



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4102077/2022**

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**Held in Glasgow on 8 and 9 February 2023**

**Employment Judge L Doherty**

**Ms Johanna Johnston**

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**Claimant  
Represented by:  
Mr T McGrade -  
Solicitor**

**The Scottish Ministers**

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**Respondent  
Represented by:  
Mr B Napier -  
QC**

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Employment Tribunal is that the claimant as a Temporary Judge  
20 is a part time worker for the purposes of Regulation 2 (2) of the Part - Time Workers  
(Prevention of Less Favourable Treatment) Regulations 2000 (the Regulations), and  
the claim under Regulation 8 of Regulations can proceed.

**REASONS**

**Background**

25 1. In an ET1 lodged in 12 April 2022 the claimant brings a claim of less  
favourable treatment under Regulation 8 of the Part Time Workers  
(Prevention of Less Favourable Treatment) Regulations 2000 (the  
Regulations).

30 2. There is a preliminary issue as to whether the Regulations are engaged. A  
Preliminary Hearing (PH) was fixed to consider whether the claimant is a part  
time worker for the purposes of Regulation 2 (2), as the claim can only  
proceed if the claimant is found to be a part -time worker in terms of the  
Regulations.

3. The respondents originally took issue with whether the claimant and her comparators were employed under the same type of contract in terms of Regulation (2) (4)(a)(i) and it was envisaged that this PH would also determine that matter. The respondents however conceded this point before the commencement of the PH.
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4. For the purposes of this hearing (and only for that purpose) the Respondent accepts that the Claimant, in her capacity as Temporary Judge was engaged in work that was broadly similar to that of her chosen comparator a full-time Senator of the Court of Session. The respondents accept on the same basis that in relation to remuneration she was less favourably treated than such a comparator on the ground of her part-time status, and that such treatment cannot be justified on objective grounds.
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### The Hearing

5. The claimant was represented by Mr McGrade, solicitor and the respondents by Mr Napier K.C.
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6. The claimant gave evidence on her own behalf and for the respondents' evidence was given by Mr Paul McKinlay, Head of Strategy and Governance, Judicial Office for Scotland, and by Mr Craig Turnbull the Sheriff Principal of Glasgow and Strathkelvin and Vice President of the Sheriff Appeal Court. Evidence in chief was taken by way of witness statements.
- 20
7. The parties lodged a joint bundle of documents and helpfully produced an Agreed Statement of Facts which cross referenced the joint bundle by page number. This is reproduced below as part of the Tribunal's Findings in Fact, other than the page references and an extensive list of dates of the claimant's sitting days as a Temporary Judge, which are summarised in the interests of brevity. The statutory provisions which are agreed as relevant to the claimant's appointments are reproduced under '*Statutory Provisions agreed as relevant to the claimant's appointment as Temporary Judge*'.
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**Findings in Fact***Agreed Statement of Facts*

1. The Claimant was appointed by the Scottish Ministers to the office of part-time Sheriff for a five-year period from 5 May 2003 until 4 May 2008. On 28  
5 April 2008, she was reappointed as a part-time Sheriff for a further five-year period from 5 May 2008 to 4 May 2013. In her role as a part-time Sheriff, she was paid for the time she spent training and carrying out the duties of a part-time Sheriff. She was paid a salary but her salary was pro-rated to that of a full-time Sheriff. Her annual leave entitlement and pension were also pro-rated  
10 accordingly.
2. The Claimant was appointed by the Scottish Ministers to the office of a salaried full-time Sheriff from 30 September 2008 under a Royal Warrant Appointment. Her appointment letter, dated 11 September 2008, noted that she was appointed as an all-Scotland floating sheriff based at Hamilton with  
15 effect from 30 September 2008 and that her annual leave allowance was 9 days for the remainder of 2008.
3. The Claimant continued in this role until her retirement on 30 June 2022.
4. Sheriffs are appointed to Sheriffdoms. They can sit in one court or multiple courts within their allocated Sheriffdoms. The Claimant was initially appointed as an all-Scotland floating Sheriff based at Hamilton however, she later became based at Glasgow Sheriff Court. Sheriffs do not work in the High Court as a Sheriff. Full-time salaried Sheriffs undertake the full range of work: Summary Trials, Solemn Trials, Civil Proofs, Debates, Fatal Accident Inquiries, Children's Referrals.

Paul Gilmour, private secretary to Lord Gill, the then Lord President of the Court of Session, wrote to the Claimant on 12 July 2013 to advise her that he had been asked to contact her by the Lord President, to offer her a position as a Temporary Judge sitting in the Court of Session/High Court of Justiciary dealing with criminal business.

6. The Claimant was appointed by the Scottish Ministers as a Temporary Judge of the Court of Session on 10 September 2013. The Claimant was appointed as a Temporary Judge by virtue of the fact she held the post of a salaried Sheriff. She was advised by letter dated 10 September 2013 from Roddy Flynn, Legal Secretary to Lord President, that the Cabinet Secretary for Justice had agreed to her appointment as a Temporary Judge of the Court of Session. Roddy Flynn wrote to her again on 17 September 2013 enclosing her commission and advising it would subsist for a period of five years until 9 September 2018.
  
7. The Claimant's appointment as a Temporary Judge was for an initial period of five years under section 35(3) of the Law Reform (Miscellaneous Provisions) Scotland Act 1990, until 9 September 2018. She was re-appointed for a further five years, from 10 September 2018 until 9 September 2023 inclusive. Gavin Henderson, Deputy Director of the Civil Law and Legal Systems Division of the Scottish Government, Justice Directorate wrote to the Claimant on 30 August 2018, advising that she had been reappointed to the office of Temporary Judge for a period of five years from 10 September 2018 to 9 September 2023 inclusive. Two documents were enclosed along with this letter. Firstly, a document headed Office of Temporary Judge, which the letter indicated set out information on her reappointment. Secondly, her commission for the period from 10 September 2018 to 9 September 2023
  
8. At the time of the Claimant's reappointment in 2018 she was provided with terms and condition of re-appointment for fee-paid Temporary Judges which noted that she would receive a daily fee for those days which she sat or was attending training in relation to her appointment. This letter was issued in error.

The Claimant remained a salaried Sheriff during the period she sat as a Temporary Judge and continued to receive the salary and pension accrual of a full-time salaried Sheriff.

10. The Claimant continued to undertake the duties of a salaried Sheriff during the period from 10 September 2013 until her retirement on 30 June 2022. She retired from the duties of Temporary Judge in December 2021.
11. During the period the Claimant held her commission as a Temporary Judge, she performed the role in the High Court of Justiciary in Glasgow, Edinburgh, Paisley and Aberdeen. The Claimant's main work was presiding over criminal trials.
12. While the Claimant held her commission as a Temporary Judge, she was expected to attend training courses organised for Senators of the College of Justice and Temporary Judges. She attended the following training courses organised for Senators of the College of Justice and Temporary Judges on the dates detailed below.
- a. 16 January 2017 (Solemn Trial Management)
  - b. 20 March 2017 (Sentencing for Senators)
  - c. 6 November 2017 (Taking Evidence on Commission)
  - d. 25 February 2019; and
  - e. 29 April 2019 (Taking Evidence on Commission).
13. The training on 16 January 2017, however, was not specifically related to the Temporary Judge role as it related to Solemn Trial Management although all attendees were Temporary Judges or Senators. The Judicial Institute regarded attendance as voluntary although there was an expectation that those invited would attend.
14. The Claimant did not sit in the appeal court in the High Court of Justiciary in Edinburgh therefore, she did not hear appeals against sentence or conviction. Nor did the Claimant sit in the Court of Session (Inner or Outer House) in Edinburgh. She did not carry out any civil work or produce written Opinions in the Court of Session. Judges of the Supreme Court (the Court of Session and the High Court of Justiciary) carry out both civil and criminal work.

15. The Claimant was paid the salary and benefits of a full-time salaried Sheriff while she performed the role of a Temporary Judge. Full-time salaried Sheriffs work 215 days per calendar year. The Claimant worked 215 days per year between both roles. The holiday entitlement of full-time salaried Sheriffs is 35 days annual leave and 11 public holidays. Full-time salaried Senators of the College of Justice work 210 days per calendar year. They are entitled to 40 days annual leave and 11 public holidays.
16. The appointment of a full-time salaried Sheriff to a Temporary Judge does not affect or prevent them from continuing in the office of Sheriff. A document is agreed which shows the numbers of salaried Sheriffs holding Temporary Judge commissions between September 2014 and December 2022 as well as how many Temporary Judges were retired Sheriffs, retired Judges or KCs. Those Temporary Judges who were full-time salaried Sheriffs, did not receive any additional remuneration for their work as a Temporary Judge.
17. The parties have sought to agree the number of sittings and related activities undertaken by the Claimant as a Temporary Judge. They have been unable to do so. It is agreed that the Claimant performed the role of a Temporary Judge on at least the number of days provided in the table below. The Claimant did not at any point during her commissions raise any issue of concern personally with the Respondent concerning payment of salary or benefits for the occasions on which she sat as a Temporary Judge.

<b>Year</b>	<b>Temporary Judge</b>	<b>Number of Sitting Days</b>
2012 – 01/01 to 31/12/12	Judge Johnston	No sitting days in the Supreme Courts for 2012
2013 – 01/01 to 31/12/13	Judge Johnston	Criminal First Instance – 13 days sat:
2014 – 01/01 to 31/12/14	Judge Johnston	Criminal First Instance – 69 days sat:
2015 – 01/01 to 31/12/15	Judge Johnston	Criminal First Instance – 101 days sat
2016 – 01/01 to 31/12/16	Judge Johnston	Criminal First Instance – 81 days sat:

2017 – 01/01 to 31/12/17	Judge Johnston	Criminal First Instance – 87 days sat:
2018 – 01/01 to 31/12/18	Judge Johnston	Criminal First Instance – 72 days sat:
2019 – 01/01 to 31/12/19	Judge Johnston	Criminal First Instance – 88 days sat:
2020 – 01/01 to 31/12/20	Judge Johnston	Criminal First Instance – 33 days sat:
2021 – 01/01 to 31/12/21	Judge Johnston	Criminal First Instance – 14 days sat:
2022 – 01/01 to 01/04/22	Judge Johnston	No sitting days in the Supreme Court

18. The appointment of Permanent Judges is open ended and does not have an end date (other than retirement). A Senator of the College of Justice can cease from appointment through resignation or through retirement at age 75.
- 5 19. There is a statutory limit of 36 Judges of the Supreme Courts. Senators of the College of Justice are paid an annual salary.

*Additional Findings in Fact*

- 10 20. The Judicial Office for Scotland have produced a paper called *The Office Of Sheriff* which provides a *Note On the Role and Responsibilities of a Sheriff* (document 12). That document outlines the role of a sheriff and provides under the heading *Primary Functions*;

15 “*The primary function of the sheriff is to act as judge at first instance. However, sheriffs also exercise some appellate and a large number of administrative and quasi-judicial functions, including the conduct of Fatal Accident Enquiries. Some sheriffs, with five or more years’ experience, are appointed as appeal sheriffs to sit in the Sheriff Appeal Court. They may be asked to act as temporary judges in the High Court.*”

21. What is described as a *Sheriff Information Pack - Judiciary in Scotland* (document 13) provides general information on the duties of a sheriff. Under the heading *Role of a Sheriff*, the same clause is reproduced.
22. The claimant accepts that these documents give a reasonably accurate account of the duties of a Sheriff.
23. The Sheriff Principal acts in the role of what could be described as a judicial line manager to Sheriffs within his sherrifdom. When she held the role of the salaried sheriff, the Sheriff Principal was a person to whom the claimant could raise any concerns regarding the performance of duties or any personal issues such as ill-health, that may have impacted her ability to perform her duties.
24. In her capacity as a sheriff the claimant participated in a judicial training each year delivered to full time and part time sheriffs.
25. In addition to fulltime sa aried sheriffs there are two types of part time Sheriff. Those are fee paid sheriffs who sit on an ad hoc basis for a daily fee, and those who are appointed on a % basis of a full-time contract. The latter category have reduced working hours in the sheriff court but carry out the same functions as a full time sher ff, albeit they undertake less work, and are paid on a pro rata basis.
26. The Judicial Office has an Operating Framework for Part Time Working (the Operating Scheme) under which full time sheriffs can make a request to reduce from full time to part time hours. The claimant did not apply to become a part time sheriff under this scheme.
27. The claimant's appointment as a Temporary Judge followed a practice adopted by the Scottish Ministers of seeking to rely upon salaried sheriffs to undertake work in the High Court. There are currently around 23 Salaried Sheriffs in Scotland who hold such appointments, which means that around less than 1 in 5 sheriffs hold that appointment. The Scottish Minister also rely on Temporary Judges who are not appointed from the pool of salaried sheriffs,



and who in general terms receive a daily fee calculated in line with the annual benefits of a Senator of the College of Justice,

28. While the Judicial Office do now ask for expressions of interest in appointment as a Temporary Judge, the claimant did not apply or express an interest in the position. The claimant could have rejected the offer of the appointment. She made no enquiry about salary when she accepted the appointment. She was aware when she accepted the appointment that it did not attract a financial enhancement. A Number of Senators have previously held the position of Temporary Judge.
29. Although the Sheriff Principal may have discussions with the Lord President, the decision as to who is appointed as Temporary Judge, it is a matter for the Lord President over which he has no veto.
30. Temporary Judges are allocated sitting time in the High Court approximately a year in advance. During periods when they are allocated to High Court sittings, they are not listed to sit in the Sheriff Court, and their High Court work is generally viewed as taking priority. There is however a liaison between the Sheriff Principal and the Keeper of the Roles in the High Court regarding listing, and if he feels it necessary, Sheriff Principal Turnbull can object to a listing for a Temporary Judge who is a sheriff in his sheriffdom.
31. Mr McKinlay continued to regard such Temporary Judges as a full time sheriffs with no change to their status. The Sheriff Principal continued to regard them as being in his sphere of influence in terms of their sittings.
32. There can be occasions when a Temporary Judge has deal with deferred sentencing diet during the time they are allocated to sit in the High Court. The claimant attempted to keep these occasions to a minimum and when it was necessary, she fitted it in before then starting her High Court work.
33. The type work which a sheriff undertakes in the sheriff court is unaffected on their appointment as a Temporary Judge. Their work in the Sheriff court is affected to extent that they sit less and therefore the amount of work they do reduces. This was the case with the claimant who sat less in the sheriff court

after her appointment as a Temporary Judge. The claimant had to give up sitting in the Drugs Court because she could not make herself available with sufficient regularity as a result of the extent of her Temporary Judge work.

- 5 34. Sitting days in the Sheriff court which claimant was not available to cover because she listed to sit in the High Court were often allocated to fee paid sheriffs.
35. As a Temporary Judge the work which the claimant performed was different to the work she performed as a sheriff. When sitting in the High Court she dealt with the criminal work which would be undertaken by a Senator of the College of Justice sitting in the Outer House of the Court of Session and the Rules of Procedure which she worked to in the High Court were different to the Sheriff Court Rules.
- 15 36. The location of her work as a Temporary Judge was different to her location of work as a Sheriff . She had the benefit of a chauffeur driven car to take her to courts outside of Edinburgh when sitting as a Temporary Judge, but did not have this facility available to her when sitting as a Sheriff. She went by a different title, (Sheriff and Temporary Judge) in each jurisdiction
37. While she performed the role of Temporary Judge the claimant would not approach the Sheriff Principal regarding any concerns she had about the discharge of her duties. If she had such concerns, she would have approached the Lord President or the Lord Chief Justice to seek their advice.
38. As a result of Lockdown in 2020, the claimant did not sit as a Temporary Judge until 2021. She then underwent three operations in 2120 which meant that she was rarely available to sit.
- 25 39. Although the claimant retired from the office of Temporary Judge in 2021 and continued in the office of Sheriff, she could have retired from the office of Sheriff and continued as a Temporary Judge, had she chosen to do so.

#### Note on evidence

40. There was little disagreement as to the facts.

When it was put to Sheriff Principal Turnbull in cross examination that once Temporary Judges were allocated their sitting pattern it was not feasible that he could not prevent them from going to the High Court, he answered to the effect that he could have, and that he had done so, and the Tribunal accepted that. There was however no effective challenge to the claimant's evidence that it was understood that her duties as a Temporary Judge generally took priority over her duties as a Sheriff. Nor was there any effective challenge to the claimant's evidence that she had to give up sitting in the Drugs Court in the Sheriff court because of her commitments in the High Court as Temporary Judge.

#### Authorities

41. The following authorities were before the Tribunal:

- a. *Hudson V University of Oxford (2007) EWCA Civ 336*
- b. *Ferris v Ministry of Justice (2001374/2007)*
- 15 c. *Keegan and Others v Ministry of Justice and Department of Justice 1910/12 and others (Industrial Tribunal Northern Ireland) (2017) NIIT0051814IT (Unreported)*
- d. *Miller and Others v Ministry of Justice and the Lord Chancellor 2202235/2019 & Others (London Central Employment Tribunal) (Unreported) December 2021*
- 20 e. *Secretary of State for Work and Pensions v Beattie and others 20022 EAT136*
- f. *Dodds and Others v (1) Ministry of Justice and (2) Lord Chancellor (2021)*
- 25 g. *Harris and Anor v Environment Agency (2022) EWHC 2264 (Admin) (06 September 2022).*

42.

**Submissions**

43. Both parties helpfully provided written submissions to which they had to opportunity to respond orally. These are not reproduced here at length but are dealt with in more detail below where relevant as part of the Tribunal's Consideration.
44. In summary the claimant's position was that the Tribunal should focus on the role performed by her which gives rise to the claim, which is that of Temporary Judge. To find that she is a part time worker in that role reflects the reality of the situation. The respondent's custom and practice in terms of working days for Senators and Sheriffs support the conclusion that the claimant is a part time worker as both a Sheriff and a Temporary Judge. Several factors, some of which could be described as operational, such duties performed, or place of work are relied upon to support the conclusion that the two appointments should be regarded as two separate part time appointments rather than one full time appointment. There could be no difficulty in confusing the two roles both of which were part time.
45. The respondent's position in summary is that for the for the claimant to show she is a part time worker in terms of the Regulation (2) (2) she has to show she is not a full-time worker in terms of Reg (2) (1). For the periods when she is identifiable as a full time worker as a Sheriff, she cannot maintain she is a part time worker as a Temporary judge. The claimant is properly seen as a full-time worker in terms of the Regulation 2(1) because of the nature of her duties as a full time sheriff. The terms of her appointment expressly refer to the possibility of her being asked as a full time sheriff to act as a Temporary Judge. Taking up that post did not remove her from the scope of her full time salaried Sheriff duties. The claimant's appointment as a Sheriff has not been varied by agreement or by law. There is no basis in fact for the argument that the claimant was by custom and practice identifiable as a part time worker. *Esto* to say the claimant changed from full to part time status under the Regulations involves disregarding Section 20B(7)(a) of the Judiciary and Courts Scotland Act 2008, which cannot be right.

**Statutory Provisions were agreed as relevant to the claimant's appointment as Temporary Judge.**

46. The Claimant was initially appointed as a Temporary Judge under section  
5 35(3) of the Law Reform (Miscellaneous Provisions) Scotland Act 1990 ("the  
1990 Act"). That subsection was repealed by the Courts Reform (Scotland)  
Act 2014, Schedule 5, paragraph 37.

47. Paragraph 6 of Schedule 4 to the 1990 Act provided as follows:

10 *"Subject to paragraph 7 below, a person appointed as a temporary judge  
under said section 35(3) shall, by also acting, be treated for all purposes as,  
and accordingly may perform any of the functions of, a judge of the Court in  
which he is acting."*

48. Paragraph 7 of Schedule 4 to the 1990 Act provided as follows:

15 *"A person appointed to be a temporary judge of the Court of Session shall, by  
virtue of such appointment, be a temporary Lord Commissioner of Justiciary  
in Scotland."*

49. The powers relating to the appointment and tenure of 'other Court of Session  
Judges' are now found in sections 20A- 20G of the Judiciary and Courts  
(Scotland) Act 2008 ("the 2008 Act"), as amended by the Courts Reform  
20 (Scotland) Act 2014, section 123. The Claimant was reappointed as a  
Temporary Judge under section 20C of the 2008 Act.

50. Sections 20B, 20C, 20D and 20G of the 2008 Act deal with the appointment,  
tenure and remuneration of Temporary Judges.

51. Section 20A of the 2008 Act provides:

25 *"(1) An individual is qualified for appointment as a judge of the Court of  
Session if the individual—*

*(a) immediately before the appointment—*

*(i) held the office of sheriff principal or sheriff, and*

(ii) *had held office as either sheriff principal or sheriff throughout the period of 5 years immediately preceding the appointment, or*

(b) *at the time of appointment—*

5 (i) *is a solicitor having a right of audience in the Court of Session or the High Court of Justiciary under section 25A of the Solicitors (Scotland) Act 1980 (rights of audience), and*

10 (ii) *has been such a solicitor throughout the period of 5 years immediately preceding the appointment.*

(2) *Subsection (1) does not affect an individual's qualification for appointment as a judge of the Court of Session by virtue of article xix of the Union with England Act 1707."*

52. Section 20B of the 2008 Act provides:

15 (1) *The Scottish Ministers may appoint an individual to act as a judge of the Court of Session; and an individual so appointed is to be known as a "temporary judge".*

(2) *An individual appointed under subsection (1) may also, by virtue of the appointment, act as a judge of the High Court of Justiciary.*

(3) *The Scottish Ministers may appoint an individual under subsection (1) only if—*

(a) *the individual is qualified for appointment as a judge of the Court of Session, and*

25 (b) *the Scottish Ministers have consulted the Lord President before making the appointment.*

(4) *Subject to section 20C, an appointment as a temporary judge lasts for 5 years.*

- (5) *Subject to subsection (6), an individual appointed under subsection (1) is, while acting as a judge of the Court of Session or the High Court of Justiciary, to be treated for all purposes as a judge of that Court and may exercise the jurisdiction and powers that attach to that office.*
- 5 (6) *Such an individual is not to be treated as a judge of the Court of Session for the purposes of any enactment or rule of law relating to –*
- (a) *the appointment, tenure of office, retirement, removal or disqualification of judges of that Court (including, without limiting that generality, any enactment or rule of law relating to*
- 10 *the number of judges who may be appointed),*
- (b) *the remuneration, allowances or pensions of such a judge.*
- (7) *The appointment of an individual under subsection (1) does not affect—*
- (a) *any appointment of the individual as a sheriff principal or sheriff,*
- or
- 15 (b) *the individual's continuing with any business or professional occupation not inconsistent with the individual acting as a judge.*
53. Section 20C of the 2008 Act provides:
- (1) *A temporary judge whose appointment comes to an end by virtue of*
- 20 *the expiry of the 5 year period mentioned in section 20B (4) is to be reappointed unless—*
- (a) *the temporary judge declines reappointment,*
- (b) *the Lord President has made a recommendation to the Scottish Ministers against the reappointment, or*
- 25 (c) *the temporary judge has sat for fewer than 50 days in total in that 5 year period.*

- (2) *Section 20B (apart from subsection (3)) applies to a reappointment under subsection (1) as it applies to an appointment.*
- (3) *A temporary judge whose appointment comes to an end by resignation under section 20D may be reappointed.*
- 5 (4) *Section 20B applies to a reappointment under subsection (3) as it applies to an appointment.*

### **Consideration**

54. In addition to the agreed statutory provisions the Tribunal had before it of Regulations 2 of the Regulations and the Framework Agreement which  
10 provide:

#### ***Regulation 2***

2.—

- (1) *A worker is a full-time worker for the purpose 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.*
- 15
- (2) *A worker is a part-time worker for the purpose 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.*
- 20

### **The Framework Agreement**

55. For the purpose of this agreement:
- 25 1. *The term 'part-time worker' refers to an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker.*



2. *The term 'comparable full-time worker' means a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due regard being given to other considerations which may include seniority and qualification/skills.*
- 5
56. The burden of proof rests with the claimant to establish that she is a part time worker. There are three elements which require to be satisfied:
- (a) *That she is a worker;*
- (b) *That she is paid wholly or in part with reference to the time she works;*
- 10 (c) *That, having regard to the custom and practice of the employer in relation to workers employed by the employer under the same type of contract, she is not identifiable as a full time worker.*
57. It is accepted by the respondents that the claimant is a worker and that she is paid wholly or in part by reference to the time she works. It is the third part of the test which is in dispute. No issue is taken with the '*employed under the same type of contract*' part of the test. The claimant accepts that the categories of full time worker and part time worker are mutually exclusive.
- 15
58. Mr McGrade and Mr Napier advocated different starting points for consideration of the question of whether the claimant was a part time worker.
- 20 59. Mr McGrade argued that the focus should be on the position of Temporary Judge, which is the subject of the claim. However, he also submitted that the position could be cross checked against the role of sheriff and that the claimant was equally a part time worker when discharging her shrivel duties. It was Mr Napier's position that what was required was an assessment of the total work on which the claimant was engaged to undertake by her employer, and the decision as to whether the requirements of Regulation 2 (2) are met should be taken by reference to the totality of the work performed.
- 25
60. The Tribunal considered that its starting point should be consider from the facts that it had found whether there was anything to distinguish the claimant's

the position as a Temporary Judge from her position as a Sheriff, and to go on to consider the effect of its conclusions on that in the context of what might be described as the claimant's employment relationship.

61. The Tribunal was satisfied of the following.
- 5 62. Both positions arose as a consequence of separate judicial appointments. There is no need to be a full time sheriff in order to become a Temporary Judge, and there were other routes to that appointment (Section 20A of the Act).
- 10 63. There were different regimes being in place in terms of length of appointment; the position of Temporary Judge was time limited to 5 years in contrast to the salaried shrieval appointment.
64. There was different provision in relation to retirement. It was significant in the Tribunal's mind that the claimant could have retired as a sheriff but continued to sit as a Temporary Judge.
- 15 65. There was no overlap whatsoever in the work which the claimant did as a Temporary Judge with the work she did as a sheriff or that she was appointed to do as a sheriff. When sitting in the sheriff court the claimant could be required to undertake the full range of duties of Sheriff court civil and criminal work. When sitting in the High Court she dealt with the criminal work which  
20 would be undertaken by a Senator of the College of Justice sitting in the Outer House of the Court of Session and she worked under different rules of procedure. The Tribunal considered the difference in the work performed to be a very significant feature.
- 25 66. The claimant was not listed to sit in the Sheriff court when listed to sit in the High Court. While the Tribunal did not consider that a great deal turned on it as it was essentially a matter of court administration, it was persuaded that in the main High Court listings took had priority over sitting in the Sheriff Court, albeit there that there was a discussion between the Sheriff Principal and the Keeper about listings.

5 67. The work which would have been covered by the claimant in the sheriff court during periods when she was sitting in the High Court was often performed by fee paid sheriffs, indicating distinct nature of the claimant's work as a Temporary Judge, and the impact that had on her ability to carry out duties in the Sheriff Court.

10 68. The work the claimant carried out in the Sheriff Court remained the same but her total workload in that court inevitably reduced as a result of time spent away from it. There was no issue that when a Temporary Judge sits as sheriffs, they do the same tasks as a sheriff who was not a Temporary Judge. The Tribunal did not consider much turned on the fact that the claimant could no longer sit in the Drugs Court, as it forms no material part of the claimant's case that she did different work as a sheriff as a result of her appointment as Temporary Judge. The fact that the claimant was no longer able to sit in the Drugs Court, did however give an indication of the degree to which she spent her time in the High Court.

15 69. In the two roles the claimant had what might be described as different judicial line managers, or individuals to whom the claimant could refer with relevant issues or concerns arising from her workload in the two Offices.

20 70. The claimant was not obliged to take up the post of Temporary Judge when it was offered to her. This was in contrast with the duties in the sheriff court which she was expected to perform as outlined in the 'Role of a Sheriff' document after she accepted the post of Sheriff.

25 71. It was not the decision of the Sheriff Principial, who had judicial line management responsibility for the claimant as a sheriff, to appoint her as a Temporary Judge. He could not veto such an appointment. Only around 1 in 5 Sheriffs are appointed as Temporary Judges, underlining that the appointment to Temporary Judge does not follow automatically on the appointment of Sheriff.

30 72. The claimant attended training which was specific to the position of Temporary Judge, and training specific to the post of Sheriff.

73. The claimants place of work in the two roles was different. She also had the benefit of a chauffeur driven car to take her courts outside of Edinburgh while sitting as a Temporary Judge which was not a benefit available to her as a Sheriff. She had a different title in the two positions.
- 5 74. The claimant sat in the High Court for a substantial amount of time, other than during lockdown and because of ill health. Mr Napier in his submissions approximated her sittings as a Temporary Judge as 20 weeks a year. The time she spent sitting in the High Court reflected the time she did not sit in the Sheriff Court.
75. These factors in the Tribunals view demonstrated, as submitted by Mr McGrade, that it was unlikely that the two roles would be confused or that there would be difficulty in identifying whether at any given point in time the claimant was exercising the duties of a sheriff or a Temporary judge. Not only were they two separate judicial appointments, the work required by each appointment was different, and a practical level the two roles were easily distinguishable. The claimant was in effect carrying out two separate jobs.
76. The Tribunal was also satisfied, indeed there could be no dispute, that the claimant sat less in the High Court than a full time Senator. By the respondent's custom and practice a full time Senator sits 210 days per annum. The number of the claimants sitting days are set out in the findings in fact, and as indicated above were approximated by Mr Napier in his submissions at 20 weeks per annum. That means that she worked less time as a Temporary Judge than a Senator who was by custom and practice recognised as a full time worker. She also worked less in the Sheriff Court than a full time salaried sheriff who by custom and practice sat 215 days per annum.
77. That is not the end of the matter however, and the Tribunal went on to consider the overall nature of the claimant's employment relationship and the impact of its conclusions as to the distinct nature of the two positions held by her in the context of that relationship. It conducted this exercise with reference

to Mr Napier's comprehensive submissions as to how Regulation 2 should be applied in light of claimant's employment relationship.

*No Variation of Appointment*

- 5 78. Firstly, Mr Napier submitted that the Claimant's appointment as a full-time sheriff had not been varied either by operation of law or by agreement. He relied on section 20B(7)(a) of the Judiciary and Courts (Scotland) Act 2008 (as amended) (the Act). He submitted that there is an important distinction to be made between appointment and job content. Being appointed as a Temporary Judge did impact on the work that the Claimant did but could not impact on her appointment as a full-time salaried sheriff, which continued unchanged throughout her tenure of the office of Temporary Judge.
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79. The Tribunal considered the terms of Section 20 (B) (7). Section 20 (B) (7) (a) provides that the appointment of a Temporary Judge does not affect any appointment of the individual as a sheriff or sheriff principal; Section 20 (B) (7) (b) provides that on appointment an individual can continue with any business or professional occupation not inconsistent with the individual acting as a judge.
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80. Section 20 (B)(7) therefore does not only deal with Sheriffs appointed as Temporary Judges, but also with individuals and it seemed to the Tribunal that the purpose of these provisions is to ensure that those appointed as Temporary Judges are still able to continue as a sheriff or with their other business, while holding that appointment.
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81. The effect of these provisions is that an individual appointed as a Temporary Judge can hold that appointment and is permitted to continue with the conduct of their business (subject to certain limitations); and that a sheriff appointee's appointment as a sheriff is unaffected, meaning they can continue in the office of sheriff while also holding the appointment of Temporary judge. The Act makes no provision about the operational impact of appointment as a Temporary Judge on the appointment of sheriff, such as whether they remain full time or otherwise, but simply provide that any appointment as a sheriff is itself unaffected. The Tribunal therefore could not agree that the effect of
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Section 20(B) (7) (a) was that it prevented the claimant qualifying as a part time sheriff for the purposes of the Regulations.

5 82. The Tribunal agree with Mr McGrade that the 'agreement' to vary the claimants full time sheriff 's appointment was to be found in that as a matter of fact that the respondents allocated her work during the full time working hours of her original shrieval appointment, away from the Sheriff court and away from carrying out Sheriff Court work, so that she carry out work in the High Court performing work as a Temporary Judge. Both sides worked under that arrangement without complaint.

10 *The Operating Scheme*

15 83. Mr Napier referred to the "Operating Scheme", by which a full-time salaried sheriff might apply for a reduction in hours. The Claimant was not aware of the existence of that document, but she saw no reason why that procedure would be of interest to her. Though not decisive of the issue, Mr Napier submitted that shows the Claimant herself saw her duties as a Temporary Judge being delivered within the context of her appointment as a full-time sheriff. She did not seek to negotiate a reduction in her hours and was content to be appointed as Temporary Judge and to continue as such on the basis of there being no alteration to the terms and conditions of her full-time shrieval appointment. Her acceptance of the appointment as Temporary Judge in the knowledge that there would be no separate remuneration for undertaking these duties is consistent with these duties being seen as part of her shrieval duties. If there were two separate roles, then she was content by her own account to undertake one of them (as Temporary Judge) for no payment.

25 84. The Tribunal considered the fact that the claimant did not seek to apply under the Operating Scheme to work reduced hours was indicative of the fact that she wished to continue to work the full time hours reflected in her original shrieval appointment, after her appointment as a Temporary Judge. That however does not cast much light on whether the functions she discharged as a Temporary Judge were regarded by her as being performed in the context of being a sheriff, even if they were performed during the full time

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working hours reflected in her original appointment as a sheriff, and she performed them for no extra remuneration. The claimant clearly saw the work she did as a Temporary Judge as being separate and she said in cross examination that she saw the two appointments sitting side by side. There could be no dispute that the work performed by the claimant under the two appointments was different.

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85. The fact that the claimant was content to take on the role of Temporary Judge for no extra payment is consistent with the duties being seen as part of her shrieval duties, but nor is it necessarily inconsistent with the role of Temporary Judge being separate to the role of Sheriff. It was suggested to the claimant in cross examination that the appointment as Temporary Judge provided her with opportunities for career advancement and to carry out interesting work, which suggests that there was at least a perception of their being a non-financial benefit to the taking up the Temporary Judge appointment. It was put to the claimant in this context that a number of Senators had previously held the position of Temporary Judge.

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86. While the Tribunal considered the fact that claimant continued to work for the same salary was a factor which tended to support of the position that she was as all times acting within the scope of her shrieval duties it was not one which could be conclusive on the matter.

#### *Custom and Practice*

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87. Mr Napier submits that the argument that by the employer's "custom and practice" the Claimant was identifiable as a part-time worker has no basis in fact. The evidence of Sheriff Principal Turnbull was that he saw her as continuing with her duties as a full-time sheriff after her appointment as a Temporary Judge, although having less time in which to do so. Under the terms of her appointment as sheriff, the Sheriff Principal had responsibility for the allocation of the claimant's work. He was, for the practical purposes of deciding her pattern of work, the voice of the employer. The evidence of Paul McKinlay to the effect that there is no change in the status of a sheriff on appointment as a Temporary Jude provides further confirmation that

appointment as a Temporary Judge changes nothing with regard to the individual's appointment as a full-time sheriff.

- 5 88. Mr Napier submitted that the divide between work as a sheriff (i.e. in the Sheriff Court) and work as a Temporary Judge (i.e. in the High Court) is not as clear-cut as the Claimant would have it. The evidence of Sheriff Principal Turnbull was that there could be discussion and negotiation between the Sheriff Principal and the Keeper as to the sitting patterns that had been allocated to particular Temporary Judges in view of competing work demands. When it was suggested to him that once a Temporary Judge had been allocated a sitting pattern it was "not feasible" for the Sheriff Principal to say that he could not go for particular weeks, Sheriff Principal Turnbull replied "It is and I can." This reinforces the point that he did not, from an administrative point of view, see the work done by one of "his" sheriffs when sitting as a Temporary Judge as out with the sphere of legitimate interest he had in respect of shrieval appointments.
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- 20 89. The Tribunal did not consider that much turned on the fact that there could be discussions between the Sheriff Principal and the Keeper around sitting patterns. These it seemed to the Tribunal were matters primarily connected to the good administration of the High Court and Sheriff Court and had little impacting on the claimant's status under the Regulations. The fact that the Sheriff Principal could intervene to interrupt a High Court listing was indicative of an element of control, but it has to be viewed in the context that the claimant was subject overall to operational demands for her to sit as a Temporary Judge and as a Sheriff, and it was a function of the administration of the Sheriff Court and High Court to reconcile those demands in listing the claimant to ensure the efficient running of the respective courts.
- 25 30 90. That Mr McKinlay regarded the claimant's status as that of full time sheriff after she was appointed a Temporary Judge, or that the Sheriff Principal regarded the work done by the claimant as a Temporary Judge as in his sphere of legitimate interest is a factor which the Tribunal has regard to, but it is was just one factor which has to be considered alongside the factual matrix of the working arrangements in place. Mr McGrade submitted that the



Tribunal has to be careful around the status attributed to the claimant by the respondents, which he likened to an argument commonly made before an Employment Tribunal that an individual is not an employee or a worker; that ultimately is a matter for the Tribunal to decide, and the Tribunal agrees that is the case. While an employer's view of status is a factor to take into account, it is not determinative of the matter. Further one part of the Sheriff Principal's evidence highlighted by Mr Napier tends to support the position contended for by the claimant. The claimant takes no issue with the fact that while working as a sheriff she continued with the duties of a full time sheriff but materially, as acknowledged by the Sheriff Principal, she had less time in which to do so.

91. Mr Napier argued that *Esto* the employer's custom and practice is supportive of her claim (which is denied), the obligation under the Regulations is no more than "to have regard" to this; this does not mean that what is custom and practice must be accepted and followed. "A statutory obligation to "have regard" to something arises in many different contexts. It is usually imposed in respect of advice or guidance or a code of practice. It means that the advice or guidance or code must be considered when exercising the function or making the decision in question. That does not mean that it must be "followed" or "slavishly obeyed"; a decision maker may depart from such advice or guidance or code if there is good reason to do so – *R (London Oratory School Governors) v Schools Adjudicator [2015] EWHC 1012 (Admin) per Cobb J at (58)*.

92. Mr Napier submitted the Tribunal in *Dodds* was wrong to interpret Reg.2(2) as requiring the only matters relevant to the decision whether a claimant is a full-time worker as restricted to (1) payment by reference to time worked and (2) custom and practice of the employer. Properly construed all the circumstances – including the basis on which the individual was first employed – are relevant to the decision.

93. No issue taken with the fact that it was the custom and practice of the respondents to regularly deploy Temporary Judges, appointed from a pool of full time salaried Sheriffs to sit in the High Court. It was not in dispute that the respondents continue to engage Temporary Judges so appointed on the

5 salary and terms and conditions of a full time sheriff. The Tribunal accepted  
the evidence of Mr McKinlay that the respondents regarded such Temporary  
Judges as a full time sheriffs, and the Sheriff Principal continued to regard  
then ad being in his sphere of influence. These were matters which the  
Tribunal had regard to in considering the argument that the claimant in  
performing the role of a Temporary Judge was carrying out an extension of  
her shrieval duties. However, for the purposes of considering custom and  
practice specifically under Regulation 2(2), the relevant consideration of the  
custom and practice of the employer in relation to workers engaged under the  
10 same type of contract, is of the time worked by the workers.

94. Mr Napier submitted that in most cases where a claim under the Regulations arises, a claimant will have a working pattern falling short of those who work under a standard five-day working week all year round. There will be occasions when working outside the standard working pattern does not lead to this outcome. He gave as an example, a teacher who works only during term-time may be treated as a full-time worker. In that situation, *“having regard to custom and practice of the employer in relation to workers employed by the employer under the same type of contract”* it may be possible for a respondent to show that the claimant is identifiable as a full-time worker despite that working pattern – if the evidence shows that is how the employer treats all its term-time teachers. He gave another example – of a firm closing for the weekend at 4 pm every Friday, notwithstanding that the employees’ employment contracts specify that their hours of work are 9 am to 5.30 pm Monday to Friday. The likelihood is that despite working fewer hours than the standard working week, all employees within that firm, by reason of custom and practice, would qualify as full-time workers for the purposes of the Regulations.
95. The Tribunal noted that these examples are based on time worked; in both cases full time status is contingent on there being no relevant comparators working longer hours, however that is not the case here.
96. The Tribunal considered that in applying Reg 2 (2) it was relevant to take into account the custom and practice of the respondents which was that Senators

were expected to work 210 days a year in the Supreme Court and a full time sheriff expected to work 215 days a year in the Sheriff Court. No argument was advanced by the respondents to suggest that was not the custom and practice. Having regard to that custom and practice, the claimant worked less than a full time comparator in both jurisdictions and on that analysis was a part time worker in both roles. The possibility exists to depart from that custom and practice, but only if there is good reason to do so.

*Salaried nature of the Claimant's post*

97. Mr Napier argued that while it is possible to have a part-time job alongside a full-time job and in some circumstances, this may be with the same employer, the timing of when the work is to be done is crucial. A worker cannot take on a separate job as a part-timer with the same employer if the work to be done falls within working hours that are already required by the terms and conditions of the worker's full-time job. Although the holder of judicial office is not an "employee" or "worker" in the usual sense, the same principle applies. The Claimant's duties as a Temporary Judge all fell within periods and times when she was required to carry out her duties as a full-time salaried sheriff.

98. Mr Napier further submitted that there is no basis for limiting the analysis of the claimant's status as a full time worker to a particular period of time within her salaried time and/or to a particular aspect of the duties performed by her within that time. Properly interpreted Reg 2(2), read with Reg 2 (1), requires an assessment of the total work which the claimant was engaged to undertake by her employer. The decision as to whether the requirements of Regulation 2 (2) are met should be taken by reference to the totality of the work performed and work undertaken during salaried time should not be analysed as giving rise to a separate engagement leading to part time worker status. In support of this position Mr Napier referred to the ET decision in *Ferris*.

99. Dealing with this last point, the Tribunal is not bound by the decision in *Ferris* which is an Employment Tribunal decision at first instance. Further the Tribunal did not understand that a proper interpretation of the Regulation 2(1)

and 2 (2) was that it was prevented per se from analysing work carried out during salaried time as giving rise to separate engagements. The reference in Regulation 2 (1) to how workers are paid (by reference to the time he works) does not prevent such an analysis. Reg 2 (1) provides no more than that those who are paid even at least partly by reference to the time worked are covered by the Regulations. The second limb of the test in Reg 2 (2) (having regard to the custom and practice of the employer is not identifiable as a full time worker) does not specifically exclude from consideration of the question of part time status work carried out in salaried time. Whether work is carried out in salaried time may be an important element in the Tribunal's consideration, but that fact alone cannot operate to prevent an analysis of the work done in order to determine if as worker had part time status under Regulation 2(2).

100. The extent to which the claimant performed her duties as a Temporary Judge during her hours of her original appointment as a full time sheriff is not in dispute. The claimant accepts the premise that one cannot be part time and full time at the same time. Her position is that after she took up her appointment as a Temporary Judge, she then had two part time posts.

101. The fact that the claimant undertook her work as a Temporary Judge during the hours of her original appointment as a full time sheriff, and that she continued to receive the salary and benefit from the same terms and conditions as a full time sheriff notwithstanding her work as a Temporary Judge are factors which pointed towards full time status. However, these have to be considered against what was referred to in *Keegan* as the 'reality' of the situation. The Tribunal is not bound by *Keegan*, the facts are not the same, and the statutory regime for appointment was not the same in *Keegan* as before this Tribunal, but 'reality' here must be relevant as it was in *Keegan*. The reality in this case is that the claimant was performing two different jobs as a sheriff and as a Temporary Judge, and in each instance was working less than the full time hours recognised for the post of a full time Senator or full time Sheriff. These were factors which were clearly not indicative of full

time status in either post despite the fact that the claimant continued to receive the salary of a full time sheriff.

- 5 102. Mr Napier submitted that the Claimant's analysis of her status after appointment as a Temporary Judge being that of a part-time worker has the surprising consequence that it changes her status from that of a full-time salaried sheriff that of a part-time salaried sheriff. The Claimant's argument, if accepted, would have the result that sheriffs appointed as Temporary Judges would bypass the detailed arrangements for applying to move to part-time working set out in the Operating Scheme. That is because the change to working part-time as a sheriff would come about automatically, on 10 appointment as a Temporary Judge. Had the Claimant taken advantage of the Operating Scheme the position would then have been different. In that situation the change of hours would have produced the result that, depending on hours worked and the time when work was carried out, she could have 15 qualified as a part-time worker when sitting as a Temporary Judge and within the scope of Reg.2(2).
- 20 103. The Tribunal did not consider that a good deal of weight could be attached to the fact that the claimant did not become a part time sheriff by virtue of making an application under the Operating Scheme, in circumstances where the reality of her situation was that she worked less than full time hours carrying out work in the sheriff court as a result of her appointment as a Temporary Judge. This was same outcome which was achieved by sheriffs applying to work part time under the Operating Scheme; they worked less hours in the Sheriff Court in the performance of their duties. On Mr Napier's hypothesis, 25 had the Claimant taken advantage of the Operating Scheme it would still have been necessary for her part time working arrangements under the Operating Scheme to be agreed in terms of her time sitting in the sheriff court, so that she was able to sit in the High Court during periods when she was required. Even if the logistics might have been different, that was in principal what 30 occurred when the claimant sat as Temporary Judge. Arrangements were made for her to sit less than her full time appointed hours the sheriff court; and arrangements were made for her to sit in the High Court.

*Repercussions of finding part time status*

104. Mr Napier also invited the Tribunal to consider that the Claimant's contentions as to her status as a part-time worker would have repercussions for the scope of the Regulations that stretch well beyond those who hold judicial office. He gave the example of an employee agreeing to 'act up' to provide part-time cover for a colleague who is a senior manager. Is he potentially entitled to claim under the Regulations if not paid an additional sum to reflect the higher pay of his colleague? Such a result would follow if his status as a part-time worker under Reg.2(2) is seen as achieved by focusing exclusively on what is done by him in his "acting-up" capacity, rather than by reference to the totality of the work he is contracted to do.
105. The Tribunal considered that while this may raise interesting points, it is only able to deal with the case which is before it. In Mr Napier's example, as one of many the possibilities, it might be that the work the employee does in an acting up capacity is not readily distinguishable from the work he already carries out. This is a factor a Tribunal may have to take into account in dealing with a such a claim under the Regulations, underlining the individual nature of cases before the Tribunal.

*Temporary Judge as extension of Shrieval Duties*

106. The Tribunal considered whether in carrying out the function of a Temporary Judge, the claimant was exercising an extension of her shrieval duties; It is the respondents primary position that she was doing so. If the Tribunal were to conclude that this as the case, it would be difficult to conclude that she was anything but a full time worker, even having regard to the custom and practice of the sitting days of Senators and Sheriffs.
107. Mr Napier submitted that the Regulations are drafted on the basis that being "not identifiable as a full-time worker" is a requirement of being a part-time worker in terms of Reg.2(2). It follows that if, as the Respondent contends, the Claimant retained the status of full-time salaried sheriff (i.e. the role to which she was appointed in 2008) after her appointment as Temporary Judge, then her claim to be a part-time worker fails. The Respondent maintains the

claimant was carrying out her shrieval duties when acting as a Temporary Judge. The terms under which she was appointed expressly refer to the possibility of her being "asked" (as a full-time sheriff) to act as a Temporary Judge. When she accepted that invitation, she was therefore taking on additional duties, in line with what was envisaged under what might be described as the terms and conditions of her appointment. In other words, taking up appointment as a Temporary Judge did not remove her from the scope of her duties as a full-time salaried sheriff, despite the content of that work being different from the work she did in the sheriff court, and despite her having less time to carry out her duties in the sheriff court. Accordingly, she remained in that full-time role and cannot claim part-time status. This position is confirmed in the evidence of Mr Paul McKinlay who refers to statutory authority to that effect in section 20B(7) of the Judiciary and Courts (Scotland) Act 2008. That interpretation of the facts is also consistent with what is said in the Appointment Letter sent to a sheriff when appointed. These inform the recipient that although he or she will principally serve the courts of the relevant shrievaldom to which appointment has been made, "you may be allocated business out with the shrievaldom from time to time."

108. The Tribunal did not consider that a great deal of weight could be attached to the part of the outline of a role of a sheriff which provides; *They may be asked to act as temporary judges in the High Court*, in order to support the conclusion that in sitting in as a Temporary Judge the claimant was carrying out shrieval duties. The Tribunal considered rather that this was a statement of a potential opportunity which may arise to sit in another jurisdiction as a consequence of holding the role of sheriff. This could not be considered in the same way as the other functions identified in the same clause, all of which are performed in the sheriff court. This difference is underlined in that the clause does not create any obligation sit as a Temporary Judge in the High Court, it merely states that a Sheriff '*may be asked*', while the other duties in that clause are listed as functions which are performed by Sheriffs, and about which it is not suggested there is any choice.

109. The Tribunal also considered the fact that claimant accepted the appointment as Temporary Judge on a voluntary basis for no extra remuneration, which she knows was not available and made no enquiry about when she took up the post. The Tribunal considered that this was a factor to which some weight should be attached, however as indicated above it was not necessarily inconsistent with Temporary Judge and Sheriff being properly regarded as two separate part time roles.
110. The Tribunal has dealt with the effect of Section 20B (7) above, as it had with the perception of Mr McKinlay.
111. The claimant's letter of appointment did not add a great deal, in that although it informed the recipient that they may be allocated business out with the sheriffdom from time to time this was in the context of the appointment being to a particular sheriffdom and did not refer to work in the High Court. Had it been the intention that Sheriffs could be allocated work in the High Court there is no reason why the appointment letter would not have said so. Further it was difficult to see how a shrieval appointment could contemplate a sheriff being asked to work in the High Court without some intervening statutory appointment, which the individual required to agree to.
112. Having considered each of the factors identified by Mr Napier individually the Tribunal also stood back and assessed their cumulative effect and considered whether taken together they supported the conclusion that the claimant in performing the duties of a Temporary Judge was carrying out an extension of her shrieval duties. It was significant that the claimant performed her duties as a Temporary Judge during her full time contracted hours provided for in her appointment as a full time sheriff, and for the salary and under the terms and conditions of a full time sheriff; and to a lesser degree it was significant that the respondents perception was that she continued in the role of full time sheriff. However these factors taken together with the other elements relied upon by Mr Napier were insufficient to allow the Tribunal to conclude that the performance of duties as a Temporary Judge was an extension of her shrieval duties, set against the Tribunal's conclusions as to what appointment as a Temporary Judge meant as a matter of fact; that is it say, the reality of the



position. That reality included that both positions as a Sheriff and Temporary Judge were as a result of separate judicial appointments., there was the ability to continue in one role while retiring from the other; different judicial line management; different training regimes; a different pace of work; and significantly both involved the performance of wholly different work.

#### *Respondents Esto Position*

113. The Tribunal also considered the respondents' *esto* case which was that to maintain that the claimant's status changed from full-time to part-time worker under the Regulations on appointment as a Temporary Judge involves disregarding section 20B(7)(a) of the Act: A move from full-time to part-time salaried status is manifestly something that affects the Claimant's appointment as sheriff. Standing that provision, it cannot be said that appointment as a Temporary Judge brings about a change from full-time to part-time status.

114. The Tribunal has already considered the impact of Section 20 (B) (7) (a) above, and for the reasons which are outlined earlier it did not conclude that Section 20(B) (7) prevented the claimant acquiring part time status for the purposes of the Regulations. A change from full time to part time does not in the Tribunals view manifestly affect *any appointment to the office of sheriff*, in that the appointee continues to hold the appointment to that office, and the purpose of Section 20 (B) (7) is to allow Sheriffs who are appointed as Temporary Judges to continue in the office of Sheriff.

115. For the sake of completeness Section 20 (B)(6) (b) which provides that an individual appointed under Section 20 (B) (1) as a Temporary Judge '*shall not be treated as a Judge of the Court of Session for the purposes of the remuneration, allowances or pension of such a judge*', did not add anything, as it merely distinguished the position of Temporary Judges however so appointed, from Judges of the Court of Session.

#### **Conclusion**

116. The Tribunal being satisfied that the claimant was not exercising her shrieval function when sitting as a Temporary Judge, and being satisfied that in the capacity of a Temporary Judge she was carrying out a different job to that which she carried out as a Sheriff , did not consider that there was any good reason to depart from consideration of the custom and practice of the working pattern of full time Senators for the purposes of Reg 2(2). It therefore concluded that the claimant as a Temporary Judge was a part time worker for the purposes of Regulation 2.
117. The Tribunal is aware that a case dealing with similar issues in England is currently before the EAT. It was agreed that this Tribunal would issue its judgment notwithstanding the possibility of a relevant judgment being issued at EAT level. If either party consider that upon receipt of the EAT judgment it is appropriate to apply for a reconsideration of this decision then it is open to them to do so.
118. The parties should advise the Tribunal within 14 days if they consider that a further PH to deal with case management issues is required, or given the outstanding appeal at the ETA, whether they have an alternative application.

**Employment Judge: L Doherty**  
**Date of Judgment: 27 February 2023**  
**Entered in register: 28 February 2023**  
**and copied to parties**