The amount of time not taken up directly by the hearing at hand, and how that time can be used, depends not only on the judge but on a multitude of factors not solely in the judge's direct control. During short periods of adjournment, the tribunal members, the parties and their representatives may all place perfectly proper demands on the judge's time, and this may often mean that a judge does not have extended periods of time to devote to work on other cases. Even consent orders require judicial scrutiny. The position may be different if a hearing goes short because of a compromise relatively early in the day; in those circumstances a useful period of time may become available. Furthermore, for obvious reasons of efficiency judges are encouraged not to adjourn where it is avoidable, and the rate at which they do so will vary from judge to judge. For all of these reasons my assessment of the amount of time gained by the claimants as a result of short hearings cannot be based on very solid foundations, but is the best I have been able to do on the evidence I have heard.

17 Judge Southby undertook an analysis limited to her own cases in 2022 to which certain assumptions, intended to be favourable to the respondent, were applied by Mr Sugarman in his closing submissions. That analysis suggests the overall time gained by cases going short is of the order of 1.4 hours per hearing

day. The result of similar analyses by the other claimants over different periods of time would obviously have yielded different results. I therefore regard Judge Southby's and Mr Sugarman's figures as an indicative guide, rather than as the basis for a firm finding applicable to all claimants throughout the periods for which they claim. That said, there is no evidence before me which causes me to think that the analysis done does not provide a fair picture of Judge Southby's cases over the period in question.

18 In addition to the statistical evidence referred to above, on which I hesitate for the reasons I have given to place overly heavy reliance, I have the evidence of the claimants, which Judge Tudur does not suggest is other than fairly and honestly given. Judge Bowen, who has long experience, both as a fee-paid judge in SEND and its predecessor, and in other jurisdictions including the Mental Health Tribunal ('MHT') and the County Court, said that SEND was much harder than every other jurisdiction with which she was familiar. In the MHT, even if two cases were listed, the hearings and writing up of the decisions would be completed within the day. In SEND, she said, 'the time gained simply does not compensate for writing-up time.' So far as short adjournments during a day are concerned, she said that if parties were in discussion, she never prepared another case. There was even a risk, she thought, of getting the different children mixed up. Unless she had 'a huge amount of time,' she would not embark on preparing another case. I consider the same would hold true of writing up decisions.

19 Common to the evidence of the claimants was the proposition, which I accept, that email communication between judges and the administration in SEND was a significant burden; far more so, according to Judge Bowen, than in MHT. Responding to emails is the kind of work which is far more easily compressed into short periods of time, of maybe ten or fifteen minutes, than preparing a case or writing up a decision, and I accept that judges were able to do some of that work during intervals in a hearing day. I do not doubt that Judge Tudur is right to say that SEND judges were not strictly obliged to attend to interlocutory work which arose in cases in which they were part heard, or to which they had been assigned. But I accept also the claimants' evidence that they regarded it as good judicial practice for them to do so, and thought of it as part of their job. That also was work which might sometimes be attended to during periods of time gained during a hearing day.

20 Based on the evidence I heard, and taking into account the statistical analysis to which I have referred above, I have no doubt that the time gained during sitting days by hearings going short for a variety of reasons is not nearly sufficient to enable judges to attend to the preparatory reading of future cases or the writing up of decisions in either past cases or the instant case. Judge Tudur confirmed that 'reading and writing up is challenging and time-consuming.'

21 As I have noted above, until about March 2020 SEND judges were required to travel to hearing locations and, depending on the overall length of their day, were entitled to an enhancement of their fee to reflect time spent travelling. As also noted above, it might before March 2020 have been possible, though on relatively rare occasions, for a judge to use some time whilst travelling

to carry out a third, or final read through of the bundle for that day's hearing. That would depend very much on the mode of transport, how busy a train was, the length of the journey, the need not to be overlooked, etc.

22 The predecessor to SEND came under the purview of the Department for Education which, it is assumed, designed the fee structure of its judges. The respondent's position, through the evidence of Jane Sigley, is that it does not know how or why the structure was designed as it is, but in 2007 when SEND became its responsibility, it decided to keep the existing structure in place. The respondent is currently conducting a review of tribunal fee structures including fees for travel in SEND and for preparation and writing up in other tribunals. The fee structures of tribunals were, according to Ms Sigley, not as cohesive as they ought to be, and there were unintended consequences of 'inheriting' tribunals from other government departments and retaining those inherited fee regimes. Ms Sigley said that the respondent's aim was that fee-paid judges should be remunerated in the same way as salaried judges.

23 Ms Sigley made perfectly clear that the element of a judge's fee which reflects travel time, where that is claimable, is paid separately from the element which reflects time spent sitting. This, she said, is because 'travel time is not pensionable. We understand that it was set up in this way as it is not a fee for work actually undertaken, but rather for time spent travelling.' This is a matter which the respondent's review will look at. Ms Sigley was unaware of any analysis by the respondent of how often travel time was payable.

24 For a variety of reasons referred to above, it is quite clear that paid travelling time cannot be regarded as compensation for time spent reading bundles or writing up decisions. Firstly, it is rarely possible to do such work when travelling; secondly, it is a fee for time spent travelling, not for working; thirdly, the non-pensionable status of the fee reinforces the second point; and fourthly, since March 2020 SEND judges have done practically no travelling at all and have received no payment in substitution for the travel time fee they formerly received.

The Comparators

25 The full-time comparators relied on by the claimants are named in their further and better particulars. They are Judges Jane McConnell, Jane Lom, Gareth Brandon, Sean Bradley, Scott Trueman. Safia Imam and Simge Ozen. It is now agreed that Judge Sean Bradley should be removed from that list.

26 Concerning the duties performed by, and the working pattern of those full-time judges, I have direct evidence only from Judge McConnell, supplemented by indirect evidence from Judge Tudur and, even more indirectly, from Jane Sigley. Judge Tudur had not investigated how the full-time judges in her jurisdiction actually spent their time, but was able to give general evidence that, as from 2015, when the duty judge day was introduced for salaried judges in SEND, the desired weekly working pattern for the salaried judges was: one duty judge day; two hearing days; one day devoted to leadership work; one day for completing personal administration and box work. I accept that there are duties which the full-time salaried judges perform which fee-paid judges do not routinely do.

These are such things as costs applications, applications to appeal, attending user groups and helping with judicial training. Fee-paid judges rarely consider costs applications because there is no fee for so doing.

27 It was clear from the evidence of both Judges McConnell and Tudur that the expectation, if not the invariable practice, is that salaried judges in SEND will do their preparatory reading of hearing bundles and their decision writing during the working day. Judge McConnell said so in terms. Judge Tudur said, 'it is expected that salaried judges should be able to write their decisions within the working week', before adding, in seeming contradiction, 'however due to pressure of workload ... writing decisions often happens at weekends or in the evening.' Her clear view is that 'preparation and writing up is a sitting day.' She acknowledged that, because hearings can go short or settle, the hope is that salaried time will arise in which such work can be done. There is no ring-fenced time for these activities and judges are expected to use their time flexibly.

28 I accept that on occasions salaried judges do some work outside normal hours, in the evenings or at weekends. Judge McConnell related the need to do so to her leadership responsibilities, which Judge Tudur said generated a lot of work for her. To that extent I do not think that Judge McConnell is typical of the salaried judges in SEND. Furthermore, the practice in SEND is not to list hearings during the school holidays, save for some case dealt with on paper. Judge Tudur accepted that that generated extra time for salaried judges. Furthermore, a statistical analysis of the respondent's data by Judge Southby suggests that the comparator judges sit rather less than the two days per week expected by Judge Tudur, perhaps around 50 rather than 88 days. As elsewhere, I treat these data with caution, but they support rather than contradict the view I form from the evidence I heard.

29 I am satisfied that, with occasional exceptions, the weekly working pattern set out by Judge Tudur routinely affords salaried judges sufficient time to do the preparatory reading and writing up of their cases together with their other ancillary duties in their ordinary salaried working hours and, further, that when that is not so, for example when they need to attend training sessions, they can be relieved from their normal sitting obligations.

30 One category of cases, known as National Trial cases, is routinely listed for a two-day hearing, although the evidence is that the hearings are often completed within the first day, and sometimes also the writing up of the decision. Whilst the preparatory reading still needs to be done in advance, the second day may often result in some paid time being gained by the judge.

Settlement with Judge Lloyd-Lawrie

31 Angharad Lloyd-Lawrie is, along with other tribunal appointments, a fee-paid judge in SEND who brought a claim against the respondent based on allegations of part-time worker discrimination identical to those raised by the claimants in this case. There was no suggestion before me that Judge Lloyd-Lawrie's work in SEND, or any other feature of her case, differed in any material respect from the claimants'. The respondent settled Judge Lloyd-Lawrie's claim,

the terms of settlement being in line with her claim and set out in a COT 3 agreement dated 23 December 2021. The result of that settlement is that for each type case she sits on in SEND Judge Lloyd-Lawrie is now paid for the time taken to do the preparatory reading and the writing up of the decision. The time taken for each task in the various categories of case has been agreed by the respondent at a fixed number of hours scheduled in the COT 3; the agreed figures for preparation time vary between 1.5 and 5 hours, and for writing-up between 3 and 7 hours. This is precisely what the present claimants claim. The arrangements made between the respondent and Judge Lloyd-Lawrie are expressed to continue until the respondent completes its review of pay structures.

32 Jane Sigley believes that the settlement required ministerial approval by the Lord Chancellor but said that she was not personally involved in the matter. Judge Tudur said that she had no input into the agreement and was unaware of it until after it had happened. Jane Sigley understands from her colleagues that the settlement is seen as unfair by salaried judges in SEND, but she doubted whether the rationale for it had been explained to them. I was given no explanation for the respondent's decision to settle Judge Lloyd-Lawrie's claim in the terms described whilst maintaining its resistance to the present claimants' claims.

33 Jane Sigley attempted to analyse the implications of the settlement with Judge Lloyd-Lawrie. She looked at an example of earnings over a nine-month period and said that the result would be that for completing 37.5 sittings a salaried judge would earn his or her salary for 37.5 days (£19,566.99) whereas the fee-paid judge would earn his or her fee for the 37.5 days plus the equivalent of a further 20.25 days (£35,264.89). I cannot accept that this analysis properly states the effect of either the Lloyd-Lawrie settlement or the claimants' claim. In the large majority of cases, as I have found, salaried judges do their preparatory reading and their writing-up in salaried time on days of their choosing other than the hearing day. Ms Sigley's analysis leaves that element, and its salary cost, entirely out of account. Given that the respondent has agreed the figures scheduled in the COT 3 agreement, I see no reason to suppose that they are not a proper, though necessarily generalised, estimate of the time taken for those various tasks, whether performed by a fee-paid or by a salaried judge.

The Issues

34 The respondent concedes some elements of the claimants' claim. Firstly, that the claimants, in their capacity as fee-paid judicial office holders of the F-tT, are and were at all material times part-time workers within the meaning of regulation 2(2) of the Regulations of 2000. Secondly, that, for the purposes of regulations 2(4) and 5(1) of the Regulations the claimants can compare themselves to the comparators named in their Further and Better Particulars, each of whom is a salaried F-tT judge whose primary appointment is to the SEND jurisdiction of HESC, with the exception of Judge Bradley who is a part-time salaried judge (90% FTE). Thirdly, that the claimants and their comparators are 'employed' under the same type of 'contract' and engaged in broadly similar work for the purposes of regulation 2(4).

35 The issues this tribunal has to decide are:

(a) whether the claimants have been treated less favourably than their comparators contrary to regulation 5(1) of the Regulations, in relation to:

i. payment (and resulting pension accrual) for reading and preparation work undertaken prior to hearings;

ii. payment (and resulting pension accrual) for writing up of judgments undertaken after hearings;

iii. receiving pensionable pay in respect of hearing but not travel time?

(b) in relation to any less favourable treatment that may be found to have occurred, whether it is on the ground that the claimants are part-time workers, contrary to regulations 5(1) and (2)(a) of the Regulations;

(c) in relation to any less favourable treatment that may be found to have occurred, whether that treatment is justified on objective grounds in accordance with regulation 5(2)(b) of the Regulations.

The Law

36 The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ("the Regulations") provide:

5. Less favourable treatment of part-time workers

(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.

8 Complaints to employment tribunals etc

(6) Where a worker presents a complaint under this regulation it is for the employer to identify the ground for the less favourable treatment or detriment.

37 The tribunal was provided with the following authorities:

Mathews and Ors v Kent and Medway Towns Fire Authority [2006] ICR 365, HL
Carl v University of Sheffield [2009] IRLR 616, EAT
O'Brien v Ministry of Justice C-393/10 [2012] ICR 955 CJEU
Gribble v Ministry of Justice, Case No 2200847/12, ET
Ministry of Justice v O'Brien [2013] ICR 499, SC
O'Brien v Ministry of Justice, Case No 4102933, ET
Hawkesworth and Ano v Ministry of Justice 200333/14. ET
Attorney General for Scotland v Barton [2016] LRLR 2010, CSIH
Engel v Ministry of Justice [2017] ICR 277, EAT
British Airways v Pinaud [2019] ICR 487, CA
Heskett v Secretary of State for Justice [2021] ICR 110, CA

Further authorities were referred to by counsel in their written arguments.

Discussion and Conclusions

Less Favourable Treatment

38 In Gribble v Ministry of Justice, a first instance decision of 2015, Employment Judge Macmillan summarised the question for the tribunal thus:

> *'My task therefore is to establish as best I can on the evidence and bearing in mind where the burden of proof lies, how many hours the typical DTJ [district tribunal judge] does to earn a day's salary and how many hours a typical fee-paid judge does to earn a day's fee. If having made that comparison it emerges that the fee-paid judges habitually do more hours, then less favourable treatment on the prohibited ground is established.'*

39 In British Airways plc v Pinaud [2019] ICR 487 (2018) the claimant was required to be available for work 130 days per year whereas her comparator was required to be available 243 days. The claimant was paid 50% of the comparator's salary. Half of 243 is 121.5. On the question whether the terms of the claimant's contract were prima facie less favourable that those of her full-time comparator, which was the only question before the Court of Appeal, Bean LJ, giving the unanimous decision of the court, said, *'In my view the employment tribunal were right to hold that they were.'* It appears to me that the Court of Appeal's decision in Pinaud supports the position taken by EJ Macmillan. The question involves a comparison: how many hours do the claimants and their comparators respectively have to work in order to earn their day's pay? The claimant in Pinaud had to work 53.5% of the full-time hours in order to earn 50% of the salary. That was less favourable treatment than her full-time comparator.

40 I have noted above, and it is in the nature of cases such as the present one, that it is impossible to arrive at precise measurements of hours of work of the kind found in Pinaud. The claimants' full-time comparators, being salaried, do not have fixed hours of work; they manage their own time; Judge Tudur does not

monitor them closely; they are not required to record the time they spend on individual tasks. The claimants claim fees based partly on the length of the working day, but beyond that they are not required to account for how they spend the time during the day; they do not record the length of short adjournments; they do not record what time, if any, they spend during a hearing day working on other matters such as preparatory reading, writing up decisions or email correspondence; nor, obviously, do they record the amount of their own time they spend on other days on preparatory reading or writing-up, because it attracts no fee. I have therefore to fall back on evidence which, though its honesty is not challenged, is necessarily somewhat impressionistic. I have estimates of times likely to be spent on relevant activities from the claimants, from Judge McConnell and from Judge Tudur. The first two of those are not greatly out of line, whereas Judge Tudur seems to have been a particularly fast worker, perhaps because of her greater experience.

41 Judge Lloyd-Lawrie is not a comparator in this case, and cannot be because she is not a full-time worker. The claimants cannot complain of less favourable treatment by comparison with her. However, on the question of how long a judge is likely to spend on preparatory reading and on writing up a decision in various categories of case, I think it is reasonable to look at Judge Lloyd-Lawrie's evidence as a further informed source of assistance in what is an imprecise exercise. I bear in mind also that Judge Lloyd-Lawrie's figures were agreed by the respondent, presumably on the basis that they were not far away from the respondent's own expectations. As it happens, they are not far either from Judge McConnell's estimates. Judge McConnell's estimates for preparatory reading, based on bundle size, range from 1 to 6 hours at least, whereas the figures agreed with Judge Lloyd-Lawrie, based on the category of case, range from 1.5 to 5 hours (with 1 hour for refreshing on a part-heard hearing). Judge McConnell's estimates for writing-up range from 3 to 6 hours at least, whereas the figures agreed with Judge Lloyd-Lawrie range from 3 to 7 hours, both based on the category of case. The figure of 7 hours relates to National Trial cases for which, because they are listed for 2 days, the claimants do not claim.

42 In order to attempt to answer the question how many hours the claimants have to work to earn their day's fee, it is tempting to take an average of the figures in the previous paragraph. That, I think, however, would not be appropriate because I do not know the frequency with which the various categories of case arise. At the lower end of the scale, the answer might be at least 1 hour's reading and around 3 hours' writing-up; at the upper end, around 5 hours' reading (more if the bundle is exceptionally large) and around 6 hours' writing-up (excluding National Trial cases). I note in this connection also that Jane Sigley's analysis of the figures agreed in the Lloyd-Lawrie settlement, based on the example of a nine-month period, suggests that in order to complete the work of 37.5 sittings a judge would be occupied for 57.75 days, a ratio of 1.54. Based on a 7-hour working day, the additional 0.54 equates to 3.8 hours, approximately 3 hours 45 minutes. That result is not out of line with the other evidence before me concerning the time taken to do certain categories of task.

43 Taking all those sources into account and with all the caveats I have mentioned, the nearest as I can get on the evidence before me to an answer to the question posed at the beginning of the preceding paragraph is that it seems probable that a part-time judge in SEND has to work 10 hours 45 minutes to earn a day's fee whereas a full-time judge has to work 7 hours to earn a day's salary. There is no reason to suppose that full-time judges do not also work a similar number of hours on their cases; the difference is that they do so in their paid working time.

44 Mr Line urges an argument based on 'swings and roundabouts', unpaid time sacrificed when a judge works 'out of hours' being balanced out by paid time gained when a case goes short. In Matthews, Baroness Hale gave some support to an argument of that nature, saying, at paragraph 49,

> *I would not wish to rule out the possibility that, in certain cases, a less favourable term might be so well balanced by a more favourable one that it could not be said that part-timers were treated less favourably overall.*

The statistical evidence in this case suggests that the time gained by cases going short amounts overall to some 1.4 hours per hearing day, or about 1 hour 25 minutes, time in which a judge can undertake administrative duties but not realistically more than that. For reasons that I have already set out, I do not consider that the claimants' paid travel time, even when it existed, compensated in any more than a minimal way for the additional work required of them. And since March 2020 the claimants have had practically no paid travel time at all.

45 As I have said, I do not rely heavily on statistical evidence alone. However, it is supported by the evidence of the claimants, including a very experienced judge, Judge Bowen, whose evidence is that the time gained in no way compensates for the extra time a judge has to put in in order to prepare and write up a case. If the figures estimated by Judge McConnell and incorporated in the respondent's settlement with Judge Lloyd-Lawrie are even very approximately accurate, then they support the evidence of Judge Bowen that the 'swings' in this case are nowhere near balanced by the 'roundabouts'. Even if a judge were able to use all of the 1 hour 25 minutes gained for reading and writing up, which as I have said I think is quite unrealistic, and if credit for that time gained were given, it remains the case that, taking all categories of case into account, a fee-paid judge is required to work approximately an additional 2 hours and 20 minutes of unpaid time for each day he or she sits. The reality is closer to 4 hours.

46 I bear in mind that the burden of proving less favourable treatment rests on the claimants. By reason that, in order to earn their day's fee, the claimants have to work a variable amount of time, likely to be on average close to four hours, in addition to their sitting day, to prepare and write up their cases, compared with a full-time judge who earns his or her day's pay in seven hours, I find that the claimants have been, and continue to be, less favourably treated than their comparators.

47 The travel time payments, when they were paid, were not pensionable because they were not payments for doing work but, as Jane Sigley said, compensation for time spent travelling. Full-time judges cannot claim an enhancement of their daily pay for travel, and to that limited extent there is a possibility that the claimants may have been treated in the past marginally more favourably in that respect. Similarly, there is a possibility, which I am unable on the present evidence to quantify, that the second day of National Trial cases, when it is not fully required for the hearing or for writing up, may result in some time gained for the judge; I note in this context that the respondent agreed with Judge Lloyd-Lawrie a figure of 7 hours for writing up a National Trial decision, on which basis there would seem little scope for significant gain. Those are matters which may need to be taken into account when the question of remedy is considered.

The Reason for Less Favourable Treatment

48 The respondent is unable to say positively why the fee structure for fee-paid judges in SEND is as it is. The respondent inherited the predecessor to SEND from the Department for Education in about 2008 together with the already existing fee structure, which it continues to apply part-time fee-paid judges. The features of the pay structure are that a daily fee is payable for a sitting day; that fee may be enhanced, in certain circumstances, to compensate for time spent travelling to and from the hearing location; and no payments are claimable for work done other than on a sitting day. The respondent accepts that the structure is anomalous and seeks to address such anomalies in the review it is conducting.

49 I accept that that predecessor tribunal was established from the outset as a ‘national jurisdiction’ and until about 2008 the judiciary of SEND was entirely part-time and fee-paid. It is possible, as the respondent speculates, that those two features provide an explanation, or some part of the explanation, for why travel time was claimable in certain circumstances. The ‘national jurisdiction’ required judges to travel extensively, and fee-paid judges would otherwise have had to undertake such travel in their own time, something which might have made the jurisdiction unattractive to potential candidates. But those features, part-time status prior to 2008 and ‘national jurisdiction’, do not account for the respondent’s failure to pay for work done on days other than sitting days.

50 Prior to 2008 no question arose concerning the different treatment of full- and part-time judges, because there were no full-time judges in SEND. When salaried, full-time judges were appointed they were, as the evidence clearly shows, paid for their preparation and writing-up time because, with rare exceptions, they did it, and continue to do it, in their salaried working time. It is also clear on the evidence before me that payment for time spent travelling was precisely that, and not intended to compensate for time spent reading and writing up. To the extent that it might ever have been arguable that paid travel time was a ‘swing’ on which the part-time judges gained something which the full-time judges did not, that argument disappeared in March 2020.

51 Mr Line says that the respondent's reason for treating the claimants as it did is that it inherited a historically developed system, which on the respondent's understanding reflected the particular characteristics of the SEND Tribunal. It is highly probable that that system was developed before the Regulations of 2000 came into force, probably even before Council Directive 97/81 was made. It would be no answer to a part-time worker's claim to be entitled to join an employer's pension scheme, for the employer to say that they acquired a business whose historically developed systems included a characteristic that part-timers were excluded from the pension scheme. It is similarly, in my judgment, no answer for the respondent to say that it inherited a tribunal in which part-time judges were historically treated in a certain way, and that it continued so to treat them even after it appointed full-time judges whom it treated more favourably. That amounts to less favourable treatment of the fee-paid judges on the ground that they are part-time workers, the very mischief at which the Directive and the Regulations are aimed.

52 It is not necessary that part-time status be the sole reason for the less favourable treatment. It is sufficient that it should be a reason. None of the part-time judges is paid for preparatory reading and writing-up whereas all of the full-time judges are. In my judgment that points strongly to part-time status being the reason for the less favourable treatment. If the respondent's speculation is right, then at least part of the reason for the historic fee structure is the fee-paid judges' part-time status. Mr Line refers me to Hawkesworth in which fee-paid judges of the MHT compared themselves with a salaried judge of the F-tT (Tax Chamber). EJ Macmillan found that if there was a difference in treatment it was because of the different historical development of the MHT and the Tax Chamber. Having accepted the respondent's counsel's submissions on that point, the employment judge added, at paragraph 16,

> *If there is no less favourable treatment when compared with the nearest equivalent salaried office holder within your own jurisdiction it is highly unlikely that the reason why you are being treated less favourably than a salaried judge in another jurisdiction which until recently has existed entirely independently of your own jurisdiction, has anything to do with the fact that you are a fee-paid part-timer.*

In the present case the premise of the employment judge's conclusion is absent. Here there *is* less favourable treatment than a comparable full-time office-holder in the claimants' own jurisdiction. For reasons I have given, I reject the arguments that history alone explains the difference in treatment in this case, and that such an explanation would in any event be an answer to the claimants' claims. I am satisfied that the respondents' treatment of the claimants was on the ground that they were part-time workers.

Justification

53 If the claimants have suffered less favourable treatment contrary to regulations 5(1) and (2)(a), the respondent argues that its treatment of the claimants was justified pursuant to regulation 5(2)(b). Mr Sugarman is correct to say that for justification to succeed the respondent must establish that it has a

legitimate aim(s) and that the means it adopts are proportionate, meaning that they are both appropriate and necessary to achieve its aim(s). The following aims are relied on by the respondent:

(a) flexible deployment of judges;

(b) fair allocation of resources;

(c) ensuring that the approach to pay reflects the particular characteristics and work of the SEND jurisdiction of the HESC.

54 It is clear that the respondent did not consider any of these aims when the pay scheme was formulated; neither does it appear that it has considered them since it inherited the scheme in 2008. I accept that that does not prevent the respondent from relying on them now as a justification for retaining the scheme.

55 I accept that flexible deployment of judges is a legitimate aim of the respondent in managing SEND, and tribunals generally. Disparate pay in different tribunals may be an incentive for judges to sit in one, and a deterrent from sitting in another. Avoiding such 'unintended consequences' was a result Jane Sigley hoped would be achieved by the current pay review. The present tribunal regimes are not uniform; some, such as the employment tribunal, pay for work such as writing up done on non-sitting days whilst others, such as SEND, do not. I cannot accept the respondent's argument that retaining disparities, such as those highlighted in this case, is a means by which flexibility can be achieved. Some claimants suggested that those disparities were a disincentive to some judges who might otherwise sit in SEND. Flexibility of deployment will more readily be achieved by removing disparities and paying fee-paid tribunal judges on the same basis across all tribunals.

56 The aim of the respondent's pay review, Jane Sigley said, is for fee-paid judges to be remunerated in the same way as salaried judges. That is also the aim of the claimants in this case. To the extent that Ms Sigley suggested that the claimants' argument would result in their being paid more highly that full-time judges, I reject that conclusion. The result of the claimants' argument is that they will be paid not more favourably, but no less favourably, that full-time judges for doing broadly similar work.

57 I accept also that fair allocation of resources is a legitimate aim of the respondent. However, I am unable to accept that requiring fee-paid judges in SEND to work unpaid hours on non-sitting days in order to complete their cases is consistent with, or a means to achieve, a fair allocation of resources. Paying judges, whether full- or part-time, for the hours they are required to work is consistent with the fair allocation of resources.

58 The respondent aims to ensure that 'the approach to pay reflects the particular characteristics and work of the SEND jurisdiction of the HESC.' I accept that it is likely, though I have no direct evidence, that the element of fee-paid judges' remuneration which compensates for travelling time 'reflects the characteristics and work of the SEND jurisdiction', as it was prior to March 2020

because of the historic need for judges to travel extensively. But I am unable to detect anything in 'the characteristics and work' of SEND which explains, or militates in favour of, not paying judges for preparatory reading and writing-up time. Moreover, even the historic practice of paying travelling time has almost entirely ceased since 2020. There is no intention to return to live hearings other than in the rarest instances. It is therefore highly questionable whether the current pay regime can be said to reflect 'the particular characteristics and work' of SEND as it now is. To the extent that this amounts to an argument for retaining a discriminatory pay regime notwithstanding that it offends the Regulations, I reject it.

59 It is almost inevitable that paying a judge to do work which was formerly unpaid may have some budgetary consequences. I have no detailed evidence of what those consequences may be, but I cannot accept that they are, as Jane Sigley suggests, that salaried judges would have to be given an amount of salaried time equivalent to the settlement in Judge Lloyd-Lawrie's case. The central point of the claimants' case, which I accept, is that full-time judges already have paid time in their salaried hours in which they do their preparatory reading and decision writing. That is precisely how they are treated more favourably at present. The respondent must decide how it allocates its available resources, but it must do so in a non-discriminatory way.

Conclusions

60 I find that, by failing to pay the claimant part-time judges for the time they are required to devote on non-sitting days to preparatory reading of case bundles and to writing up their decisions, the respondent has treated, and continues to treat the claimants less favourably than comparable full-time judges. The reason for the claimants' less favourable treatment was, and is that they are part-time workers. The claimants' less favourable treatment is not justified on objective grounds.

61 In the light of my finding above, the claimants' claim, in the alternative, that if the travel payments they have received are intended to compensate them for preparation and writing up, those payments ought to have been pensionable, does not arise and is dismissed.

62 The question of remedy is adjourned to a date to be fixed.

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EMPLOYMENT JUDGE WILLIAMS

16 November 2022 London Central

JUDGMENT AND REASONS SENT TO THE PARTIES

……17 November 2022……..
DATE SENT TO THE PARTIES

.....
FOR THE TRIBUNAL OFFICE